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When Are Arguments from Scholarly Legal Authority Legitimate?

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Abstract

Judges often cite legal scholars. Sometimes they defer argumentatively to scholars as authorities. Such arguments, we claim, are neither sound nor legitimate. Legal scholarship serves two functions. One is modest and descriptive: reporting the undisputed content of legal sources and existing consensuses on some point of law. Such matters can lend themselves to authoritative settlement. But the core function of legal scholarship, involving the substantive reconstruction of suboptimal legal sources, is normative. And on such matters, we argue—by discussing the structure of arguments from authority and what counts as genuine authority—there is no room to treat scholarly pronouncements as authoritative.

Keywords: *Arguments from authority; Legal scholarship; Epistemic authority; Ad verecundiam; Legal argumentation*

1. Introduction

Courts in many countries turn to works by legal scholars, whom they often cite and quote in their decisions.

It is not a universal practice. In France or Spain, for instance, only rarely do courts mention legal scholarship.[1] Among English judges, the convention until recently—"better read when dead"—was never to cite living authors, and to cite

1. See e.g. Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart, 2001) at 49-59 (regarding France); Sabrina Ragone, "Jurisprudencia constitucional y doctrina en España: una 'relación clandestina'" in Lucio Pegoraro & Giovanni A Figueroa Mejía, eds, *Profesores y jueces: influjos de la doctrina en la jurisprudencia constitucional de Iberoamérica* (Centro de Estudios Constitucionales, 2016) 95 (regarding Spain).

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dead ones only if they had accrued a certain degree of "authority."[2] In Italy, courts are even forbidden by law to cite legal scholars at all.[3]

Elsewhere, though, courts may be not only permitted but explicitly instructed to do so. The Swiss Civil Code enacts that judges shall "follow established doctrine and case law."[4] The Turkish Civil Code provides that "[t]he judge, when making a decision, draws on scientific opinions and judicial rulings."[5] Canon 19 of the Vatican's 1983 Code of Canon Law prescribes that "[i]f a custom or an express prescript of universal or particular law is lacking in a certain matter," cases should be decided in light of (among other considerations) the "common and constant opinion of learned persons."[6] And the *Statute of the International Court of Justice* provides that the Court "shall apply"—"as subsidiary means for the determination of rules of law"—"the teachings of the most highly qualified publicists of the various nations."[7]

When free to cite scholars, judges can be prodigal. German courts have traditionally relied on legal scholarship to such an extent that their opinions have been said by foreign authors to resemble "dissertations."[8] "[I]t sometimes looks as if they cannot write a clause, far less a whole sentence, without inserting some

2. Duxbury, *supra* note 1 at 78. See also Lord Neuberger of Abbotsbury, "Judges and Professors—Ships Passing in the Night?" (2013) 77:2 Rabels Zeitschrift für ausländisches und internationales Privatrecht 233 at 235; Lord Rodger of Earlsferry, "Judges and Academics in the United Kingdom" (2010) 29:1 UQLJ 29.
3. See Art 118(3) of the *Disposizioni di attuazione del codice di procedura civile* (Regio Decreto n. 1368 of 18 December, 1941). In the original: "*In ogni caso deve essere omessa ogni citazione di autori giuridici* [In any case, any references to legal scholars must be omitted]." There are analogous examples prior to the unification of Italy: see Alexandra Braun, "Professors and Judges in Italy: It Takes Two to Tango" (2006) 26:4 Oxford J Leg Stud 665.
4. Art 1(3) Civil Code (Switzerland). This provision says slightly different things in each of its three official versions. In French, it says that the judge "*s'inspire des solutions* consacrées *par la doctrine et la jurisprudence* [*is inspired* by solutions *enshrined* in legal doctrine and case law]"; in Italian, that the judge "*si attiene alla dottrina ed alla giurisprudenza più autorevoli* [*adheres* to the *most authoritative* doctrine and judicial decisions]"; in German, that the judge "*folgt dabei bewährter Lehre und Überlieferung*" [in doing so, *follows established* doctrine and tradition] (*ibid* [emphases added]). The non-official English version also says that "in doing so, the court shall *follow established doctrine* and case law." Swiss Federal Authorities, "Swiss Civil Code" (status as of 1 January 2026), online: www.fedlex.admin.ch/eli/cc/24/233_245_233/en [emphasis added]. The phrase "in doing so" explicitly refers (as does the German "*dabei*") to section 2 of the same article, which speaks only of what judges should do "in the absence of a provision" and of "customary law," and instructs the court to decide "in accordance with the law that it would make as legislator" (*ibid* at art 1(2)). So there is a reading of art 1(3) of the Swiss Civil Code according to which judges are allowed to turn to doctrine *only* in the absence of a legal provision and customary law.
5. Art 1 Civil Code (Turkey). In the original: "*Hâkim, karar verirken bilimsel görü lerden ve yargı kararlarından yararlanır*." We thank Rahmi Oruç for advice on the translation.
6. 1983 Code c 19. The official version is the Latin one: "*communi constantique doctorum sententia* [the common and constant opinion of the doctors]."
7. *Statute of the International Court of Justice*, [1947] ch II, art 38 at § 1(d).
8. Hein Kötz, "Scholarship and the Courts: A Comparative Survey" in David S Clark, ed, *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot, 1990) 183 at 193. Jansen notes, however, the recent "diminishing influence of doctrinal science on judicial practice in Germany." Nils Jansen, "The Point of View of Doctrinal Legal Science" in Thilo Kuntz & Paul B Miller, eds, *Methodology in Private Law Theory: Between New Private Law and Rechtsdogmatik* (Oxford University Press, 2024) 179 at 180 [footnote omitted].

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citation in brackets," wrote Alan Rodger, Justice of the UK Supreme Court.[9] In countries like Brazil or Portugal, courts also cite legal scholarship profusely and indeed as a matter of course.[10] In an open letter of June 2023, dozens of Portuguese jurists and magistrates decried the prolixity of judicial decisions, in which—it was one of their worries—"quotations abound."[11]

Length is a concern with quotation-larded judgments. Both sheer number of citations and the size of quoted passages, which can run for many paragraphs, will further bloat opinions that may already be much longer than necessary. This costs time, patience, and money. It can also hinder understanding. But criticism extends to even more important matters: As Lord Rodger writes of German judgments, "judgments of that kind do not appear to be giving a clear and authoritative statement of the court's own view of the law."[12] Judges may seem to be unwarrantedly outsourcing to scholars at least part of their own task—their duty—of interpreting law and giving reasons for their decisions.[13]

For what purposes do courts rely on works by legal scholars? That is not always easy to discern. In some countries at least, courts will often introduce quotations with formulas such as: "As taught by Prof . . . ," "In the learned words of Prof . . . ," "In the wake of Prof . . . ," "In the footsteps of Prof . . . ," "In Prof . . . 's opinion"—stock phrases, used again and again across dozens if not hundreds of decisions.[14] Such language fails to make transparent exactly why the court is citing an author or quoting a passage. Courts themselves may not always be clear about their reasons.

Still, it seems plain that citations by courts of scholarly works sometimes play an *argumentative* role—as elements of arguments from authority. Here is an example, from a 2018 decision of the Portuguese Supreme Court:

> [A]rticle 82-A of the [current] Code of Criminal Procedure does not include a provision identical to that of Article 34(2) of the [previous] 1929 Code, which stipulated that the amount [of compensation] should be determined "at the discretion of the judge, who shall take into account the seriousness of the offence, the material

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9. Rodger, *supra* note 2 at 32.

10. On Portugal, see Maria Rita Trazzi, "Un Tribunal cerrado (pero no del todo): las citas doctrinales del Tribunal Constitucional portugués" in Pegoraro & Figueroa Mejía, *supra* note 1, 105. On Brazil, see André Ramos Tavares & Renato Gugliano Herani, "A contribuição da doutrina na jurisdição constitucional brasileira (apresentação dos dados)" in Pegoraro & Figueroa Mejía, *supra* note 1, 179.

11. Rui Gustavo, "'O inferno de Dante em laudas burocráticas': advogados, juízes e procuradores pedem justiça mais breve: no tempo e no número de palavras", *Expresso* (23 June 2023), online: expresso.pt/sociedade/2023-06-25-O-inferno-de-Dante-em-laudas-burocraticas-advogados-juizes-e-procuradores-pedem-justica-mais-breve-no-tempo-e-no-numero-de-palavras-7d1f4a4d [translation by the authors].

