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LEGITIMACY, DEMOCRACY, AND RAZIAN AUTHORITY*

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Joseph Raz has developed a highly detailed analysis of the nature of authority that accounts for its structure, the role it plays in practical reasoning, and the conditions under which it is legitimate. Raz's analysis, which has been evolving over the last few decades, is impressive in both scope and insight. With it, Raz dissolves many of the paradoxes and conundrums that have traditionally puzzled students of authority.

This essay explores the relationship between authority and democracy. It investigates whether Raz's account of legitimacy, specifically his normal justification thesis, captures the conditions under which a democratic authority is legitimate. I shall argue that it does not. Moreover, I shall suggest that the inadequacy of the normal justification thesis as a test for the legitimacy of democracies teaches us an important lesson about the legitimacy of political authorities.

Before we examine the normal justification thesis, we need to understand the whole of Raz's account of authority. That in turn requires a quick look at his work on reasons. In Section I, I explain some of Raz's work on reasons. In Sections II and III, I introduce Raz's account of authority and legitimacy. Readers well versed in Raz's analysis may wish to skim ahead. Beginning in Section IV, I argue that the normal justification thesis is inadequate as a test of legitimacy for political authorities. Finally, in Section VIII, I consider an unsuccessful attempt to redeem the normal justification thesis from the objections presented.

I. REASONS

We engage in practical reasoning when we decide what to do. Practical authorities impact practical reasoning by guiding behavior.[1] In order to understand how practical authorities guide behavior, we need to learn a

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1. Practical authorities can be contrasted with theoretical authorities, which are authorities about what to believe. A meteorologist is a theoretical authority about what we should believe the weather will be like. A police officer directing traffic is a practical authority about how

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little bit about reasons and how they work. Raz's analysis of reasons and practical reasoning is nearly as comprehensive as his analysis of authority, but we shall consider even less of it here.

Raz distinguishes between first-order and second-order reasons. *First-order reasons* are reasons for action or reasons for refraining from action. That it is raining is a reason to carry an umbrella. That it is snowing is a reason not to wear a bathing suit. These are examples of first-order reasons. *Second-order reasons* are reasons to act for reasons or reasons to refrain from acting for reasons. This is a confusing notion. In order to understand it, we first need to understand what it means to act for a reason. We will say that a person acts for a reason if the reason is part of her motivation for acting. If I carry an umbrella because it is raining, then I act in part for the reason that it is raining. Further, we will follow Raz and say a person *conforms* with a reason if she does what the reason requires, whereas a person *complies* with a reason if she acts for it.[2] Last, a person refrains from acting for a reason if it is not part of her motivation, even if she conforms with it; refraining from acting for a reason does not necessarily require refraining from the action the reason requires.[3]

What does it mean to have a second-order reason, a reason to act for or not act for another reason? An illustration will help. Suppose Aaron's grandmother is in the hospital and that this provides Aaron reason to visit her. Suppose further that Aaron goes to the hospital and visits his grandmother, but only because he was hoping to run into Michelle, whom he has a crush on. In this case, Aaron conforms to his reason to go the hospital to visit his grandmother but he does not comply with it. Does Aaron have reason to comply with his reason to visit his grandmother rather than just conform with it? Raz suggests he does, and I agree.[4] Because Aaron went to the hospital to see Michelle and not his grandmother, his actions do not embody appropriate respect for his grandmother. Aaron had a reason to comply with his reason to visit his grandmother, that is, he had a second-order reason to act for a reason: Only through visiting his grandmother for the sake of visiting her could he show her proper respect.

We will be primarily concerned with the other type of second-order reason: reasons not to act for reasons. Raz calls these *exclusionary reasons*.[5] To illustrate, imagine that you are the commissioner of Major League Baseball. That your favorite team is the Milwaukee Brewers is a reason for you cheer for that team and to support the team in any number of ways. However, your

drivers should move their cars. Some authorities are both theoretical and practical authorities simultaneously; the Pope is a theoretical authority regarding what Catholics should believe on theological questions and a practical authority about how they should lead their lives. Raz's analysis applies to practical authorities. Hence "authority" as used in the argument here refers to practical authority unless otherwise noted.

2. Joseph Raz, PRACTICAL REASONS AND NORMS 178 (2nd ed., 1999).

3. *Id.* at 185.

4. Raz offers a similar example. *See id.* at 178–179. Raz argues that cases like this are special and that in general reasons are reasons for conformity and not compliance. *Id.* at 179–182.

5. For Raz's response to objections to his account of exclusionary reasons, *see id.* at 178–199.

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role as commissioner gives you an exclusionary reason not to act for reasons of favoritism in discharging your official duties. It might be okay to offer support to the Brewers as commissioner, but not because of the fact that it is your favorite team. Occupying the position of commissioner gives you an exclusionary reason not to act for reasons that would otherwise apply to you.

One potential source of confusion is to think that an exclusionary reason is a reason to act for no reason at all. This is not the case, as exclusionary reasons are reasons to refrain from acting for a specific reason or set of reasons. Exclusionary reasons are not reasons to refrain from acting for any reason whatsoever. Another potential source of confusion is to think that an exclusionary reason is a reason not to think about other reasons—to exclude them from consideration. This is mistaken. It is acceptable to think about an excluded reason, but not to act for it. As long as one does not allow it to affect what one does, there is nothing wrong with thinking about it.[6] Last, we should note, nothing is wrong with conforming to an excluded reason as long as one does not act for it. Suppose a mother tells her child, "I do not trust Ms. Smith; do not mind her instructions." She is not telling the child never to do what Ms. Smith instructs; rather, she is telling her child not to do what Ms. Smith instructs simply because Ms. Smith instructed it. If there is independent ground to do what Ms. Smith instructs, then the child may do so; her mother has given her a reason not to comply with Ms. Smith's orders, but conformity may still be warranted.

