Some Problems with Extrajudicial Writing

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Abstract

Since the Second World War, judges in Australia and the United Kingdom have increasingly written legal articles and textbooks. The purpose of this article is to test current dogma, which paints as innocuous the practice of extrajudicial writing on points of law, by showing that there are some very real problems raised by the practice; problems that threaten the integrity of the judiciary. We argue that committed writing by sitting judges amounts to prejudging of potential legal issues, and acts as a signal to potential litigants. It is also argued that committed extrajudicial writing differs in its effects to holdings in previous cases; that it is different in fundamental ways from the writing of academics who subsequently become judges or the advocacy of barristers and solicitors who go on to become judges, and that its contemporary prevalence is not a measure of its appropriateness. Finally, we will offer a solution to the problems that we have identified: judicial silence.

> *…I have been surprised (to use a mild word) at the increasing number of articles and speeches by judges, especially Supreme Court Justices, in the past 20 years in which they discuss all sorts of issues that seem likely to come before them.*[1]

I Introduction

In this article we argue that the practice of sitting judges discussing live legal issues in legal literature raises serious problems. In particular we argue that such writing in learned journals and in legal textbooks amounts to 'prejudging' as defined by the law of apprehended bias in the United Kingdom and Australia. As Lucy notes, central to the notion of impartiality in adjudication is that judges have an attitude of 'openness to and lack of pre-judgment upon the claims of the disputants.'[2] The danger stemming from published writing about a legal issue is that the judge is tied to an answer to the legal problem and holds a stake in the intellectual outcome. Rather than possessing general thoughts or beliefs about a

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1 Andrew Kaufman, 'Judicial Ethics: The Less-often Asked Questions' (1989) 64 *Washington Law Review* 851, 867.

2 William Lucy, 'The Possibility of Impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3, 15.

legal issue, the judge has provided a public, crystallised written opinion which is likely to be replicated if the question comes before the judge. In such circumstances there is a real possibility that the judge will give the appearance that he or she will not give full consideration to the parties' arguments. In addition, such writing has the potential to signal to litigants and lawyers the issues judges want to be litigated before the courts.

These two problems — of prejudging and signalling — challenge the historically validated process of adversarial litigation in the common law. This process requires a plaintiff who has standing, who must bring a live matter before a court, and who must make a prima facie case against a defendant over whom the court has jurisdiction. In addition, the court is constrained by evidentiary and procedural rules in the processes it follows and the information upon which it acts. When these requirements are satisfied through the argumentation of professional litigators — barristers in the main — the court will hand down a decision that is binding only on the parties to the matter, even though it also states the law that will apply in the future to like cases. Judges are usually quite restrained in commenting on issues not squarely in dispute between the parties before them. When they do so comment, it is with the understanding that the comments are not law and are not binding in other disputes.[3] This framework, of course, is deviated from at times, but such deviations need to be carefully scrutinised to ensure that they do not threaten the common law's longstanding dispute resolution process. Prejudging and signalling are threats, because they will lead to a fundamental change from the historically passive role of judges, who would wait for disputes to come before the courts, to an active role where the judges openly advertise for particular disputes to be litigated.

Our argument is structured as follows. First, we explain why we believe that writing by judges in learned journals and legal textbooks is not tentative but, rather, committed. When judges write in learned journals or publish in legal textbooks, they are engaging in behaviour that requires much research, effort and thought. Ordinary human insight tells us that such writing reflects commitment on the part of the writer to the arguments made and positions adopted in the work that has been published. Such publicly articulated views are not easily cast aside and would lead fair-minded observers to doubt that judges who have written in this style would bring an impartial mind if the same legal question came before them in the courts.

Second, we outline the law of apprehended bias in the UK and Australia to show that under this law, which differs very little between the two jurisdictions, committed extrajudicial writing amounts to bias and prejudging. In our third section we examine some examples of extrajudicial writing from the UK and Australia to show how this writing offends the bias tests.

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[3] Thus, for example, the High Court of Australia from an early date has refused to hear cases that would amount to an advisory opinion of the court because of the absence of a dispute between parties whose specific rights and liabilities were in question: see *Judiciary & Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257.

In the remaining sections of the article we examine arguments that could be made against our position. The first suggests that we should trust judges to be fair and open-minded in adjudication. This we find to be unconvincing. The second considers the suggestion that our concerns are tied to a legalist conception of judging. We show, however, that whatever one's conception of judging is, committed extrajudicial writing amounts to prejudging and is bad. The third suggests that committed extrajudicial writing is not in any significant way different from earlier writing of academics who subsequently become judges or the arguments made by barristers in previous litigation. The fourth suggests that there is no difference between the previous decisions or *obiter dicta* of judges and extrajudicial writing. The fifth suggests that the practice is so wide-spread that to argue against it is futile and that extrajudicial writing by common law judges is merely replicating the practices of civil law judges.

Finally we proffer a solution to the problem that we have isolated — judicial silence. While judges can and do make important contributions to the scholarship of law, such benefits come at too great a cost by threatening the integrity of litigation and the judicial function more broadly.

In writing this article, our concern is to show why we think this type of writing by sitting judges is wrong. While we believe that the incidence of such writing is high and growing, we do not propose to adduce proof of this because we think the evidence for it is clear and manifest — as can be seen by looking at the publication pages in the website for any superior court or at the table of contents of legal journals. Therefore the examples we give are illustrative. Neither do we want to be seen to be taking a position in favour or against the propositions made by the judges in these examples**.** We also note that we are dealing with a specific form of extrajudicial writing — that which deals with live legal issues that might come before the courts. Other forms of extrajudicial writing, such as that which enters into current political controversies, are not within the scope of this article and will not be considered.

Extrajudicial commentary on live legal issues is now so widespread that many will assume that it presents no real problems. Yet it does present real problems and is an issue that demands and deserves serious analysis and critique, not passive and unthinking acceptance.