12. Rodger, *supra* note 2 at 32.

13. On the judicial duty to give reasons, see Fábio Perin Shecaira, "Should judges give reasons for their decisions?" in Luís Duarte d'Almeida et al, *Research Handbook on Legal Argumentation* (Edward Elgar, 2025) 13.

14. By way of illustration: a search for "as taught by" ("*como ensina*") or "in the wake of" ("*na esteira de*") in the Portuguese database for judicial decisions yields over a hundred occurrences for each. See IGFEJ—Bases Jurídico-Documentais (last accessed 29 June 2026), online: www.dgsi.pt

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> and moral damage caused by it, and the economic situation and social condition of the victim and the offender." This remains, however, in essence, the criterion to be applied when considering the factors mentioned, following [Professor] Germano Marques da Silva, who says that "the amount of compensation for the damage suffered, . . . because it is not to be confused with civil damages, is set at the discretion of the judge (*op. cit.* p. 190)."[15]

The page reference at the end is to a textbook on criminal law. Its author's assertion—that compensation is set at the judge's discretion, and not in another way—is taken by the Supreme Court to settle the point. It is a substantive legal point: a point about what the law on the matter, properly understood, is. The current Code, unlike the previous one, has no provision about it. But there is a pronouncement by a scholar—whom the Supreme Court, as it explicitly tells us, 'follows'.

Or consider another example, from a 2024 decision of the Oporto Court of Appeal:

> [R]egarding an appeal from a decision on which facts are proved rendered by a first instance court, we must heed the provisions of Article 662 of the Civil Procedure Code. . . . According to the teachings of Prof. Miguel Teixeira de Sousa, in *Estudo Sobre o Novo Processo Civil* [*Study on the New Civil Procedure*], p. 374, appeals for reconsideration "*. . . are satisfied by reviewing the contested decision and ascertaining whether, within the constraints of the appealed instance, that decision was appropriate, so that such appeals control merely—it can be said—the 'relative justice' of that decision*". Therefore, if there is, as in the present case, a recording of the testimony given at the trial, then under Article 662(1) of the Civil Procedure Code, the Court of Appeal must amend the first instance court's decision on the facts if it is reasonable, on the basis of the elements contained in the case file (including, of course, the recording), to conclude that such a decision is flawed.[16]

The relevant statutory provision says only that the Court of Appeal shall alter such a decision "if the established facts, the evidence produced, or a supervening document require a different decision."[17] How precisely to interpret it is a substantive legal question. The Court answers it by simply turning to the "teachings" of a scholar, from which it ("[t]herefore") draws its conclusion for the case at hand. *Magister dixit*.[18]

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15. Acórdão do Supremo Tribunal de Justiça, 2 May 2018, Proc 156/16.0PALSB.L1.S1 (Portugal), par 16, online: https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/2d5e036bf715d3a6802583700041c141 (last accessed 29 June 2026) [translation by the authors].

16. Acórdão do Tribunal da Relação do Porto, 24 September 2024, Proc 634/23.5T8PVZ.P1 [emphasis in original, translation by the authors], online: https://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/780f8e0e67f926ce80258bac002e58f0 (last accessed 29 June 2026). The omitted segment between the first and the second sentences is just another citation from a different author.

17. Art 662(1) Code of Civil Procedure (Portugal) [translation by the authors]. In the original: "*A Relação deve alterar a decisão proferida sobre a matéria de facto, se os factos tidos como assentes, a prova produzida ou um documento superveniente impuserem decisão diversa*."

18. For further examples, from different jurisdictions, see Fábio Perin Shecaira, *Legal Scholarship as a Source of Law*, 2nd ed (Springer, 2024) at 51-52, 55, 59, 81, 121-24, 151. The examples

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Such arguments hinge on scholars' being regarded as 'authorities', as courts themselves often call them. In a 2013 UK Supreme Court decision, for instance, Lord Clarke agrees that a party's submission "derives support" from a "recent article" by "Professor Briggs," and Lord Neuberger goes on to say that he "acknowledge[s] the authority of Professor Briggs and the force of his views, as described by Lord Clarke."[19] Sometimes scholars are even classed, and relied on, as 'authorities' alongside—indeed in the same breath—as, say, precedent:

> The next point taken is proportionality. It is said on the authority of Professor De Smith's book, and other authority much older than that, including a decision of my own in 1985, that there must be an appropriate relationship between the means and the end; one must balance the harm from any anticipated trouble against the extent of the Under Sheriff's restriction on observers. I do not see that there is anything disproportionate whatever in the Sheriff's decision.[20]

Yet is there not something odd about this practice of arguing *from* scholarly authority to settle substantive legal matters? Unlike precedent or statutes, scholarly works are not typically viewed as 'formal' sources of law that courts can simply turn to and rely on to justify their views.[21] And what of the above-mentioned worry that the practice might run counter to judges' duty to *themselves* work out what the law is? Is the worry justified? Are judicial arguments from scholarly legal authority legitimate?[22]

That is our question in this paper. In Section 2, we give a bare-bones account of authority and authoritative reasons. In Section 3, we lay down the structure of arguments from authority. In Section 4, we argue at length that legal scholars are not epistemically trustworthy on substantive legal matters—that they cannot be regarded as authorities on such matters, in the relevant sense of 'authority'—and raise normative worries regarding the legitimacy of treating them as such. We conclude, in Section 5, that arguments that seek to justify substantive conclusions of law on the basis of pronouncements by legal scholars are neither sound nor legitimate—and that courts should thus not give them.

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we give in the text are particularly clear cases, but we do not mean that courts only argue from scholarly pronouncements in such transparent cases. Whether a court's reliance on such pronouncements is playing such an argumentative role is an interpretative matter that turns on linguistic, substantive, and contextual (including jurisdiction-specific) indicators.

19. *VTB Capital plc v Nutritek International Corpn and others*, [2013] UKSC 5 at paras 221, 110.
20. *R v Under Sheriff of Greater London and another ex parte Poorun* [1998] Lexis Citation 2061.
21. Works by the old 'institutional' writers in Scots or South African law are—but only arguably—a quaint exception: see Shecaira, *supra* note 18 at 58, n 24. But see also Luís Duarte d'Almeida, "Sources of Law and the Justification of Judicial Decisions (and the Absolutely Fabulous Model of Law)" in Thomas Adams, Kate Greasley & Denise Réaume, eds, *The Morality in Law: Themes from the Work of Leslie Green* (Oxford University Press, 2025) 19.
22. Michelon has recently also asked (but not answered) this question: see Cláudio Michelon, "The Authority of Doctrinal Scholarship" (2025) 11 Ius Dictum 5.

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2. Authority

2.1. Authoritative Reasons

We rely, for the purposes of this paper, on a standard understanding of 'authority' and 'authoritative reasons'. We will take reasons—normative reasons—to be pro tanto considerations in favour (or against) something. And the understanding of authoritative reasons we rely on turns on two independent classifications of reasons.[23]

The first distinguishes between practical and epistemic reasons (or 'theoretical' reasons, as the latter are also commonly called)—reasons for action and reasons for belief, respectively. The fact that a friend is struggling with a deadline and needs your help revising a draft is a reason for you to help them, and thus a practical reason: a reason for you to do something. So is the fact that you promised to help them revise their draft. The fact that you personally witnessed an event is a reason for you to believe it took place, and thus an epistemic reason. So is the fact that a reliable witness reports that such an event did occur.

The second distinction is between substantive and content-independent reasons. A fact is a substantive reason if the justification of the corresponding reason-claim—the claim that someone has reason to act in a certain way or to believe a certain proposition—depends on the actual content of the reason: that is, if it depends on the specific action or belief for which it is a reason. A fact is a content-independent reason if the justification of the corresponding reason-claim does not depend on the content of the reason.

The two distinctions are cross-cutting. Both practical and epistemic reasons can be either substantive or content-independent. The fact that your colleague needs your help is a substantive moral reason for you to assist them: The reason-giving strength of that fact depends specifically on the moral value of helping others. By contrast, the fact that you promised to help your colleague is a content-independent reason for you to do so: The reason-giving strength of that fact does not depend on the moral value of helping your colleague. Rather, it depends on the moral value of doing what you promise—whatever the specific content of your promise may be. What matters is that you *promised* to help them, not that you promised *to help* them; had the content of your promise been different—had you promised something else—you would then have had reason to do *that* instead.[24]

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23. See Frederick Schauer, "Authority and Authorities" (2008) 94:8 Va L Rev 1931; Grant Lamond, "Persuasive Authority in the Law" (2010) 17:1 Harvard Rev Philosophy 16. Schauer and Lamond both build on Hart's and Raz's work: see HLA Hart, "Commands and Authoritative Legal Reasons" in *Essays on Bentham* (Oxford University Press, 1982) 243 at 254-55; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at 35-42.