One last type of reason will be important for understanding Raz's analysis of authority: *content-independent* reasons.[7] Content-independent reasons are facts that achieve their status as reasons in virtue of features other than their content. As any parent who has ever uttered the words, "because I said so," will attest, parental edicts are reasons for their children to act independent of what the parent requires. This general truth is not without limits. If a parent instructs her child to do something that will cause her great harm, the instruction may be no reason for the child to do so. Nevertheless, within a great range of activities, the fact that a parent has ordered an act is a reason to perform it regardless of what the act is (perhaps not a conclusive reason—there may be weightier countervailing reasons—but a reason nonetheless). This is exhibited clearly by cases in which a parent can order diametrically opposed actions ("go with your brother to the store" or "do not go with your brother to the store") and provide a reason for the child to act through both.

II. RAZIAN AUTHORITY

Let us put aside our analysis of reasons for a moment and return to authority. Many describe authority as the ability to change what other people do. On this view, if I can make you eat bean sprouts, I have the authority to make you

6. *Id.* at 184.
7. J. Raz, THE MORALITY OF FREEDOM 35 (1988).

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eat bean sprouts. This conception of authority is too broad. Perhaps I get you to eat bean sprouts by blackmailing you, or bribing you, or just by telling you about the positive effects of eating them. It would hardly seem correct to say that I exercised authority over you. This view of authority confuses it with power and influence.[8]

Nevertheless, authority is closely related to power and influence. Some suggest that authority is the power to change what people *ought* to do or, more accurately, to change the reasons that apply to them—to change their normative situations. This suggestion comes closer to capturing our concept of authority. When a mother orders her daughter to take out the trash, the daughter has a reason to take out the trash that she did not have beforehand; her normative situation has changed. This analysis of authority is still too broad, however. It encompasses a variety of activities that we do not consider instances of authority. For example, you can often change what someone ought to do by requesting something of them. If I request that you help me carry my groceries, I have given you a reason for action which you did not have before: my request. The ability to issue a request, however, does not indicate that one has authority over the addressee. Requests are often issued precisely because one lacks authority to order the requested action. Authority is something narrower still than the power to change people's normative situations.

Raz highlights the difference between ordering and requesting to draw out the structure of authority. It will help to summarize his remarks briefly.[9] When one makes a request, one gives the addressee a reason for action that she did not have before. However, the individual making the request recognizes that it is not an exclusionary reason to refrain from acting for other reasons. Countervailing reasons may outweigh the request. If I request that you help me carry my groceries, I expect you will consider my request along with all the other reasons you have for action. I expect you to act upon my request only if it tips the balance of reason in favor of doing so.[10]

Ordering is different. An order is intended to exclude other reasons as a basis for action.[11] Suppose Mary tells her son Patrick to wash the dishes. Patrick, prior to the order, may have had reasons to wash the dishes and he may have had reason to do many other things as well, perhaps mow the lawn or play tennis with a friend. Does Mary intend Patrick to consider her order

8. *See id.* at 23–28 for criticism of such views.

9. For further discussion of the difference, *see* J. Raz, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 15–16, 23 (1997).

10. Someone who requests may believe that their request is conclusive reason to perform the requested action; they may think the request outweighs all other considerations. Nevertheless, one who requests does not intend to exclude other reasons from consideration.

11. Some contend that the difference between ordering and requesting is not one of kind, as Raz asserts, but rather is a difference of weight. Orders are simply weightier reasons than requests, on this view, and though they may be intended to outweigh other considerations, they are not intended to exclude them. Raz points out that valid requests do not necessarily carry less weight than valid orders. There are weighty requests and orders that exclude little. Raz, *supra* note 9, at 23.

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as a reason alongside all the other reasons he has for acting and comply only if it tips the balance as to what he should do? If she did, she would not have issued an order. Mary's order to Patrick is intended to exclude and replace the reasons he had previously.

Mary's order to Patrick is a first-order reason to wash the dishes and an exclusionary reason not to act for some reasons he had previously. Raz calls reasons that are both first-order reasons for action and exclusionary reasons *protected reasons*. Authority over others, according to Raz, is the power to change their protected reasons.[12] To avoid confusion, we need to revise this slightly. Legitimate authorities change protected reasons; merely *de facto* authorities do not (though they purport to change or are taken to change protected reasons). Legitimate orders are protected reasons to act as the order requires and not to act for (some) other reasons for or against the required action.[13] Requests are not exercises of authority because they are first-order reasons only and not protected reasons.

Raz captures the exclusionary aspect of an order in his *preemption thesis*:

> The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[14]

The preemption thesis is, of course, true only of legitimate authorities, because the directives of authorities lacking legitimacy may fail to create reasons at all.[15] Raz notes that this view of the nature of authority is captured in the legal doctrine of *res judicata*.[16] Once a binding judgment has been issued by a court, the original cause of action cannot be relied upon for any

12. *Id.* at 19. We can also change protected reasons for ourselves through promising.

13. Raz, *supra* note 2, at 191. Raz suggests that orders exclude all reasons within the jurisdiction of the authority issuing the order. *Id.* at 192. That is to say, reasons that the authority was able to base its decision upon are excluded, whether they are reasons for or against the action the order requires. Orders that are clearly mistaken, however, may fail to exclude reasons at all. Raz, *supra* note 7, at 62.

Authorities do other things besides issue orders. They grant permissions and confer powers. Both actions can be helpfully elucidated in terms of the power to change protected reasons. When an authority grants permission for an action, it either cancels protected reasons against performing the action or excludes some reasons against doing the action from a subject's deliberation. Raz calls the latter an exclusionary permission. Additionally, sometimes permissions serve as an indication that no order against an action will be issued. Conferring power does not change protected reasons but it allows the empowered to change protected reasons. *See* J. Raz, *Permissions and Supererogation*, 12 AM. PHIL. Q. 161 (1975); Raz, *supra* note 9, at 18.