II Not Just Academic

Extrajudicial writing on points of law has largely been characterised as academic and therefore tentative. The academic label conveys the idea that the writing is far removed from the practical context of decision-making and that, therefore, the judge's mind is still open to argument. The practice is seen as innocuous and seems to have the imprimatur of historical acceptance.[4] Justice Thomas, in his

[4] John Sopinka, 'Must a Judge be a Monk — Revisited' (1996) 45 *University of New Brunswick Law Journal* 168, 171–2.

leading Australian textbook on judicial ethics, implies that the academic context provides refuge and sanitises the legal comment by judges.[5]

The ethical guidelines and literature in this area often create the impression that a judge's extrajudicial speech on points of law involves stating settled principles and therefore does not betray predispositions beyond that which ought to be found in decided cases. They convey a positivist understanding of the law: the idea that rules and principles stand ready to be neutrally interpreted and explained by the textbook or article writer. This is despite the repeated, and largely accepted, critique of positivism which has been accepted, by even legalist writers, that judging involves creativity (albeit bounded).[6] For example, the Australian Institute of Judicial Administration's Guide to Judicial Conduct states that the writing of a legal textbook by a judge is not controversial.[7] At the same time it provides that '[i]t is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity.'[8] Taken together these guidelines suggest that it is both possible and acceptable for a judge to write a textbook which does not clarify reasons for judgment or does not take a position on points of law which are open to interpretation. How such a descriptive feat is to be achieved is left unexplained. Lindell accepts that judges can write textbooks and articles but lodges the caveat that judges:

> unlike academics, should, however, not be seen to attempt to answer or foreclose the determination of questions which appear at the time of writing to be uncertain or undecided beyond merely noting their existence and summing up the opposing possible views.[9]

Despite these sentiments, we think that even the most doctrinally focussed should consider extrajudicial writing to be a problem. Once it is accepted that common law judging is inevitably creative and that judicial mastery of the law is inevitably provisional, *any* serious discussion of rules, from their identification to their elaboration, involves a judge in making, in effect, a judgment about what he

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5 James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 116–17, citing William Ross, 'Extrajudicial Speech: Charting the Boundaries of Propriety' (1989) 2 *Georgetown Journal of Legal Ethics* 589, 616. See also Judicial Conference of the United States, *Code of Conduct for United State Judges* (at 30 June 2009) Canon 4. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [25] Lord Bingham reasoned, 'We cannot, however, conceive of circumstances in which an objection [of bias] could be soundly based on … extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)…' See also *Hoekstra v HM Advocate (No 2)* (2000) SCCR 367, [23] (Lord Rodger).

6 See, for example, John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519.

7 The Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, March 2007) [5.10]. The United Kingdom Supreme Court, *Guide to Judicial Conduct* (2009), cl 3.4, provides that 'it is important for members of the [Supreme] Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary.'

8 Ibid [5.6.2]. Both clauses are subject to the guidelines that judges must take care that their conduct does not undermine independence: [2.2.2]; and should ensure that their conduct maintains and enhances impartiality: [3]. Clause 3.2 of the United Kingdom Supreme Court, *Guide to Judicial Conduct* (2009), provides to similar effect.

9 Geoffrey Lindell (ed), *The Mason Papers, Selected Articles and Speeches by Sir Anthony Mason* (Federation Press, 2007) 6.

or she thinks the law is and should be. Once this is done in a piece of committed extrajudicial writing, a judge is open to being seen as having prejudged a live legal issue. By 'live legal issue' we mean any legal issue which might come before a court and which is in any way controversial.

These defences of extrajudicial writing ignore the reality that much of the current extrajudicial literature is prescriptive and adopts an approach closely resembling judgment writing. When writing extrajudicially in journals or in textbooks judges are commonly commenting on case law and drawing firm conclusions on how doctrinal issues ought to be resolved. Far from being tentative, this literature is overtly practical and has a quality of finality. It is difficult to appreciate what counsel could possibly add to the judge's thought processes as it will appear that the judge has independently considered and decided on live legal issues. Such writing speaks of a commitment to one's expressed views. There is little, if any, room for persuasion. It conveys the appearance of bias.

There are a number of characteristics or elements which, when combined, create this impression. The first is the crystallisation of the judge's opinion in print. Articles in scholarly journals and work contained in textbooks are, normally, polished pieces of writing that are indicative of the judge's considerable time and effort and not hastily thrown together thoughts. Commonplace observations on human nature suggest that when a person has devoted considerable time and energy and then committed this work to a public audience, he or she will be committed to the position arrived at and that it will take more than ordinary argument to get them to change their minds. Such publication about moot legal issues makes life difficult for counsel arguing different views despite invocations by judges that they will, of course, be open to argument.[10] As Sir Robert Megarry sagely noted:

> The real danger for the judge is that if he frames an argument, he will put it in the way that best appeals to his own ways of thought. He is then in danger of being over-impressed by his own propositions, put in his own language. There is the risk of the judge being seduced by his own creation.[11]

The second characteristic is that the judge's position is published and widely distributed. The public nature of the judge's view further increases the cognitive investment in it. Both the judge's awareness of the audience — practitioners and scholars — and the desire to maintain the confidence of that audience, suggest that he or she will embark on this work in earnest and with gravity.

The third characteristic of the literature is that it is recorded and published at a time when the judge *is a judge*. This raises the question of motive. Why would judges want to publicly communicate their position on points of law outside of

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[10] For a recent example of such a claim, see Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 *Cambridge Law Journal* 537, 537.

[11] Sir Robert Megarry, 'Temptations of the Bench' (1980) 54 *Australian Law Journal* 61, 63. Sir Robert's discussion was framed in the context of a discussion about judges intervening and making their own arguments during litigation. We think that these observations are equally valid when applied to extrajudicial writing. See also Sir Robert's discussion of his own extrajudicial writing in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16–17 and our comments about this discussion in Part V below.

judgments? Are they attempting to lend 'scholarly' weight to a position in order to influence other — perhaps lower-ranked — judges? Are they voicing their frustrations on a wrong turn in the law? Are they signalling to the legal profession their preferred solutions to legal problems? Such motivations suggest that the judges hold emotional investment in the points that they raise. The writing is not done solely for debate but either to prove a point or correct the record. Neither can we accept the argument that the expression in print of views about live legal issues is no different in essence from the preliminary views about such issues that most judges will hold. Ordinary human observation informs us that, while it might be difficult to change the mind of a person who has an unarticulated view on a matter, it is much more difficult to do so when that person has gone to the effort of making a comprehensive argument which is then publicly available in the form of an article or textbook.

III Apprehended Bias: The Law

Impartiality is 'a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions',[12] whereas bias 'denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues.'[13] A predisposition formed without the benefit of argument in a real dispute and when held with conviction suggests that the judge will not be open to persuasion during a trial. Such a decision will subvert the adversarial process.

The common law tests for apprehended bias and their application support the notion that a judge should avoid committing to a conclusion on a point of law in an article or textbook which adopts a judicial methodology.[14] In Australia, the common law test for apprehended bias is whether 'a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question.'[15] The English test is that:

> The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility . . . that the tribunal was biased.[16]

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12 *R v S (RD)* 151 DLR 193 (4th Cir, 1997) 227 (Cory J).

13 Ibid.

14 We note, however, that Justice Hammond, writing extrajudicially on judicial ethics, argues that a valid bias claim for extrajudicial statements in literature will only arise in extreme circumstances: Grant Hammond , *Judicial Recusal, Principles, Process and Problems* (Hart Publishing, 2009) 133.

15 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 (Gleeson CJ, McHugh, Gummow and Hayne JJ) citing as authority *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488.

16 *Medicaments and Related Classes of Goods (No 1)* [2001] 1 WLR 700, 726–7 (Lord Phillips). This statement was endorsed by the House of Lords in *Porter v Magill* [2002] 2 AC 357, 494 (Lord Hope) (agreed to by Lord Bingham: 480; Lord Steyn: 481; Lord Hobhouse: 502; and Lord Scott: 511).

