FAR-CITED[1]

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Grammatici certant et adhuc sub iudice lis est.[2]

I

Long long ago in Ottawa, our Top Court heard a Very Important Case.[3] Ten lawyers, seven of them Leading Counsel, argued for four days.[4] One of the lawyers[5] tried to cite an Article[6] by a Learned Academic, published in a Very Respectable Law Review. But the Old Chief Justice stopped the lawyer, saying that the Learned Articles were Not Authorities.

Another Very Learned Scholar[7] then selflessly published another Article in a Very

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1 The editors of this Law Review for 2001-02 asked me to write this article. As a writer on advocacy once observed, even more interesting than a talk on fishing by an experienced fisherman, is one by a fish. I hope that the editors will forgive some of my footnotes; cf. K. Lasson, "Scholarship Amok" (1990) 103 Harv. L. Rev. 926 at 949. Narrowing the gap between the Academy and the Bar has always been close to my heart. Trevor Anderson, Tim Hay, Robert Chambers, and Mr. Justice Watson kindly supplied a great many copies or cites of articles, but are wholly innocent of complicity in the opinions in this article. Beth Millard kindly supplied copies of dozens of articles, and several books, amazingly quickly. She also used considerable ingenuity to verify a citation and provided useful information on electronic article databases and indexes. A number of friends gave me useful comments on a draft of this article, and much as I owe them, I had better suppress their names to protect the innocent.

2 Horace, *Epistle to the Pisones (Ars Poetica)* ed. by N. Rudd, (Cambridge, U.K.: Cambridge University Press, 1989) at 61, line 78 (unofficial translation). Professors do battle, and the dispute is still before the courts.

3 *Reference Re the Validity of the Wartime Leasehold Regulations, P.C. 9029*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

4 *Ibid.*

5 Professor Bale tells us that it was Maurice W. Wright: G. Bale, "W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada" (1994) 19 Queen's L.J. 36 at 49-50. *The Montreal Gazette* ran lengthy daily stories about the Supreme Court argument, including some of Mr. Wright's argument, but they do not mention the interchange about citing articles. Maybe it was brief and not noticeable. Or maybe the *Gazette* was not as sympathetic to Mr. Wright's views, or to his client, as was the *Toronto Star*.

6 Dean Bowker says that the article in question was V.C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77; see W.F. Bowker, "Extra-Judicial Writing" (1980) 18 Alta. L. Rev. 458 at 467.

7 George Van Veldt Nicholls, Q.C., a highly respected Quebec lawyer and later a professor at Dalhousie, who published many articles on many legal topics, including the Civil Code of Lower Canada. He enjoyed a reputation as an excellent editor. I have been unable to read any published biography or obituary of him, though Dean Bowker (*ibid.*) gives a few general comments. Apparently Professor Nicholls died in 1990 and the *Canadian Bar Review* ran an obituary on him, but it was printed in the introductory pages, which binders are instructed to discard. The bound copies in libraries here omit it, and I have been unable to find it in my own unbound copies. The 1940 *Canadian Law List* showed him as one of several house lawyers with the Canadian Manufacturers' Association in Toronto, and the 1947 issue as a house lawyer with the Canadian Chambers of Commerce. In 1950 he had his own office in Montreal as editor of the *Canadian Bar Review*. I have

Respectable Law Review,[8] citing many other Articles by Respected Academics and Judgments by Other Appellate Courts. The Top Court then Repented,[9] and now all Judges accept all Law Review Articles by Academics.

II

Professions preserve, share, and affirm values in many ways. One is by recounting and recording sagas, such as the one above.[10] This is proper and fitting. Young medical students learn how Semmelweis and Pasteur bravely promoted the germ theory against entrenched opposition. Young engineering students hear of the collapse of the Quebec bridge and see movies of the Tacoma Narrows bridge flying apart.

Professor Nicholls was right to call attention to the question of citing articles. More avenues for better judgments lie open if courts can look at, and counsel cite, books and articles.[11] So it is understandable that generations of legal authors have handed on this story about Professor Nicholls' article.[12]

However, saga can become myth, and sometimes the borderline between the two is hard to see. Indeed, the world was surprised to learn from Schliemann that Troy really had existed[13] and was not merely an invention of Homer or his predecessors.

There are reasons that saga is often distorted and inflated history.[14] An obvious one is the tendency of any oft-told tale to grow and shed detail in the telling. Less obvious is the fact that an instructive tale for the young has to be simple and unequivocal. And it needs a clear moral. Therefore, qualifications and exceptions tend to fall away as an accurate history blossoms into a saga. Often the result is oversimplification, purging true but awkward details.

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just been referred to two works that I have not seen: R. St. J. Macdonald, ed., *Dalhousie Law School 1965-1990: An Oral History* (Halifax: Dalhousie University, 1996) at 287 (quoting W.H.R. Charles) and "Select Bibliography"; J. Willis, *A History of the Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

8 G.V.V. Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28 Can. Bar Rev. 422.

9 Cf. B. Dickson "The Role and Function of Judges" (1980) 14 L. Soc. Gaz. 138 at 164.

10 Cf. Nicholls, *supra* note 8 at 425 (on professional convention).

11 The advantages are mentioned below: see text at notes 73-74. Some Australian articles mirror historians' usage and call these "secondary authorities," *e.g.*, R. Smyth, "What Do Intermediate Appellate Courts Cite?" (1999) 21 Adel. L. Rev. 51 at 67 [hereinafter "Appellate Courts"]. But Canadian writers seem not to be attracted to the flavour of that term.

12 A written recounting is Bale, *supra* note 5 at 49-50. I have not found another, but maybe some exist somewhere. Melanie Hayes-Richards has kindly made computer searches and cannot find any judgment or article on an electronic database in Canada which cites Nicholls' 1950 article.

13 Cf. *Encyclopaedia Britannica*, vol. 20, 14th ed., (London: Encyclopaedia Britannica Co., 1929) at 79 "Schliemann, Heinrich."

14 See J. Tey, *The Daughter of Time* (New York: MacMillan, 1951) at 98-100, on Tonypandy. One problem with living too long is that one sees more and more distorted or invented published accounts of events that one has witnessed.

Indeed that can occur at the outset, even before the obvious apotheosis of an article as saga. For example, two famous articles recount the key experiments discovering two famous remedies, but the experiments are likely non-reproducible, and so of doubtful accuracy: Fleming on penicillin[15] and Banting on insulin.[16]

Professor Nicholls hastened the saga-making process a little. People reading his 1950 article usually view him as St. George, slaying the dragon (who bars academic works) and rescuing the damsel (who scientifically studies the law).[17] But the dragon was moribund, if not dead, when Professor Nicholls rode up; indeed, his lance may have missed the dragon and wounded the damsel instead.