24. And so, as Raz puts it, "there is no direct connection between the reason and the action for which it is a reason." Raz, *supra* note 23 at 35.

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Likewise, if you personally observed an event, you have a substantive epistemic reason to believe it happened. But the say-so of a reliable witness gives you a content-independent reason—not a substantive one—to believe that the reported event took place. For what justifies *this* reason-claim is the fact that the report came from a reliable witness, not that it had the specific content that it did. Had the reliable witness reported something different, you would then have had reason to believe *that* instead.

Authoritative reasons—those given by the pronouncements of an authority—can be either practical or epistemic. But they are in any case content-independent: The reason-giving fact is that the authority *said so*. If a legislative authority prescribes that we pay a 40% tax on our earnings, we have reason to do so. This reason turns solely on the fact that *that* is what the authority prescribed; it does not turn on the merits of paying a 40% tax (as opposed to a different tax rate, or no tax at all) on our earnings. If an expert philatelist—an authority on stamps—states that a certain stamp is particularly rare, we have reason to believe it is so. But again, this reason turns solely on the fact that *that* is what the expert said.

This is not to say that lawmakers and experts are authorities of the same kind. The former are practical authorities—they *have* authority *over* their subordinates. The latter are epistemic (or 'theoretical') authorities—they *are* authorities *on* or *in* some given subject or field. In both cases, however, their pronouncements are sources of content-independent reasons.

Of course, there are many debates not only about whether this standard account of authority and authoritative reasons is sound, but also about how best to understand the notion of a 'content-independent' reason (and indeed on how best to characterise the very notion of a normative reason).[25] We need not enter such debates here. We adopt this framework primarily because it is fairly well known and makes our exposition easier. But the points we want to press in this paper could be made just as well under different understandings of authority.

We also take no stance on whether arguments from scholarly authority are best characterised as arguments that rely on authoritative pronouncements as sources of epistemic or also of practical reasons. Each of us has defended in print different views about this issue; but it too has no bearing on what we jointly defend in the present paper.[26]

25. On content-independent reasons, see P Markwick, "Law and Content-Independent Reasons" (2000) 20:4 Oxford J Leg Stud 579; P Markwick, "Independent of Content" (2003) 9:1 Leg Theory 43; Stefan Sciaraffa, "On Content-Independent Reasons: It's Not in the Name" (2009) 28:3 Law & Phil 233; NP Adams, "In Defense of Content-Independence" (2017) 23:3 Leg Theory 143; Julie Dickson, *Content-Independence in Law: Possibility and Potential* (Cambridge University Press, 2024). There are also debates about how authoritative reasons relate to other reasons; Raz, for example, thinks that authoritative reasons not only are content-independent but also 'pre-empt' other, otherwise-applicable reasons: see e.g. Joseph Raz, "Authority, Law, and Morality" (1985) 68:3 Monist 295 at 296-97. We are not committed to such a view.

26. See Shecaira, *supra* note 18; Duarte d'Almeida, *supra* note 21.

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2.2. Being an Authority vs Being Treated as an Authority

Being an authority is different from being *treated as* an authority. Genuine authority, to put it differently, is not the same as *de facto* authority. One can *claim* to be an authority, *believe* oneself to be an authority, be believed *by others* to be an authority—all of which are matters of non-normative fact—and yet not *be* an authority. If someone *is* an authority, their pronouncements are indeed reason-giving—which is a normative matter. Anyone who, for example, requires someone to do something—to rely on a well-known way of framing things—claims to have practical authority over their addressee; but they may or may not actually have the authority they claim to have.[27] In other words, they may or may not be legitimate authorities.

When then is an authority legitimate? There are many competing accounts, and again we do not mean to enter that debate. One popular idea we can helpfully avail ourselves of, though, appeals to the increased probability that, by relying on someone's say-so—as opposed to trying to work things out on our own—we will do the right thing (in the case of practical authority) or form the correct (i.e., true) belief (in the case of epistemic authority).[28]

There is more debate on whether this holds for practical authorities than there is regarding epistemic authorities. It seems plausible to say that if someone is an authority on some given matter—an expert in the field—then if they hold that *p* is the correct answer to a given question pertaining to that matter, we have reason to believe that *p*. As Lamond puts it, an expert's considered pronouncement that *p* provides us with "a reason to believe that the balance of [substantive] reasons supports the correctness [i.e., the truth] of *p*."[29]

The examples standardly given in the literature to illustrate epistemic authority seem to bear this out. Most of us, who are not climate scientists, believe, rationally, that global warming is a reality. We do so because the vast majority of scientists—authorities in the field—say so. We have "no authority-independent way of knowing" it, as Schauer says; but we rationally "reach that conclusion … based on the fact that it is consistent with what various scientists whose authority [we] recognise and accept have said."[30] Or consider Lamond's example of an "internationally acknowledged" art expert who "vouches for the authenticity of a Rembrandt": Given that we, who are not art experts, are "simply in no position to judge" for ourselves whether the painting is a Rembrandt, "it is rational to prefer the expert's judgment."[31]

There are, of course, other ways by which we could come to rationally form the same beliefs. We could decide to become climate scientists or art experts

27. On this distinction, see Joseph Raz, "Authority and Justification" (1985) 14:1 Philosophy & Public Affairs 3.
28. For the case of practical authority, see Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2006) 90:4 Minn L Rev 1003.
29. Lamond, *supra* note 23 at 20.
30. Schauer, *supra* note 23 at 1941 [footnote omitted].
31. Lamond, *supra* note 23 at 19-20.

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ourselves, put in the required years of study, and eventually become able to directly assess the relevant evidence. But that is itself neither a rational nor a viable way to go about forming our beliefs about all the matters we do and need to form beliefs about. That is why it is not only rational but even necessary to turn to authorities. Many if not most of our beliefs are formed on the basis of what other people say, and rationally so—as long as those on whose pronouncements we rely *are* indeed authorities on the relevant issues, and have considered matters before presenting us with their views.

Note, though, that while both Schauer and Lamond speak of the say-so of people 'acknowledged' or whom we 'recognise' as experts, being an expert or an authority is also not the same as being *recognised*—socially, institutionally—as such. Nor is it the same as professionally occupying a certain position (as a member of academic staff at a university, for instance) or as *having a reputation as*, or as *being respected*, however widely or internationally, as an authority. These are neither necessary nor sufficient for someone's *being* an authority. They are, at best, defeasible indicators that they are one. And, depending on context, they might be very weak indicators indeed. Just think of what we know about the criteria that sometimes, in some countries, in fact determine who is and is not awarded certain academic degrees, or who is and is not promoted; or of the grounds on which some reputations can be built. As the folk saying goes, "Give a man a reputation as an early riser and he can sleep till noon."

This matters, because there is a *fallacious* type of argument 'from authority' that relies precisely, not on the fact that someone *is* an authority, but on their social standing and reputation as such: what John Locke proposed to call the 'argument *ad verecundiam*'. It is one sort of argument, Locke says, "that Men in their Reasonings with others do ordinarily make use of, to prevail on their Assent; or at least so to awe them, as to silence their Opposition":

> [T]o alledge the Opinions of Men, whose Parts, Learning, Eminency, Power, or some other cause has gained a name, and settled their Reputation in the common esteem with some kind of Authority. When Men are established in any kind of Dignity, 'tis thought a breach of Modesty for others to derogate any way from it, and question the Authority of Men, who are in possession of it. . . . Whoever backs his Tenets with such Authorities, thinks he ought thereby to carry the Cause, and is ready to style it Impudence in any one, who shall stand out against them. This, I think, may be called *Argumentum ad Verecundiam*.[32]

Maybe courts' reliance on the opinions of legal scholars does sometimes instantiate this fallacy. But our concern in this paper is with non-fallacious arguments from authority.

32. John Locke, *An Essay Concerning Human Understanding* [1689], ed by Peter H Nidditch (Clarendon Press, 1975) at 685-86 [IV.xvii.19].

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3. Arguments from Authority

With this bare-bones understanding of authoritative reasons in hand, we can now ask what an argument from authority is. All arguments have a conclusion and one or more premises. What, then, is the structure of arguments from authority?