As Lord Hope indicated, this test removed 'any possible conflict with the test that is now applied in most Commonwealth countries and Scotland.'[17] Under either the Australian or English test, the discernment of apprehended bias involves reasoning by analogy and forming an 'objective' view of the circumstances.

The boundaries between what a judge can and cannot say have been described as 'an ill defined line',[18] criticised as essentially unworkable,[19] and it is thought that the cases generated by the common law tests are 'confused and contradictory.'[20] The cases therefore provide some, but not complete, guidance. The preponderance of authority nonetheless acknowledges that a judge's extra-judicial statement on a particular point of law can convey the impression that the judge is no longer able to hear the parties fairly. In *Ebner v Official Trustee in Bankruptcy*, a majority of the High Court said that the application of the bias principle requires two steps:

> [f]irst, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[21]

The question of bias in the context of extrajudicial statements turns on whether the judge's commitment is so strong that his or her ability to hear the parties fairly is placed in question. The authorities make it clear that the mere conclusion on a point of law is insufficient.[22] In *Re JRL; Ex parte CJL*[23] Wilson J considered that:

> [a] court of review must be careful not to exaggerate the significance of actions or statements made by a judge in the course of proceedings. There must be 'strong grounds' … for inferring the existence of a reasonable suspicion [that the judge's mind is made up].[24]

Reasons that courts have provided for the absence of such strong grounds include: the fact that the statement was of a general nature not squarely addressing the legal or factual points of a dispute;[25] that the issue was not one that might be considered afresh;[26] that the judge was merely providing the parties with the benefit of his or her thinking so that that position could be rebutted during argument;[27] and that the view was expressed towards the end of a trial

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17 [2002] 2AC 357, 494 (Lord Hope). This view is shared by one of the leading commentators in this area of the law: see, Abimbola Olowofoyeku, 'Regulating Supreme Court Recusals' [2006] *Singapore Journal of Legal Studies* 60, 79.

18 *Vakauta v Kelly* (1989) 167 CLR 568, 571 (Brennan, Deane and Gaudron JJ).

19 Sir Noel Anderson, 'The Appearance of Justice' (2004) 12 *Waikato Law Review.* 1, 11.

20 Kate Malleson, 'Judicial Bias and Disqualification after *Pinochet (no 2)*' (2000) 63 *Modern Law Review* 119, 121.

21 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

22 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100 (Gaudron and McHugh JJ).

23 (1986) 161 CLR 342.

24 Ibid 359–60 (Wilson J).

25 *NTD8 v Australian Crime Commission* [2008] FCA 984, [61] (Reeves J).

26 *Minister for Immigration and Multicultural Affairs v Jia Leging* (2001) 205 CLR 507, 564 (Hayne J).

27 *Galea v Galea* (1990) 19 NSWLR 263, 279 (Kirby ACJ) (NSW Supreme Court).

when it is reasonable for a judge to have settled on that view.[28] These are not typical hallmarks of extrajudicial comments on points of law published in articles and texts. As the examples in the next section of this paper demonstrate, our concern is with judges who are writing on controversial points and where their views are directly addressing issues that might be raised in court and are being made without the benefit of any argument. Their commitment suggests that argument from counsel would be superfluous.

An example of such commitment by a judge is provided in a series of actions surrounding a drug importation prosecution in Scotland where Lord Rodger (whose judgment was supported in the Privy Council) applied the law dealing with bias. The case involved a judge (Lord McCluskey) who was asked to recuse himself because he had given public lectures and written newspaper articles which were critical of the European Convention on Human Rights when the defendants sought redress under that very Convention.[29] Lord Rodger, who delivered the opinion of the High Court of Justiciary, described the law on apprehended and actual bias and noted that Lord McCluskey's imagery was 'overwhelmingly negative' and that the views expressed by him about the Convention could not be 'dismissed as a passing fancy'.[30] In particular Lord Rodger noted as important to his decision the tone and colourful nature of Lord McCluskey's writing.[31]

While we do not differ from Lord Rodger's description of the law,[32] we take issue with his explanation of its operation. First, it is unconvincing to emphasise the tone of a judge's comments or how striking or colourful it is. Lord McCluskey certainly used striking language and no one who had read the newspaper articles would have been left wondering what his attitude to the Convention was. But does the tone of the language used really matter? Is well modulated bias any better than shrill bias? Calm, even boring, legal writing can appear just as committed as colourfully expressed writing. In fact, it could be argued that legal analysis presented in everyday legal language is more likely to convey an impression of thought, consideration and a commitment to one's view than a striking use of language which might convey a passing whim or ill-thought irritation.[33] Second, as our examples show, we believe that if a judge goes to the trouble of writing a considered view on a contested legal issue in a legal scholarly journal or textbook, this illustrates views that are certainly deep seated and may also be longstanding.

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28 *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310, 317 (Lockhart, Pincus and Gummow JJ) (Federal Court of Australia).

29 *Hoekstra (Lieuwe) v HM Advocate (No3)* [2000] SLT 605 (Scottish High Court of Justiciary) ('*Hoekstra (No 3)*'); *Hoekstra v HM Advocate* [2001] 1 AC 216 (Privy Council).

30 *Hoekstra (No3)* [2000] SLT 605, 611 (Lord Rodger).

31 Ibid 612.

32 Indeed, we note that he accepts that there is no substantial difference between the Scottish and English position on apprehended bias and, by implication, no substantial difference between both of them and the Australian position. *Hoekstra (No3)* [2000] SLT 605 at 610–11.

33 Justice Hammond similarly confuses style with conviction by suggesting that a judge who 'rubbishes' other views of the law is more likely to raise apprehensions of bias: Hammond, above n 14, 133.

The examples of judicial comment presented in the next section of this paper are of a similar quality to those made by Lord McCluskey. They involve the expression of strong views about legal issues without the benefit of any argument by barristers in the context of a real dispute.

IV Some Examples of Extrajudicial Writing

There are many recent examples of extrajudicial writing that is not academic and tentative. While it is not our intention to carry out a comprehensive study of recent extrajudicial writing in the UK and Australia, the following examples illustrate our concerns in concrete terms. As indicated above, these examples are illustrative only and we should not be understood as making any comment about the appropriateness or otherwise of the substantive arguments made by the judges. As numerous other examples could have been used, our selection should not be taken as personal attacks on the judges concerned. These examples are only a few of the many that could be examined.

A *The United Kingdom*

Our examples from the UK concern and surround the House of Lords decision in *Pepper (Inspector of Taxes) v Hart*[34] and a series of articles written by Lord Steyn in which he first praised then criticised this decision.