We have two signs that the dragon was comatose, even terminal, in 1950. The first was illustrated in Professor Nicholls' very article. For 10 1/2 pages, with 98 footnotes,[18] he gave earlier examples of courts citing and following non-judges' writings. Many of his examples were Canadian. He also pointed out that the list was far from exhaustive.[19] How then could he portray any existing barrier to citing such writings?

The second sign that the dragon was dead, is that English courts never forbade counsel to adduce textbooks or articles by non-judicial authors during argument. At worst, counsel had to adopt those passages as their own argument.[20] Indeed, Professor Nicholls recognized that convention and cited authorities for it.[21] But he quoted Allen[22] as saying it was often virtual fiction.[23]

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15 G. Macfarlane, *Alexander Fleming: The Man and the Myth* (Cambridge, Mass.: Harvard University Press, 1984) at 133ff, 245ff.

16 M. Bliss, *The Discovery of Insulin* (Chicago: University of Chicago Press, 1982) at 76-77, 94-95, 203-208.

17 In fact, St. George was the damsel's employee, not a disinterested rescuer. He was the editor of the *Canadian Bar Review*, the very journal that the Chief Justice declined to call an "authority." I suppose that everyone in the Canadian legal world knew that in 1950; no one could suspect Professor Nicholls of concealing that fact. But I am a little slow on the uptake, and I did not notice that connection until I was working on a draft of this article and read the article by Professor Bale (*supra* note 5) and the speech by Dean Bowker (*supra* note 6). Professor Nicholls' 1950 article (*supra* note 8) modestly describes him with one word: "Montreal." Like many people, I do not usually read the title page of a journal. So I would imagine that many people who heard the saga in recent years did not know that the academic author was *parti pris*.

18 Nicholls, *supra* note 8 at 431-42 (nn. 22-119).

19 *Ibid.* at 431. And the Supreme Court of Canada itself had cited an article six years before: Bale, *supra* note 5 at 50, n. 38. Indeed in certain areas, such as conflict of laws or conveyancing, the English courts had constantly cited textbooks: C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964) at 276-78. In 1950 the pertinent edition was the 4th ed. (1945), which states the same. See also Duxbury, *infra* note 44 at 62ff.

20 Allen, *ibid.* at 278 n. 3; *Hodge* v. *R.* (1883), 9 App. Cas. 117 at 119, Fitzgerald L.J. *arguendo* (P.C.); *Greenlands* v. *Wilmshurst* (1913), 29 T.L.R. 685 at 687, Vaughan Williams L.J. *arguendo* (C.A.). And indeed, English courts often treated certain textbooks as having great weight: *Bastin* v. *Davies*, [1950] 2 K.B. 579 at 582-83 (D.C.). See also Duxbury, *infra* note 44 at 66ff, 78ff.

21 Nicholls, *supra* note 8 at 427-29.

22 *Ibid.* at 429.

23 Professor Nicholls also discussed at length the English rule allowing dead authors to be authorities, though it was not part of the Chief Justice of Canada's supposed ruling. Was this merely similar fact evidence used by Professor Nicholls to convict the accused courts because of bad tendencies?

So why was all the fuss made?[24] Why write a long article on citing academic writing? Why did so many others later cite the article[25] and turn it into a formative legal saga?[26]

Because there was a real dispute. But its nature was clouded. Professor Nicholls' 1950 article[27] and the saga throw a spotlight on a non-issue: whether counsel could cite a (living) non-judicial author to a court.[28] Clearly the answer was yes.[29]

Professor Nicholls' article obscured the real issue: what weight a court should give to such writings. By viewing the issue as one with a yes or no answer, Professor Nicholls and his followers subtly suggested that the answer to the real question should also be black or white. The issue is phrased this way: "Are textbooks and articles authorities in court?" The approved answer is "yes"; the answer "no" is nowadays taken to be irrefutably wrong — embarrassingly wrong. That is the real point of the saga: to shame those who question that dogma.

But there may well be a logical fallacy here[30] because the word "authority" is ambiguous.[31] One of its more common meanings is that which has automatic persuasive weight in court.[32] For example, ten appellate decisions to the same effect from other provinces across Canada would have considerable weight in any Canadian court, even if none of them contained any real reasoning or other citation of authority.

That automatic weight is the point where Professor Nicholls' lance wounded the damsel. He has led us to the point where we now assume that a court owes any legal book or article published by a university or a commercial publisher some weight, whether or not the book or article cites other authorities or contains any proof.[33] We would probably

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24 Besides the fact that Professor Nicholls was defending his own journal.

25 Without ever mentioning the well-settled rule that remarks by a judge during argument decide nothing and are not precedent? See *R.* v. *Hodson* (2001), ABCA 111, 281 A.R. 76; Simon L.C., "Practice Note" (27 March 1942), [1942] W.N. 89 (Simon L.C., himself *arguendo*!).

26 Chief Justice Dickson both recounted the saga and said that it had only antiquarian interest: Dickson, *supra* note 9 at 164. That latter comment is a two-edged sword.

27 Nicholls, *supra* note 8.

28 On asking the wrong question, cf. D.L. Rhode, "Conflicts of Commitment" (2000) 52 Stan. L. Rev. 269.

29 This dangerous knowledge had, however, been kept from the common people: cf. W.C. Sellar (Aegrot: Oxon.) & R.J. Yeatman (Failed M.A., etc. Oxon.), *1066 and All That* (London: Methuen & Co., 1930, reprinted in Oxford: Clio Press, 1987) chap. 25, Appendix, para. I(b).

30 The undistributed middle term.

31 Professor Nicholls approached this point: *supra* note 8 at 423. But then he set up a straw man by asking whether something has to be binding to be an authority. No one suggested that, of course.

32 *Oxford English Dictionary*, 2d ed., *s.v.* "authority": n. definition **II.7** "The quotation or book acknowledged, or alleged, to settle a question of opinion or give conclusive testimony," or **II.8** "a. The person whose opinion or testimony is accepted; the author of an accepted statement, b. One whose opinion *on* or *upon* a subject is entitled to be accepted; an expert in any question" [emphasis in original].