One simple structure—sometimes mooted (with minor variations) in the literature—runs like this:

(1) *A* says that *p*.
(2) *A* is an authority on matters related to *p*.
So, absent countervailing reasons,
(3) *p*.[33]

Does this scheme capture our everyday arguments from authority, whether practical or epistemic? They do tend to be terse. Because your mechanic said so, you conclude that your car has a defective part. Because a police officer said so, you conclude that parking is not allowed on this street on Sundays. The scheme above retains this pithy character:

(1) My mechanic says that my car has a defective part.
(2) My mechanic is an authority on matters related to the proposition that my car has a defective part.
So, absent countervailing reasons,
(3) My car has a defective part.

(1) The police officer says that parking is not allowed on this street today.
(2) The police office is an authority on matters related to the proposition that parking is not allowed on this street today.
So, absent countervailing reasons,
(3) Parking is not allowed on this street today.

Yet there is something odd about a premise such as (2) in either of these arguments. When we regard someone as an authority, we normally do not do so relative to specific propositions; we do so relative to more or less broad domains. Someone can be an authority on climate matters (or on climate), on literary matters (or on literature), on engines, on traffic regulations, and so on. Or they can be an authority over a certain person or persons regarding a certain range of types of action. (The range may well be unlimited, as in the case of at least some law-making authorities.) But in the scheme above, '*p*' is a propositional variable, and it seems strange to refer to someone as an authority on matters 'related to' some specific proposition. Suppose a historian says: "The battle of

33. See e.g. Wesley C Salmon, *Logic*, 2d ed (Prentice-Hall, 1973) at 91-2; Edwin Coleman, "There is No Fallacy of Arguing from Authority" (1995) 17:3 Informal Logic 365 at 366; Fábio Perin Shecaira, "Legal Arguments from Scholarly Authority" (2017) 30:3 Ratio Juris 305. Miotto calls it "the standard model" of arguments from authority: Lucas Miotto, "Arguing from Authority" in Duarte d'Almeida et al, *supra* note 13, 146 at 146.

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Borgerhout took place near Antwerp in 1579." If we take this statement to be authoritative, it will be because we regard the historian as an authority on, for example, military matters—a general field—not on matters 'related to' that very proposition.

Indeed, premise (2) wrongly suggests that, for any given proposition, we can readily identify—presumably on semantic grounds—the 'matter' to which it 'relates'.[34] But why think that the proposition "the battle of Borgerhout took place near Antwerp in 1579" is a 'matter' of military history, rather than, for instance, a 'matter' of the history of Antwerp, or of what happened in 1579? One can be an authority on any of these—widely different, if occasionally intersecting—matters, and utter that proposition from the standpoint of that specific field of expertise.

It seems to us, rather, that the relevant 'matter' in any given context will turn on the *question* being addressed: the question which the conclusion of an argument by authority is deemed to answer. If the question is something like "When did the battle of *X* take place?", the relevant 'matter' is different than if the question is "Where did the battle of *X* take place?"; and we might consider turning to different authorities—to people specialising in different fields—in each case: an expert on carbon-dating military remains in the first case, for example; an expert on the history of some specific city or cities in the second. Yet in both cases the answer given by the authority may well be the same proposition. So the proposition-relative notion of a matter 'related to *p*' (or similar notions) seems inadequate.

While such a concern has not (as far as we know) been explicitly raised in the literature, it may have silently motivated some variations on the simple scheme. The second premise might, for instance, be reformulated along the lines of "*A* is an authority in a domain *D* that contains *p*."[35] Such a premise, though, combines two claims deserving of separate consideration, since each presents one potentially vulnerable flank of the argument: whether the putative authority *is* indeed an authority on the relevant domain, and whether *p* is within that domain.[36] And in any event it seems odd to speak of the relevant proposition, *p*, as being 'contained' in a domain. Domains or subject matters are not so much sets of

34. Salmon formulates the relevant premise as "*x* is a reliable authority concerning *p*," where "*p*" is the asserted proposition. Salmon, *supra* note 33 at 91. Coleman gives it as "A is authoritative *on such things*" or "E is an expert *on p*." Coleman, *supra* note 33 at 366 [emphasis added]. Miotto expresses it as "*A* is an authority on *x*-matters," where "*x*" is *A*'s pronouncement. Miotto, *supra* note 33 at 148. Our worry extends to all such formulations.

35. See e.g. Douglas Walton, Chris Reed & Fabrizio Macagno, *Argumentation Schemes* (Cambridge University Press, 2008) at 14: "*Major Premise*: Source *E* is an expert in subject domain *S* containing proposition *A*."

36. We do find "*E* is an expert in domain *D*" and "*A* is within *D*" rendered as separate premises in Douglas Walton, *Informal Logic: A Pragmatic Approach*, 2d ed (Cambridge University Press, 2008) at 217. See also John Woods & Douglas Walton, "Argumentum ad Verecundiam" (1974) 7:3 Philosophy & Rhetoric 135 at 146 (giving "X has the *de jure* authority in domain K" and "p ε K" as independent premises).

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propositions (especially if such propositions are referred to regardless of truth-value) as they are fields of inquiry; and the relevant propositions will be answers to the pertinent questions that can be raised within any such field.

It seems better, then, to revise the simple structure of arguments from authority as follows:

(1) *A* says that *p*.
(2) Whether *p* is the case is (in this context) an *M*-matter.
(3) *A* is an authority on *M*-matters.
So, absent countervailing reasons,
(4) *p*.

By turning a two-premise scheme into a three-premise one we sacrifice simplicity; but we do so moderately, and with a view to preparing the ground for the appropriate evaluation of arguments from authority in the legal domain.

More could be said about this structure and the critical questions that might go with it, of course. For present purposes, though, it will do. Our concern in this paper is with premise (3), specifically in the context of pronouncements made by legal scholars in their works: in the monographs, treatises, textbooks, and articles in which they present the results of their research. These are, as we saw, the materials that many courts in many countries so frequently turn to and quote from when justifying their decisions.

4. Are Legal Scholars Authorities on Substantive Legal Matters?

4.1. Preliminaries

The question in this section's title may strike you as daft. Surely legal scholars and academics are—the vast majority of them, at least—authorities or experts in their respective fields?

But we should not be so quick. It is true that legal scholars and academics are *professionals*; yet being a professional is again not the same as being an authority in the sense—explained above—that matters for arguments from authority.

What is a professional? Someone who performs an activity that requires a range of skills and specialised knowledge, and who can be trusted to possess the relevant training, to have acquired such skills and knowledge, and thus to follow, in carrying out that activity, whatever methods are appropriate to it. As Mizrahi points out, however, there is a difference between *professional trust* and *epistemic trust in expertise*.[37] If you trust that a person *E* is a professional, you trust that she "knows what she is doing":

37. See Moti Mizrahi, "Why Arguments from Expert Opinion are still Weak: A Reply to Seidel" (2016) 36: 2 Informal Logic 238.

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> For example, I may trust my physician insofar as she is a professional who knows what she is doing (e.g., she knows how to perform physical examinations and make clinical decisions). . . . In the scientific context, [professional] trust means that *E* is to be trusted to correctly follow procedures of scientific observation and protocols of scientific experimentation; in other words, that *E* is a professional scientist.[38]

When it comes to arguments from authority, though, "the relevant kind of trust is epistemic trust in expertise (i.e., trusting that *p* is true because *E* judges that *p* is true)."[39]

Why does this matter? We can expand on Mizrahi's distinction. It is not surprising that many of the standard illustrations of arguments from authority come from the domain of the 'hard', empirical sciences. In such fields, there is, generally speaking, a close relation between the correct—the professional—use of the appropriate methods and the probability that the conclusions of one's professionally-carried-out research be true. If, for example, a scientist does their experimental work professionally, following appropriate methods, protocols, procedures, and so on, and correctly reports that the result of such work is *p*, we have reason to trust, with some degree of credence, that '*p*' is true.

This is not to deny that there is a creative aspect to scientific work—in drawing analogies, constructing hypotheses, proposing explanations. And empirical scientific work can itself come in many shapes, and can rely on conceptual frameworks that are themselves contested. But in scientific research, methods themselves are geared towards maximising the likelihood that, by following them, the conclusions professionals reach *are* true. Professional trust and epistemic trust will thus correlate to some extent. Put differently: If you have not read someone's work, but trust it was professionally carried out, and know they conclude that *p*, then you have reason to believe that *p*.

Yet is this true of law? Hardly. We can grant that legal scholars and academics are to be trusted as professionals. As professional academic *researchers*, they can rightly be expected to know *how* to carry out research in their fields and on their topics; to be able to identify which primary and secondary sources to read, and to have read them adequately; to know how to engage with other scholars' views; to offer arguments of the right *kind* in support of their views; and so on. But none of this is linked to any increased likelihood that the theses and conclusions they come to propose on any substantive legal point are 'true', correct, or to be adopted.