In *Pepper*, the House of Lords held that in certain circumstances the then existing exclusionary rule relating to the construction of statutes should be relaxed to enable Hansard to be consulted as an aid to construction. The statute in question involved a taxation matter and the taxpayers sought to use statements made by the relevant Parliamentary Secretary to show that it was not intended to make them liable to pay tax for benefits received from the school in which they taught. The House of Lords found for the taxpayers.

In an article published in 1996, Lord Steyn (who did not sit in *Pepper*) claimed that: 'The bold decision of the House of Lords in *Pepper v Hart* is simply a culmination of a more realistic approach to the interpretation of statutes.'[35]

However, in the following three years, separate articles written by three judges — Lord Hoffman, Lightman J and Lord Millett — presented critical reflections on *Pepper*. The three judges thought that there were practical and theoretical problems with the decision and were clearly unhappy with it.[36] Indeed, Lord

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[34] [1993] AC 593('*Pepper*').

[35] Johan Steyn, 'Does Legal Formalism Hold Sway in England?' [1996] *Current Legal Problems* 43. In this paper attention will only be paid to Lord Steyn's discussion of *Pepper*. However, in this and other publications by Lord Steyn there are many examples of the sort of prejudging that is criticised in this paper. In this very article it could be shown that Lord Steyn prejudges live legal issues emanating from the cases of *Walford v Miles* [1992] 2 AC 128, and *White v Jones* [1995] 2 WLR 187 and indicates his support for the further development of privacy in English law.

[36] Lord Hoffman, 'The Intolerable Wrestle with Words and Meanings' (1997) 114 *South African Law Journal* 656, 668–9: Gavin Lightman, 'Civil Litigation in the 21st Century' (1998) 17 *Civil Justice Quarterly* 373, 383: Lord Millett, 'Construing Statutes' (1999) 20 *Statute Law Review*107, 110. As with Lord Steyn's articles, the articles by Lord Hoffman and Justice Lightman contain numerous

Millet felt comfortable in saying that in the seven years since the decision in *Pepper*:

> I am aware of no case where the material has been determinative, not even in *Pepper v Hart* itself. But the decision was not only misguided in practical terms, it was in my view contrary to principle. … A simple way of reducing the costs of litigation and returning to principle at the same time would be to pass a short Act abolishing the rule in *Pepper v Hart*.[37]

These articles, and *not*, one should note, the argument of counsel in a concrete dispute before him, seemed to have had a strong impact on Lord Steyn. In a chapter of a book published in 2000 he had the following to say:

> In a Bentham lecture delivered in 1996 I welcomed the decision in *Pepper v Hart*. Now I am far less confident that the balance of principled arguments favoured the *Pepper v Hart* decision. . . [88] I am now inclined to agree with … Lord Hoffman that the *Pepper v Hart* decision has by the judgment of experience probably been shown to be an undesirable luxury in our legal system. The pragmatic case against the decision in *Pepper v Hart* is strong.[38]

Here we have a judge from the very highest court in the land first writing in praise of *Pepper* and subsequently (and both times extrajudicially and not in response to arguments of counsel in matters before the courts) criticising it in terms that indicate a concluded view on the merits of the decision. Ordinary human experience tells us that a person who has expressed one view publicly and then publicly retracted that view in considered language is unlikely to change his mind one more time. In other words, it is clear that if presented with a case raising issues about the applicability of *Pepper*, Lord Steyn would have looked favourably on arguments restricting the effect of *Pepper*, or, indeed, even to having it overruled. At the same time, it is clear that counsel arguing in favour of *Pepper* would, not unnaturally, feel that Lord Steyn had already come to a position on these arguments before they could be made. By this stage it would not be inaccurate to argue that Lord Steyn has prejudged the merits of applying and restricting *Pepper*. But, unfortunately, Lord Steyn did not stop there.

In a paper given at Oxford University in 2000,[39] Lord Steyn summarised his previous treatment of *Pepper* as consisting of an initial 'untutored' view in favour of the decision and his subsequent reversal of this view on grounds of practical operation of that case.[40] He saw the lecture as demanding that he 'should examine the subject more deeply and comprehensively'[41] and he did this by examining in

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examples of prejudging by both judges on live legal issues in addition to those raised by *Pepper*. For the sake of brevity these instances will not be considered in this paper.

37 Lord Millett, above n 36, 110. Although this paper will restrict itself to Lord Steyn's ruminations on *Pepper* it is worth pondering the nature of the signal being sent by Lord Millett to barristers contemplating using *Pepper*.

38 Johan Steyn, 'Interpretation: Legal Texts and their Landscape' In B Markesinis (ed), in B Markensis (ed), *The Clifford Chance Lectures: The Coming Together of the Common Law and Civil Law* (Hart Publishing, 2000) 79, 87–8 (citations omitted).

39 Later published as Johan Steyn, 'Pepper v Hart: *A Re-examination*' (2001) 21 *Oxford Journal of Legal Studies* 59.

40 Ibid 63.

41 Ibid 64.

some detail arguments based on the rule of law, legality and constitutional concerns, as well as more straightforward legal analysis dealing with possible interpretations of the rule in *Pepper*.[42] Clearly, for Lord Steyn the incongruity of dealing with a complex and contested legal issue in a lecture was not apparent. Holding that matter aside, it is to be noted that Lord Steyn's analysis of the arguments against a wide reading and application of *Pepper* was carried out in some depth and at some length. He had clearly thought deeply about the matter and his analysis shows this. Lord Steyn concluded his treatment in the following terms:

> If the principle footholds of my reasoning are secure, it follows that *Pepper v Hart* is not good law. What are the chances of *Pepper v Hart* being reversed? Being a decision that marks a shift of power from Parliament to the executive the prospect of any government initiating legislation to reverse it must be slight. It is, however, possible that *Pepper v Hart* may be confined by judicial decision to be used only against the executive when it seems to go back on an assurance given to Parliament.'[43]

Here we have a member of the House of Lords publicly articulating and defending his understanding of the effect of *Pepper*. His speech reads as a judgment; it includes a number of pages of carefully reasoned argument and states his position as a clearly delineated legal rule. It is implausible to believe, we suggest, that if a case dealing with *Pepper* had come before him in his judicial capacity in the House of Lords he would have decided differently to the position that he outlined in his speech at Oxford. And although he might not have intended it, the speech could also operate as a signal to the Bar outlining what he would say if presented with a case dealing with this topic. It is hard to imagine a clearer case of prejudging. But Lord Steyn did not stop at outlining what his preferred legal position was. He also provided a legal route to get there. He did this by discussing the increasing use of Explanatory Notes in legislation in the English Parliament. For Lord Steyn, they raised the issue of whether and to what extent they can be referred to by the courts in interpreting legislation.

