Ratio Juris
An International Journal of Jurisprudence and Philosophy of Law

Ratio Juris. Vol. 30 No. 3 September 2017 (305–321)

Legal Arguments from Scholarly Authority

FÁBIO PERIN SHECAIRA

Abstract. Ordinary arguments from authority have the following structure: *A says p; A is authoritative on such things; so p*. Legal actors use such arguments whenever they ground their decisions on the sheer "say-so" of legislators, judges, scholars, expert witnesses, and so on. This paper focuses on arguments appealing to the authority of scholars, "doctrinal" or "dogmatic" legal scholars in particular. Appeal to doctrinal authority is a puzzling feature of legal argumentation. In what sense are doctrinal scholars "authorities"? Is p, as advanced by a scholar, descriptive or prescriptive? Is scholarly authority grounded on expertise or something different? The paper addresses these questions.

1. Introduction

Ordinary arguments from authority have the following structure:

A says p;
A is authoritative on such things;
So p.[1]

A variety of arguments can fit into this general framework (henceforth the "Framework"). Notice, for instance, that p may amount to either a statement of fact or a prescription.[2] Moreover, the claim that A is "authoritative" can be interpreted in different ways. A is often deemed an expert on the subject of which p is part. But, of course, authority does not derive exclusively from superior knowledge or expertise: A's authority may well derive from some other aspect of A's social position or status.

[1] The scheme is taken from Coleman 1995, 366. It is less elaborate than other schemes in the literature (Walton and Gordon 2011), but I choose it because it provides an accurate representation of the terse way in which arguments from authority appear in everyday discourse. Indeed, one of the aims of the paper is to discuss difficulties involved in analyzing terse arguments from authority.

[2] It is not my view that there is a strict dichotomy between factual statements and prescriptions. There are statements (such as those employing "thick" evaluative terms) that have factual as well as evaluative, and perhaps prescriptive, content. Within the limits of a paper on arguments from authority, however, it makes sense to restrict the domain of the factual to statements having no normative implications. Any assertion that has implications about what ought to be done is here deemed a prescription, even if it also carries information of a factual type. I return to this issue in Section 2.

These variations (and others, such as the meaning of *expertise*)[3] are crucial for evaluating arguments from authority. Good arguments of this type must appeal to the opinions or advice of individuals whose credentials are not easily impugned, and the appraisal of an authority's credentials depends crucially upon the nature of p. Authority in factual matters is different from authority in prescriptive matters. Some may go as far as to say that while factual issues admit of greater or lesser expertise, issues in ethics or politics simply do not. Such people might still use moral or political arguments from authority, but only if they are convinced that the relevant authority can be grounded on other factors apart from expertise. The questions will then be: What factors, and why are they constitutive of authority?

Legal actors often use arguments that fit the Framework. They ground their claims and decisions on the "say-so" of legislators, judges, legal scholars, expert witnesses, and so on. The fact that legislators included p in a statute, the fact that a court held p in a case, or the fact that an academic said p in a treatise is taken as a reason to affirm or abide by p again in the future. It is true that the strength of the reason to affirm or abide by p varies significantly according to its specific source. Legislative affirmation of p tends to carry more weight in legal argumentation than judicial affirmation of it, which in turn (at least in legal systems that adopt some form of *stare decisis*) carries more weight than academic affirmation of p. But be that as it may, all these sources—legislatures, judges, scholars—may be treated as more or less authoritative in legal reasoning.[4]

This paper considers arguments that appeal to the authority of legal scholars. In particular, it considers appeals to the authority of academics involved in so-called "doctrinal" or "dogmatic" legal scholarship. Doctrinal legal scholarship is the dominant form of scholarship in modern law schools.[5] Methodologically, it attempts to set itself apart *both* from empirical fields of legal study (e.g., legal sociology, legal history, and the positive strand of law and economics) *and* from normative disciplines dedicated to the criticism of legal institutions (e.g., legal philosophy and normative law and economics). Doctrinal scholarship seeks to expound the content of existing law in a systematic way. When positive law is vague, ambiguous, contradictory, or otherwise indeterminate, doctrinal scholars cannot help but propose developments—by filling in gaps in the law, disambiguating it, and undoing its contradictions. But doctrinal scholars characteristically shy away from bold legal

[3] The idea that A is an expert on a subject could mean that A is always right when addressing that subject. If the Framework were interpreted this way, then arguments from authority would be deductively valid. The problem is that they would never be sound (since authorities are fallible). A's expertise could also mean that A is more often right than wrong. In that case, arguments fitting the Framework could aspire to be inductively good at best.

[4] Some may reject the idea that authority is a gradable concept; see, e.g., Hart 1982, 253–4, where (practical) authority is associated with content-independent *and* peremptory reasons for action. Here I keep the element of content-independence as a necessary feature of authority (theoretical and practical), but I drop the element of peremptoriness. A peremptory reason is one that cuts off or severely limits independent deliberation on the reasons for or against that (action or belief) which the reason prescribes. This, I submit, is not part of the broader concept of authority that is relevant in a discussion about arguments from authority. For our purposes, if someone's "say-so" has content-independent credibility or legitimacy (even if defeasible credibility or legitimacy) then that person counts as an authority. I return to this issue in Section 3.