Of course, we expect professional legal scholars to make fewer *mistakes* than lay people might if trying to work out answers to the same questions. But that is not enough to warrant epistemic trust; and judges are not lay people anyway. If all a judge knows is that the conclusion of some scholar's professionally executed work on some substantive legal question is that *p*, that by itself is no reason for the judge to believe that *p*.

Why not? There are several reasons.

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38. *Ibid* at 242-43.
39. *Ibid* at 243.

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4.2. Methodological Unawareness and Epistemic Trust

One reason is that there is no stable set of methods for constructing 'doctrinal' theories—as they are often called—on any point of law: no set of methods we can trust any legal scholar to follow if their theories are to count as professionally constructed.

What does doctrinal legal scholarship involve? While it is not easy to define precisely (as some note), consider some proposed general characterisations:

> [Legal doctrine] is probably best described as research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.[40]

> Legal doctrine … aims to formulate concepts, systems and principles by asking which parts of the law are based on which values. It has three objectives: Firstly, it focuses on collecting and viewing the legal material as an empirical dimension. Secondly, it seeks to achieve the conceptual-systematic penetration of the legal substance as an analytical dimension. Thirdly, it seeks to ensure the reference to practical reason as a normative-ethical dimension. … With legal doctrine, new concepts, theories and intermediate layers are developed that go beyond the requirement of individual norms. … It thus creates an intermediate layer between the individual case casuistry and the legal principles by means of a value-oriented process of discovering the law.[41]

> First, legal scholars set out to provide accounts of the legal materials in particular fields of law and make explicit their systematic character. Secondly, they subject pieces of legislation and major judicial decisions to critical scrutiny. They exercise some 'quality control' over the (judicial and legislative) decisions that serve as the primary drivers of normative development in concrete legal practices. Thirdly, legal scholars ask about the desirability and plausibility of institutional reforms in respect of existing legal mechanisms.[42]

These are quotes from works by legal theorists and philosophers: works in general jurisprudence, not in any substantive area of the law. The methodology of doctrinal legal scholarship is a complex field, long the subject of discussions among legal philosophers—but not so much among doctrinal scholars themselves.[43]

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40. Jan M Smits, "What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research" in Rob van Gestel, Hans-W Micklitz & Edward L Rubin, eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017) 207 at 210.

41. Thomas MJ Möllers, *Legal Methods: How to Work with Legal Arguments*, translated by Gill Mertens (Hart/Beck/Nomos, 2020) at 308 [emphasis omitted, footnotes omitted].

42. Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021) at 8.

43. There are exceptions, of course: see e.g. Jason NE Varuhas, "Mapping doctrinal methods" in Paul Daly & Joe Tomlinson, eds, *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70; Stefan Theil, "Carefully Tailored: Doctrinal Methods and Empirical Contributions" (2025) 45:4 Oxford J Leg Stud 1047.

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The point is not that each scholar can adopt a method or range or methods that philosophers may find inadequate. The point is that doctrinal scholars often appear to carry out their work without having a well-defined methodological view about how it *should* be carried out. They can seem largely unaware, for example, of the success conditions for doctrinal theories, of standards for comparing among theories, indeed of the very character, methodologically speaking, of the *kind* of 'theories' they themselves put forward. This bears not only on the soundness of their 'theories' as such, but also on many of the arguments they can offer in support of their conclusions.

This is a familiar point of criticism. Byrne and Olsen write that "[d]octrinal legal scholarship is ... rarely theorised [by doctrinal scholars themselves], often leaving it with no more than implicit understanding of its own methodology."[44] Van der Burg notes that "[t]he standards of evaluation" of doctrinal legal research "are often unarticulated and simply taken for granted. Moreover, many steps in the argument[s] as well as many assumptions are not discussed explicitly but are left implicit."[45] Smits says:

> There is little doubt that the doctrinal approach provides a separate mode of thinking about the law, but both its proponents and critics seem too little aware of its foundations. ... It has even become a truism that most jurists know how to do doctrinal work but are not able to tell how they do what they do.[46]

Rubin goes as far as saying that this poses "basic problems" for the "core identity" of legal scholarship:

> There is ... a serious question whether legal scholarship constitutes a discipline at all, or whether it is simply the body of work produced by university professors who teach in programs that prepare their students for careers in law.[47]

For our present purposes, it means also that while doctrinal legal scholars can generally be trusted to be professional academic *researchers* in a broad sense, they cannot be trusted to be professional *theorists*. In the relevant sense, they do *not* "know what they are doing"—which from the outset prevents a correlation between professional trust in their work and epistemic trust in their views. The methods involved in professionally carrying out *research* are themselves not geared towards maximising the truth or correctness of any given substantive view.

There may be something of a Catch-22 situation here. On the one hand, as Van Gestel notes, the fact that "methodological ground rules" for doctrinal legal

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44. William Hamilton Byrne & Henrik Palmer Olsen, "Doctrinal Legal Science: A Science of Its Own?" (2024) 37:2 Can JL & Jur 343 at 345.

45. Wibren van der Burg, "The Merits of Law: An Argumentative Framework for Evaluative Judgements and Normative Recommendations in Legal Research" (2019) 105:1 Archiv für Rechts- und Sozialphilosophie 11 at 12 [footnote omitted].

46. Smits, *supra* note 40 at 208, 221.

47. Edward L Rubin, "Legal Scholarship" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2d ed (Blackwell, 2010) 548 at 548.

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scholarship "have always remained rather implicit" and that legal scholars "currently seem to have a disregard for methodology" may impair the credibility of doctrinal scholarship itself—especially in times "in which disinformation, fake news and scholarly activism may threaten people's faith in academic (legal) research."[48] On the other hand, Van Gestel hypothesises, there may be academic political incentives *against* promoting "methodological accountability in doctrinal legal research"—among others, the fear that it might "alienat[e] doctrinal legal scholarship too much from legal practice, because that could make [law schools] less relevant and credible in the eyes of the future employers of their students."[49]

4.3. Methodological Pluralism and Epistemic Trust

This problem is compounded by a further, related feature of doctrinal legal scholarship.

Any two legal scholars addressing the same substantive legal question may come to hold conflicting views as a matter of course. In legal scholarship, substantive disagreement is rife. By itself, this does not distinguish it from other fields. In the empirical sciences, too, professional scientists can and often do disagree. In that case, though, they—and their audiences—will both readily agree that at most only one of them is right. No quite so in law.

We do not mean that legal scholars do not seek to arrive at true answers to the questions they address. If a scholar defends that the answer to some substantive legal question is p, they are committed to the truth of p. And if another scholar defends that the answer is *not* p, then of course only one of the answers is true.[50]

Still, that is not how conflicting scholarly views are typically handled within the legal community. Legal disagreement among scholars is not only frequent but expected—and for good reason. Any two works of scholarship will likely rely—however implicitly—on at least partly different sets of substantive and methodological assumptions, insights, creatively constructed concepts, professed 'schools' of thought, normative commitments, value judgements, and more. Alexy gives an example:

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48. Rob van Gestel, "Quality, Methodology, and Politics in Doctrinal Legal Scholarship" [2023] Law & Method 1 at 1, 8, 2 [footnotes omitted], DOI: 10.5553/REM/.000070.

49. *Ibid* at 21.

50. Jansen says that, legal doctrine being "always the result of legal argumentation," "[d]octrinal constructions are not true or false, but rather more or less appropriate or inappropriate," and that legal doctrine does not "formulate, in the same way as other sciences, truth-apt, viz. falsifiable, statements." Jansen, *supra* note 8 at 189 [footnote omitted]. But this is neither correct nor consistent. Truth-aptness does not entail falsifiability; and if legal doctrine is "the result of legal argumentation," then surely its conclusions must be truth-apt: After all, the elements of arguments are truth-apt sentences (and argumentative validity is standardly understood by reference to the truth-values of premises and conclusions).

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> For someone for whom only the will of the legislator constitutes law in the strict sense, general practical arguments will play quite a different role than for the person whose conception of law is first and foremost as a rational ordering of human coexistence.[51]

This means that the conclusions of each scholarly work cannot be straightforwardly contrasted. They may propositionally contradict each other, but that may well be the result of each scholar's different options, methods, starting points, and so on. Their propositional disagreement, in other words, may not be genuine. Or it may be genuine but unresolvable, if, as some think, law itself is structurally and unavoidably ambiguous.[52]

Of course, each scholar will typically have mustered arguments in favour of their own conclusions, arguments they take to be good and persuasive given their assumptions. But their readers will be aware that there may be—as there typically are—other works offering equally good arguments for the opposite view, given *their* assumptions. It follows that the mere fact that a legal scholar holds that p cannot by itself warrant epistemic trust in p. (This point would hold even if scholars were fully aware of, and explicit about, their own methodological assumptions.) While each work of legal scholarship will purport to offer conclusive reasons for its proposed views, no such views can themselves be regarded by the legal community as conclusive on the mere grounds that a scholar defends them.