14. Raz, *supra* note 7, at 46.

15. *See id.* at 46. Raz presents the preemption thesis as a consequence of the normal justification thesis and the dependence thesis, which will be discussed below. Raz argues that if the dependence thesis were true of legitimate authority and the preemption thesis false, certain reasons would be double counted. *See also* J. Raz, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 215 (1995). I have changed the order of presentation for ease of exposition. I do not think that it affects the substance of Raz's views to do so. Raz's analysis is an interlocking whole whose parts mutually reinforce each other. *See* Raz, *supra* note 7, at 55.

16. Raz, *supra* note 7, at 42.

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purpose. The judicial decision is a new reason for action for the participants that excludes and replaces the reasons they had previously.

III. RAZIAN LEGITIMACY

Now that we understand the structure of authority on Raz's analysis, we can ask what makes an authority legitimate. We can ask what circumstances justify accepting someone else's order as a protected reason for action. Before we start, I should clarify a potential ambiguity. Raz understands legitimacy as entailing an obligation to obey. Some theorists use "legitimate" to denote authorities that are in some sense justified even though subjects are not obligated to obey their directives.[17] I shall follow Raz's usage.

According to Raz, an authority may be legitimated or justified in many ways;[18] however, one criteria captures the normal and most important way of justifying an authority. Raz calls it the *normal justification thesis*:

> The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[19]

That is a mouthful. The idea is simply that if we will do better by following an authority than by working out what to do on our own, the authority is legitimate for us.

Illustrations will help, but before we start, we should make a minor revision in Raz's canonical expression of the normal justification thesis. The normal justification thesis, as Raz presents it, is fulfilled whenever a subject would do better *complying* with the reasons she has by following the order than she would otherwise. But if one follows an order, the most one can do is *conform* with the reasons one has apart from the order. This is because one is acting on the order and not on the other reasons one has. Remember, in Raz's framework, complying with a reason requires acting for it. This problem is easily remedied: We should replace "comply" with "conform" in the formulation of the normal justification thesis. With this potential

17. Raz sees the question of the legitimacy of political authority as part of a "wider issue of the justification of government." Raz, *supra* note 15, at 356. Justifying a government is the wider issue, in Raz's view, because governments do things that are not properly construed as exercises of authority; for example, governments own property, participate in markets, and employ people. Raz believes governmental action stands in need of justification regardless of whether it involves an exercise of authority. The legitimacy of authority presents special problems, however, because it involves an obligation to obey. *Id.*

18. *See* Raz, *supra* note 7, at 53–56, 75, for discussions of other ways an authority might be justified.

19. *Id.* at 53.

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source of confusion cleared, we can examine the operation of the normal justification thesis.

Suppose Andy is ill. Andy has reason to take the medication that will best aid his recovery, if he has reason to take medication at all. Since Andy knows nothing about medicine, he will be more likely to take the best medication if he consults Eboo, a doctor. Eboo is a legitimate authority for Andy regarding what medicine he should take, because Andy will be more likely to conform with the reasons that antecedently apply to him (reasons about what medication to take) by following Eboo's orders than he would were he to choose which medicine to take on his own.

Contrast this with the case of Dave. Dave is also ill, but he is a doctor. Dave's mother has no medical training but likes to dispense folk remedies. Dave has reason to take the medicine that will best aid his recovery, but given his medical knowledge, it is likely that Dave will do better deciding which medicine to take on his own than he would following his mother's orders. Dave's mother is not a legitimate authority for Dave regarding what medicine he should take.

Suppose, however, that Eboo is telling Dave what medicine to take, instead of his mother. Remember, Eboo is a doctor too. Whether Eboo is a legitimate authority for Dave depends in part on who has greater expertise regarding the illness in question. But it does not depend solely on that. Perhaps Dave knows slightly more than Eboo, but Eboo will be better able to make a decision free from bias due to Dave's emotional involvement in his own illness. If this is so, Eboo will be a legitimate authority for Dave regarding what medicine he should take, despite Dave's superior expertise.

Two things are apparent. First, the justification of authority is personal, in the sense that an alleged authority may be justified for one person and not another. Eboo is an authority for Andy but perhaps not an authority for Dave. Second, a common way for an authority to fulfill the normal justification thesis is through superior expertise to its subjects, though, as we have seen, this is not the only way the normal justification thesis can be fulfilled.

Another way of fulfilling the normal justification thesis which has attracted a lot of attention from legal theorists is for an authority to be in a position to provide and enforce a solution to a coordination problem. Following Raz, we can define a coordination problem as "a situation in which the vast majority have sufficient reason to prefer to take that action which is (likely to be) taken by the vast majority."[20] A classic example of a coordination problem is which side of the road people drive on. Considerations of safety and efficiency demand that people drive on the same side of the road, but it does not matter much if it is the left or the right.[21] An entity that has the ability to enforce a solution may be a legitimate authority regarding which

20. *Id.* at 49.

21. I have been told but have not confirmed that it matters a little. Supposedly studies have shown that driving on one side is better suited to our reactions and reflexes, but which side the studies have shown seems to correlate with the nationality of the person reporting the result.

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side of the road people drive on, despite its lack of expertise or any claim to better judgment. It is legitimate because following its directives allows people to conform with reasons they have (driving on the same side of the road as everybody else) better than they could on their own.

