

# REASONING WITH PERSUASIVE PRECEDENT: THE ROLE OF PERSUASIVE AUTHORITY IN THE LAW

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## Raciocinando com precedentes persuasivos: o papel da autoridade persuasiva no Direito

### ABSTRACT

This paper attempts to draw attention to the role of persuasive authority in the law, by providing a critical review of Frederick Schauer's influential account of persuasive authorities as optional authorities. Although recognizing that Schauer highlights some important features of the notion, it is argued that, as long as his interpretation leaves no room for theoretical authority in the law, it fails to account properly for one of the main roles of persuasive authorities, namely, to provide future courts with reasons to distinguish their case from previous court's decisions. It is also suggested that persuasive authorities are best understood as theoretical authorities providing practical reasons. The article concludes with some final remarks on the consequences of the adopted view for our understanding of the law in general.

**Keywords** Jurisprudence, Argumentation, Precedents, Persuasive Authority, Non-Binding Precedents.

### Resumo

Este artigo tenta chamar a atenção sobre o papel da autoridade persuasiva na lei, fornecendo uma revisão crítica da influente explicação de Frederick Schauer de autoridades persuasivas como autoridades opcionais. Embora reconhecendo que Schauer destaca algumas características importantes da noção, argumenta-se que, enquanto sua interpretação não deixa espaço para a autoridade teórica na lei,

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ela não leva em conta adequadamente um dos papéis principais das autoridades persuasivas, a saber, fornecer aos futuros tribunais razões para distinguir o seu caso das decisões dos tribunais anteriores. Sugere-se também que as autoridades persuasivas sejam melhor entendidas como autoridades teóricas fornecendo razões práticas. O artigo conclui com algumas observações finais sobre as consequências da visão adotada para nossa compreensão da lei em geral.

**Keywords:** Teoria do Direito, Argumentação, Precedentes, Autoridade Persuasiva, Precedentes Não Vinculativos.

## 1. INTRODUCTION<sup>1</sup>

Although binding precedents have always drawn the attention of legal scholars in the common-law tradition, the role of persuasive precedents has usually been overlooked in comparison with their binding counterpart<sup>2</sup>. This lack of attendance is not universal, and there have been many important recent contributions in the field<sup>3</sup>. However, as Chad Flanders has rightly noted, most of the literature fails to treat persuasive precedents as an independent subject of study “in its own right”<sup>4</sup>. Persuasive precedents are still viewed as precedents only in a “loose” meaning of the term, compared to the “strict” use of the word when applied to binding precedents<sup>5</sup>. The very fact that they are usually referred to simply as *non-binding* precedents is a clear indicator of the residual character usually attributed to persuasive precedents.

<sup>1</sup> For helpful comments and suggestions, I am grateful to the two anonymous reviewers for *Teoria Jurídica Contemporânea*. I am only too aware that I have not always followed their advice. I am also grateful to Cláudio Michelon and his course “Reasoning With Precedent” at the University of Edinburgh, for encouraging me to think and write on this subject. This paper was written while studying at the University of Edinburgh with funding provided by CONICYT- PFCHA/Concurso para Becas de Magíster en el Extranjero 2016 (73170364).

<sup>2</sup> This lack of attention to non-binding precedents has been noted, for instance, by BRONAUGH, 1987, p. 217: “Academic writers, it need hardly be observed, take interest only in the binding sort [of precedent], and the other is treated with a indifference”. See also FLANDERS, 2009, p. 56: “Very little has been said to explicate the very idea of persuasive authority itself, in its own right”. More recently, see LAMOND, 2010, p. 16: “It is universally accepted that many such considerations [i. e., persuasive precedents] do play a role, and an important one, in understanding the content of common law doctrines, but there are few corresponding accounts on the way in which they play that role.”

<sup>3</sup> See, for example, BRONAUGH, 1987; GLENN, 1987; SCHAUER, 2008; FLANDERS, 2009; LAMOND, 2010. For a recent attempt to make sense of precedents – binding and non-binding alike – in the context of analogical reasoning in the law, see DUARTE D’ALMEIDA; MICHELON, 2016.

<sup>4</sup> FLANDERS, 2009, p. 56 and p. 57. Chad FLANDERS notes two contemporary debates in which the idea of persuasive authorities is present as a collateral discussion: the debate over the citation of foreign authorities, and the discussion on the nature of judicial authority in general. See FLANDERS, 2009, pp. 57-58.

<sup>5</sup> Cf BRONAUGH, 1987, p. 217.

**Although the word *binding* itself immediately conjures up associations with its literal meaning of being ‘fettered’ or in some way physically constrained to do something, this is clearly not what binding precedents do.**

This parasitic account of case-based considerations which are not binding on a court, but are nonetheless relevant, is potentially misleading, since, as lawyers in civil law countries know very well, the former is in no way dependent on the existence of the latter. Therefore, to understand the role played in legal reasoning by persuasive authorities<sup>6</sup> is not only a parochial question of the common law, but rather a general question about the operation of jurisprudence in general<sup>7</sup>.