33 Blackstone calls this "intrinsic authority in the courts of justice": *Blackstone's Commentaries by Chitty*, vol. 1, from the 19th London ed. (Philadelphia: J.B. Lippincott & Co., 1860) at 72 (end). The uncritical reception of textbooks two generations ago was criticized by J.H. Wigmore, *Evidence in Trials at Common Law*, rev. ed. by P. Tillers (Toronto: Little, Brown & Company, 1983) at 615 (§8a). "History teaches us that the reforms of one generation create the scandals of the next": Rhode, *supra* note 28 at 345.

not extend that courtesy to self publication[34] or to journals or periodicals of the wrong sort.[35]

III

So Professor Nicholls made an assumption, and there is a gap in his logic. That need not, of course, disprove his thesis. Nor do I suggest that judges never give any article[36] or book persuasive force (weight) of its own. Canadian courts now properly cite academic sources frequently,[37] and some deserve weight.[38] The question is, which ones?

Suppose that counsel cites a textbook or a journal article while arguing an appeal. Should the judges give the article or book weight? Of course any logic in the article or the book, or any earlier authority cited in it, may well have weight. But the logic or earlier authority would have that weight had counsel merely recited the logic or earlier authority and not mentioned the book or article. The book or article framework can scarcely reduce that inherent weight. So the old practice of letting counsel adopt the book or article as his or her own had a point; courts received any submission from any source on its own merits. That counsel merely "adopted" it was not a pointless fiction.[39]

But that is a tangent. The question today is, what weight should the judges give to the conclusions or unsupported assertions and opinions in the book or article? To answer that, we must consider why courts ever cite non-binding authority of any description.[40]

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34 Unless maybe done electronically online with one's own web site, newsletter, etc.

35 Excessively interested in U.F.O.'s, aliens, or certain flavours of revisionist history, containing pictures, especially coloured ones, or sold in supermarkets. Rhode (*supra* note 28) cites lawyers' newspapers and the *Washington Post*, a newspaper for people. She also cites the *New York Times*, a newspaper for posterity, and the *Dallas Morning News*, a newspaper for Dallasites.

36 The history of law reviews is sketched in F.C. Hicks, *Materials and Methods of Legal Research*, 3d ed. (Rochester N.Y.: Lawyers Co-operative, 1942) at 197ff. That book deserves study.

37 See P.J. McCormick, "Judicial Authority and the Provincial Courts of Appeal" (1993) 22 Man. L.J. 286 at 293.

38 A number of reasons are given by a federal appellate judge who used to be a tenured professor at Michigan and then Harvard: see H.T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich. L. Rev. 34 at 44-45. See further *infra* notes 72-73 and accompanying text.

39 It may have had another function. There is some reason to think that today many of the academic writings cited by judges may not have been proffered by counsel: R. Smyth "Academic Writing and the Courts" (1998) 17 U. Tas. L. Rev. 164 at 174 [hereinafter "Academic Writing"]. There is another advantage to the old rule. The author is not present in court for the judge or judges to question, both as a test, and to find limits or exceptions to his or her published opinions: *Union Bk. of London* v. *Munster* (1887), 37 Ch.D. 51 at 54, 57 L.J. Ch. 124, 57 L.T. 877. But counsel is.

40 Why they cite binding statutes or precedents is obvious: to explain that they had no real choice in making their decision, and show why.

We may restate the question.[41] When judges write reasons for decision, what are their possible reasons for citing (without disapproval)[42] previous writings by other people other than counsel or judges?[43] It might take many years to compile an exhaustive list,[44] but here is the best that I can do now:

1. Mere record:
   (a) To show what counsel argued.
   (b) To show what independent research the court did (beyond counsel's argument).[45]
2. Expectations:
   (a) To show whether this judgment makes new law or merely applies settled law.
   (b) To show that the law and practice seem settled, so that to hold otherwise would disappoint legitimate expectations and create uncertainty.[46]
3. Reputation or Ability:
   (a) To piggyback on the prestige or authority of the person or body cited, such as Wigmore or the House of Lords.[47]

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41 This article is about judgments citing articles. Swift might suggest that you stop reading now:

"So, nat'ralists observe, a flea
Hath smaller fleas, that on him prey;
And these have smaller fleas to bite 'em,
And so proceed *ad infinitum*.
Thus ev'ry poet, in his kind,
Is bit by him that comes behind"

See J. Swift, "On Poetry" (1733), lines 337-42, reprinted in A. Ross & D. Woolley, eds., *The Oxford Authors: Jonathan Swift* (New York: Oxford University Press, 1984) at 543-44.

42 There are some hints on why courts cite articles with which they disagree. See E.R. Becker "In Praise of Footnotes" (1996) 74 Wash. U. L.Q. 1 at 2, 6-7.

43 Such citations may even harm the judgment: Smyth, "Appellate Courts," *supra* note 11 at 56.

44 Cf. F.R. Shapiro, "The Most-Cited Law Review Articles" (1985) 73 Cal. L. Rev. 1540 at 1543; and, on citing case law, see P.J. McCormick, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts" (1996) 34 Alta. L. Rev. 870 at 872-73, 882. There is a list in R. Smyth, "The Authority of Secondary Authority" (1999) 9 Griffith L. Rev. 25 at 28-29, but I do not find it very analytical. After this was written and submitted in draft form, a friend lent me a book containing a very apt discussion and citations: N. Duxbury, *Jurists & Judges: An Essay on Influence* (Oxford: Hart, 2001) at 9-12 especially.

45 This has several legitimate purposes. A less legitimate purpose is reluctance to throw out any cite that one spent labour acquiring. Another is to show off: R.L. Goldfarb & J.C. Raymond, *Clear Understandings: A Guide to Legal Writing* (Tuscaloosa: Goldenray Books, 1988) at 156. Professor Raymond has taught judgment writing to Canadian judges for years and rightly discourages this practice; H.W. Fowler, *A Dictionary of Modern English Usage*, 2d ed. (Oxford, U.K.: Clarendon Press, 1965) *s.v.* "quotation" (not in 3d ed.); Lasson, *supra* note 1 at 937. Cf. Becker, *supra* note 42 at 10-11. Plainly many judges do not cite materials that they have read but not (in the end) found useful, *e.g.*, Lord Goff of Chieveley: see *Hunter* v. *Canary Wharf*, [1997] A.C. 655 at 695, [1997] 2 All E.R. 426 (H.L.) [hereinafter *Canary Wharf* cited to A.C.].

46 Allen, *supra* note 19 at 279.

47 Becker, *supra* note 42 at 4-5; Nicholls, *supra* note 8 at 424. A variant arises when the work cited has no particular prestige but has been approved by another court: see Smyth, "Academic Writing," *supra* note 39 at 167.

(b) To piggyback on the expertise or experience of the author cited, *e.g.*, on a very technical, specialized, or pragmatic topic.[48]

(c) To piggyback on the (presumed) impartiality of the author.