One last thesis is necessary to fill out Raz's account of authority: the *dependence thesis*. Raz writes:

> All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.[22]

Raz calls reasons that already apply to subjects *dependent reasons*. The name draws an appropriate contrast with content-independent reasons, because dependent reasons are often, though not exclusively, reasons for a person in virtue of their content as opposed to their pedigree.[23]

We do not require a detailed examination of the dependence thesis here. It is easy to see how it is intertwined with the normal justification thesis. An authority's role, on Raz's analysis, is to assist a subject in better conforming with the reasons that apply to her. This necessitates basing decisions on dependent reasons.[24]

The normal justification thesis, the preemption thesis, and the dependence thesis together form what Raz terms the *service conception of authority*. On the service conception, legitimate authorities serve their subjects by mediating between them and the reasons that apply to them. In the remainder of this essay, I aim to show that the service conception is inadequate for understanding the legitimacy of political authorities.

IV. RETHINKING LEGITIMACY

Remember that Raz holds that the normal justification thesis is only one way in which an authority can be justified, though he thinks it the normal and most important way. In the next few sections, I argue that Raz's service conception of authority is inadequate for understanding important features of law in democratic societies, because the normal justification thesis does not represent either the normal or most important way of justifying political authorities in such communities.

Both Roberto Unger and Jeremy Waldron have suggested that the "dirty little secret" of modern jurisprudence is that it is uncomfortable with

22. Raz, *supra* note 7, at 47.

23. Not exclusively, because the directives of a different authority may be dependent reasons that an authority can base its decisions upon.

24. The dependence thesis is often taken to lead to a corollary, the *no-difference thesis*, according to which "[t]he exercise of authority should make no difference to what its subjects ought to do." Raz, *supra* note 7, at 48. The inference from the dependence thesis to the no-difference thesis is invalid. For discussion, see *id.* at 30–31, 48–49.

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democracy.[25] I am not sure that "uncomfortable" is the proper adjective, but less attention has been paid to what I will argue is the special character of law in democracies than is warranted. Indeed, contemporary legal theorists devote little attention to the legislative process; they focus mainly on the activities of judges. Waldron's *Law and Disagreement* and its companion volume *The Dignity of Legislation*[26] are, in part, conceived as an attempt to redress this defect. The lack of attention to legislation and to the distinctive character of law in democracies is partially explained by the desire many theorists have to engage in general jurisprudence, to say what is true of law wherever and whenever it is found.[27] The project of general jurisprudence is certainly worthwhile. However, in searching for commonalities among all legal systems, we may overlook features of law in certain political communities that contribute more to the shape of what law is for those communities than the features they share in common with law across the board. I believe along with Waldron that just this has happened with democracies.

An important part of what we have neglected about law in democracies is that it is the mechanism people use to make collective decisions about their governance and that these decisions are (ideally) the result of participatory procedures. Below I shall discuss the implications this has for our understanding of law and its legitimacy, but I want to begin by placing the issues in context.

As near as I can tell, there are a few reasons the special character of law in democracies is often overlooked (aside from the desire to do general jurisprudence). Modern jurisprudence developed prior to the rise of statutes as the most significant source of law, and it is the modern statute produced in an elected legislature (along with law enacted through referendum) that, among the various types of laws, lays the greatest claim to participatory development. Further, much of modern jurisprudence has been a reaction against John Austin's command theory of law. In one important respect, it seems that the discipline is still held in its sway. On Austin's view, laws are commands backed up by threats. Of course, jurisprudence has moved far beyond Austin.[28] Raz's theory of law's authority is light-years ahead of Austin's in sophistication. Nevertheless, Raz's analysis, our most advanced, still conceives of law as telling us what we may and may not do. This affects

25. Roberto Mangabeira Unger, WHAT SHOULD LEGAL ANALYSIS BECOME? 72–73, 115 (1996); Jeremy Waldron, LAW AND DISAGREEMENT 8–9 (2001).

26. J. Waldron, THE DIGNITY OF LEGISLATION (1999).

27. As Waldron notes, Raz has suggested that a legal system need not have a legislature. Waldron, *supra* note 25, at 34; Raz, *supra* note 2, at 139–141. Waldron discusses general jurisprudence and what he considers its misguided aim for institutional neutrality at Waldron, *supra* note 25, at 45–48.

28. Hart assailed Austin's command theory because it neglects the normativity of law. He also showed that Austin's theory lacks the nuance necessary to explain law. Law does more than issue commands; it also grants permission, creates powers, and regulates its own development and application. H.L.A. Hart, THE CONCEPT OF LAW (2d ed. 1994).

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how Raz understands legitimacy.[29] We can see this clearly if we look at the questions Raz asks at the outset of his inquiry into legitimate authority: "What can justify holding some people duty-bound to obey others? Under what conditions can some have a right to rule others?"[30] Let me be clear: These are important questions that any account of legitimate authority must answer. Yet in a way they seem vaguely unsatisfying as questions about the legitimacy of democratic authorities because they presuppose a division between rulers and subjects—a division between the duty-bound and the binders—that many deny can be drawn in a suitable democracy.

An ideal (perhaps not the only one) of democracy views government action as collective action, as the action of the community taken through various procedures and decision functions that operate on the preferences or views of its members. The idea behind this view of democracy is that *we are binding ourselves* through acts of legislation. Contrast this with the view expressed by Raz: "Governments decide what is best for their subjects and present them with the results as binding conclusions that they are bound to follow."[31] This is no doubt true generally, and yet an adherent of the view I am expounding will deny that it is true of well-constructed democracies. Rather, in democracies, people decide together what they shall be bound to do. Law in a democracy does not merely tell us what we may and may not do—though it does that; law is how we decide what we may and may not do.