What is the role of persuasive authorities in the law? It has been said that the main role of persuasive authorities in the law is to show ways in which “the fetters of binding precedent can be slipped”<sup>8</sup>. But this is not completely accurate. Although the word *binding* itself immediately conjures up associations with its literal meaning of being ‘fettered’ or in some way physically constrained to do something<sup>9</sup>, this is clearly not what binding precedents do. As Sir Carleton Allen stated many years ago,

We say that he (a judge) is bound by the decisions of higher courts; and so he undoubtedly is. But the superior court does not impose fetters upon him; he places the fetters on his own hands. He has to decide whether the case cited to him is truly apposite to the circumstances in question and whether it accurately embodies the principle which he is seeking. The humblest judicial officer has to decide for himself whether he is or is not bound<sup>10</sup>.

What this “mystifying”<sup>11</sup> account of binding precedents tries to explain is that precedents do not bound in the sense that courts must *follow* a decision. Rather, courts are bound “to either ‘follow’ or ‘distinguish’ the previous court’s decision.”<sup>12</sup> What binding precedents seem to do is to impose an argumentative burden on future courts<sup>13</sup>. If a future court is not convinced by a previous

<sup>6</sup> Although I am aware that not every persuasive source is a “persuasive precedent” or is treated as a “persuasive authority”, in this paper I am using these terms as synonyms. On the difference between them, see especially BRONAUGH, 1987; FLANDERS, 2009.

<sup>7</sup> Cf LAMOND, 2010, p. 16.

<sup>8</sup> BRONAUGH, 1987, p. 247

<sup>9</sup> SIMPSON, 1973, p. 14.

<sup>10</sup> ALLEN, 1964, p. 290. Cited by A. W. B. SIMPSON, 1973, p. 14.

<sup>11</sup> SIMPSON, 1973, p. 14.

<sup>12</sup> DUARTE D’ALMEIDA; MICHELON, 2016, p. 27. For the same formulation of the doctrine of binding precedents, see also SIMPSON, 1973; LAMOND, 2005, 3;

<sup>13</sup> I am grateful to Cláudio Michelon for this insight.

*dictum* which nonetheless seems binding, that is, if it does not want to follow it, then it has the burden of finding additional motives to distinguish the present case from the previous case.

If this is true, then the main role of persuasive authorities is not to show ways in which the ‘fettters’ can be slipped, but rather to provide courts with a motive for not putting them on in the first place. In other words: the main role of persuasive authorities in the law is to provide courts with *reasons* for distinguishing.

But what *kind* of reasons do persuasive authorities provide? And what kind of *authority* do they have for the courts deciding the case? In what follows, I shall engage these and other related issues by providing a critical review of Schauer’s influential account of persuasive authorities as having practical authority, and suggesting that a better understanding of their role would be to conceive them as theoretical authorities providing practical reasons.

The structure of this paper is as follows.

In section (2) I provide a brief account of the differences between theoretical and practical reasons and theoretical and practical authorities.

The main part of this paper – sections (3) to (7) – is a critical engagement with Schauer’s account of persuasive authorities as practical authorities. Section (3) introduces Schauer’s idea of authority and explains his distinction between substantive and content-independent reasons by comparing it to Raz’s distinction between first-order and second-order reasons. Section (4) provides a critique of Schauer’s claim that the idea of a “persuasive authority” is self-contradictory. Section (5) develops further the idea of authority providing second-order reasons, specifying that these reasons are exclusionary or pre-emptive practical reasons. Section (6) explains Schauer’s conception of persuasive authorities as optional authorities providing *pro tanto* reasons for action. Section (7) shows how the idea of optional authorities is grounded on Schauer’s account of exclusionary reasons as including, after all, the possibility of considering first-order reasons. This account is compared critically with Raz’s views on exclusionary reasons.

Sections (8) and (9) are aimed at providing an alternative account of persuasive authorities as having theoretical authority. Section

(8) is concerned with the shortcomings of considering persuasive authorities as having practical authority, and the possibility of conceiving them as having theoretical authority. Section (9) develops further this claim, by suggesting that there is no sharp separation between the two kinds of authorities in the context of judicial reasoning, claiming that persuasive authorities are best conceived as theoretical authorities providing practical reasons.

Finally, section (10) provides, as a mode of conclusion, some consequences of the proposed approach.

**The distinction between reasons for belief and reasons for action accounts for another parallel distinction between theoretical and practical authorities**

**2. REASONS AND AUTHORITY: THEORETICAL AND PRACTICAL**

It may be useful to begin by providing a brief and basic parallel between theoretical and practical reasons as usually understood in this context. In the standard account, theoretical reasons are reasons to *believe* that something is true, whereas practical reasons are reasons to *decide* or to *act* in a certain way. Although a distinction might be drawn between reasons for deciding and reasons for action – since “it is possible that I make the right decision to do the wrong thing”<sup>14</sup> – they are both *practical* reasons in the sense that they are concerned with what one ought to do or what one ought to decide *in order to do* something.