> [W]hen the occasion presents itself to decide whether in principle such materials may be admitted, the question of the future status of *Pepper v Hart* is likely to arise. That may be an opportunity to confine *Pepper v Hart* as I have suggested.[44]

So, not only has Lord Steyn engaged in prejudging by discussing and pronouncing on arguments about the reach and meaning of *Pepper*; he has also provided a legal route which might be attractive to the judges wishing to limit the effect of *Pepper*. As he showed in yet another article in 2003, where he repeated the sentiments expressed in his Oxford speech,[45] the status, reach and operation of *Pepper* were indeed live legal issues when Lord Steyn was writing about them. We know this because Lord Steyn refers to two decisions which had considered *Pepper — R v Secretary of State for the Environment, Transport and Regions: Ex*

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42 Ibid 64–8.
43 Ibid 70 (emphasis in original).
44 Ibid 72.
45 Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5.

parte Spath Holme[46] and *Robinson v Secretary of State for Northern Ireland*.[47] Indeed in the latter, Lord Hoffman endorsed the arguments Lord Steyn made regarding *Pepper* in his Oxford speech.[48]

If we compare this lengthy series of publications, containing complex legal and constitutional arguments surrounding *Pepper* and outlining not only his preferred legal position but also a practical legal route to achieving this goal, with the tests adumbrated in English and Australian authority on bias, it becomes clear that Lord Steyn had effectively prejudged the issue of the applicability, reach and continued operation of *Pepper*. Would a fair-minded lay observer think that Lord Steyn would have brought an unbiased mind if a case involving *Pepper* had come before him? We think not. Do we think that this series of articles would signal to the legal profession what Lord Steyn would decide if a case involving *Pepper* had come before him? We think so.

B *Australia*

Our first Australian example is an article by New South Wales Court of Appeal judge, Justice Ipp. This article deals with the topic of malicious prosecution and was published in a journal widely read by legal practitioners; the *Australian Law Journal*. The purpose of his article is to demonstrate that one of his contemporaries, O'Keefe J, in *Nye v New South Wales*,[49] was incorrect in adopting the reasoning of Jordan CJ of the New South Wales Supreme Court where Jordan CJ suggested that a plaintiff can succeed 'merely by proving that the defendant prosecutor did not believe the plaintiff to be guilty of the offence in question.'[50] Justice Ipp's article is eight pages in length, is the product of careful consideration of all the relevant authorities and is highly polished and tightly reasoned. While generally respectful of Jordan CJ, Ipp J nonetheless suggests that his honour was recalcitrant in propounding a test which conflicted with High Court authority, in particular Dixon J's statement of the law in *Sharp v Biggs*.[51] There is nothing equivocal about Ipp J's view on this point. It is difficult to conceive of other information or lines of reasoning that would elucidate the issue further. If the arguments of a former Chief Justice of the New South Wales Supreme Court cannot sway Ipp J in his reasoning, it is unlikely that a contemporary barrister would have better luck if the question were to come before Ipp J in court.

Justice Ipp adopts a typical legalist approach in the article in order to establish that Dixon J's position — that a plaintiff must establish that the prosecution held a belief that 'the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted,' — represents the law in Australia. He works through the relevant Australian and English

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46 [2001] 2 WLR 15.
47 [2002] UKHL 32.
48 Ibid [40] (Lord Hoffman).
49 [2004] Aust Torts Reports 81-725 (NSW CA).
50 D A Ipp, 'Must a Prosecutor Believe that the Accused is Guilty? Or, Was Sir Frederick Jordan Being Recalcitrant?' (2005) 79 *Australian Law Journal* 233, 233.
51 (1932) 48 CLR 81, 106 (Dixon J).

authorities and explains the correct interpretation of obiter dicta which might otherwise suggest support for Jordan CJ's position. He also incorporates policy considerations to bolster his claim that Dixon J's preferred rule ought to be maintained.[52] The approach is typically judicial. It could easily be transposed into a judgment with very little alteration.[53]

Our remaining Australian examples are drawn from legal textbooks. The practical and conclusive nature of the extrajudicial statements made in them is highlighted by the incorporation of such statements in actual judgments. In *Harris v Digital Pulse Pty Ltd*[54] Heydon JA, then a Justice of the New South Wales Court of Appeal, rejected the claim that exemplary damages should be awarded for a breach of fiduciary duty arising out of a contract. In essence, he reasoned that to permit such an award would be at odds with the dominant line of authority and would amount to a 'fusion fallacy' by intermingling a common law remedy with an equitable right. Heydon JA reasoned that such an award would be 'a radical change, having no justification in traditional thinking, properly understood'[55] and that the change could only be achieved through legislation.[56] This is consistent with the position taken in the fourth edition of *Equity Doctrines and Remedies*[57] which Heydon JA co-authored and co-edited. The textbook states that the common law remedy of exemplary damages should not be awarded for an equitable wrong[58] and, more generally, that common law rights and remedies should not be intermingled with equitable rights and remedies.[59]Meagher, Heydon and Leeming had made two specific references to the trial judge's decision in *Digital Pulse Pty Ltd v Harris*. First they expressed their 'amazement' at Palmer J's finding that 'breaches of trust are to be attended by exemplary damages.'[60] Second, they said that Palmer J, 'the poor man's Robin Cooke', 'disregarded all this [referring to a

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52 Ipp above n 50, 240.

53 In fact Justice Beazley explicitly drew from Ipp J's article to settle the same point of law in *A v State of New South Wales* (2005) 63 NSWLR 681 685 (Beazley J) (NSWCA). There are many other examples of Australian judges adopting a largely judicial approach to writing legal scholarship and of other judges either adopting that judge's prescription and method in future judgments or even treating it as authoritative. See, for example, Justice Callinan's very specific condemnation of the High Court's interpretation of the external affairs power in I D F Callinan 'International Law and Australian Sovereignty' (2005) 49 *Quadrant* 9**.** This prompted Rose to comment that 'One must hope that, if these constitutional issues happened to come before the High Court in some other context before Justice Callinan retires (in or before 2007), and *if he was able to sit in the proceedings*, a balanced and informed understanding of the constitutional issues would — to adapt an expression by Sir Samuel Griffith — "find entrance to [his] mind".'(emphasis added): Dennis Rose, 'Justice Callinan on the Tasmanian Dam Case' (2005) 49 *Quadrant* 61.

54 (2003) 56 NSWLR 298 (NSW CA).

55 Ibid 413.

56 Ibid 402–3.

57 R Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: doctrines and remedies* (LexisNexis Butterworths, 4th ed, 2002).

58 Ibid 54. For the expression of the contrary position in the extra-judicial writing of a judge see Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in W R Cornish et al, (eds), *Restitution Past, Present & Future* (Hart Publishing, 1998) 255.

59 Meagher, Heydon and Leeming, above n 57, 52–4. In *Harris v Digital Pulse Ptd Ltd*, Heydon JA cites an earlier edition of this text, which he did not co-author, as evidencing the 'hostility' of Australian lawyers to the proposition that exemplary damages are available for breaches of equitable duty: (2003) 56 NSWLR 298, 363.