[5] This may be changing due to the influence of economics and other sciences on legal studies: see Smits 2013, 4–6.

reform. They preserve their distinctive approach by developing the law frugally in accordance with what they regard as its implicit rationale or spirit.[6]

Appeal to doctrinal authority is an important feature of legal argumentation. It is not, however, a straightforward phenomenon. Arguments appealing to doctrinal authority are not as transparent as other, more familiar forms of argument from authority. What is the nature of p as uttered by a doctrinal scholar? Is it a statement of fact or a prescription? What grounds the authority of a doctrinal scholar? Is it expertise or something different? The paper provides tentative answers to these questions. The answers come in Section 3, after some preliminary conceptual analysis in Section 2. Sections 4 and 5 render the discussion more concrete by referring to cases where scholarly authority has been used.

2. Types of Authority and Its Grounds

It is said that practical authority gives reasons to act a certain way, while theoretical authority gives reasons to believe something.[7] I reject this way of drawing the distinction between practical and theoretical authority because it implies that we must classify as theoretical an authority that gives reason for belief about how one *ought* to act. I submit that, at least for the purposes of a discussion about arguments from authority, we should characterize theoretical authority as authority that gives reason for belief of a factual (i.e., nonprescriptive) nature, while practical authority should be understood broadly as giving reason for action or for belief about how to act. It is true that reasons for action and reasons for belief about how to act are not the same thing, since one may conceivably fail to act as one should while making no epistemic mistake in assessing the correctness of the possible courses of action. Yet the difference between reasons for action and for belief about how to act loses significance in light of two assumptions made in this paper.

The first assumption is a general one that has implications for a variety of philosophical debates; the second assumption pertains more specifically to our topic. *Assumption 1*: Individuals should act as they believe they should, so long as they have arrived at the relevant beliefs by rational means.[8] *Assumption 2*: Unless we

[6] This view of doctrinal scholarship is developed below. It derives from Shecaira 2013 and 2015.

[7] See, e.g., Raz 2009, 8, and Lamond 2010, 18. Lamond's paper has direct implications for the topic of this essay, since he also discusses authorities whose views have influence in legal reasoning but not the same level of bindingness as the views of legislators or courts. Lamond would argue that scholars do not play the role of practical authorities, but I believe that argument would be vitiated by the problematic way in which he (like Raz) draws the distinction between practical and theoretical authority.

[8] Is Assumption 1 subject to counterexamples? Imagine that I conclude, after reading sophisticated philosophy essays, that abortion is permissible and that I should support this cause. Yet I hesitate to get involved in pro-choice campaigns because of my religious family. Assumption 1 may be taken to imply that I should support the campaigns because that is what my rational beliefs require. But should I? Is family harmony secondary relative to my ideals? To circumvent the counterexample, all we need is a broader understanding of rationality, one that does not reduce rational inquiry to bookish musings. My philosophy studies give me strong but defeasible reason to believe I should support the campaigns. Concerns about family welfare are also morally and prudentially significant. If I balance the opposing considerations and conclude that I should sacrifice my ideals for the sake of family in this case, then why deny that I have rationally reached the view that (all things considered) I should not support the campaigns?

want to ground an analysis of arguments from authority on a skeptical view about the existence of genuine authorities, we should hold that beliefs induced by someone else's "say-so" *sometimes* count as rationally acquired beliefs.

Now consider this scenario. A, who is an authority on matters related to p, has said p to B. Imagine also that p is a prescription about how to act. The fact that A said p to B can mean two things. Either it gives B a reason to abide by p, or it gives B a reason to believe he ought to abide by p. Let us focus on the second characterization of the reason given to B by A, while bearing in mind Assumptions 1 and 2. Given that A is a recognized authority on matters related to p, by heeding A's "say-so" B will have acquired the belief about p rationally. If B should act as his rationally acquired beliefs tell him he should, then B should abide by p. The moral of the story is this. Given Assumptions 1 and 2, the fact that an authority issues a prescription will ultimately be a reason to abide by the prescription even if we initially interpret that fact as a reason *for belief* that the prescription ought to be abided by.

As a result, if the assumptions hold, we need not make much of the difference between reasons for action and reasons for belief about how to act. Indeed, from this point on I will refer pithily to practical authority as authority that issues prescriptions, and to theoretical authority as authority that states facts.[9] This view will be appropriate for our purposes, provided we keep in mind one caveat. The distinction between types of authority cannot depend upon the face value of authoritative discourse (Goodwin 1998, 268). The weatherman, arguably a theoretical authority, tells his listeners not to forget their umbrellas; and indeed the recommendation may play a part in listeners' decision to carry umbrellas. Do examples like this prove that it is wrong to characterize theoretical authority in terms of statements of fact? Not exactly. The weatherman has exclusive information about what the weather is and will be like in the future. That is why members of the public seek his advice. But the weatherman is no authority on how people should behave. When giving advice, he assumes that listeners share certain interests. He assumes, for instance, that people hate to be caught in the rain without an umbrella. On the basis of that assumption, he may indulge in making prescriptions. Yet he knows people seek his advice, not because they want to be convinced that getting wet is bad, but because they want to know if there is a risk of getting wet. The weatherman and his audience both understand the limits of his authority.

Likewise, a doctor may tell her patient to take a pill regularly. Although some people have deeper relationships with their doctor, for the most part patients regard their doctor (and the doctor regards herself) as someone with a distinctive ability to identify the cause of illness and indicate measures that will offset it. The doctor indulges in prescriptive talk because she assumes that the patients' wish is to follow instructions that will improve their health. Imagine a doctor approaching a masochist to tell him that he should take a pill to alleviate his pain. The doctor would be dismissed as someone who has no right to determine how others should live (with or without pain). The examples show that the nature of an authority cannot be gleaned from a superficial analysis of its discourse. The nature of an authority depends upon assumptions and tacit conventions regarding the relationship

[9] Not only empirical facts but also facts about the meaning of concepts and logical relations between propositions. The relevant contrast is not between the empirical and nonempirical but between the nonprescriptive and prescriptive.

between authority and audience. The idea that theoretical authority makes factual claims is correct so long as we remember that this is not just a thesis about how theoretical authorities express themselves, but rather about the limits of authority as recognized by individuals involved in the practice of giving and taking advice.