The distinction between reasons for belief and reasons for action accounts for another parallel distinction between theoretical and practical authorities<sup>15</sup>. Theoretical authorities are regarded as having some higher degree of knowledge or a certain skill that gives their opinions more weight than the opinions of an average person. In a word, theoretical authorities are *experts* in a certain field. When a theoretical authority uses his authority to judge of a certain issue, his judgement provides a strong reason to believe that what he says is true. This is because their judgements serve as an intermediate between the substantive reasons supporting the authoritative claim and the rest of us who are unaware of those reasons. Therefore, the assertion that *p* is the case by a theoretical authority gives us “a reason to believe that there are (other) good reasons supporting the

<sup>14</sup> MICHELON, 2006, p. 116. On the distinction between reasons for deciding and reasons for action, see MICHELON, 2006, pp. 114-117.

<sup>15</sup> Cf RAZ, 2006, pp. 1032-1034. See also LAMOND, 2010, pp. 18-23.

truth of *p*<sup>16</sup>. As Grant Lamond has noted, *p* represents an *all-things-considered* judgement: it provides a reason to believe that, *in the balance of reasons*, *p* is more likely to be true than not<sup>17</sup>.

By contrast, practical authorities provide reasons to *decide* or to *act* in a certain way. As Raz argues, “questions of who has authority over whom are practical questions”<sup>18</sup> because they bear on “what one ought to do”<sup>19</sup>. When a practical authority commands us, for example, to “Be quiet!” he is not only providing us with a reason to believe that he prefers us to be quiet. He is also, by the mere fact of saying so, giving us a very good reason to be quiet. If someone dared to ask why he is supposed to be quiet, the authority may give him substantive reasons that justify his judgement, but, since he is the authority, he may rightly reply: “Because I said so!”. In other words, the fact that a practical authority commands us to decide or to do *p* gives us a reason to do it not because, in the balance of reasons, *p* is more likely to be the right thing to do, but rather because *p* is to be obeyed *irrespective of its substantive merits*.

### 3. SCHAUER ON AUTHORITY: SUBSTANTIVE AND CONTENT-INDEPENDENT REASONS

In an influential article for the *Virginia Law Review*<sup>20</sup>, Frederick Schauer claimed that persuasive authorities are better understood as having practical authority over future courts. He also claims that legal non-binding sources are best conceived as *optional* rather than as *persuasive* authorities. In the next paragraphs, I shall review what I consider are some of the most important insights in Schauer’s account.

According to what Schauer calls the “conventional wisdom”<sup>21</sup> about the idea of authority, “the characteristic feature of authority is its *content-independence*. The force of an authoritative directive comes not from its content, but from its source”<sup>22</sup>. Authority “provides reasons for action by virtue of its status and not by virtue of the intrinsic or

<sup>16</sup> LAMOND, 2010, p. 19.

<sup>17</sup> Cf LAMOND, 2010, p. 19.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> SCHAUER, 2008.

<sup>21</sup> SCHAUER, 2008, p. 1935.

<sup>22</sup> SCHAUER, 2008, p. 1935.

content-based soundness of the actions that the authority is urging”<sup>23</sup>.

Persuasion, on the other hand, is grounded on *substantive* reasons, which are always *content-dependent*, that is, its force derives not from the source, but from its content. Persuasion and authority are thus “inherently opposed notions”<sup>24</sup>. “The use of a source can be one or the other – it can be persuasive or it can be authoritative – but it cannot be both at the same time”<sup>25</sup>. Therefore, the very idea of a “persuasive authority” is self-contradictory.

As Schauer expressly notes in his *Thinking Like a Lawyer*, the distinction between substantive and content-independent reasons is identical to Joseph Raz’s distinction between *first-order* and *second-order reasons*<sup>26</sup>. First-order reasons, in Raz’s account, are reasons to perform an action based on merits. They can be *weighed* against each other, and in cases of conflict “the stronger reason overrides the weaker”<sup>27</sup>. Second-order reasons, on the other hand, are reasons “to act for a reason or to refrain from acting for a reason”<sup>28</sup>. They are, as Schauer puts it, “reasons about reasons”<sup>29</sup>: they provide a reason to act regardless of their intrinsic merits. Second-order reasons are always *practical* reasons, that is, “reasons for action”<sup>30</sup>.

#### 4. PERSUASION AND AUTHORITY: “INHERENTLY OPPOSED NOTIONS”?

Although Schauer claims that the idea of content-independence is part of the “conventional wisdom”<sup>31</sup> about authority, the truth is that there is no agreement over what the source of that conventional wisdom – H. L. A. Hart<sup>32</sup> – actually meant by it, and he has probably been misinterpreted<sup>33</sup>. And although Schauer has also claimed that

<sup>23</sup> SCHAUER, 2008, p. 1939.