60 Ibid 80.

line of cases and articles] learning and principle' to 'decide that damages could be awarded in a claim for equitable compensation.[61] They concluded with the hope 'that this is a decision which will never be followed.'[62]

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[63] Heydon and Gummow JJ, as part of a unanimous High Court, overturned the New South Wales Court of Appeal's decision to expand the role of unjust enrichment to claims for recipient liability (the first limb of *Barnes v Addy*[64]) in a manner that was consistent with the position taken in both the third and fourth editions of *Equity Doctrines and Remedies*[65] and the sixth and seventh edition of *Jacob's Law of Trusts.*[66] Gummow J co-authored the third edition of *Equity Doctrine and Remedies* and the sixth edition of *Jacob's Law of Trusts*.[67] Heydon J co-authored the fourth edition of the former text and the seventh edition of *Jacob's*. In the seventh edition of *Jacob's* Heydon J and Leeming specifically referred to the New South Wales Court of Appeal's decision in *Say-Dee Pty Ltd v Farah Constructions*[68] and condemned the reasoning:

> Some think that liability under the first limb of *Barnes v Addy* does not depend on acquisition of property with notice, but merely on unjust enrichment. These views have been expressed in cases, the decision of which did not call for their expression. [Citing *Koorootang Nominees Pty Ltd v Australian & New Zealand Banking Group* Ltd [1998] 3 VR 16 at 95–105; *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* (2005) NSWCA 309 [206]–[232]]. These cases exhibit a violent approach to authority, and have already been subjected to convincing criticism.[69]

The textbook therefore answered the issue pending before the High Court with explicit reference to the New South Wales Court of Appeal decision that was on appeal. The High Court judgment mirrored the reasoning outlined in the textbook albeit in an expanded form.

In each of the above examples, the views expressed in a textbook later appeared in a judgment by the same judge dealing with the very same legal issue. The textbooks are lengthy, carefully considered, detailed and polished works. The textbooks go beyond stating general principles and in each of the judgments above, the position taken accords with a particular position taken by the textbook on a

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61 Ibid 839.

62 Ibid.

63 (2007) 230 CLR 89.

64 (1874) LR 9 Ch App 244.

65 Meagher, Heydon and Leeming, above n 57, 1131; R Meagher, WMC *Gummow* and J Lehane, *Equity Doctrines and Remedies* (Butterworths , 3rd ed 1992) 881 (emphasis added).

66 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 7th ed, 2006) 289; R P Meagher and WMC Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 6th ed, 1997) 334–5).

67 Gummow J's attitude towards the use and abuse of the unjust enrichment doctrine is also captured in a number of his articles. See WMC Gummow, 'Unjust Enrichment, Restitution and Proprietary Remedies' in Paul D Finn (ed), *Essays on Restitution* (Law Book Company, 1990).

68 [2005] NSWCA 309.

69 Heydon and Leeming, above n 66, 289. The text cites the case note by James Watson, 'Breach of Fiduciary Duty: Whether Volunteer Who Innocently Receives Property Must Restore It' (2006) 80 *Australian Law Journal* 172 for the convincing criticism.

doctrinal point. It is difficult to interpret these examples as anything other than prejudging by the judges in question. The fact that the textbooks are co-authored and the positions are sometimes repeated in multiple editions of the text does not diminish the strong association between the text and its judicial author. We consider that when repeating a comment in a new edition it is as though that position is being put anew and that, unless expressly stated otherwise, all co-authors stand by the material published in the edition that bears their name. In addition, the textbooks clearly signal to the legal profession what the judge thinks about a legal issue and that litigation on this point would be welcomed by the judge.

Having raised our concerns about committed judicial writing, we now consider possible objections to our position.

V Can't We Trust Judges?

A large part of the law in the area of bias involves judges sorting the tentative from the committed judicial view. Tests for bias draw upon perceptions of the strength of the judge's commitment to a particular position and the cognitive abilities of the judge; that is, whether their mental and moral fibre means that they can overcome such commitments. Because of the latter consideration, discussion often turns to the question of how much faith or confidence we hold in judges. Some commentary polarises discussion by suggesting that those who complain about a judge's extrajudicial views underestimate the ability of the judge to withstand the temptation a committed position raises. This suggestion both ignores the range of opinions on this issue and generally debases what could otherwise be an enlightening discussion of the values and dangers of extrajudicial speech. Further, grounding the discussion on the question on how much we should trust a judge can lead to an *ad hominem* argument. It allows supporters of extrajudicial speech to dismiss the critics on the basis that they must be making the broader claim that judges are generally bad or untrustworthy. Such a position leaves very little scope to raise a genuine concern based on the idea that all, including judges, are susceptible to confirmation bias: the temptation to confirm and accept those propositions that confirm or give merit to thoughts and opinions previously held, especially those which place one in an advantageous light.

We recognise, as does Lucy, that judges are capable of 'acting contrary to their pre-judgments' in cases 'in which they lament the decision the law compels them to reach'.[70] Indeed, Sir Robert Megarry, in response to an argument based on his own extrajudicial writing, made it clear that he would not necessarily follow his own ideas and that that the 'purifying ordeal of skilled argument on the specific facts of a contested case' would provide the ultimate source for his decision.[71] Nevertheless, the possibility of pre-judgment following committed legal writing seems so strong that it would be naive to believe that judges can routinely ignore the effects of such writing. It is not our argument that judges cannot disassociate themselves from extrajudicial comments made while they are judges; of course

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70 Lucy, above n 2, 15.

71 *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16.

they can. Rather, it is that it is more likely than not that they will follow previously and publicly articulated positions because that is the way that human nature works. The occasional exception cannot, by itself, justify a practice that is fraught with the possibility of bias.

VI Judicial Politics — Is a Concern with Extrajudicial Writing Inherently Conservative?

Judicial restraint is most often associated with conservative judicial politics. An argument that judges should limit their extrajudicial writing may therefore seem aligned with a conservative cause. This is wrong. The idea that judges ought to place themselves in a position where they can consider and hear the argument of both sides is neither a conservative nor a liberal ideal but central to adversarial litigation in the common law. It cuts across both sides of judicial politics.

Further, the risk that the judge will not hear the parties is relevant irrespective of the legal method adopted in the article or textbook. It makes no difference whether the comment adopts a progressive instrumental or traditional incremental approach to developing the law. Examples of both can be found in the literature, with some judges developing socio-economic theories, while others base their critique and legalist prescription on prior cases or hypothetical scenarios. In either case, the fact that the judges have effectively determined the merits of a dispute has the potential to dull their receptiveness to argument and increase the likelihood of bias. The fact that judges will ultimately decide the case based on a legalist interpretation of past authorities is no guarantee that they will carefully consider the interests and arguments of the litigants. They will be just as susceptible to the risk of bias, by favouring their predetermined views. Indeed, many of the examples of strongly committed extrajudicial comments on points of law are written by judges of a traditional legalist bent, some examples of which have been provided earlier in this paper. Even modern sceptics of judicial objectivity should appreciate the difference between a judge deciding a case according to a range of personal preferences and a judge actively and publicly closing out contestable lines of legal argument, creating a shift in the power relations between adversaries.