Does the idea that we are binding ourselves make sense or is it just happy rhetoric obscuring the brute fact that in all political systems one group of people rules over another? We might think so, because we believe all actual democracies fall short of the ideal. I want to set this aside, however, and focus on the ideal itself, asking whether there are theoretical reasons to believe that a group cannot bind its members through collective action. Taken out of the political context, it is clear that a group can collectively make decisions which bind its members. A football team can decide which tournament it wants to enter, a husband and wife can decide together where they shall settle, a corporation can decide to introduce a new product, and so on. All of these collective decisions, in the right circumstances and subject to limitations, can bind the individual members that compose the group. Though there are interesting philosophical issues regarding the relationship between collective action and individual action and between collective decision-making and individual obligation, no one doubts that we can make decisions in concert with others which bind us. Why should a political community be any different?

I raise all this only to suggest that Raz's questions are misleading when applied to democracies. Democratic governments, as I am conceiving them, may have different criteria of legitimacy from nondemocratic governments

29. *Cf.* Waldron, *supra* note 25, at 100.
30. Raz, *supra* note 15, at 356.
31. *Id.* at 359.

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precisely because of the fact that one group of people is not ruling over another, because of the fact that people are binding themselves. Clearly, I can bind myself in ways others cannot bind me, through promising and such. Though I would not suggest that lawmaking involves any sort of promising on the part of an individual (the analogy may not be so bad when it comes to the polity as a whole), a law that I enact in concert with others may have greater claim on me, or a different sort of claim, than one promulgated by a government I play no role in.

I do not want to minimize the difficulty in specifying the conditions of legitimacy for democracies. Here are some of the important questions we must confront.

1. What types of decisions are properly made collectively and what types of decisions are properly reserved to individuals?
2. What counts as a collective decision?
3. What procedures should be used to reach a collective decision?
4. How does a person become a part of, or cease to be a part of, the community which is binding itself?
5. How far does the obligation of an individual extend if she disagrees with the collective decision reached?

Answers to all of these questions, and to many more, would be necessary parts of a theory of the legitimacy of democratic authorities. The last is particularly important; we might call it *the problem of losers*, and it exists because consensus is not a realistic method of making decisions in modern political communities. Under any decision procedure that is serviceable, some will lose out. Their favored outcome will not be selected. There are serious questions as to (1) whether the losers can be said to have bound themselves; and (2) how far their obligation extends. The answers would, of course, depend on the nature of the group and its decision-making process, and even a general attempt to tackle the questions is too large a project to take on here. For now, I shall simply note that the aspiration of democracy on the ideal I am presenting is for people to make decisions together through fair procedures, and we need to consider the normative implications of this aspiration for law's authority. Moreover, how close actual democracies on their grand modern scale do come or can come to achieving this aspiration is a further question, one that will hover in the background of the considerations here but will certainly not get the treatment it deserves.[32] My aim in

32. An important difference between democratic communities of differing size is the character of participation opportunities. Les Green somewhat skeptically describes democratic citizens as "*law-takers* just as individual consumers in a competitive market are price-takers." Les Green, *Law, Legitimacy and Consent*, 62 S. CAL. L. REV. 795, 802 (1989). I have misgivings about this description, but as the size of a community grows, it probably becomes more apt. However, even in gigantic democracies, more robust (and effective) forms of participation than law-taking at the ballot box are frequently available (e.g., protest, petition, and lobbying). The legitimacy of a democratic political authority will depend in part on the character of the participation opportunities it affords.

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the following sections is simply to raise doubts that the normal justification thesis is an adequate test of legitimacy for democratic communities.

V. VARIETIES OF LEGITIMACY

The normal justification thesis is a *substantive theory of legitimacy*. A theory of legitimacy is a substantive theory if it confers legitimacy on the basis of the directives an authority issues. The normal justification thesis assesses whether an individual better conforms with the reasons she antecedently has by following the directives the authority issues than she would by following her own reasoning on the matter. No assessment is made of how the directives are reached; the thesis judges only the content of the directives themselves.[33] We might also have *procedural theories of legitimacy*. A procedural theory of legitimacy assesses how the directives an authority issues are arrived at. Such a theory might judge, for example, whether the process was fair, deliberative, or public.[34] Last, a theory of legitimacy could be a *hybrid* theory, partially judging the substance of a directive and partially judging the procedure that produced it.

Procedural theories of legitimacy play an important role in our thinking about the legitimacy of democratic governments. We critique governments based on the degree to which people have access to the political process and equal efficacy within it. We often think, for example, that decision-making behind closed doors is inappropriate even if the decisions reached are good ones. Notice that we do not oppose decisions made behind closed doors only because we think that open decision-making processes produce better decisions; on some occasions we recognize that a better decision might be reached without the process proceeding publicly. We support open government partially because we think it disrespectful of the dignity of citizens as agents in their own self-government for the government to make important decisions affecting their lives without allowing them to witness and hence contribute to the debate shaping the outcome, even if only indirectly through public comment and protest.[35]

We do not always have reason to care how an authority reaches its decisions. It makes no difference to me whether my doctor reads all the relevant literature herself or instead consults an expert, as long as she is making the

33. Of course, the method of reaching the directives may be relevant in helping us to determine whether the directive fulfills the normal justification thesis. If we believe that the authority's method of deciding a question helps it to reduce bias that would afflict our own reasoning, we may believe that its directive will help us to better conform with the reasons we have for action.

34. I use "procedural" broadly. Amy Gutmann and Dennis Thompson distinguish between procedural, constitutional, and deliberative theories of democracy. Amy Gutmann and Dennis Thompson, DEMOCRACY AND DISAGREEMENT 27–49 (1996). As I use the term, whether a political process is deliberative in Gutmann and Thompson's sense is a question about procedure.

35. For an illuminating discussion of the value of open government and countervailing concerns, *see id.* at 95–127.

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best decisions possible regarding my care. Likewise, I do not care whether my guitar instructor has studied methods of teaching music extensively and suggests exercises in accord with an academic theory or whether she has developed her expertise in teaching through years of experience, as long as her instructions help me to progress as efficiently as possible toward my goals. Judging the directives of a doctor or a music instructor solely on the basis of their substance makes a lot of sense. This is because we regard the doctor and the music instructor as experts; how they became experts is of no consequence as long as they truly are experts.