<sup>24</sup> SCHAUER, 2008, p. 1943.

<sup>25</sup> SCHAUER, 2008, pp. 1943-1944.

<sup>26</sup> SCHAUER, 2009, p. 63.

<sup>27</sup> RAZ, 1990, p. 25.

<sup>28</sup> RAZ, 1990, p. 39.

<sup>29</sup> SCHAUER, 2009, p. 63.

<sup>30</sup> RAZ, 1979, p. 17.

<sup>31</sup> SCHAUER, 2008, p. 1935.

<sup>32</sup> See HART, 1958; 1982, chapter 10, especially p. 255 ff.

<sup>33</sup> See SCIARAFFA, 2008.

the idea of content-independence is “unlikely to be controversial”<sup>34</sup>, the truth is that some controversy over the issue does exist: there seems to be no clear definition of the idea<sup>35</sup> and, more importantly, there seems to be no clarity as of what a *content-dependent* reason would look like, since it has also been claimed that all reasons are, in some sense, content-independent<sup>36</sup>.

Now, even assuming the soundness of the idea of content-independence, I still remain unconvinced about Schauer’s claim that persuasion and authority are “inherently opposed” notions. I believe he would need to prove not only that persuasion and authority are opposed when someone is not convinced by substantive reasons, but also that it could not be possible for someone to be persuaded of the substantive reasons *because of* – or at least *aided by* – the authoritative nature of the source providing such reasons. I think experience could show many cases in which we are more inclined to see the truth of substantive reasons aided by the authority of someone whose judgement we trust. Thus, for instance, when a student asks a question, and the right answer and the right reasons for that answer are given by a peer student, the first student would probably still want to know what the teacher has to say in the matter. And if the teacher agrees with the answer given by the other student and says so, I think it would not be far from the mark to claim that he is *persuading* the first student *by his authority*.

Moreover, there are cases in which the only substantive reasons are authoritative reasons. Historical facts are probably the best example of authoritative sources that are also used as substantive reasons. We are persuaded of, say, Napoleon’s historical existence, and the only substantive reasons we could give are a number of authoritative sources that say so.

To sum up: there are cases in which persuasion and authority are not “inherently opposed”: First, when someone is being persuaded aided by an authoritative source, and, second, when someone is

<sup>34</sup> SCHAUER, 1994, p. 499.

<sup>35</sup> See MARMOR, 1995, p. 345.

<sup>36</sup> See MARKWICK, 2000; 2003.

being persuaded because of the authoritative nature of that source, and there are no other kinds of substantive reasons available<sup>37</sup>.

## 5. A REASON TO EXCLUDE: PERSUASIVE AUTHORITIES AS EXCLUSIONARY REASONS

So what kind of authority, if any, do “persuasive authorities” have? As I will show, according to Schauer, if they are to maintain their legal authoritative character, then non-binding authorities are better conceived as having *practical* authority for the court which has to decide the case: they provide the court with a second-order reason to decide or to act irrespective of their substantive merits.

Authoritative reasons are a special type of practical reasons: they are *exclusionary* or *pre-emptive* reasons. An exclusionary reason is “a second-order reason to refrain from acting for some reason”<sup>38</sup>. As Schauer puts it, authoritative reasons such as rules or precedents function as such by “*excluding or preempting* what would otherwise be good reasons for doing one thing or another”<sup>39</sup>. Exclusionary reasons exclude not by *weight* – as a strong first-order reason would do – but by *kind*<sup>40</sup>. Authoritative reasons are not “rules of thumb”<sup>41</sup> to be balanced against substantive reasons: they exclude those reasons from the deliberation process altogether.

To be sure, an authoritative reason can count as both a good first-order reason and as an exclusionary second-order reason at the same time<sup>42</sup>. As Schauer puts it, both kinds of reasons may proceed

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<sup>37</sup> An anonymous reviewer objected to the reasoning outlined above on the grounds that Schauer’s point would be that a person cannot *treat* something as a reason of practical authority and as a substantive reason at the same time. I agree with the reviewer only insofar as that *is* Schauer’s point when dealing with authority in the law. I would also agree with the reviewer if it is conceded that, for Schauer, as for Raz, “authority is a practical concept” (RAZ, 1979, p. 10). However, in this part of his argument, he makes no distinction between theoretical and practical authorities. He expressly mentions that content-independent reasons are “reasons to act, decide, or *believe*” (SCHAUER, 2008, p. 1935. *Emphasis added*). Therefore, to show that authoritative reasons can serve as a substantive reason to believe that something is true – as I have tried to show by stressing the idea that one can be persuaded by authority – is, in my view, enough to prove the unsoundness of Schauer’s claim as a general claim about persuasion and authority.