The only context in which the objection to bias may accord with a line of judicial politics is where the extrajudicial comment amounting to bias is thought necessary in order to fulfil a competing goal. One of the most obvious competing goals is judicial accountability.[72] There may be strong pragmatic reasons for allowing extrajudicial speech which provides insights into a judge's reasoning

[72] Barry identifies that the competing value to impartiality and independence in this context is judicial accountability: Leo Barry 'Judicial Free Speech and judicial Discipline: A Trial Judge's Perspective on Judicial Independence' (1996) 45 *University of New Brunswick Law Journal* 79, 80. Free speech is another obvious competing goal. In *Republican Party of Minnesota v White* 122 S Ct 2528(2002) the United States Supreme Court held that a legal restriction preventing a candidate for judicial office from announcing views on disputed legal and political issues violated the First Amendment right to freedom of speech. However, this judgment does not impact on recusal standards once an individual becomes a judge. For example, Justice Kennedy said that the court's judgment should not be construed as diminishing the importance of maintaining judicial integrity: at 2544.

processes and predispositions and which therefore increase accountability. Where the judiciary is highly politicised, where decision-making seems arbitrary, imposed by will rather than reason, and law is interpreted and made to advance contemporary societal interests, then the interests of individuals will always be subordinate to the greater good as interpreted by the judge.[73] Maintaining the appearance of judicial impartiality by limiting judges' ability to comment in these circumstances may in fact give judges free rein to exercise power independent of public scrutiny. For this reason, greater knowledge about the judge and his or her political perspectives may increase confidence in such a system rather than undermine it.

This is a particular issue which is faced in America and Canada, where it is increasingly recognised that judging at all levels is highly political, largely on account of those countries' courts' roles in interpreting a constitutionally entrenched Bill of Rights. Commentators in these jurisdictions are concerned that extrajudicial writing signals that a judge's decision-making will be dominated by certain normative concerns and thus will be highly instrumental in nature. For example, Webber writes of the danger of extrajudicial speech dominating the court's reasoning, leading it to forsake its ability to 'protect individual rights against the pure instrumentalism of the legislature and executive.'[74] Assessments of extrajudicial speech are therefore mixed in with perspectives on the propriety of instrumental judging practices.

The tests for bias in Australia and England have not traditionally adopted a proportionality analysis and, as noted earlier, extrajudicial literature from these jurisdictions does not often adopt a highly instrumental approach to law making.[75] In these jurisdictions the impartiality of the judiciary remains paramount. It is not forsaken for reasons of efficiency or accountability. In Australia, some have gone so far as to suggest that impartiality is a constitutional right of litigants and that attempts by some state legislatures to qualify the common law bias test for reasons of efficiency, for example, are unconstitutional.[76] For these reasons, objections to extrajudicial speech should not be characterised as the product of purely conservative anxieties.

VII Is Extrajudicial Writing Really Different from Previous Scholarly Writing or the Argumentation of Barristers?

It might be argued that extrajudicial scholarly writing is not different from the scholarly writing of academics who subsequently go onto the bench, or of the arguments of barristers made before they become judges. If this is the case, it seems to follow that these activities amount to prejudgment, requiring, at the

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73 Brian Flanagan, 'Scalia, Hamdan and the Principles of Subject Matter Recusal' (2007) 19 *Denning Law Journal* 150, 162.

74 Jeremy Webber, 'The Limits to Judges' Free Speech: A Comment on the Report to the Committee of Investigation into the Conduct of the Hon Mr Justice Berger' (1984) 29 *McGill Law Journal* 369, 377, 383–6.

75 However we appreciate the potential for this to change in the UK in light of the *Human Rights Act 1998* (UK).

76 See dicta of Gaudron and Kirby JJ in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 368 (Gaudron J) 373 (Kirby J).

very least, recusal in any cases raising issues that have been the subject of a former academic's scholarly writing or have been litigated by a former barrister. Indeed, it might be suggested that these concerns undermine our argument because of the ramifications for judging generally if such a widespread recusal were necessary, given the range of legal topics upon which legal academics write and barristers litigate.

Our response to such arguments is that academic writing by academics who subsequently become judges and litigation by barristers before appointment to the bench are different from extrajudicial writing by judges.

We do not deny that for most academics their scholarly writing involves much time and effort and that, as a consequence, it is likely that they will be committed to the position adopted in their publications. This is simply an observation about human nature. But the difference between such academics and judges lies in that very difference; that is, academics are not judges. Appointment to the bench is a rite of passage: it involves a private decision to become a judge with all that is associated with this position and a public affirmation to judge according to the law and the merits of a case. We should not assume that this rite of passage is taken other than very seriously by the overwhelming majority of those appointed as judges. An academic appointed as a judge will inevitably look back on her or his writing from a distance created by a public ritual designed to inculcate judicial virtues and practices and a particular judicial mindset.

Similar considerations apply to barristers who become judges. Of course, we recognise that barristers are paid to argue for positions that they might not support — indeed, they may have argued for two or more sides of a legal issue. Nevertheless, litigating, too, is demanding of time and effort, and human nature being what it is, barristers, too, are likely to become committed to the positions which they have argued before a court. But we believe that the private decision to become a judge and the public affirmation of this decision on oath to administer the law, works to cleanse a barrister of commitments to formerly argued positions — at least as much as is humanly possible.

By writing *after* appointment judges are engaged in a different activity to that of legal academics and practising barristers. To write in a committed fashion while a judge sends a signal, one that we would argue is an accurate one, that the judge has prejudged a legal issue that is moot. Being a judge is different from being a legal academic or a barrister, and the significance that attaches to committed writing by a sitting judge is different too.

VIII Is Extrajudicial Writing Different from Judgments Handed down in Previous Cases or from Obiter Dicta Contained in those Cases?

It might be argued that previous decisions amount to prejudging by the judge involved. After all, a good barrister will often be able to predict in some cases what a judge is likely to decide in a current dispute merely by examining the

language and holding of that judge in a previous judgment. How does this differ from views expressed in extrajudicial writing?

The history and tradition of the common law requires judges to commit to certain doctrinal positions in judgments. These commitments are legitimate and are binding in future matters because they are grounded by a fair hearing of the arguments and issues raised by counsel. They are open to revision in the light of argument by counsel in a real dispute where the arguments are not abstract but driven by interest.[77] By contrast, when a judge writes extrajudicially, that judge is giving effect to purely personal preferences conceived in the abstract and untested in the forensic arena of the courtroom. Previous judgments therefore can be clearly distinguished from extrajudicial writing on points of law.