4. Evidence:
   To fill in gaps in the evidence (which Part V discusses).
5. Reasoning:
   To show how the judge really reasoned or decided.[49]
6. Bibliography:
   (a) To save ink and avoid repeating information or citations already in the work cited.[50]
   (b) To help the reader find more information on the subject.[51]
   (c) To write a small textbook or guide to the general topic.[52]
7. Plagiarism:
   (a) To avoid plagiarism and acknowledge a moral debt to the author of an idea or some wording.
   (b) To avoid the labour of writing part of the judgment, instead telling a secretary to quote a discussion or explanation from some author.[53]
8. Non-rational reasons:[54]
   Habit, custom, or belief that citation is necessary for vague reasons.[55]

Numbers 1(a), 1(b) (recording), and 8 (irrational) may likely occur more commonly than we realize. Sometimes they reflect politeness, sometimes author-based (unnecessary) writing. Sometimes a judge (or law clerk) thinks that reasons for judgment have mandatory contents. Canadian law reports no longer report argument and rarely even list what authorities counsel cited,[56] so there is some merit in the judge's doing so.

It is important that a judge's reasons for judgment carefully distinguish mere recital from approval or the judge's own reasoning (but sometimes judges do not).[57] Therefore, some sets of judicial reasons truly cite fewer books and articles than they appear to at first glance. Reciting counsel's argument does not count. So when we study what writers courts cite, merely totting up incidental references can have its drawbacks,[58] such as overstating

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48 The tension between the judicial edict, which needs no more reason that does an Act of Parliament to be law, and the judicial conclusion appealing to reason or to academic approval, is discussed in R. Post, "The Supreme Court Opinion as Institutional Practice" (2001) 85 Minn. L. Rev. 1267 at 1362-68.

49 Cf. Becker, *supra* note 42 at 3.

50 Smyth, "Academic Writing," *supra* note 39 at 166.

51 Cf. J.F.J. "Books in Court" (1948) 92 Sol. J. 399 (col. 2). "It is a good thing for an uneducated man to read books of quotations": W.S. Churchill, *My Early Life* (New York: Charles Scribner's Sons, 1930, reprinted 1958) c. 9 at 116.

52 Becker, *supra* note 42 at 4.

53 Goldfarb & Raymond, *supra* note 45 at 156.

54 "The devil can quote scripture for his own ends" (late 16th century proverb).

55 Humour in a footnote is legitimate: Becker, *supra* note 42 at 7. *Caveat*: the instance cited by Becker (n. 22) is not funny. See further, Lasson, *supra* note 1 at 943 n. 94, 948 (which is).

56 Of course most tabulate what authorities the court cites.

57 Cf. the problems that those mechanically counting cites encounter: see below.

58 The problem is discussed by V. Black & N. Richter, "Did She Mention My Name?" (1993) 16 Dal. L.J. 377 at 380-81 and P.J. McCormick, "Do Judges Read Books Too?" (1998) 9 Supreme Court L.R. (2d) 463 at 470. Because of the lack of clarity in how judges sometimes refer to articles and

the degree of reliance by courts.[59] Conversely, judges often read and benefit from texts and articles that they do not cite.[60]

Bibliographic aims (number 6(a), 6(b), and 6(c)) are also somewhat beside the point of the present discussion. Some are to a degree mechanical; others represent essentially educational writing inside a judgment. That is legitimate, and lawyers, students, and commentators are often grateful to judges for it. But such education is not really a step in the reasoning by which the judges decide the case at hand. Nor has it any direct connection to what weight the court gives a piece of non-judicial writing.

Aims number 2, 3, and 5 (and their subdivisions) are the heart of the matter. They are expectations, reputation, and reasoning. All of them represent legitimate[61] ways that courts handle non-binding sources of law. Therefore, they suggest what weight of their own such writings legitimately claim.

Here we should distinguish two types of legal question or appeal, because what a journal article offers differs sharply in the two cases. One is applying settled law, and the other is making or settling law.

We may begin with a suit where aim number 2 (expectations) applies, and the issue is simply how to apply settled law to the case at hand. Then the court seeks a reflection or summary of what is the current practice and understanding of the Bar, and what the decided cases say and are generally understood to say.[62] What the law should be, or whether the law is just, reasonable, or socially desirable, is both irrelevant[63] and distracting when discussing that particular question. A book or article can have value[64]

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books, not distinguishing recital from approval, Black and Richter ended up totting up all references (except where the judge merely recounted the treatment in the lower courts). An even more inclusive approach seems to have been used by Smyth, "Academic Writing," *supra* note 39 at 171. He (at 164, n. 2) cites similar American studies. But at 169-70 he gives more substantive reasons to doubt the value of such counting. The history of such counting is given by Shapiro, *supra* note 44. Some scholars seem to attempt a more qualitative analysis: see the citations in J.S. Kaye, "One Judge's View of Academic Law Review Writing" (1989) 39 J. Leg. Ed. 313. A number of such studies of judicial citation of articles are cited in Smyth, "Appellate Courts," supra note 11, and R. Smyth, "Judicial Citations," (2000) 1 Vict.U.Well. L. Rev. 847 at 849-50. On the difference between citation frequency and influence, see Duxbury, *supra* note 44 at 13ff, 35ff.

59 Hicks, *supra* note 36 at 187-88.

60 Edwards, *supra* note 38 at 45.

61 And often necessary.

62 It is suggestive that in the United States, judges tend to cite different articles than do academics: D.J. Merritt & M. Putnam, "Judges and Scholars" (1996) 71 Chi.-Kent L. Rev. 871. That article does not differentiate whether the judges were applying old law, or making new law.

63 No new law is at issue where neither side asked the court to make new law or where the law is fixed by binding authority.

64 M.D. McClintock, "The Declining Use of Legal Scholarship by Courts" (1998) 51 Okla. L. Rev. 659, finds sharply dropping rates of citation of law review articles by the main US appellate courts. But those judges (and others) who reply to questionnaires say that they make heavy use of law reviews: M. Stier *et al.*, "Law Review Usage and Suggestions for Improvement" (1992) 44 Stan. L. Rev. 1467.

in such a case if it either sticks to settled law or distinguishes those two topics.[65] If it does not, it may confuse, even mislead.