It should also be noted that there is no conceptual impediment to a person or institution exercising both practical and theoretical authority. Religious figures are often thought by their followers to be authorities *both* on matters of value *and* on speculative matters that have remote connection to how people should act (e.g., a religious leader may disseminate a cosmology that has little consequence for our moral choices.) Religious leaders and their followers may have difficulty in noticing the difference between practical and theoretical authority. They may see dissent in respect of speculative doctrine as equivalent to moral insubordination. This is no argument against the sharpness of the distinction between theoretical and practical authority. The difference is clear enough, even if it is missed by those who juxtapose moral and intellectual virtue.

So far we have discussed the status of authority, and whether it counts as theoretical or practical. The status of authority is relatively independent from the *grounds* of authority, i.e., the reasons someone or some institution may be regarded as an authority of one kind or another. It is natural to think that theoretical authority is grounded on epistemic factors. When we defer to a theoretical authority we normally do so because we think the authority is better than we are at finding out the truth about the relevant facts, or at least we think that the authority is provisionally in a better position than we are to establish the truth. As a result, expertise (in the sense of superior access to truth) is normally among the grounds for theoretical authority, though this does not mean that expertise can *never* be taken out of the equation. Think of those people who are confident that, in assenting to the factual claims of an authority, they will gain some sort of practical advantage (like solace) that has priority relative to truth. This may be a dubious case for theoretical authority, but it is a possible case nonetheless.[10]

Practical authority can also be grounded on diverse factors. The authority of legal officials, for example, is often taken to be grounded on their capacity to promote predictability, stability, and coordination. They rely on a coercive apparatus that is able to ensure the compliance of otherwise recalcitrant individuals. They also work within a bureaucracy that can muster effective techniques for disclosing and applying directives which otherwise would be mysterious even to the dutiful citizen. Predictability, stability, and coordination may be taken as grounds for fidelity to the authority of law even by those who think that the law sometimes errs in moral and other ways. However, predictability, stability, and coordination do not exhaust the possible grounds of legal authority. Expertise also plays a role in this area. For instance, directives issued by regulatory agencies are heeded not only

[10] It is misleading to say, like Lamond (2010, 18), that "[t]o be a theoretical authority is, in essence, to have a level of knowledge and/or skill in some domain that gives one's considered views [. . .] within the domain far more credibility than the views of those possessing an average level of knowledge or skill." Perhaps superior knowledge or skill are the only good reasons for treating someone as a theoretical authority, but that is different from saying that to *be* a theoretical authority *is* to have superior knowledge or skill. Lamond overlooks the distinction between types and grounds of authority.

because of concerns with stability and coordination but also out of deference for the knowledge and special training of the people who make the directives.

3. The Authority of Legal Scholars

The previous section argued that there is more than one type of authority, more than one possible ground of authority, and more than one way of combining types and grounds. It is important to bear these points in mind when analyzing legal arguments from doctrinal authority, for doctrinal scholars do not always exercise the same type of authority, and it is not safe to assume that they deserve their authority (when they do) always for the same reason.

Before beginning our analysis, it will pay to consider a source of possible doubts and objections. To some readers, it will continue to sound odd to say that a scholar can exercise authority in the same sense as legislators and judges can, the difference being merely of degree (i.e., of degree of strength of the content-independent reasons provided in each case, stronger in the case of legislation or precedent, weaker in the case of scholarship).

Edward Rubin has argued that there is a categorical difference between the type of authority associated with legal scholarship and that associated with legal officials. For Rubin, the authority of officials is based on their distinctive hierarchical position. A scholar may aspire to play a hierarchical role but can never actually do so:

> Scholars know, of course, that [. . .] their effect on public decision-makers must be based on the content of their work, and will be continuously open to challenge. "But perhaps," whispers that voice, "I can present my views in such a compelling manner that the decision-makers I address will follow me as if I were a true, hierarchical authority." The mechanism by which such an effect would be achieved is persuasion. When a person is persuaded by another's argument, he adopts that argument as his own, while consciously recognizing its source. Thus, persuasion is the content-based equivalent of true authority. (Rubin 1992, 748)

For Rubin, the impact of legal scholarship on legal reasoning is necessarily dependent on its ability to persuade. The mere (content-independent) fact that a scholar said p is never by itself a reason (not even a weak reason!) to abide by or believe in p. I do not deny that the authority of a legal scholar is typically connected to the perceived quality of his work. Yet the connection is not necessarily as direct as Rubin imagines. Judges may heed a piece of scholarship because it is the work of an author whose intellect is worthy of admiration, or because it appeared in a journal recognized for its sophistication, or because the author is affiliated with a reputable research institution, or for some other content-related reason. In all of these cases, the relevance of the piece of scholarship is indeed connected to the perception that its author or venue has produced good work in the past. The point that needs to be emphasized is that the source's praiseworthy performance in the past may allow it to enjoy a status that shelters it considerably from the scrutiny Rubin has in mind. If past performance is consistently satisfactory, a presumption arises with regard to the reliability of the author or venue. The presumption can be defeated, but only if the quality of the work declines significantly or if it becomes obsolete.