4.4. The Normative Character of Doctrinal Legal Scholarship

As the quotes in section 4.1. illustrate, there are in substantive legal scholarship both a 'descriptive' and a 'normative' element. The two are closely linked.

Doctrinal theories seek not only to 'describe' existing law, but also to put forward answers to normative legal questions. They engage in the creative tasks of making sense of unclear sources (e.g., by suggesting ways of solving ambiguities in or contradictions among statutory provisions); of proposing theories that seek to make coherent sense of whole sections or 'branches' of the law in light of legal 'principles' that may themselves be unwritten (but which scholars will themselves venture to articulate); of offering answers to normative legal questions that positive law has not yet addressed (legal 'gaps'), answers they take to be justified by the 'spirit' of existing law; and even of revising and updating parts of the law that the passage of time has rendered inadequate.

Yet the 'descriptive' component of legal scholarship is in a different sense 'normative' as well. It goes well beyond the mere reporting of the content of legal sources. The work of 'systematising' existing law, of proposing concepts and definitions, of articulating principles taken to underly certain areas of the law,

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51. Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, translated by Ruth Adler & Neil MacCormick (Oxford University Press, 1989) at 252.

52. See Ino Augsberg, "In Defence of Ambiguity" in Kuntz & Miller, *supra* note 8, 137.

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and more, is also part of what is involved in 'describing' what law itself requires or permits. And such work can only be carried out if the theorist adopts and reasons from various normative and evaluative commitments—starting with those that characterise the very practice of law-making and law-applying within the relevant jurisdiction or legal system. In order to properly 'describe' and 'state' existing law, legal scholars must adopt what is commonly called an 'internal' or 'hermeneutic' point of view—which is a thoroughly normative stance. Understanding of what the law on any given matter *is* is intertwined—to say the least—with an understanding of what it *ought* to be.

These points are also often recognised. For instance, Bódig says that "[l]egal scholarship is characterised as a normative and interpretive discipline that offers an internalist and non-instrumentalist perspective on law."[53] Alexy says it "has normative content. Its propositions can be advanced as arguments for deciding questions which cannot be answered by reference to empirical arguments alone."[54] And Bogg writes:

> The formulation of a coherent doctrinal account depends upon value judgements, identifying those cases which are central and which are aberrant by reference to the theorist's criteria of significance and importance. . . . [D]octrinal scholarship is normative. Coherence and systematization depend upon political and moral judgements that place the settled legal material in its best moral light.[55]

It is beyond the scope of our paper to tease out in any further detail the different ways in which substantive legal scholarship is normative in character. We note only that it gives us a further reason to deny that legal scholars can be assigned epistemic trust on such matters. Whether there can even be epistemic authorities on normative matters is an open philosophical question. It seems clear, though, that legal scholars *as such* would not qualify.

True, there is one kind of scholarly legal work that comes close to being exclusively descriptive: writings—typically found in introductory textbooks aimed at law students—that seek simply to report the state of the art in some area of the law. Such writings will mention, for instance, whether there happens to be legislation, case law, or doctrinal commentary on some point of law; they may highlight the existing academic and judicial consensus (or lack thereof) on some given issue; and so on. There is nothing trivial about such reports; they serve an important pedagogical function. Yet this—merely reporting the content of legal sources or the empirical, social fact of, say, juristic consensus—is not what legal theorists and legal scholars themselves take to be the distinctive ambition of doctrinal legal scholarship. It is also not the kind of scholarship that attracts judicial attention in minimally complex cases.

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53. Mátyás Bódig, "Legal Doctrinal Scholarship and Interdisciplinary Engagement" (2015) 8:2 Erasmus L Rev 43 at 43.
54. Alexy, *supra* note 51 at 256 [emphasis omitted].
55. Alan Bogg, "Doctrinal method in labour law in common law systems: potential, problems, concepts" in Alysia Blackham & Sean Cooney, eds, *Research Methods in Labour Law: A Handbook* (Edward Elgar, 2024) 186 at 203.

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4.5. Trust vs Choice

If, as Pursley puts it, legal scholars "have no well-settled criteria for choosing among competing theses and are all over the place with respect to how to proceed," even less can their readers—including lawyers and judges, who are typically not trained as scholars—be expected to be able to unearth and assess such criteria.[56] What good, then, one might ask, is legal scholarship to them? Yet we need not dismiss it wholesale. As Varuhas says, "less-than-fully-theorized work" can still have "significant, but necessarily limited, capacity to advance understanding of law."[57] But how?

Law is often said to be an 'argumentative' field, and what that means is not just that propositions of law must, of course, be argued for. It means also that substantive legal points are always regarded as *arguable* in principle, in the sense that there may and often will be reasons both in favour and against any given answer. Yet while the correct answer will be the one that corresponds to the all-things-considered balance of relevant reasons, legal actors—lawyers, judges—are not expected to offer a full justification for the views they put forward. Lawyers arguing their cases are not required to consider—or even mention—many reasons that might possibly count against their clients. And although judges *are* typically required, or at least expected, to address all arguments that have in fact been brought before them, both for and against a possible outcome, they are not required to consider all conceivable arguments that might bear on how they ought to decide any given case.

Moreover, while there are kinds of reasons and arguments regarded as particularly well suited to legal justification—arguments by analogy, arguments *e contrario*, arguments *a fortiori*, consequentialist arguments, and so on—there is no conventionally settled weight to be given to each, and judges are to some extent permitted to exercise discretion and *choose* which sets of arguments to assign greater weight to.

We can illustrate this idea by reference to the range of arguments admitted by jurists in many Western legal systems in the context of debates about the meaning of statutory provisions. In *Interpreting Statutes*, an ambitious 1991 comparative study of legal interpretation spanning eleven countries (predominantly European, with the inclusion of the United States and Argentina), the editors identified eleven common types of legal argument subsumable under four broad categories: (i) linguistic arguments, (ii) systemic arguments, (iii) teleological or evaluative arguments, and (iv) the transcategorical argument from intention.[58]

Arguments of any of these categories can be employed either individually or in concert. A judge might, for instance, rely exclusively on linguistic factors (e.g., "The truck may not enter the park, because a bylaw prohibits 'all vehicles'

56. Garrick B Pursley, "Metatheory" (2016) 47:4 Loy U Chicago LJ 1333 at 1334.
57. Varuhas, *supra* note 43 at 86.
58. See D Neil MacCormick & Robert S Summers, *Interpreting Statutes: A Comparative Study* (Routledge, 1991) at 512-15.

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from entering the park, and trucks fall within the ordinary meaning of 'vehicle'"). But when arguments of different categories align, jurists will often invoke them in combination (e.g., "Not only do trucks fall within the ordinary meaning of 'vehicle', but the statutory ban on trucks serves the purpose of keeping the park clean and safe for pedestrians").

Yet the different arguments do not always align, and jurists may be forced to prioritise one over the other (e.g., "A garbage truck is a 'vehicle' in the ordinary sense of the word; but its exceptional use in the park accords with the statutory purpose of keeping the park clean and safe for pedestrians"). On what criteria then is argumentative priority to be assigned in case of conflict? It would be quite possible for legal systems to institute hierarchies among argument-types—for example, by determining that textual arguments should prevail over teleological ones. In actual practice, however, there are no such hierarchies: no defined criteria for solving such conflicts. This is the case *within* any given jurisdiction (any two judges may solve the same conflict differently without thereby breaching any conflict-solving rule), and thus also (and *a fortiori*) across jurisdictions. As MacCormick and Summers, the editors of *Interpreting Statutes*, say:

> In a work of this kind it is clearly impossible to produce any standard set of second-order criteria by way of conflict-settling argument forms valid across all legal systems. Differences of approach to the relative weight of ordinary meaning arguments have been noted, different doctrines of precedent, different approaches to analogy, different conceptions of purpose and of intention ('objective' versus 'subjective' in both cases). So one cannot construct or reconstruct any general scheme of priorities in the case of overriding, or any general principles either of cumulation of weights of argument, or of conditions of outweighing.[59]

Nor is each judge required or expected to go over all the relevant points that might theoretically justify their preference for one argument-type over another in any particular case. On the contrary: Judges are typically regarded as free to choose—to settle the conflict in one way or another in each particular case—without further elaboration.