Where the question before the judges is applying settled law (aim number 2), and a book or article is tendered to them by counsel, what should the judges look for to assess its proper weight? I suggest that judges carefully check the work's citations and other evidence for and against the author's

(a) diligent and complete research[66] (because if the cases are misstated the work is misleading);[67]
(b) objectivity;[68]
(c) personal experience in the practice of the particular branch of the law in question; and
(d) established reputation.[69]

The author and his or her writing could legitimately command weight to help establish what is settled law on those grounds. It is also possible that judges could draw comfort from the fact that the journal containing the article is a specialized one, with a specialist editor and that most of the specialists in the field read it. Such a journal may be less likely to print something unsound.[70]

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65 But those seeking tenure may not write such practical expository works: see W.R. Slomanson, "Legal Scholarship Blueprint" (2000) 50 J. Leg. Ed. 431 at 437; Edwards, *supra* note 38; Kaye *supra* note 58, especially at 318-19, 320; McClintock, *ibid.*; J. Lindgren, "An Author's Manifesto" (1994) 61 U. Chi. L. Rev. 527 at 532-33. Cf. T. Voon & A.D. Mitchell, "Professors, Footnotes and the Internet" (1998) 9 Leg. Ed. Rev. 1 at 5-6. Many comments on the Edwards article are reviewed in M.J. Saks, H. Larsen & C.J. Hodne, "Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?" (1996) 30 Suffolk U.L. Rev. 353 at 356ff. And non-academics do not write many articles: Kaye, *supra* note 58 at 320. Note again Merritt & Putnam, *supra* note 62. See also Duxbury, *supra* note 44 at 23, 31-32, 42ff. Why do many academics not write on practical topics?

First come I. My name is Jowett.
There's no knowledge but I know it.
I am the Master of this College.
What I don't know, isn't knowledge.

The history and variants of this jingle, passed on orally, are described in G.C. Faber, *Jowett*, 2d ed. (London: Faber & Faber, 1957) at 21-22.

66 Hicks, *supra* note 36 at 188-89. Cf. Dickson, *supra* note 9 at 165. Cf. Edwards, *supra* note 38 at 45-46, 53. The research for this present article is incomplete, and I lack confidence in the classification of articles on this topic in the indexes. I do not recommend that anyone tender this article to any court as having any weight.

67 Hicks, *ibid.* at 186-87.

68 Yet "One learns more from a good scholar in a rage than from a score of lucid and labourious drudges": R. Kipling, *Something of Myself* (London, U.K.: Macmillan, 1937) at 32.

69 Ironically, the point that articles should be evaluated before gaining weight is more or less conceded by Nicholls in passing: *supra* note 8 at 424. That robs his article of much of its point, and the saga of all point.

70 Cf. Smyth, "Academic Writing," *supra* note 39 at 175. But whether specialized law school reviews always fit that description is open to doubt. See T.E. George & C. Guthrie, "An Empirical Evaluation of Specialized Law Reviews" (1999) 26 Fla. St. L. Rev. 813.

Now we may leave questions of settled law and turn to a different problem. In a different suit, what if there is no binding precedent,[71] an arguable question as to what the law should be, and no settled practice or reasonable expectation? Then the judges must make new law. Books or articles that merely survey the decided cases then offer little help. Counsel can truly help the court by citing valuable books or articles that advocate one view of what the law should be, over another.[72] As Justice Kaye says,[73] they offer the latest views, where the law seems to be heading, and where the immediate small problem fits into the bigger picture, including social context.[74] The parties and their counsel sometimes lack knowledge and interest in such long-term questions.[75]

Here we see the value of aims number 3 and 5 (and their various subparts). They are reputation and reasoning. Which books or articles should the judges accord weight of their own, to help make new law, aside from the internal force of their reasoning?

The author's disinterest and freedom from conflict of interest is of course a necessary condition.[76] But it is scarcely a sufficient one.

In principle, a court should give a book or article some law-making weight of its own (apart from its internal cogency) when the author brings something that either counsel or the judges lack.[77] An author who has spent years studying (and practising or teaching) a subject, in a respectable and recognized setting, thereby adds legitimate persuasiveness to his or her opinions.[78] If most other people who have studied the topic acknowledge that author's persuasiveness, that adds more legitimate weight.[79] If the scales are fairly

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71 The curious may look up the definition of "precedent" in any edition of *The Devil's Dictionary*, by Ambrose Bierce.

72 Those writings may sometimes refuse to acknowledge any contrary view, and pretend that their preference *is* the law, but (though distracting) that does not rob them of all value where the court must make law.

73 Kaye, *supra* note 58 at 319; similar are Edwards, *supra* note 38 at 45, and S.M. Martin, "The Law Review Citadel: Rodell Revisited" (1986) 71 Iowa L. Rev. 1093 at 1095-97; W.O. Douglas, "Law Reviews and Full Disclosure" (1965) 40 Wash. L. Rev. 227. Other citations are given in Smyth, "Appellate Courts," *supra* note 11 at 57. A century before, the homonymous Kay J. struck a similar note in *Re Holmes* (1890), 60 Ch.D. 267 at 269.

74 On textbooks, see *Cordell* v. *Second Clanfield Props.*, [1969] 2 Ch. 9 at 16-17, [1968] 3 All E.R. 746 [hereinafter *Cordell* cited to Ch.]. The curious may look up the sad lot of that substantive decision in later judicial consideration by the same judge; it is irrelevant here.

75 But they may also be unable or unwilling to decipher the language of the author of the article: see F. Rodell, "Goodbye to Law Reviews — Revisited" (1962) 48 Va. L. Rev. 279 at 288-89; D.P. Bryden, "Scholarship About Scholarship" (1992) 63 U. Col. L. Rev. 641 at 647.

76 See Part IV below. On bias from associations, see Rhode, *supra* note 28 at 271. For an example of it, see Rhode (*ibid.*) passim.

77 But the very respected Lord Goff of Chieveley, who cannot be accused of prejudice against academic writing, apparently declines to give academic writing any weight where there is no analysis to back up mere assertion: *Canary Wharf*, *supra* note 45 at 694.

78 Cf. *Cordell*, *supra* note 74 at 16-17. On the American Law Institute and its Restatements, see Hicks, *supra* note 36 at 189-95.