Another way to make the point is to say that the considerations that ground the authority of any legal actor need not play a part in the (content-independent) reasoning that follows its recognition as an authority. The quality of an author's work may be what grounds its authoritative status, but once that status is obtained the author's opinions may be treated as carrying weight independently of the author's capacity to persuade. To show that there is no categorical difference (i.e., no difference in respect of ability to give content-independent reasons) between hierarchical authority and scholarly authority, we need only consider that the kind of consideration that goes into the justification of scholarly authority can also go into the justification of the former. As mentioned above, the expertise of regulatory agencies may serve to justify the ascription of authority to them. No one would contend that regulatory agencies are less authoritative (i.e., less capable of giving content-independent reasons) just because their authoritativeness is based on the quality of their reasoning.[11]

Consider also the matter of precedent. According to Neil Duxbury, English judges give more weight to precedents that they regard as more likely to be grounded on sound reasoning:

> The attention which later courts pay to a precedent will depend very much on how judges and lawyers assess it as an effort at legal reasoning. [. . .] In English law, law reporters can increase the likelihood that a decision will be treated as especially authoritative by signalling—through the insertion of *cur. adv. vult* after the arguments of counsel—that judgment was reserved (i.e., only delivered after some reflection) rather than delivered extempore at the conclusion of the case. (Duxbury 2008, 65)

A presumption that the reasoning behind a decision delivered after reflection is better than it would otherwise have been is something that can render the precedent weightier. However, if there is no reason to doubt that the increased authoritativeness of a precedent can be based on the belief that it possesses a feature that makes it more likely to be based on sound reasoning, then there is no reason to doubt that a scholar's authority can be grounded on the belief that he too exhibits signs of good reasoning.

As a result, *contra* Rubin, there is no conceptual impediment to a scholar's ability to give content-independent reasons for judges and other legal actors. Even if that basic point is granted, however, it is true that we may still have difficulty identifying genuine instances of appeal to scholarly authority in legal practice. Chad Flanders has expressed reservations along these lines:

> [. . .] it is not clear that the trust [in a scholar] is wholly divorced from the content of the reasoning. A court may pay special attention to a decision [or an academic work] by [e.g.] Richard Posner, but it will not defer to him *independently* of what he says. It just means that the court has previously found Posner a good judge [or academic] to turn to when facing a difficult problem. (Flanders 2009, 66 n. 53)

[11] The issue here is not ability to direct behavior over time (i.e., *de facto* authority). It is indeed more difficult for a scholar to become and remain influential in legal decision-making than it is for officials, given the lack of coercive power of the scholar. The point of the text is that even if a scholar's influence (or *de facto* authority) is more contingent, there is no reason to think that a scholar could *never* be treated as a source of content-independent reasons just because that treatment is grounded on epistemic considerations.

Flanders's remark prompts some important observations. I insist that it is conceptually possible for scholarship to be treated as a genuine source of content-independent reasons. However, it must be conceded that it is also possible, as Flanders suggests, for an author to be regarded as an expert, for his work to be privileged over that of others, and yet for that author's opinion to be regarded as reason-giving only when it is based on persuasive arguments. I also concede that in practice it is not always easy to determine in which of these two ways scholarship is being used by legal actors who cite it. So why do I think it can be done? One crucial piece of evidence indicating that legal actors are referring to a scholar as an authority occurs when they state the conclusion of scholarly work while making summary reference (if any) to the argument that grounds it. Terseness, here, is key. I return to this issue below.

So far, I have only tried to establish the general possibility that scholars may be referred to as sources of content-independent reasons, and thus as authorities in the relevant sense. We should now move on to more specific questions about the nature of scholarly authority. Is it always theoretical (i.e., does it always function as a source of content-independent reason for non-normative belief), or is it also sometimes practical (i.e., is it sometimes used as a source of content-independent reason for action or normative belief)? I argue in the following that scholars sometimes do play the role of practical authorities, but I must first enter a caveat. Lest my insistence on the possibility of practical scholarly authority be misunderstood, I insist that the content-independent reasons for action provided by scholars are not normally as strong as the content-independent reasons provided by statutes and precedents.[12] It is a difference of degree, to repeat, but it is not negligible. Legal systems recognize different authorities, and arrange them hierarchically. Statutes normally carry more weight than precedents; and precedents, more weight than custom. Scholars are not often ranked highly in this hierarchy, which means that a scholar's "say-so" (as esteemed as the scholar may be) will rarely defeat a relevant statute or precedent. Scholarly writings, as we will see, play a significant practical role in hard cases, where the standard sources are unclear. This is the context in which scholars have the best chance to guide legal behaviour (as opposed to giving non-normative information about the content of other sources of law). But let us not put the cart before the horse. What follows is an attempt to explain when it can be said that scholars exercise practical authority, and when their authority is only theoretical.

Legal academics take different approaches to the study of law. For instance, they may seek to provide empirical (sociological, political, economic) information of use to legal actors; or they may seek to give information about the content of the law itself. Here we should put strictly empirical work to one side, as it falls outside the province of doctrinal scholarship. Doctrinal academics are interested in conveying *legal* information. *Legal* is an equivocal term. As Frederick Schauer puts it, *legal* has

[12] I say "normally" because there are exceptions: "Given that [Liacos's] book [on evidence law] [. . .] has been cited 894 times by the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, it would be a brave (or foolhardy) lawyer who attempted to argue a point of evidence before one of those courts without dealing with what Liacos has to say on the issue. To say that the source is not a mandatory authority thus appears to be a considerable oversimplification" (Schauer 2009, 82 n. 48).

thinner and thicker senses. In a thin sense, the term refers to a "conception of law as consisting largely of reported cases, statutes, regulations, and constitutional provisions" (Schauer 1991, 1007). Legal information in a thin sense is information pertaining to the determinate meaning of the standard sources of law. Providing this kind of information is not necessarily a trivial task: Even when the interpretation of statutes, precedents, and other sources is not likely to give rise to disagreement, scholars provide a service to the legal community by systematizing legal content spread out across numerous, lengthy, nondidactic sources.