<sup>38</sup> RAZ, 1990, p. 39.

<sup>39</sup> SCHAUER, 2009, p. 61. *Emphasis added*.

<sup>40</sup> RAZ, 1979, p. 22. *Emphasis added*.

<sup>41</sup> RAZ, 1990, p. 59.

<sup>42</sup> *See* RAZ, 1979, p. 22.

from the same source<sup>43</sup>. Nevertheless, they remain fundamentally different, since they are reasons of a different order<sup>44</sup>.

If so, how are “persuasive authorities” treated by courts? Do they provide first-order reasons or second-order reasons? This is an empirical matter. Depending on the case, they may be treated as one or the other, or even as both at the same time. However, according to Schauer, non-binding sources are usually used by courts as providing content-independent rather than substantive reasons:

Although courts often cite legal sources because they are genuinely and substantively persuaded, many – perhaps even most – judicial uses of so-called persuasive authority seem to stem from authority rather than persuasion. (...) It is not that courts follow these optional sources because they are persuasive; rather, courts follow them because of their very existence<sup>45</sup>.

**[Persuasive sources] must be viewed as providing practical reasons for the court deciding the case. However, [...] courts can ignore these sources without breach of duty.**

## 6. OPTIONAL AUTHORITIES AND *PRO TANTO* REASONS

When legal sources are treated as authorities, they must be viewed as providing *practical* reasons for the court deciding the case. However, these sources are not mandatory or *binding* in any meaningful sense. In fact, courts can ignore these sources without breach of duty. This feature of authoritative yet not mandatory sources leads Schauer to designate them as *optional* authorities.

Although the idea of an “optional authority” may seem as self-contradictory as the idea of a “persuasive authority”, Schauer insists this it is not the case. “Even optional authorities can be genuinely authoritative”<sup>46</sup>. For him, there is no need for real authorities to be binding in the sense that they are “absolute or non-overridable”<sup>47</sup>. “Sources can also function as authorities without necessarily prevailing over all other sources, or even all other reasons for a decision”<sup>48</sup>. Schauer argues this point thus:

<sup>43</sup> Cf SCHAUER, 2008, p. 1941.

<sup>44</sup> *Ibid.*

<sup>45</sup> SCHAUER, 2008, p. 1945.

<sup>46</sup> SCHAUER, 2008, p. 1954.

<sup>47</sup> SCHAUER, 2008, p. 1952.

<sup>48</sup> SCHAUER, 2008, p. 1953.

The existence of an authoritative reason is not inconsistent with there being other outweighing authoritative reasons or outweighing reasons of other kinds. When a court rules that even the crisp rules of an applicable statute must yield at times to the demands of justice, it is saying that an undeniably applicable statute is to be understood as *prima facie* but not absolutely outcome producing. In this sense, it is certainly true that most authorities are not binding or controlling in an absolute way. And the suggestion that treating some source as authoritative requires that the prescriptions emanating from that source must be followed, come what may, is simply not part of the concept of authority at all<sup>49</sup>.

In other words: the fact that an authority is “optional” does not mean that it cannot provide exclusionary reasons to act. Being an optional authority does not transform its instructions into first-order reasons. What Schauer claims is that the reasons for action provided by an optional authority, while still being exclusionary reasons, are not *decisive*, but merely *pro tanto* (“prima facie”<sup>50</sup>) reasons: they are reasons in favor of a certain course of action, but they are not necessarily sufficient to justify it.

To be clear, to claim that optional authorities provide merely *pro tanto* and not decisive reasons is not to say that a case cannot be decided on *pro tanto* reasons. Quite the contrary: in the absence of countervailing considerations, *pro tanto* reasons will give the court reasons which are able in themselves to decide the case. But these reasons can be outweighed by other “authoritative reasons or outweighing reasons of other kinds”<sup>51</sup>, that is, by other second-order reasons or by strong first-order reasons.

<sup>49</sup> SCHAUER, 2008, p. 1953-1954. Emphasis added.

<sup>50</sup> SCHAUER, 2008, p. 1953. Following the common usage, Schauer speaks of *prima facie* reasons as a proxy for *pro tanto* reasons. However, a distinction may be drawn between the two. As Shelly Kagan explains: “A *pro tanto* reason has genuine weight, but nonetheless may be outweighed by other considerations. Thus, calling a reason a *pro tanto* reason is to be distinguished from calling it a *prima facie* reason, which I take to involve an epistemological qualification: a *prima facie* reason *appears* to be a reason, but may actually not be a reason at all, or may not have weight in all cases it appears to. In contrast, a *pro tanto* reason is a genuine reason – with actual weight – but it may not be a *decisive* one in various cases.” (KAGAN, 1989, p. 17)

<sup>51</sup> SCHAUER, 2008, p. 1953. Emphasis added.