79 J.F.J., *supra* note 51; Dickson, *supra* note 9 at 165. One could compare the Hoffman citation in Smyth, "Academic Writing," *supra* note 39 at 169 n. 12.

evenly balanced, it is legitimate for a judge to let Rupert Cross or "Caesar" Wright[80] tip the scales (and it was legitimate to do so while they were alive).[81]

Where there is a highly centralized bench and bar, it is often possible for the judges to know enough about authors to evaluate published writings in that way. So the English have an advantage. But when counsel hands judges, in say Fredericton, a photocopy of an article by a professor or practitioner in Saskatoon, those judges probably have very few easy means of evaluating the author. For all they know, he could be a complete partisan, even a paid advocate.[82] The number and variety of law reviews is prodigious.[83]

If the judges really know how the law review which published the articles operates, that may give them some clues.[84] Does that journal seek outside opinions from those in the field before publishing? How? From whom? Do the better articles get published there? Has that journal been known to publish a weak or unbalanced or unreliable piece?[85] Some people try to play Zagat and create *Guides Michelin*, which rank law reviews, but how sound the result is, is questionable.[86]

A danger of relying on "peer review" for quality control[87] is that Canada has a fairly small academic and legal population.[88] The number of people known generally to be experts in a field and accessible to law review editors may be small.[89] They will all know each other.[90] Some will be friends, some rivals (or worse). Some law reviews at times publish a surprisingly high number of authors from one or two cities or universities.

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80 These names date me, but singling out one or two recent names might create resentment or other emotions.

81 Assuming that more recent events or information do not give more recent authors an advantage.

82 See Part IV below.

83 The American army of journals a few years ago was surveyed by R. Zimmermann, "Law Reviews: A Foray Through a Strange World" (1998) 47 Emory L.J. 659. One gets hints about the Canadian scene in S. Sharma, "Tracking the Cost of Canadian Legal Subscriptions" (2000) 25(1) Can. L. Libraries 34, though it also includes looseleaf texts. The last bound volume of the *Index to Canadian Legal Periodical Literature* (1999) lists 126 periodicals reviewed. The 1999-2000 vol. of the *Index to Legal Periodicals and Books* lists around 1100 titles. There are a number of on-line indexes or databases, but they appear to contain fewer than 126 Canadian titles.

84 The North American and Australian practices are contrasted in Voon & Mitchell, *supra* note 65 at 7ff.

85 See Lindgren, U. Chi. L. Rev., *supra* note 65; J. Lindgren, "Why I Comment" (1991) 24 Conn. L. Rev. 195.

86 See R. Korobkin, "Ranking Journals: Some Thoughts on Theory and Methodology" (1999) 26 Fla. St. U. L. Rev. 851; G.S. Crespi, "Ranking Specialized Law Reviews" (1999) 26 Fla. St. U. L. Rev. 837; T.E. George & C. Guthrie, "In Defence of Author Prominence" (1999) 26 Fla. St. U. L. Rev. 877; R.M. Jarvis & P.G. Coleman, "Ranking Law Reviews" (1997) 39 Ariz. L. Rev. 15. One can rank journals by numbers of cites in other journals: F.R. Shapiro, "Most-Cited Law Review Articles Revisited" (1996) 71 Chi.-Kent L. Rev. 751 at 763. A considerable number of such studies are contained and cited in a symposium "Interpreting Legal Citations" (2000) 29(1) J. Leg. Stud.

87 The Australian method of peer review is described in detail in Voon & Mitchell, *supra* note 65 at 12-15.

88 There are other problems too: see B.J. Hibbitts, "Yesterday Once More" (1996) 30 Akron L. Rev. 267 at 292-95.

89 So there may not be enough to have time to do a proper job: Voon & Mitchell, *supra* note 65 at 14.

90 The danger may be lessened if the review is double blind (*ibid.* at 13), unless the reviewer resents any interloper or can guess the identity (*ibid.* at 14).

That may explain why not all peer-reviewed Canadian legal articles seem to be of equal quality.

But it is doubtful that judges will have ready access to any reliable information about how a given law review operates. There are enough law reviews, even in Canada, that judges may well not follow a given review closely enough to evaluate the articles that it habitually publishes. Besides, the judges cannot be experts in all topics.[91]

If one follows closely one area of Canadian law for many years, one gets a chance to read hundreds, even thousands, of cases and dozens of articles on the topic. One gains a growing and firm view that the articles and case comments published on the familiar topic vary a great deal in objectivity, depth and geographical spread of research,[92] and quality of reasoning.[93] Similarly, when counsel or a judge research a narrow legal question intensely for a particular suit, they often find that many textbooks and articles are inaccurate and meagre on the precise question. Nor does there seem to be reliable correlation between the names of the law reviews and such variations in quality in familiar topics.[94]

That in turn leads one to suspect that law review articles on all the other topics relatively unfamiliar to one also vary in quality.[95]

Canadian[96] textbooks appear to be more objective and practical[97] than many articles in legal journals,[98] and do fertilize thought,[99] but they have other weaknesses. An occasional textbook seems poor. Most texts are good but are subjected to unavoidable market pressures, which limit the amount of space that the publisher can give to any one

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91 Nor can law review editors. See Hibbitts, *supra* note 88 at 291ff.

92 It is common, for example, for a Canadian appellate decision within the last decade, reported in two or three well-known law reports, not to be cited by any of the people writing on the topic. The reasons for that might make a more valuable article than this one.

93 The circumstances under which books and judgments are written differ greatly; the author of a book often hears no contrary argument. See J.F.J., *supra* note 51, quoting Fry J.'s "Preface" to the 2d edition (1881) of his famous text, *Specific Performance*. And also see Megarry J. in *Cordell*, *supra* note 74 at 16-17 (when his own textbook was cited to him.).

94 It would be an enormous amount of work to research that question, and there would probably be no way to prove one's conclusions objectively at the end.

95 Many American scholars think so. See Zimmermann, *supra* note 83 at 679ff; Lasson, *supra* note 1; cf. Bowker, *supra* note 6 at 470. The oblique motives for publishing some articles are reviewed by Slomanson, *supra* note 65; F. Rodell, "Goodbye to Law Reviews" (1936) 23 Va. L. Rev. 38 at 44. On the other hand, what is the matter with an article on perpetuities in Saskatchewan? *Pace* Rodell at 42. Some balance is offered by A. Phang, "Scholarship in Perspective" (1991) 2 Leg. Ed. Rev. 277.

96 The courts do not confine themselves parochially. One judgment cites Aristotle, Hobbes, and Kant: *R.* v. *Perka*, [1984] 2 S.C.R. 232, [1984] 6 W.W.R. 289, 55 N.R. 1 at 6-7, paras. 10-12.

97 And a few are relied on for years by counsel and judges, and so courts should not readily differ from them: *Bastin* v. *Davies*, *supra* note 20.

98 On the influence of textbooks on American judges, see Kaye, *supra* note 58 at 317, and Hicks *supra* note 36 at 185-86.