On the other hand, doctrinal academics provide legal information in a thick sense when they present the law under the gloss of nonposited concepts, principles, and theories. As mentioned above, presenting the law in a rich sense is unavoidable for doctrinal academics whenever the meaning of the standard sources is vague, ambiguous, or otherwise indeterminate. The distinction between thick and thin is admittedly vague, as it is not always easy to determine the extent to which a scholar's "report" of legal content has passed through the interpretive sieve of scholarly theory. The academic himself may often be unaware of the part he plays in shaping the law that he purports to describe. He may confidently report a judicial doctrine that is really but one way of perceiving the rationale behind an ambiguous line of precedents. Likewise, he may fail to perceive the indeterminacy of statutory text, presenting as certain an interpretation that is but one reasonable way to read the statute. What matters for our purposes is that there are at least some clear instances of each concept. Doctrinal academics, especially in textbooks or treatises, often report the determinate meaning of the standard sources of law. In other contexts, academics address legal questions that are subject to reasonable disagreement. This is what they do in monographs, peer-reviewed articles, and cases notes.

It should not surprise anyone to hear that the discourse of doctrinal academics is a precarious index of the nature of doctrinal authority. Scholars sometimes present their findings in terms of what the law *is* or requires. At other times they speak in terms of what *ought* legally to be. To determine whether scholarly authority is theoretical or practical, we must look for shared assumptions regarding the character and limits of the scholar's influence. Imagine a judge who wishes to defer to an academic. Does the judge look to the academic for information about the content of source-materials that she, the judge, has not had the opportunity to review? Does the judge trust the academic to do no more than report the determinate meaning of the relevant materials? A positive answer to these questions indicates that the academic is cited as a theoretical authority. However, if the judge recognizes the relevant materials as being "hard" to interpret (i.e., if she expects reasonable lawyers to differ about its content) then, by relying on the academic's "say-so," the judge may well be relying on practical authority. To see why this is so, consider argument (A):

(A)

1. I (as a judge) ought to rule according to the determinate meaning of the standard sources of law.
2. The determinate meaning of the standard sources of law on a relevant subject is M.
   Therefore,
3. I (as a judge) ought to rule according to M.

This is how many people expect dutiful judges to reason. They expect such judges to rule in accordance with the undisputed meaning of the relevant statues and precedents. The first premise of argument (A) is supposed to be constant in the mind of the dutiful judge. The truth of the second premise is something she may, in principle, ascertain by reviewing the standard sources herself. If she lacks the time or will to do so, she may resort to someone else's authority. In this context—i.e., to support the second premise of argument (A)—appeal to the authority of a scholar would look like this: "Scholar S says that the determinate meaning of the standard sources of law is M. Scholar S is an authority on such things. So, the determinate meaning of the standard sources of law is M." The second premise of argument (A) is a factual statement.[13] Authority for belief in a factual statement is theoretical authority.

On the other hand, when well-informed legal actors seriously dispute the meaning of the standard sources (because of vagueness, ambiguity, contradiction, obsoleteness, and so on) a judge cannot use argument A. The judge is bound to reason somewhat like this:

(B)

1. When positive law admits of more than one meaning I (as a judge) ought to rule according to the best possible interpretation of it.
2. The best possible interpretation of the law on a relevant matter is L.
   Therefore,
3. I (as a judge) ought to rule according to L.

The premises of (B) are not factual premises, not invariably. The best possible interpretation of a legal source that admits of more than one interpretation is usually thought to be (in Dworkinian terms) the interpretation that presents the source in the most favorable moral-political light. Many judges see their task not merely as one of applying the law, but of doing *justice according to law* (Gardner 2012, 37–42). This involves interpreting controversial sources in the most just way possible. If a judge resorts to scholarly authority in order to justify an interpretation L of a controversial source, then he resorts to practical authority—not authority for belief about the settled meaning of existing law, but authority as to the just way to proceed in the face of alternative interpretations of the law.[14]

As I argued in this section, establishing the nature of scholarly authority is difficult. It requires analyzing often misleading rhetoric to determine whether a scholar is giving and being taken to give reason for (factual) belief about the agreed-upon meaning of the sources of law or instead practical guidance as to how to do justice according to law. Clearly, it is also difficult to find good grounds for scholarly authority. It is to this issue that I now turn.

[13] A factual claim is not necessarily empirical. The domain of the factual includes morally neutral conceptual analysis, which doctrinal scholars also do.

[14] At first sight, a scholar who offers L as an interpretation of debatable sources gives a reason *for belief* that L is what justice-according-to-law requires. That is true, but we must not forget Assumptions 1 and 2. Ultimately, the scholar's affirmation of L (provided that he is a genuine authority) will work as a reason for action.