## 7. “TO LOOK JUST QUICKLY, IF POSSIBLE, AT THE EXCLUDED”: SOME DIFFICULTIES WITH EXCLUSIONARY REASONS

But how can a first-order reason *outweigh* a second-order reason, if exclusionary reasons are supposed to exclude first-order reasons from consideration? In Raz’s account, this would be impossible. “The reasons that can defeat them are those they do not exclude”<sup>52</sup>. An authoritative reason which can be outweighed by first-order reasons is not authoritative at all. Exclusionary reasons, to be sure, may differ in scope: they may exclude all or only some of the conflicting reasons<sup>53</sup>. But they do not *change* the balance of reasons. They *exclude action* on that balance<sup>54</sup>. For Raz, to say that a second-order reason can be outweighed by other consideration within its scope is to treat it not as an order, but as a mere request: “A request is made with the intention that it shall be taken as a reason for action and be acceded to only if it tips the balance. Orders are made with the intention that they should prevail in certain circumstances *even if* they do not tip the balance”<sup>55</sup>.

It is precisely on this point where Schauer distances himself from Raz’s account of exclusionary reasons<sup>56</sup>. For Schauer, a rule can be overridden even within its scope “by recourse to the very kinds of facts [*i. e.*, reasons] the consideration of which the rule appears to exclude”<sup>57</sup>. For Schauer, the exception confirms the rule. For Raz, it destroys it.

Thus, Schauer’s account of non-binding authorities as optional authorities relies on the assumption that exclusionary reasons can be conceived as “capable of override”<sup>58</sup> by the very same first-order reasons which were supposed to be excluded. In what sense, then, are those reasons excluded? According to Schauer, exclusionary

<sup>52</sup> RAZ, 2006, p. 1023.

<sup>53</sup> See RAZ, 1990, p. 46; 1979, p. 22.

<sup>54</sup> See RAZ, 1979, p. 23.

<sup>55</sup> RAZ, 1979, p. 23.

<sup>56</sup> SCHAUER, 1992, p. 89: “Raz’s account of rules as including exclusionary reasons is largely consistent with the conclusions I have just reached. The primary inconsistency appears to be in the way in which Raz takes exclusionary reasons as incapable of override, claiming that an exclusionary reason ‘always prevails’ in cases of conflict with a first-order reason.”

<sup>57</sup> SCHAUER, 1992, p. 89.

<sup>58</sup> SCHAUER, 1992, p. 91.

reasons only exclude a “careful look at a first-order reason”<sup>59</sup>, but they are compatible with “merely a perfunctory glimpse at it”<sup>60</sup>:

Insofar as it is possible for an exclusionary reason to tell an agent to look just quickly, if possible, at the excluded first-order reason to see if this is one of the cases in which the exclusion of that factor should be disregarded, it changes the decision-making procedure from one in which the agent is expected to look at every first-order reason with equivalent care<sup>61</sup>.

But once the exclusionary thesis has been assumed, is this “quick look” at first-order reasons even possible? As Cláudio Michelin, following the lead of Emiliós Christodoulidis<sup>62</sup>, has pointed out, “it is not at all clear how the thesis that formal reasons always exclude other reasons for action could be made compatible with the qualification that sometimes some sorts of reason (...) can defeat the formal reason”<sup>63</sup>.

I think Raz’s rejection of the possibility of a quick look at first-order reasons is a much more *logical* approach to authoritative reasons conceived as exclusionary reasons. However, Schauer’s account is *psychologically* more compelling. In other words: Formal reasons are problematic. But if it is true that one of the differences between *using formal reasons* (Schauer) and *being a formalist* (Raz) is the admission of exceptions to authoritative rules<sup>64</sup>, then it seems more reasonable to be a full-blown formalist than to defend that formal reasons are not so formal after all.

Nevertheless, I think Schauer is correct in stating that we tend to treat authoritative reasons as being defeasible by first-order reasons. But his strength is also his weakness, since he has implicitly recognized that, in real life, we tend to override second-order reasons by first-order considerations. Since he cannot accept the authoritative nature of reasons for belief – hence his rejection of the very idea of a “persuasive authority” as self-contradictory – he is forced to conclude that authoritative reasons emanating from persuasive precedents are practical reasons, just

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<sup>59</sup> SCHAUER, 1992, p. 91.

<sup>60</sup> *Ibid.*

<sup>61</sup> SCHAUER, 1992, pp. 90-91.

<sup>62</sup> CHRISTODOULIDIS, 1999, p. 231.

<sup>63</sup> MICHELON, 2006, p. 135.

<sup>64</sup> Cf ATIYAH, 1986, 20 ff.

as binding precedents are, but with the difference that they are not mandatory, but rather *optional* authorities.