99 *Cordell*, *supra* note 74. Australian courts seem to cite textbooks much more than articles: Smyth, "Appellate Courts," *supra* note 11 at 68. That may be because Australian textbooks are often very good and oriented to practitioners more than to undergraduates. For the New Zealand Court of Appeal, see Smyth, "Judicial Citations," *supra* note 58 at 879-84.

topic thus limiting the number of topics.[100] Therefore, often the treatment of a given topic is brief, and the citation of authority for it is sparse. Most Canadian textbooks are primarily designed for teaching undergraduates in law faculties. They are not really designed for citation to courts,[101] especially on side issues that are outside the usual undergraduate curriculum.[102] And a textbook can contain clear errors.[103]

What are the judges to do when counsel cite books and articles by people unknown to the judges?

We are all uncomfortable with any "exclusionary" rule, but no one seems to be able to find any easy substitutes. If there are many well-made counterfeit $50 bills in circulation, or a number of people are passing NSF cheques, what should a reasonable merchant do? The only solution which I can suggest, is to look for objective guarantees of trustworthiness, and weigh necessity. So the problem has some analogies to the law of hearsay. If there are no such guarantees at hand, the merchant should refuse the bill or cheque.

A judge handed an article by an unknown author is in much the same position. What are those guarantees of trustworthiness? The ones listed above in Part III. If they are absent, the judge should not give the article any more weight than its internal logic or the judicial authority cited in it already offer. That may sound harsh, but why should the judge do otherwise? What if counsel handed in to the judge an unpublished manuscript from a lawyer in another province, unknown to either the judge or counsel? Would the judge give it any independent weight beyond its internal cogency? Clearly not. What legitimate weight is added by a printing press and a bindery?

IV

The problems discussed above are not the worst ones that can lurk behind an article tendered to a court.[104] To this point we have assumed that any article is written by a disinterested scholar, seeking only to improve society, justice, and law as a science.[105]

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100 That may be what Lord Goff of Chieveley was hinting at in *Canary Wharf, supra* note 45.

101 There are studies of academic citations of textbooks, such as F.R. Shapiro, "The Most-Cited Legal Books Published Since 1978" (2000) 29 J. Leg. Stud. 397.

102 Doubtless the market forces apply doubly. Canadian lawyers used to be notoriously stingy in buying textbooks: see M.W. Maxwell, "Encouraging Canadian Law Books," "Correspondence" (1952) 30 Can. Bar Rev. 956.

103 As the author of a number of published errors in textbooks, I can speak positively as to my own knowledge (or rather, ignorance). And to the best of my knowledge, information, and belief, I have discovered a number of undoubted errors in other people's legal textbooks. It would not be polite to cite any here. I will not even send a list to those who send me a self-stamped, self-addressed envelope (lest the request come from the mother of someone on the list). It has been suggested that this applies to judgments too.

104 An example which I hope is still imaginary is *Suet* v. *Haddock* in A.P. Herbert, *Uncommon Law; being sixty-six misleading cases, revised and collected in one volume*, 2d (London: Methuen & Co., 1936) at 66.

105 And maybe get tenure.

But that need not be so. The more attention that courts pay to articles in journals, the more reward there is for the litigant who can cite a favourable article in a prestigious journal. Some lawsuits and precedents involve a lot of money, directly or indirectly; others have powerful political, social, or emotional significance for governments or non-profit and lobby groups. Besides, if publishing an article which is then cited favourably by appellate courts helps one gain tenure, one could improve one's chances by writing on a topic that the courts could hardly ignore.

Therefore, sooner or later, someone will publish an article that is not disinterested, and is inspired, funded, encouraged, written, or published by someone with an axe to grind, even a lawsuit to win or lose.[106] Apparently that has been going on in the United States for over thirty-five years.[107] There have been rumours that the same thing has occurred in Canada; whether they are true, I do not know.

There is no doubt that a lawsuit can take many years to reach trial, so getting a favourable article on a relevant topic published before trial should be easy. Even after trial, an appeal can take two years to be heard, especially if one party drags its feet. So a second article should not be difficult either. There are enough journals, of various sorts, that counsel's getting published somewhere an article written by or attributed to his or her claque should not be very difficult.

Furthermore, if the person with the axe to grind and money to spend helped feed the author ideas and research material, that might actually let the author produce a product more attractive to prominent journals. And if any of their referees who vet articles in the field were friendly with the camp sponsoring the article, or were even excited by the controversy brewing, the editor's acceptance should come fairly easily too.[108]

Professor Nicholls mentioned the danger, but brushed it aside.[109] That is unfortunate, as his article was a piece of advocacy that also benefited the very journal that hired him and published the article.[110]

Therefore, judges should be careful and scrutinize the reputation and connections of the authors of articles cited. For example, a case comment from a lawyer at a law firm that has acted in the litigation in question should be handled with tongs (if at all).

However, *caveat emptor* is not the only rule. This is not purely the judges' problem. Practising lawyers are bound by the laws[111] of professional conduct, on pain of

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106 See the comments of Chambers J. in *G.T.E. Sylvania* v. *Continental T.V.* 537 F.2d 980 at 1018 (9th Cir. 1976), complaining that the majority cited case comments on the very suit in question, and fearing the tendency. And cf. "Correspondence" (1951) 29 Can. Bar Rev. 572-85.

107 Douglas, *supra* note 73 at 230 especially, citing detailed studies of specific cases.

108 Luckily, legal journals do not often have big advertisers. On the problem with advertisers in medical journals, see D. Orentlicher & M.K. Hehir, "Advertising Policies of Medical Journals" (1999) 27 J. L. Med. & Ethics 113.

109 Nicholls, *supra* note 8 at 430.

110 See discussion *supra* note 17.

111 "Ethics" is the wrong word, for it misleadingly implies optional exhortations. But cf. Rhode, *supra* note 28 at 303.

professional discipline (or maybe contempt of court). One of those rules forbids lawyers to lie or mislead with half-truths or certain forms of concealment.[112] And a corollary of that rule expressly forbids lawyers to sail under false flags. If a lawyer has a pecuniary interest in a matter, or a retainer affecting it, he or she must disclose that interest and cannot pretend to be neutral or disinterested.[113] One Code forbids a lawyer to "attempt or allow anyone else to attempt, directly or indirectly, to influence the decisions or actions of a tribunal or any of its officials by any means except open persuasion as an advocate."[114] It is arguable that those rules would apply to publishing an article to help a client or friend while pretending to be a neutral scholar.

There is a body of academic ethics that says the same thing.[115] Such a client-lawyer relation may well deprive the publication of much of its academic value for promotion and tenure.[116] Indeed, even if a teacher in a university merely gets funding or assistance from some outside source for his or her research, that may give the teacher a conflict of interest or a bias in publishing the resulting article.[117] Presumably that would be limited to funding from some person or body that could have a pecuniary interest in, or axe to grind over, the topic. Funding from a government or large foundation which regularly funds research and has no interest in the topic, should not be a problem.