Political authority is different. We do care how governments reach the decisions they make. A full accounting of why we care is far too large a task to tackle here, though I shall make some exploratory remarks about the reasons for being concerned with procedure, specifically reasons for preferring the procedures of government to be democratic ones. I shall not focus on any specific conception of democracy, much less any specific democratic procedures. Controversy of course surrounds most questions about the nature of democracy and what it demands. Here I conceive of democracy simply as a class of political systems that are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy. All democracies embody in some sense the ideal expressed by the word's Greek ancestor, *demokratia*, meaning "rule by the people." Democracies stand in opposition to political systems that display rule by one, a few, and so on. We probably ought to think of political systems as being democratic in degrees, that is, more or less democratic, but even this modest point extends deeper into a discussion of democracy than appropriate for our task here. I want merely to call attention to reasons for preferring democratic decision-procedures, whatever form we ultimately decide best, whatever other values might mitigate against them.

VI. THE VALUES OF DEMOCRACY

We might believe that democratic procedures will produce better decisions than other forms of political decision-making. On this view, the fact that a decision is reached through democratic procedures marks it as having a claim to expertise. An element of this line of thought partially underlies some theorists' attraction to democracy; they believe that if we throw our ideas into the public arena, vigorous debate will allow us to reach better decisions than we would otherwise. The value of democratic procedures, on this reasoning, is instrumental; democracy serves the goal of improving the substance of our decisions.

There are further reasons to be concerned with procedure, reasons that do not view procedure merely as a proxy for judging substance. One of these is the value we place on autonomy. People are better off, we believe, if they are able to organize their own affairs and develop and pursue their own

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conceptions of the good. Since governments play a pervasive role in organizing our lives, denying people the opportunity to participate in the process of government closes off opportunities to organize one's life autonomously. Democratic procedures afford people opportunities to participate in life-defining decisions.[36]

We also value democratic procedures because we believe they show proper respect for the dignity of people as rational agents. It is harder to pick out experts in moral and political matters than it is in medical or musical matters. Indeed, some argue that there are no moral experts. Since we believe that none of us are (generally) better situated than others to discover moral truth, when there are moral decisions to be made that affect us all, nobody (generally) has a claim to be better able to make those decisions than anyone else. We are equals, and respecting this requires that we participate as equals in the decision-making process that orders much of our moral universe. Not only does democracy allows us to participate as equals, but it reinforces that status. As Amy Gutmann and Dennis Thompson put it: "When citizens deliberate in democratic politics, they express and respect their status as political equals."[37]

Justice may also demand democratic procedures. Robert Dahl suggests that democratic procedures instantiate a form of procedural justice.[38] Moreover, he suggests that distributive justice requires a fair distribution of crucial resources, including not only wealth, income, and education, but power as well.[39] Power, Dahl argues, is determined in part by the structure of authority in a community. Hence distributive justice, in his view, demands that the exercise of authority be controlled through procedures that allocate power fairly.

In addition to the intrinsic values that democracy instantiates, there are further consequentialist reasons to support democratic decision-making procedures aside from any positive impact they may have on the substance of the decisions reached. People who can access their political system are empowered to take control of their lives. Those who feel that they have no voice in their governance, no efficacy in the political process, may experience alienation and resignation.[40] Often it is little comfort to be assured

36. I do not intend to invoke what Raz calls the "least persuasive argument for democracy," which is, according to him, "one which regards it as the nearest we can get to self-determination." J. Raz, *Disagreement in Politics*, 43 AM. J. JURISPRUDENCE 25, 45 (1998). The value of people participating in decisions that have an important impact on their lives can be grounded without any suggestion that self-determination, whatever that might be, is required or desirable.

37. Gutmann and Thompson, *supra* note 34, at 18.

38. Robert Dahl, DEMOCRACY AND ITS CRITICS 164 (1989).

39. *Id.*

40. I have in mind here phenomena like adaptive preference formation, in which people define their goals by what they believe is reasonably available to them, as well as much of the research on the importance of what sociologists and historians call "social capital." On adaptive preference formation, see Jon Elster, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1983).

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that important decisions that will affect your life but are being made without your input will be good ones. For related reasons, John Rawls finds additional value in democracy. He believes that democracy "enhances the self-esteem and the sense of political competence of the average citizen."[41] Rawls speculates that being expected to vote and therefore to have political opinions encourages "the development of . . . intellectual and moral faculties."[42] The point of all of this is to highlight the fact that political procedures can shape the lives of citizens just as substantive policy does. Democracy's positive contributions to character and psyche are further sources of its value.

Another view about the value of democracy deserves discussion, but it is one that I shall disclaim. A long tradition of thought holds that political legitimacy rests on the consent of the governed. There is no important conceptual link between consent and democracy; we can consent to monarchy just as easily. However, as Raz notes: "In common political discourse, government by consent often means no more than democratic government."[43] I imagine that democracy and consent are linked in people's minds because the participatory nature of democracy makes it appear as though people consent to the political process. In fact, few of us act in a way that can reasonably be interpreted as consent to the near-limitless authority over our lives that government purports to exercise.[44] Even if we did, it is doubtful that consent contributes significantly to political legitimacy. We need not be detained by the details of the argument, but the idea is simple. Consent to be governed by a wicked authority is akin to promising to do something morally atrocious; neither generates the reasons it might under more felicitous conditions. Indeed, Raz argues persuasively that consent to a political authority is effective only if the authority satisfies an independent test of legitimacy.[45] Raz thinks the independent test is specified (for the most part) by the normal justification thesis. I think the normal justification thesis is inadequate as a test of political legitimacy for the reasons we are in the midst of exploring. However, I agree with Raz that consent is generally insufficient to render an illegitimate political authority legitimate. Hence I do not believe that the value of democratic procedures derives from any connection between consent and legitimacy.