## 8. FROM ACTION TO BELIEF: PERSUASIVE AUTHORITIES AS THEORETICAL AUTHORITIES

Schauer's treatment of non-binding precedents as *optional* authorities captures a very relevant feature of persuasive precedents, namely, the idea that courts have no legal duty to use them. To put it in Hohfeldian terms, they have a legal "privilege"<sup>65</sup> concerning their use. Whereas binding precedents must be followed or distinguished, but never ignored, persuasive precedents *can be ignored* without breaking the law<sup>66</sup>.

Nonetheless, insofar as the idea of optional authority replaces that of persuasive authority, it also obscures some important features which are better highlighted by adopting the rejected terminology. I would like to draw the attention to one of these features: persuasive authorities admit *degrees of persuasiveness*, that is, courts usually consider some authorities as more persuasive than others<sup>67</sup>. Thus, in general terms, a domestic court's judgement is treated as more authoritative than the judgements of a foreign court of the same hierarchy. In civil law countries, a Supreme Court's decision is more authoritative than a judgement from a Court of Appeals. The Court of Appeals from the same jurisdiction as a civil court is more authoritative than the judgment of a Court of Appeals from another jurisdiction, and so on.

This is not, however, a fatal blow to the adoption of the idea of an optional authority. Arguably, degrees of persuasiveness may also account for degrees of optionality. The real problem is the idea of precedents as having *practical* authority which is embedded in such terminology.

There are serious reasons for doubting that non-binding authorities are best conceived of as having *practical* authority for the courts deciding the case. One major difficulty has been noted by Grant Lamond. He states that the "normal reason"<sup>68</sup> for deferring to the

<sup>65</sup> HOHFELD, 1946, p. 36. See also BRONAUGH, 1987, p. 238.

<sup>66</sup> Cf BRONAUGH, 1987, p. 231.

<sup>67</sup> On ranking persuasive authorities, see FLANDERS, 2009, p. 68.

<sup>68</sup> LAMOND, 2010, p. 25.

view put forward by another court is that the later court finds that view convincing. But in those cases, in which the court does not think that the view is correct, “what would be the reason then for preferring the persuasive source’s view to the court’s own?”<sup>69</sup>. The major challenge, then, to understand persuasive authorities as having practical authority lies in “explaining the rationale for deferring to a view even when it is erroneous”<sup>70</sup>.

A tentative response to this challenge would be to say that there is no reason to do so. There is no reason to defer to the view of a court unless the later court finds the earlier judgement convincing. If persuasive precedents are conceived as having practical authority over the court, then the most reasonable way of dealing with ‘persuasive yet not convincing’ precedents would be simply to ignore them. As Richard Bronaugh has argued:

whereas binding precedent must be followed (convincing or not), no judge could ever declare something as a persuasive precedent, then decide according to it, but express judicial regret over the result. (...) It would be inappropriate to cite a persuasive precedent as indistinguishable but unsound; ignoring such precedents seems the proper act. (...) Binding precedents may be cited as precedents yet followed without conviction; persuasive precedents may also be cited as precedents but are followed always and only with conviction. (...) No persuasive precedent is cited and followed unless it has been convincing to the court<sup>71</sup>

But this is not a sufficient response. To note that persuasive precedents are always followed with conviction would not explain the fact that courts normally tend to defer to an earlier court’s view not only to follow it, but also to *distinguish* it from the present case. Moreover, as Lamond has also noted, Schauer’s account does not fit very well with the fact that “judges do not write as if they expected their dicta to have any practical authority for other courts”<sup>72</sup>.

Founded upon this and other reasons, he argues that persuasive precedents are best conceived of as having *theoretical* rather than

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> BRONAUGH, 1987, p. 223-224.

<sup>72</sup> LAMOND, 2010, p. 27.

practical authority. According to Lamond, the force of persuasive sources lies

not in their carrying weight regardless of their merits, but as carrying weight due to the probability of their having merit. They provide a reason to *believe* that the view is a sound analysis (and so should be followed); they do not, in themselves, provide a reason to follow the view irrespective of its merits<sup>73</sup>.

Lamond argues that an account of, at least, some persuasive sources as theoretical authorities makes sense of the way in which courts make use of persuasive sources<sup>74</sup>. In general, courts not only consider how convincing the arguments of other courts are: they also give weight to the very fact that another court has expressed a view in a certain matter<sup>75</sup>. Moreover, lawyers clearly believe that it is an advantage to cite persuasive sources supporting their arguments, and a disadvantage to have no such support<sup>76</sup>.

## 9. AND BACK AGAIN: THEORETICAL AUTHORITIES PROVIDING PRACTICAL REASONS

I agree with Lamond in that persuasive authorities are best conceived as theoretical authorities. However, I would like to suggest a further claim: that persuasive authorities are best conceived as *theoretical authorities providing practical reasons*. By affirming this, I am not only claiming that theoretical authority can extend to matters of practical reasoning by providing reasons to believe that something must be done<sup>77</sup> I am saying that, when applied to practical matters, theoretical authority provides not only a reason to believe, but also a reason to act. In other words: Although there is a distinction between theoretical and practical reasons, that does not mean a sharp separation between the two. This point has been clearly explained by Cláudio Michelin:

The apparently sharp distinction between reasons to believe and reasons to act collapses when one has a reason to believe that an action should be performed. Such a reason is itself a reason to act and this is a fact of the grammar of beliefs. To say 'All applicable reasons support

<sup>73</sup> LAMOND, 2010, p. 17. Emphasis in the original.