A good starting point is Schauer's account of the possible reasons for scholarly authority. Schauer dismisses "many of the standard reasons for recognizing authority—maximizing predictability or certainty, increasing stability for stability's sake, solving Prisoner's Dilemma or coordination problems, ensuring a cohesive community, and effecting a division of labor" (Schauer 1991, 1013). Indeed legal scholars are not equipped to secure these advantages. They lack bureaucratic organization, have no power to coerce, disagree among themselves, and are apt to change their views in light of new evidence.[15]

Schauer considers three other possible grounds of scholarly authority, and thus distinguishes "effort-based authority" from "process-based authority" and "authority based on expertise" (Schauer 1991, 1013–6). Effort-based authority is authority to which we resort because it provides us with information that we have "neither the time nor the inclination" to seek for ourselves (ibid., 1013). Lack of time and inclination is not laziness: It is a real problem for judges who have to make prompt decisions on important matters. When a decision-maker is under pressure, relying on someone else's "say-so" may be the most rational option. Now, it is only rational to resort to effort-based authority if there is independent reason to believe that the authority is reliable. So although effort economy can figure in a legal actor's choice to defer to a scholar, it is not clear that effort-related considerations can be applied independently of the other grounds of scholarly authority. In any case, effort-related considerations are more compelling in respect of sources of "thin" legal information. When a judge is dealing with a case that requires analysis of numerous legal materials (but which is not quite *hard*), the judge has good reason to rely on the compilatory research of reputable scholars.

Let us turn now to the second possible ground of scholarly authority. Someone has process-based authority, according to Schauer, when the legitimacy of their views is attached to the way in which those views were formed. The process by which scholars reach their conclusions can enhance their authority:

> Suppose that legal scholars were constrained by conflict-of-interest rules as stringent as those applied to judges, that they were constrained by an obligation to cite to opposing authority that was substantially stricter than the existing similar obligation now applied to practicing lawyers, that all journal submissions were blind reviewed by three reviewers before publication, that every article was subject to the kind of substantive cite-checking that occasionally still takes place with some law reviews, and that no article could be published unless accompanied by a written opposing commentary of a scholar of equivalent stature. (Schauer 1991, 1015)

The trustworthiness of scholarly work increases as the process of inquiry and publication is made subject (*inter alia*) to more stringent peer review. Peer review can enhance both theoretical and practical authority. In fact, of all possible grounds of scholarly authority this seems to me most capable of justifying practical authority in the context of hard cases. Debate is essential for eliminating prejudice and moral bias that are apt to affect one's views about what is just according to law. Peer review obligates an academic to expose his views about justice to criticism.

[15] One reason behind the traditional English convention against citing living authors in court is that authors are not bound by *stare decisis*; see Duxbury 2001, 73.

There is no guarantee that consensus will arise from the dialectic, but it is more likely that views based on prejudice will be checked in the process.

Finally, there is authority based on expertise. Schauer uses "expertise" in a narrow sense. Earlier in the paper, expertise was defined as superior access to truth. In this broad sense of the word, process-based authority is also a type of authority based on expertise. To the extent that we trust scholars who have submitted their work to strict peer review, we do so because we see a connection between that process and the enhanced likelihood that they will get to the truth. However, a scholar could also be singled out because he is exceptionally clever. He could stand out among his peers, either because of a privileged vantage point, special training, or sheer genius. This is what Schauer means by expertise.

Authority based on expertise in a narrow sense is a dubious ground for scholarly authority. With regard to theoretical authority, it is unclear that a judge would refer to a scholar out of deference for his superior skills, since judges are also trained in the art of discerning the plain meaning of the standard sources of law. When a judge defers to scholarly authority of the theoretical type, he does so for the sake of effort economy, along with a sense that the relevant scholar is generally trustworthy. Expertise in a narrow sense is also a dubious reason for practical scholarly authority. Again, are judges any less skilled than legal academics at solving hard cases? Solving these cases requires not only a good command of the standard materials (which judges have) but also an ability to read these materials in the best moral-political light. Are legal academics experts at moral or political reasoning? Is anyone? Perhaps moral and political philosophers are more methodical than most people who engage in practical reasoning. They have specialized knowledge of theoretical devices like reflective equilibrium, and they spend more time thinking critically about moral and political issues. They do not, however, spend much time thinking about how to harmonize their moral beliefs with positive law—which is required by the idea of doing justice *according to law*. The idea that there are experts at doing justice according to law is a debatable one. A case would have to be made for it and then another for the view that academics have more of the relevant expertise than judges.

Table 1 summarizes the foregoing claims about the considerations that ground the authority of doctrinal scholars for the purpose of judicial decision-making. As the table shows, the strength of the different considerations varies according to whether scholarly authority is theoretical or practical.

4. Case Analysis

The Canadian Supreme Court decision in *R v. Oakes* ([1986] 1 SCR 104) provides a variety of examples of judicial reference to scholarly work. I wish to discuss some of these examples, while trying to determine (i) whether they constitute genuine arguments from authority (given the Framework), (ii) whether they involve appeal to theoretical or practical authority, and (iii) what could justify each appeal, depending on its nature. My answers to these questions are tentative, since the Court is often unclear about its purposes in using scholarly work. In fact, this is a common characteristic of judicial use of academic work (it is not a Canadian quirk). The point of the exercise is to show how much simpler it would be to assess judicial appeal to academics if the legal community were to adopt some concepts and distinctions discussed in this paper.

Table 1

Possible grounds of doctrinal authority

	Theoretical authority	Practical authority
Effort-based considerations	Plausible grounds for the theoretical authority of scholars, as judges cannot always invest time in reviewing the sources of positive law.	Dubious grounds for the practical authority of scholars, as doing justice according to law is not as time-consuming as it is intellectually challenging.
Process-based considerations	Plausible grounds for the theoretical authority of scholars, as judges should rely on authors who have submitted their findings to peer control.	Plausible grounds for the practical authority of scholars, as peer control helps to fight bias in reasoning about what is just according to law.
Considerations based on expertise (in a narrow sense)	Dubious grounds for the theoretical authority of scholars, as judges are adept at discerning the plain meaning of the sources of law.	Dubious grounds for the practical authority of scholars, as there is no reason to believe that scholars have a special ability to figure out how to do justice according to law.