Whether and on what grounds this central feature of legal practice is justified or even inevitable need not concern us here.[60] What matters now is that a judicial decision partly grounded on a judge's sheer declared but itself unargued-for preference for some relevant considerations over others is not regarded as failing for that reason to comply with the demand that judicial opinions be justified—argued for.

Now, a work of doctrinal scholarship may well include arguments that are not substantively dependent on their assumptions, and which readers, including judges, may in any event find independently plausible. The fact that a work of scholarship is naïve or flawed—methodologically or otherwise—does not

59. *Ibid* at 529.

60. One possible ground to think it justified is that such flexibility may increase the likelihood of substantively just decisions: decisions more attuned to the normatively relevant features of each particular case than a strictly 'rule-based' procedure would allow.

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mean it cannot contain good arguments on a range of points. And since different scholars may hold different views on the same substantive legal questions, there will often be in the literature arguments both for and against a certain claim, arguments that judges might find plausible and which they again may *choose* to avail themselves of and give weight to—crediting the scholars who made them—in justifying their decisions. Courts are free, rationally as well as legally, to pick and choose from such arguments on substantive rather than meta-theoretical grounds.[61] But to do so is not to ascribe epistemic trust to legal scholars. It is a matter of substantively endorsing an argument that happens to have been put forward by someone else; an argument one finds persuasive or relevant on its merits, not because it was made by a scholar (or anyone else).[62]

Which is to be expected, after all. Judges are jurists, too, not lay people, and therefore their position vis-à-vis legal scholars is not the *kind* of position that would justify treating scholars' pronouncements as epistemically authoritative. Judges are just as able as legal scholars to identify relevant legal reasons and to assess and produce relevant legal arguments.[63] Of course, courts are not in the business of constructing substantive theories of any part of law, and their workload will typically not allow them to specialise in the way that legal scholars do. It makes sense for judges to turn to works of scholarship as repositories of general arguments (and even of broader ways of framing questions) either in favour or against a certain view, arguments they might well not have the time or the imagination to come up with on their own. But what matters in the end is whether they themselves take those arguments to be good or weighty, and choose to make them their own—not that they found them between the covers of a book.

4.6. Do Numbers Matter?

While courts will often cite individual scholars, in several countries they will also refer and appeal to what 'most' or the 'majority' of scholars hold, or to the 'prevailing' or 'dominant' doctrine (the '*herrschende Lehre*', the '*dottrina dominante*', the '*doctrine majoritaire*', the '*maioria da doutrina*': all idiomatic phrases in their respective jurisdictions). Even in England, Braun notes, "judges occasionally refer to the 'weight of academic opinion', the 'weight of academic authority', the 'weighty academic authority' or 'the majority of academic opinion'."[64]

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61. On so-called 'permissive' sources, see Duarte d'Almeida, *supra* note 21 at 24ff.

62. Schauer also makes the point that 'persuasive authority' is an oxymoron: see Schauer, *supra* note 23 at 1940-44; Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) at 67-71.

63. Commenting on what he perceives as a recent decline in German courts' habit of turning to, and citing, works by legal scholars, Jansen remarks that judges in Germany today (as opposed to the eighteenth century, when "many judges … still did not hold a university degree") "possess[] the same knowledge and abilities as legal scholars. Professors are no longer better jurists than judges." Jansen, *supra* note 8 at 183 [footnote omitted].

64. Alexandra Braun, "Judges and Academics: Features of a Partnership" in James Lee, ed, *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart, 2011) 227 at 230 [footnote omitted].

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'Weight' and 'majority' are not necessarily to be understood in terms of the sheer number of scholars who have defended a certain view. In Germany, for instance, Vogenauer notes:

> Whether a legal proposition represents the 'prevailing doctrine' or a 'minority view' is not determined by a simple head count of the authors in favour and against the proposition, but by weighing the various voices according to the authors' reputations. Thus a view held by three of the most distinguished specialists in a certain area of law will usually be considered to be the 'prevailing doctrine' even if a host of brilliant young authors might put forward sensible arguments for a different solution.[65]

Is this practice justified? Some think so:

> [T]here is ample justification for regarding the 'prevailing doctrine', *la doctrine dominante* or *die herrschende Lehre*, as a '*de facto*' or 'indirect' source of law with strong persuasive authority. A specific opinion is all the more persuasive, the more authors (dead or alive) subscribe to it and the better their academic reputation.[66]

But "persuasive authority" is not, as we have seen, the same as epistemic authority—it is no 'authority' at all—and "reputation" is not a basis on which arguments from authority can be made. And why should we think that the higher the number of authors who hold an opinion, the more 'persuasive' it is?

Vogenauer says that the appeal to "prevailing" doctrine "can readily be identified as the inheritor of the old *communis opinio doctorum* of the continental *ius commune*,"[67] which, he notes elsewhere, "was taken to be the view of all or, at least, of the majority of the most authoritative writers."[68] There were many debates over the centuries about whether and why it should matter that most learned jurists agreed on some point of law—including warnings against the risk of "absolutizing thoughtless views, only on the grounds that they are shared by numerous authors who follow them like a herd of sheep or a flock of wandering birds."[69]

Still, our claims in this paper so far do leave room for some argumentative weight to be assigned, under certain circumstances, to the fact that most scholars

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65. Stefan Vogenauer, "An Empire of Light? II: Learning and Lawmaking in Germany Today" (2006) 26:4 Oxford J Leg Stud 627 at 632.

66. William Twining et al, "The Role of Academics in the Legal System" in Mark Tushnet & Peter Cane, eds, *The Oxford Handbook of Legal Studies* (Oxford University Press, 2012) 920 at 937.

67. Vogenauer, *supra* note 65 at 631 [footnote omitted].

68. Stefan Vogenauer, "An Empire of Light? Learning and Lawmaking in the History of German Law" (2005) 64:2 Cambridge LJ 481 at 486 [footnote omitted]. The above-quoted reference in Canon 19 of the Vatican's 1983 Code of Canon Law, to the "common and constant opinion of learned persons" ("*communi constantique doctorum sententia*") seems to echo that old notion: 1983 Code, *supra* note 6.

69. Tymoteusz Mikolajczak, "The Authority of *communis opinio doctorum* in the Medieval and Early Modern *Ius commune* (13th-16th centuries)" (2020) 37:1 Bulletin Medieval Canon Law 87 at 100 [footnote omitted], citing Martinus Azpilcueta, *Enchiridion sive Manuale confessariorum ac poenitentium* (Rome, 1588) cap 27 fol 879-880 n 289.

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working on a given substantive legal topic have come to hold the same view—even if no single scholar's say-so can be regarded as epistemically authoritative.

We saw that legal scholars are often unclear about the methodological assumptions on which their works more or less implicitly rely. Moreover, any two legal scholars are likely not to fully share their methodological assumptions. Their works will also differ in a range of substantive matters. Each will have made different choices, developed different concepts and theoretical frameworks, offered different arguments in support of their views. Their arguments matter, as we also saw, if and because they are persuasive on their merits: if and because they give good reasons for the views they defend.

But it seems plausible to think, given what we know generally about the contents and quality of works of legal scholarship, that if a scholar has defended a certain view, then they have probably offered some plausible argument or arguments to support it. In other words: If a scholar has defended that *p*, they will probably (though not necessarily) have done so on the basis of at least some arguments that we—or trained jurists at any rate—would also probably recognise as plausible and relevant. That is why it makes sense for judges to turn to works of legal scholarship expecting to find some good legal arguments. And if there is a preponderance of scholars—each likely to be working from a different set of assumptions—coming to the same view from different angles (including different methodological angles) and with different arguments, then we have reason to think there probably is a wealth of plausible, relevant reasons supporting that view.

But this is still not to ascribe epistemic authority to the collective fact that the 'dominant' portion of scholars hold a certain view. Our point is not that by simply aggregating different scholars' convergent opinions we will at some stage cross a threshold for epistemic authority. Yet since the sheer fact that many scholars hold a certain view—a fact that may be known independently of us having thoroughly read the relevant works—is reason to think there probably are weighty arguments to support it, then if a judge is either unable or unwilling to engage substantively with each such argument, they will have reason to ensure that they themselves argue particularly forcefully *if they disagree with the dominant view*.