The foregoing paragraphs encompass an embarrassingly short account of the value of democracy. Articulating a full defense of democracy would be

41. John Rawls, A THEORY OF JUSTICE 234 (1971).
42. *Id.*
43. Raz, *supra* note 15, at 366.
44. *See* Raz, *supra* note 9, at 239; Green, *supra* note 32, at 808.
45. Raz, *supra* note 15, at 355–369. Raz does allow that consent can have some impact on legitimacy. He believes that it can strengthen obligations to obey and that it can express a citizen's trust for his government. *Id.* Raz also thinks that there are limited cases in which consent can establish authority—cases where it is an "optional good" for people to decide the matters in question themselves. The authority of the modern state does not fall into this category. *See* J. Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1183 (1989).

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a significant undertaking, but fortunately, the world does not lack for good ones.[46] Though short, the discussion has reminded us, I hope, of some of the important reasons we have for being concerned with the procedures that political authorities use to make decisions as well as with the substance of those decisions. We can now turn more explicitly to questions of legitimacy.

VII. LEGITIMACY AND DEMOCRACY

Our discourse about the legitimacy of governments indicates that we believe a government can fail to be legitimate on procedural grounds. If a government's electoral system favors some interests in society, or appears corruptly financed, or causes portions of the population to be marginalized and voiceless, we are quick to judge it illegitimate, or at least less legitimate than it might be otherwise. Where these deficiencies are present, it counts for little that a government may produce substantively good decisions, decisions that the normal justification thesis would hold authoritative. Nondemocratic governments that rule well are tolerated only as second-best options when we see no opportunity for democratic reform. This shows us one way in which the normal justification thesis is incomplete as a theory of legitimacy for political authorities: Governments that fulfill it may fail to be legitimate on procedural grounds. They fail to be legitimate because, even though they produce good law, they do it without showing proper respect toward their citizens, without allowing them appropriate opportunity to participate in the structuring of their own lives, without regard for a just allocation of political power, and perhaps in ways that breed resentment and alienation.

We ought to ask whether the normal justification thesis might be incomplete in the other direction as well. Can governments that fail its test still be legitimate on procedural grounds? In *Law and Disagreement*, Jeremy Waldron argues that democratically enacted laws deserve respect even if they fail the test of the normal justification thesis, and it seems that his argument accords legitimacy (of sorts—it is unclear how the demand for respect differs from an obligation to obey) solely on procedural grounds.[47] Waldron, like many before him, bases his argument in part on the normative importance of the fact that people disagree about the principles that should be used to order society.[48]

46. *See, e.g.*, Dahl, *supra* note 38; Gutmann and Thompson, *supra* note 34.

47. Waldron, *supra* note 25, at 85–118.

48. Raz has responded in a number of forums to Waldron and other theorists (including, most prominently, John Rawls) who accord normative importance to disagreement. He argues that disagreement can ground neither the neutrality of the sort that Rawls seeks nor an obligation to submit to fair decision procedures Waldron might be taken to argue for. In part, Raz objects because, he claims, arguments from disagreement undermine themselves. People will inevitably disagree over the implications of disagreement, and hence attempts to ground political theories in the fact of disagreement crumble in an endless regress. The debate over what

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Waldron suggests that the *circumstances of politics* are marked by:

> a felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.[49]

Waldron believes that democratically enacted laws achieved in the circumstances of politics demand a certain sort of respect. He writes:

> When something is enacted as law or as a source of law, I believe it makes on us a demand not to immediately disparage it, or think of ways of nullifying it or getting around it, or mobilizing the immune system of the *corpus juris* so as to resist its incorporation. . . . It is a demand for a certain sort of recognition and, as I said, respect—that *this*, for the time being, is what the community has come up with and that it should not be ignored or disparaged because some of us propose, when we can, to repeal it.[50]

This respect, Waldron argues, "is in part an acknowledgment of the need for a common solution and respect for the conditions of fairness in which a common solution was arrived at among those who disagreed about what it should be."[51] Importantly, it is the pedigree of the law that demands respect of us, and not its substantive merit. Waldron claims: "Once voted on in the legislature, [a law] is entitled to whatever respect this communitarian status confers on it, without regard to—indeed bracketing away from—the substantive merits of its content."[52]

I agree with Waldron. Democratically enacted law demands our respect because it "stands for the time being in the name of the whole community"[53] and represents how we have bound ourselves through fair procedures in the face of disagreement (of course, this is true only where the procedures are fair). Yet the fact that law is achieved in a democratic community in the circumstances of politics is not the only claim it has on our respect or obedience. The values canvassed in the last section—the value of autonomy, the importance of respect for persons as rational agents, and the consequentialist value realized through democratic procedures—place demands on us as well. To my thinking, these values are so important that they demand

disagreement implies for democracy is one of the most important and challenging in political theory. It is also one that, I believe, can be avoided entirely for our purposes here. I should point out, however, that if one could successfully show that disagreement over the principles that should be used to order society grounds an obligation to participate in fair democratic procedures, one would also have shown that political authority can be legitimate at least in part on procedural grounds. *See* J. Raz, *Facing Diversity: The Case of Epistemic Abstinence, in* ETHICS IN THE PUBLIC DOMAIN, *supra* note 15, at 60–96; J. Raz, *Liberalism, Scepticism and Democracy, in* ETHICS IN THE PUBLIC DOMAIN, *supra* note 15, 97–124; Raz, *supra* note 36.