The central question of *R v. Oakes* is about the constitutional validity of a provision in the Narcotic Control Act (NCA). Section 8 NCA establishes that a defendant tried under that act,

> upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.[16]

Section 8 of NCA arguably violates Section 11(d) of the Canadian Charter of Rights and Freedoms (henceforth "the Charter"), which establishes that every individual charged with an offence must be considered innocent until proven guilty in a fair trial. Section 8 NCA places the burden of proof on the individual accused of drug trafficking, while Section 11(d) of the Charter would seem to shift the burden away from the accused.

In interpreting NCA and the Charter, the Court refers to scholars. Some references involve genuine arguments from authority; others do not. For instance, in analyzing Section 8, the Court refers to the plain meaning of the provision and to previous judicial decisions concerning NCA. The author Sir Rupert Cross is mentioned but only as a source of helpful phraseology:

> In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions *without* basic facts and presumptions *with* basic facts. A presumption without a

[16] *R v. Oakes*, [1986] 1 SCR 104.

basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross on Evidence*, 5th ed., 122–3).[17]

Cross's "say-so" is not taken as a reason to interpret Section 8 in one way or another. Cross is referred to for his taxonomy, which allows the Court to label the type of presumption involved in Section 8. At a different point, however, Cross provides a more substantial service. The question arises as to whether Section 8 NCA and Section 11(d) of the Charter could be reconciled, since the former places on the accused a burden of proof that is relatively easy to discharge. The accused need not *prove* his innocence beyond a reasonable doubt: He needs only to rebut the presumption of trafficking on a balance of probabilities. The Court disagrees with this reconciliation attempt, and quotes Cross for support:

The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the *Rede Lectures*, "The Golden Thread of the English Criminal Law: The Burden of Proof," delivered in 1976 at the University of Toronto, at pp. 11–13: It is sometimes said that [...] whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt. [...] The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection [...] as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.[18]

Here Cross is used to refute an attempt to harmonize NCA and the Charter. This is a potential argument from scholarly authority, and Cross's authority would arguably be practical, as it concerns a controversial matter of statutory interpretation. One reason to hesitate in classifying this as an argument from authority is that the Court does not simply abide by Cross's "say-so," but quotes his argument at some length. The argument is not esoteric (the Court is expert enough to understand it), and does not involve reference to other legal materials that the Court is unwilling to review (Cross is not used for the sake of effort economy). Thus it could be that the Court refers to Cross not for the independent credibility of his opinions, but for the persuasiveness of his argument.

The clearest uses of argument from scholarly authority are those in which judges make summary reference to an author's opinion. Arguments are omitted, indicating that the author's word has independent legitimacy. In *R v. Oakes*, this is what happens when the Court refers to a book on the law of evidence in support of the idea that the civil standard of proof is itself equivocal: "Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385."[19] No argument; just the authors' word. It is not obvious whether the Court refers to Sopinka and Lederman as theoretical or practical authorities. Figuring that out would require checking (at least) page 385 of their book to see if they purport to describe the content of the standard sources of the

[17] *R v. Oakes*, [1986] 1 SCR 115.
[18] *R v. Oakes*, [1986] 1 SCR 133.
[19] *R v. Oakes*, [1986] 1 SCR 137.

law of evidence, or if their opinion is the result of a value-driven interpretive exercise. Even less certain is the Court's motivation for taking the authors as authorities. Are they experts? Have they used a credibility-enhancing research process? There is no way to know.

Sometimes judges do not single out any academic, but refer to scholarly consensus.[20] It is the "say-so" of the *community* of scholars that has weight, independently of their arguments (which may be too many to review). This is a good example of argument from authority, though it raises questions about grounds. Process-based considerations are interesting candidates here, since the consensus view is arguably the only one to have survived the pressure of the peer community. In Section 3 I dismissed stability, predictability, and coordination as grounds of scholarly authority, but perhaps that was hasty. When academics reach consensus on a topic, then deference to scholarly authority may be a good way to secure practical advantages. Consensus may be uncommon among legal scholars, but it can serve a stabilizing function when it occurs, so long as the legal community generally expects that controversial legal questions will be resolved by appeal to academic consensus. (For this thought to figure in Table 1, another line would have to be added. The line would indicate that, in cases of academic consensus, the authority of scholars may be grounded on considerations pertaining to stability, predictability, or coordination.)

5. Conclusion

References to doctrinal scholarship are frequent in legal argumentation, but it is difficult to determine when they count as genuine examples of deference to authority, and whether the authority in question is practical or theoretical. One indication that scholars are being treated as authorities is the summary nature of references to their work. Even when legal actors clearly defer to the "say-so" of scholars, however, they are seldom explicit about the precise nature of the authority to which they defer and their reasons for deferring.

The paper is tentative in providing general answers to questions about the grounds of scholarly authority. Yet it should help us to achieve a sharper sense of how to appraise appeals to scholarly work. To illustrate these lessons, I refer to one final Canadian example. In *R. v. Morgentaler* Justice Wilson of the Supreme Court found that a criminal statute prohibiting abortions at all stages of pregnancy failed the proportionality test pertaining to Section 1 of the Canadian Charter of Rights and Freedoms. Her argument for this position consisted in the claim that,

> in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the Charter against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125–28.[21]

[20] See, e.g., *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486: "It is now generally accepted among penologists that there are five main objectives of a penal system [. . .]."
[21] *R. v. Morgentaler*, [1993] 3 SCR 463.