Indeed, an academic writer should not send his or her published or unpublished articles to a court or judge to consider in a pending case.[118] Presumably that suggests bias.

Nor is the journal immune to questions of ethics. In the late 1940s and early 1950s, the *Canadian Bar Review* would "not in principle publish a comment [on a case] known to be written or instigated by a lawyer who has been directly involved in the case."[119]

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112 Every code of conduct says that.

113 For example, see Law Society of Alberta, *Code of Professional Conduct* (Calgary: The Law Society of Alberta, 1995) c. 10, r. 13 at 106 and commentary at 118-19.

114 Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1988) c. IX, comm. 2(d) at 35; and cf. c. XIII, comm. 4 and comm. 5 at 60.

115 P.T. Hayden, "Professional Conflicts of Interest and 'Good Practice' in Legal Education" (2000) 50 J. Leg. Ed. 358; R.K.L. Collins, "A Letter on Scholarly Ethics" (1995) 45 J. Leg. Ed. 139 at 141 citing rules of the American Law Institute. *Sed contra*, M.S. Quinn, "'Scholarly Ethics': A Response" (1996) 46 J. Leg. Ed. 110.

116 Lasson, *supra* note 1 at 935-36.

117 R.S. Eisenberg, "Academic Freedom and Academic Values in Sponsored Research" (1988) 66 Tex. L. Rev. 1363; Slomanson, *supra* note 65 at 441 citing the Association of American Law Schools' Statement of Good Practices.

118 Chief Justice McLachlin sent out a circular letter to that effect to law schools across Canada on March 28, 2000. I have not been able to find a published location for it, but it is extensively quoted in L. Chwialkowska, "Law Professor may have tried to influence court secretly" *The National Post* (25 September 2000) A1 and in L. Chwialkowska, "Chief Justice warns scholars not to sway cases" *Edmonton Journal* (26 September 2000) A8, and those stories seem to jibe with an unpublished copy of the letter. Cf. Post, *supra* note 48 at 1369-73.

119 G.V.V. Nicholls, "A Note on Policy by the Editor" (1951) 29 Can. Bar Rev. 578 at 579.

Where such situations arise, the very least that the author should do is disclose the possible conflict of interest.[120] And the law review should ask all contributors for such disclosure.[121] But whether such disclosure removes the problem in a strong case is very doubtful. After all, the recurring question is what weight an article has apart from its internal cogency. If the author has a partisan role, the answer surely is nil.

V

To this point, I have assumed that the book or article that has been cited to a court is about law, by someone with a law degree, designed for readers with a law degree, and published by a legal periodical (or publisher).

But what if the topic of the passage in question is not law,[122] but psychology, physics, medicine, sociology, or economics?[123] Then the judges will lack training to evaluate it. So may the editors who published it, if the passage or article appears in a legal journal.

In such cases, opinion seems divided on what the court should do. I will not venture to reach, or preach, a settled and general rule for judges and counsel. However, I do suggest that judges with such materials in front of them ask themselves questions like these:[124]

(a) Have all counsel had notice that this might be used against them and a fair chance to test it or counter it?
(b) Would the usual methods used for expert evidence be required, properly to test or counter it? (They are threshold tests, expertise, oath, cross-examination, and rebuttal evidence.)
(c) Do I fully understand this material and the basis for it (experiments, citation of authority)?
(d) Have I training or experience in the field?
(e) Is the proposition admitted, notorious, novel, or controversial?
(f) How central might its role be in the judgment proposed?
(g) Has this publication undergone peer review from people in the field (psychology, physics, etc., *not* law)?
(h) Do I know how respected this author is in his or her field?

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120 Douglas, *supra* note 73 at 232; cf. Hayden, *supra* note 115 at 371ff especially. One recent case comment in a specialized law report very properly discloses funding from three bodies, two of which could well have somewhat differing perspectives. I will avoid unintended innuendo by not giving an exact cite. And some law reviews would not publish a case comment while an appeal was pending: Duxbury, *supra* note 44 at 107, 109.

121 Collins, *supra* note 115 at 141; cf. Nicholls, *supra* note 119.

122 The cite counters have measured this in the US alone, and found it growing. See F. Schauer & V.J. Wise, "Nonlegal Information and the Delegalization of Law" (2000) 29 J. Leg. Stud. 495.

123 That seems to have been the case when the Chief Justice of Canada would not receive the *Canadian Bar Review* as "authority" in 1950: see Bale, *supra* note 5. Once again, Professor Nicholls seems to have directed his gaze to a question somewhat off topic.

124 Maybe this will enable a multi-pronged test. See P. Schlag "Writing for Judges" (1992) 63 U. Colo. L. Rev. 419 at 422.

If judges do not ask such questions, there is some danger that one party will try to bootleg surprise evidence into court, outside and long after the evidence-gathering stage, indeed on appeal. A book of authorities is not a transcript of evidence.[125]

VI

Therefore, we return to the starting point of our inquiry. The pre-1950 tendency was suspicious of non-judicial authority; the 1990s tendency was indiscriminately receptive. Both views are often buttressed by superficial approaches to the topic.

Judges' duty is to make decisions, and make them carefully. It behoves judges to read every precedent or writing that counsel puts before them, whatever its source. But it should take more than that for judges to act on such material. Neither love of scholarship, desire to appear learned and informed, nor fear of ridicule for supposed ignorance or caution, should move judges. Those who would call the judges dragons are sometimes wrong. Judges often do less harm in giving unverified and unverifiable non-judicial writing no independent weight than in letting it tip the scales.

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[125] Cf. Binnie J. alone, in *Public School Boards' Assn.* v. *Alberta (A.G.)*, [1999] 3 S.C.R. 845, 89 Alta. L.R. (3d) 1; and in (#2) [2000] 1 S.C.R. 44, 250 A.R. 314. Cf. *Lovelace* v. *Ontario* (26 April 2000), S.C.C. Bulletin 800, [1997] S.C.C.A. No. 427, online: QL (SCCA); Binnie J. alone, in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (3 May 2000), S.C.C. Bulletin 916, [2000] S.C.C.A. No. 106, online: QL (SCCA); Binnie J. alone, in *Ahani* v. *Canada (Minister of Citizenship & Immigration)* (3 May 2000), S.C.C. Bulletin 917, [2000] S.C.C.A. No. 120, online: QL (SCCA); *R.* v. *Powley* (2001), 196 D.L.R. (4th) 221 at 246-47 (Ont. C.A.).