49. Waldron, *supra* note 25, at 102.
50. *Id.* at 100.
51. *Id.* at 85.
52. *Id.* at 101.
53. *Id.*

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democracy and can overwhelm concerns about substantive legitimacy. Simply put, making decisions together can be more important than getting them right.

If the values of democracy support making decisions together even at the expense of getting them right, then the most important tests for the legitimacy of political authorities will be procedural or, at the very least, hybrids of substance and procedure. Of course, the argument so far has been too cursory to serve as a demonstration that the values of democracy demand that we make political decisions together, that we submit to fair democratic procedures and abide by their outcome. A fuller demonstration is a task left for others, or perhaps for another day. I hope simply that I have made plausible the claim that political legitimacy has a procedural dimension.[54] If this is right, the normal justification thesis is inadequate as a test of political legitimacy because it is insensitive to procedure.

I hasten to add the caveat that the obligation to obey the results of fair democratic procedures can go only so far. We can tolerate just so much deviance from good decision-making. A fair procedure that consistently produced disastrous results might undermine the very value of the autonomy and respect that led us to seek fair procedures in the first place. Democracy may in some instances be a luxury too expensive to afford. We should also not underestimate the degree to which we want decisions made by people with expertise. Indeed, part of the rationale for representative government over referendum is that we delegate authority to make decisions to a group of people we expect to engage in the extensive study and consideration we do not have time to engage in ourselves. We cannot (and need not) reach any final conclusions here about the proper balancing of substantive and procedural legitimacy. It is important to recognize, however, that the normal justification thesis leaves out important tests we ought to apply in determining whether our political authorities are legitimate.

I want to be careful not to overstate the impact of this objection on Raz's analysis. Raz never claims that the normal justification thesis is the sole test for legitimacy, nor does he claim that it is not a defeasible criterion. Indeed, Raz indicates some sympathy with the view I have expressed here. He writes:

> First, because participation is valuable in itself, providing opportunities for it through democratic constitutional arrangements is a value which may justify putting up with some shortfall in other dimensions of performance.[55]

I suspect that I am willing to put up with more shortfall than Raz. He follows this passage with the suggestion that "[democracy] relies, for its legitimacy,

54. As Gutmann and Thompson put it: "The moral authority of collective judgments about policy depends in part on the moral quality of the process by which citizens collectively reach those judgments." Gutmann and Thompson, *supra* note 34, at 4.

55. Raz, *supra* note 15, at 117. Raz also says that "how we decide what to do is, sometimes, of independent value." *Id.* at 366 n.7.

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on its ability to deliver sound decisions."[56] Democracy, in my view, draws some of its legitimacy from its ability to deliver sound decisions, but the main source of its legitimacy lies elsewhere.

The normal justification thesis is neither the normal nor most important test of political legitimacy. The importance of the normal justification thesis for understanding authority should not be underestimated—some types of authority can be legitimate simply because they meet its requirement. However, we have seen that we have reason to be concerned with the procedural legitimacy of political authorities. Indeed, political authorities that fall short of fulfilling the normal justification thesis may nevertheless be legitimate on procedural grounds. Conversely, political authorities that meet the requirement of the normal justification thesis may be illegitimate on procedural grounds.

VIII. AN OBJECTION REJECTED

One might object to this conclusion by claiming that the normal justification thesis is flexible enough to accommodate the procedural concerns I have been addressing. The test it offers for determining the legitimacy of an authority is whether by complying with its directives I will better conform with the reasons that apply to me than I would otherwise. The objector might say that where I have reason to comply with the results of a particular decision procedure, doing so will help me to conform better than I might otherwise to the reasons I have. We should reject this strategy because it makes the normal justification thesis empty. So conceived, the normal justification thesis would accommodate all theories of legitimacy that turned out to be true; hence it ceases to be a competitor with other candidate theories of legitimacy.

Raz does not appear to understand the normal justification thesis in this way. He suggests that the need for certain life-defining choices to be made autonomously by individuals (like choosing one's career or one's friends) is an exception to the normal justification thesis.[57] Raz recognizes that some people might conform better to the reasons that apply to them if the government chose their career; nevertheless, he suggests, it would be illegitimate for a government to do so. If Raz was open to the strategy we are exploring here, he might have argued that there is no way an individual could ever do better by complying with a government's directive because of the importance of making the decision autonomously. He did not argue this for good reason; it would make the normal justification thesis empty. In order for the normal justification thesis to be a competitor with other theories of legitimacy, it cannot be the case that it subsumes or gives way to any theory that on its face conflicts with it but turns out to be true.

56. *Id.* at 117.
57. Raz, *supra* note 7, at 57.

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This objection misconstrues Raz's analysis in another way as well. According to the normal justification thesis, we have reason to treat a directive as an exclusionary reason when following it helps us better to conform with the reasons we have for acting *on the matter the directive regards*. Hence, if a directive concerns the use of prescription drugs, the test for its legitimacy is whether it helps us to make better decisions about prescription drugs than we would on our own. The test is not whether by following the directive we make our decision the way we have reason to decide such questions, as it would have to be in order to sustain the objection under consideration. If something like that were part of the test of the normal justification thesis, then we would need on all occasions a further (and different) criterion of legitimacy to assess whether the normal justification thesis was fulfilled, whether following the directive amounted to making the decision the way we have reason to make it. All this is just another way of saying that the normal justification thesis is offered as a candidate theory of legitimacy that competes with others. It is a substantive test that cannot be stretched to account for procedural concerns.

IX. CONCLUSION

The normal justification thesis is inadequate as a test for the legitimacy of political authority. The legitimacy of some authorities, perhaps doctors or music teachers, may not turn on the procedures they use to reach their decisions. But political authorities are different. We care about how they make decisions, and we are right to care. The normal justification thesis fails as a test for the legitimacy of political authorities because it fails to account for the procedural dimension of legitimacy.

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