Justice Wilson addresses a difficult moral question (are fetuses at later stages more deserving of state protection?) that positive constitutional law did not settle with precision. She attempts to make her view more credible by referring to the opinion of an author from a prestigious university. Lack of analysis of Sumner's arguments and explicit reference to his university affiliation are elements indicating that Wilson regards him as an authority. Since the question at issue is a contentious moral question, Sumner's authority is of the practical type. Wilson does not regard him as a source of factual information but as a source of guidance on how the fetus "should be viewed."

Possible reasons for treating Sumner as a practical authority on abortion are the following: (i) deferring to Sumner is a way to settle the issue in a predictable fashion (i.e., deference serves stability and coordination); (ii) deferring to Sumner is likely to lead the Court to make the morally correct decision, and this could be so for three different reasons; (iia) Sumner has made the effort of conducting ethical research that Canadian judges lack the time or inclination to do; (iib) Sumner has produced his work in a way that enhances its accuracy; (iic) Sumner is simply better than others at solving moral problems (due to a privileged vantage point, special training, or genius).

The case for Sumner's authority on abortion is not convincing. Consider (i): for Sumner's work to serve a stabilizing function, there would have to be a preexisting judicial convention in favor of heeding his "say-so" on abortion and other moral issues. As far as I know, no such convention exists within the Court. Might there be a different convention assigning authority more broadly to moral philosophers affiliated with the University of Toronto or other respected universities? If that were the case, then the convention would be of no use unless there were some sort of consensus among the relevant scholars. Abortion is so controversial among moral theorists that there should be enough dissent within the University of Toronto for the hypothetical convention to be of limited significance.

Indeed, the existence of profound disagreement about abortion also undermines each consideration pertaining to (ii). Sumner is not alone in having taken the time to review the literature on abortion and reflect on the questions raised by it. Others have made the effort, but have come to other conclusions. It would be arbitrary for a judge to defer to Sumner on effort-based grounds. It is true that Sumner has published his work with the consent of his peers, but so have other moral theorists whose writings on abortion appear in reputable venues. As a result, process-based considerations also fail to make Sumner stand out among his peers. Finally, there is no reason to believe that Sumner is any more of an expert (in a narrow sense) than the theorists who hold different views on abortion.

Wilson made a choice to refer to Sumner that is likely based on her sympathy for his moral views. If that is the case, then it is the persuasiveness of Sumner's views, not the content-independent legitimacy of his "say-so," that should be emphasized in Wilson's argument. When there is no good reason to treat someone as an authority, legal actors ought to face the substantive issues earnestly and openly.[22]

[22] For helpful comments, I am grateful to Pat Bondy, Raquel Barradas de Freitas, Ben Hamby, and participants in the special workshop on Types of Legal Argument at the *IVR World Congress* 2015. My research has been supported by CNPq (Chamada MCTI/CNPQ/Universal 14/2014, Processo: 448772/2014–0).

Federal University of Rio de Janeiro, Faculty of Law
Rua Moncorvo Filho n° 8
Rio de Janeiro
20211-340 Brazil
E-mail: fabioperin@direito.ufrj.br

References

Coleman, E. 1995. There Is No Fallacy of Arguing from Authority. *Informal Logic* 17(3): 365–83.
Duxbury, N. 2001. *Jurists and Judges: An Essay on Influence*. Oxford and Portland, OR: Hart.
Duxbury, N. 2008. *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press.
Flanders, C. 2009. Toward a Theory of Persuasive Authority. *Oklahoma Law Review* 62: 55–88.
Gardner, J. 2012. *Law as a Leap of Faith*. Oxford: Oxford University Press.
Goodwin, J. 1998. Forms of Authority and the Real *Ad Verecundiam*. *Argumentation* 12(2): 267–80.
Hart, H. L. A. 1982. *Essays on Bentham: Jurisprudence and Political Theory*. Oxford: Oxford University Press.
Lamond, G. 2010. Persuasive Authority in the Law. *The Harvard Review of Philosophy* 17: 16–35.
Raz, J. 2009. *The Authority of Law*. 2nd ed. Oxford: Oxford University Press.
Rubin, E. 1992. What Does Prescriptive Legal Scholarship Say and Who Is Listening to It: A Response to Professor Dan-Cohen. *University of Colorado Law Review* 63(3): 731–50.
Schauer, F. 1991. The Authority of Legal Scholarship. *University of Pennsylvania Law Review* 139(4): 1003–17.
Schauer, F. 2009. *Thinking like a Lawyer*. Cambridge: Harvard University Press.
Shecaira, F. 2013. *Legal Scholarship as a Source of Law*. Heidelberg, New York, Dordrecht, London: Springer.
Shecaira, F. 2015. Legal Scholarship and the Subject Matter of Jurisprudence. *Archiv für Rechts- und Sozialphilosophie* 101: 411–27.
Smits, J. M. 2013. *The Mind and Method of the Legal Academic*. Cheltenham: Edward Elgar.
Walton, D., and T. F. Gordon. 2011. Modeling Critical Questions as Additional Premises. In *Argument Cultures: Proceedings of the 8th International Conference of the Ontario Society for the Study of Argumentation (OSSA)*, May 18–21. Ed. F. Zenker, 1–13. http://www.dougwalton.ca/papers%20in%20pdf/11OSSA.pdf (last accessed June 6, 2017)