Put differently: The sheer fact that the 'dominant' view happens to be *p* is not a reason on which a judge can legitimately rely to justify their own view that *p*. At best, a judge who has given substantive arguments that suffice to establish *p* may add that *p* is also the 'dominant' view, thereby signalling that there are likely even *more* arguments that could and have been given for *p*. But the fact that *p* is the 'dominant' view among scholars is a reason for a judge who disagrees with *p* to give particularly weighty arguments for their own view that *not-p*—arguments they can plausibly claim to be conclusive regardless of any arguments that could be mustered for *p*.

Vogenauer draws attention to this aspect. He explains the normative force of 'dominant' or 'prevailing' doctrine by saying that "any judge who wants to deviate from the prevailing doctrine" bears the "burden of argument": "to discharge the burden a court decision must be very carefully reasoned in order to convince

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the legal community that the court has got the better side of the argument."[70] Vogenauer goes on to say that this amounts to a "rebuttable presumption in favour of the 'truth' of the [prevailing scholarly view]."[71]

But this is not quite right. No presumption of 'truth' (with or without scare quotes) attaches to the mere fact that some view is 'prevailing' on any given point. Nor is there any peculiar 'burden of argument' on any judge who wishes to deviate from it, since there is no good argument from the fact that a certain view is 'prevailing' to begin with. No judge would argue legitimately for *p* simply by saying that *p* happens to be the 'prevailing' view. What there is is reason to think it likely that the prevailing view is well supported by arguments. In view of that, a judge who takes the opposite view may either substantively tackle all such arguments, one by one, or—more realistically, perhaps—claim, giving reasons, that the considerations that favour *not-p* outweigh those that favour *p*, whatever they may be.

It will not suffice, though, that a certain view just happens to 'prevail' among scholars. If only three scholars have written on a topic, and two of them hold that *p*, they 'prevail' numerically. With so few works, though, it seems that judges would simply engage, should they choose to, with the arguments on either side, rather than declare one view to be 'prevailing'. Numbers matter. By the same token, every new work of scholarship reinforcing a truly 'dominant' view will make it even more likely that such a view is well supported, argumentatively speaking.

It matters also that the different works do not all share the same methodological assumptions. It would hardly be surprising if authors who explicitly professed to belong to a certain 'school' of thought all held similar views on some topics: The sheer number of such authors would not necessarily count towards establishing their view as 'prevailing'. And it matters, of course, whether the relevant works meet basic standards of control: Peer-reviewed work, for example, is more likely to be good (or at least not to be bad) than work sent to print straight from its author's hands.

4.7. Political Legitimacy

Even if the conceptual worries we have raised could all be dismissed, the practice of relying argumentatively on the say-so of legal scholars to justify judicial rulings on substantive legal matters would still lend itself to criticism of a different kind—having to do with the type of 'source' legal scholarship is.

Courts are not merely expected to give reasons for their decisions. They are expected to give reasons that can be understood and assessed by the parties before them and by citizens more generally. When they justify their rulings on the basis of statutory authority, it matters that the statutes they appeal to—formal 'sources' of law—are themselves public, and accessible to everyone. It matters also that such sources are politically legitimate: authoritative reasons properly enacted by legitimate lawmakers.

70. Vogenauer, *supra* note 65 at 652.
71. *Ibid*.

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Yet this is not true of legal scholarship, which is neither public in the relevant sense, nor subject to any political legitimacy criteria. It is not accessible to citizens: certainly not *freely* accessible, at least not typically, and sometimes not accessible at all (courts do not shy away from citing scholarly works that may be old, out of print, or written in foreign languages).

Judicial use of legal scholarship, then, is not something that citizens can control. Indeed, the effect of including citations of scholarly works in judicial opinions may well be that of *precluding* rational assessment—preventing their audiences from fully understanding and evaluating the court's reasons for its ruling—and instilling blind respect and deference instead, perhaps even intimidating the losing party into simply submitting to the ruling.[72]

That is a further reason against relying argumentatively on the 'authority' of scholars. Even if they were sound—and we have argued that they are not—arguments from scholarly 'authority' would be politically illegitimate.[73]

This point applies more forcefully to modern liberal democracies, though, than it might to other forms of government, whether historical or contemporary. In autocratic regimes marked by limited judicial independence, for instance, scholars may be a source of perspectives on the law that are *more* democratic than those that predominate in the political and judicial milieus. Relying on scholarly works, despite their lack of 'publicity', might then contribute to minimise the legitimacy deficit in such systems.

And we note also that legal scholars have historically played other important political roles, such as helping to unify the law in countries characterized by fragmentation and weak central institutions. A case in point is the role played by legal scholars in the formation of such systems as the German or the Dutch ones. Writing about the former, Vogenauer says:

> [Given] the political and institutional fragmentation of the Empire that prevented the enactment of a powerful, French-style national codification before 1896[,] ... the only force that could establish at least a minimum degree of legal unity in Germany was legal scholarship.[74]

And, writing about the Dutch legal system, Van Caenegem argues:

> Here, unlike in France, medieval customary law had not been fixed in writing and promulgated or 'homologated', nor was there any extensive legislation. ... So the vacuum was filled by jurists, first and foremost amongst whom was Hugo Grotius, who created a new legal system out of an amalgam of old Dutch customary elements and the learned law of the civilians.[75]

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72. This is also, as we saw in section 2.2, a feature of arguments *ad verecundiam*.

73. This holds even in jurisdictions in which judges are explicitly permitted or even required by lawmakers to rely on legal scholarship. Mere legislative authorisation does not suffice to allay political legitimacy worries; on the contrary: In such cases, the worries extend to the authorisation itself.

74. Vogenauer, *supra* note 68 at 494-95.

75. RC van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987) at 70-71.

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In systems plagued with political strife, then, legal scholars have played the role of impartial unifiers. In systems marked by autocratic centralization, they may conceivably contribute progressive perspectives. And, more generally, there can be non-epistemic reasons, including political reasons, to rely for some purpose on the say-so of epistemic authorities. Our point, however, remains. In legal systems that do not face such problems, legal scholars—even assuming they were authorities on substantive legal matters—have no special political standing.

5. Conclusion

Our conclusion is a normative one: Courts should not argue from scholarly 'authority' to justify conclusions on substantive points of law. Such arguments are always unsound, relying on the false premise that a legal scholar is an authority on such matters: that their say-so is by itself reason-giving. These arguments are also of dubious political legitimacy.

We have not claimed that courts should not care about, and read, legal scholarship. On substantive legal matters, its role is that of providing courts (and other readers) with plausible arguments that may or not persuade *on their merits*, and which courts may thus choose to adopt and make their own. A scholar's proposed systematisation of some area of the law can also, again if a court finds it persuasive, assist courts in dealing with future, novel cases, and provide them with a broader picture of the 'systemic' impact of their verdicts. In such instances, though, it is not enough that courts declare themselves persuaded by a certain scholar's arguments or proposals. They should rather present the relevant arguments themselves—*giving* the corresponding reasons, as opposed to simply mentioning that they think there are such reasons—and credit the scholarly work as the place in which they may have come across them.

Moreover, our discussion has concerned scholars' pronouncements on substantive legal matters only; but we do of course find in works of scholarship many remarks of *other* sorts. Indeed, there are different kinds of services legal scholars can provide to the legal community.

One kind is comparatively modest, if important. Judges and other legal practitioners cannot be expected to be acquainted with every single aspect of our enormously complex legal systems, and even experienced judges may rely on scholars for such information. A judge may, for instance, rely on a scholar known for having carefully reviewed numerous legal precedents on a certain topic, precedents that the judge may not have the time to glean. The precedents themselves may be quite clear, and there may be little or no scholarly disagreement about the doctrines they have posited. Or a judge may find it relevant to allude, in a decision, to aspects of the *history*, say, of some legal concept or 'institute'; or to *refer to*—which is not the same as adopting—the range of views that have in fact been held over the years by other scholars. Such judges *can* in principle rationally trust, epistemically speaking, the pronouncements of scholars who have surveyed such history and included 'state-of-the-art' sections in their works. To rely on the

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say-so of scholars on such descriptive or factual matters does not seem particularly problematic.

As we have pointed out, however, that is neither the only nor the most important (or indeed characteristic) kind of service legal scholars provide. Substantive legal scholarship characteristically aims at both stating what the law, *properly* understood, is, and at proposing legal developments. This involves, as we saw, making normative and evaluative judgments that straddle the putatively clear boundary between judgments about what the law is and judgements about morality and what the law ought to be. And on such matters, there is neither room nor reason for judges—or anyone else—to simply defer to the say-so of legal scholars.

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