<sup>74</sup> See LAMOND, 2010, p. 27.

<sup>75</sup> See LAMOND, 2010, p. 28.

<sup>76</sup> *Ibid.*

<sup>77</sup> LAMOND, 2010, p. 23.

the belief that x is the right [thing] to do, but I don't have any reason to do x' makes as much sense as saying that 'All applicable reasons support the belief that the cat is on the mat, but there is no reason to believe that the cat is on the mat'. (...) Although a conceptual distinction could be made between theoretical and practical authority, *under some conditions*, having one implies having the other<sup>78</sup>.

I believe that a judge's reasoning constrained by binding and persuasive precedents takes place in precisely the kind of conditions in which the distinction between theoretical and practical authority is blurred. When deciding a case, courts are not merely concerned with providing exclusionary reasons to act *ad intra*, that is, for the parties of the case under their consideration. They are also concerned with the *ad extra* effects of their decisions, especially when those decisions come from higher courts<sup>79</sup>. That is, they are concerned with creating authoritative reasons for belief.

**(...) the role of persuasive authorities is better understood as providing the courts with reasons to believe which, in turn, influence their deliberation process.**

## 10. CONCLUSIONS AND COMMENTS

In this article, I have suggested that the role of persuasive authorities is better understood as providing the courts with reasons to believe which, in turn, influence their deliberation process. I believe this understanding of legal sources accounts better for the role which future courts actually assign to previous case-based considerations when deciding if the case at hand is similar to the previous one. In those cases, the court's process of deliberation continues even when precedent binds it, and especially if it is unsure whether the earlier decision was right. When this happens, courts usually search for grounds to *distinguish* the present case from the former. It is precisely in this process where persuasive precedents, understood as providing reasons to believe that something must be done, can play their most important role.

The proposed understanding also helps to rescue the very idea of a 'persuasive authority' from Schauer's critique. If the authoritative reasons given by legal authorities are conceived as reasons for belief,

<sup>78</sup> MICHELON, 2006, p. 122. Emphasis added.

<sup>79</sup> For a clear example of this kind of worry about the secondary effects of a ruling in the UK, see the aftermath reflections by Lord Hoffmann, a member of the House of Lords that decided *Fairchild v Glenhaven Funeral Services Ltd*, a paradigmatic (and controversial) liability case in the UK. See HOFFMANN, 2012; 2013.

then the idea of a “persuasive authority” involves no performative contradiction. Authoritative reasons for belief are aimed at persuading by definition.

Although the idea of conceiving persuasive authorities as optional authorities rightly captures their character of Hohfeldian ‘privileges’, it fails to account for the fact that there are *degrees* of authorities. The idea of a “persuasive authority” seems to fit better with the fact that courts treat some authorities as *more* persuasive than others. By contrast, it seems counter-intuitive to claim degrees of optionality.

I would like to add two final comments regarding the consequences of the adopted view for our understanding of the law in general.

*First.* To recognize the importance of reasons for belief stemming from legal sources may lead us to revise conceptions of law in which “there is no role for persuasive sources except as practical authorities”<sup>80</sup>. This is especially true of those theories that conceive legal authority as giving formal reasons to act. The idea of theoretical authorities providing practical reasons to be weighed against the reasons of practical authorities challenges the view that authoritative reasons are supposed to *exclude* personal beliefs about morality or even about that same law from the deliberation process.

*Second.* The proposed view on persuasive authorities may also lead us to revise theories of law that account for a sharp separation between theoretical and practical reasons. I think it is precisely the insensitivity to the influence of theoretical authorities in our practical reasoning that forces Schauer to conclude that, since courts treat non-binding sources as authorities, then they must treat those sources as having some sort of practical authority. In Schauer’s view, to claim otherwise would be tantamount to an acceptance that the personal preferences or beliefs of a court might prevail over the commands of the law, which would put in danger the very authoritative nature of the law. The proposed account of persuasive authorities challenges precisely this view, by suggesting that a reason to believe is not an arbitrary reason to act. It is a persuasive reason to do so.

<sup>80</sup> LAMOND, 2010, p. 32. He is referring to Raz’s exclusive legal positivism. He also notes that, in Dworkin’s interpretivism, there is “no room for theoretical authority, because it involves giving a certain role to others’ views of the effect of legal material. But Hercules does not need anyone else to assist him in determining what the law is, since he is not subject to the limitations under which ordinary rules labor.” (LAMOND, 2010, pp. 31-32.)

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