We do not intend to add to the vast literature on the topic of obiter dicta in judgments. But we would like to distinguish between the phenomena of such pronouncements in judgments and extrajudicial writing. First, some parts of judgments might wear the appearance of obiter dicta but are in actuality part of the reasoning of a judge working toward a conclusion. A judge might use a hypothetical argument to better explain how he or she arrived at a legal conclusion and to better delineate that conclusion from other possible legal answers.[78] Second, some obiter dicta are just that: obiter dicta. Over its history the common law has seen and tolerated examples of judges dealing with hypothetical problems or suggesting lines of inquiry that were not necessary for the resolution of the dispute at hand. Given the nature and imperfections of the common law and litigation, there is a place for the occasional signal sent by a judge about possible legal problems that have come to light in the cauldron of litigation. However, there is a world of difference between a judicious exercise of this practice and the contemporary experience of almost rampant extrajudicial writing on live legal issues.[79]

It is important to note that the signalling provided by obiter dicta is not as clear cut as is commonly assumed. While some may perceive that signalling provides guidance and clarity in the law, the fact that the individual judge's view does not have the authority of law and may not represent the opinions of other judges means that it might also lead to confusion. The actual guidance provided by a judge or some judges in an obiter statement will vary according to the strength and persuasiveness of the statement. It will also vary according to how many judges support the statement and whether and to what extent individual formulations about a hypothetical point vary from judge to judge. In other words, the signals sent via an obiter dictum will not always be clear and might lead to confusion rather than illumination. Not only can the same be said of the signals that emanate from extrajudicial writing; such writing can also create further problems of its own. If the extrajudicial comment concerns a question of law that the judge has already addressed in court, this raises confusion over the authority that should be attributed to the various interpretations offered by that judge. Further, when deciding controversies, a lower court judge may feel compelled to

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[77] Flanagan makes a similar argument in arguing that dissenting judgments should not be equated with extrajudicial writing. Flanagan, above n 73, 167–9.

[78] We wish to thank Anne Hewitt for this suggestion.

[79] See, eg, Megarry, above n 11, 66.

consider whether the extrajudicial writing of a senior — and potentially appellate court — judge ought to be treated as authoritative. They must rationalise the common law tradition which has never treated secondary literature as authority with the practical perception that a ruling at odds with a senior judge's extrajudicial writing will probably lead to an appeal.

IX Is Extrajudicial Writing the Norm Today?

It may be argued that the contemporary prevalence of extrajudicial writing displays its innocuousness; indeed, its very usefulness. We should be wary of such arguments for, after all, a similar argument could have been made against early no-smoking campaigns when many more people smoked than is the case now. Just because a lot of people are doing something does not make it right. Rather, the practice in question should be evaluated on its merits and as indicated above, extrajudicial writing comes at a great cost with, as we shall argue below, a modest return. In particular, such writing threatens the common law process of adversarial litigation based on real disputes where the parties have a genuine interest in the outcome and where barristers (and solicitors) devote time and their professional skills, knowledge and ingenuity in the development of legal arguments within the existing architecture of the area of law in dispute. The common law has long accepted that the abstract musings of judges do not compare with the arguments made by barristers and solicitors in the context of a real dispute where the lawyers have usually devoted much thought and discussion to the legal issues raised by the dispute. Arguments made in the cauldron of litigation have been tested in the way that the hypothetical thoughts of a judges have not and the differences between the two have been central to common law judging.[80]

The common law is *based* on this form of litigation. It has not, as have the civil law systems of Europe, been a scholarly system of law. It has not accorded primacy in legal development to professors in university, preferring, whether rightly or wrongly, to rely on a process that is forensic (and, perhaps, relatively insular).

If we are to move to a common law which takes its lead from commentary, be it from judges or academics, this needs to be a transparent move with the arguments for and against scrutinised carefully. After all, such a change would be of some moment and not to be lightly entered into. Instead, we have been presented with amounts to a *fait accompli* and we need to ask if the common law deserves more than that. The contemporary practice of extrajudicial writing requires scrutiny, not unthinking acquiescence.

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[80] The practice of Sir Owen Dixon in this regard is both exemplary and illuminating. See John Gava, 'When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence' (2011) 33 *Sydney Law Review* 157, 159–60. Sir Robert Megarry's comments about the 'purifying ordeal of skilled argument on the specific facts of a contested case' are apposite here: see, *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16.

X A Suggested Remedy

Our remedy is a simple one. Busy judges should not write about moot legal problems.

Of course, such a remedy has its costs. Most judges are, after all, masters of their craft and they do have something of value to contribute to scholarly and legal debate. But such a benefit comes at too great a cost. Judges owe their allegiance to their role — as impartial expositors of the law who apply their knowledge and skills to concrete legal disputes. A world with thousands of legal academics writing about every legal topic under the sun does not lack for legal writing. In a society where many judges complain about the length of their dockets, do we need to impose any more work on judges or distract them from their primary role in order to have a few more legal articles or books? In the words of Hammond J:

> Every appellate judge is all too familiar with the problem of impossible workloads, endless streams of appellants, hopelessly over-loaded briefs, and generalized cries from appellants of a 'dreadful miscarriage of justice' in their particular cases.[81]

Despite Hammond J describing as 'outmoded' the view that judges are better off not engaging in public discourse[82] he wisely concludes his discussion of this topic by saying that:

> there is still real force in the old adage that the less that is seen of a judge off the bench, the better. Judges are not celebrities.[83]

The best remedy to the problems caused by committed extrajudicial writing is to bring it to an end. Of course, some might argue that judges could always recuse themselves if they have written extrajudicially about an issue before them. But can our courts afford the loss of judicial capacity that widespread extrajudicial commentary would entail?

No suggestion, of course, of any compulsion is intended here. Ours is a call for prudence. Just as judges already accept that certain activities become taboo upon ascension to the bench, we would ask them to consider our arguments against extrajudicial writing on matters that might come before them in court. The existence of rules against bias provide a ready and convenient vehicle for judges to cease writing extrajudicially.

XI Conclusion

Judicial commentary on live issues in the law is now a common feature in our legal system. Like all existing practices this confers a certain legitimacy and the associated protection afforded by the inertia that bedevils all attempts at change. Nevertheless we should always avoid the temptation of confusing the actual with the ideal. The practice of extrajudicial writing needs to be examined and

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81 Hammond, above n 14, 73.
82 Ibid 132.
83 Ibid.

analysed in an open manner with the awareness that its contemporary existence or prevalence do not automatically justify such a practice. As we have shown above, there are very good reasons for thinking that extrajudicial writing on live legal issues is a bad thing and that it should be discontinued.

This article demonstrates that in many instances a judge's extrajudicial comment on points of law speaks of predispositions that are neither tentative nor academic. The manner of execution, tone and content of much of this writing conveys the strong impression that the judge's mind is made up. The strength of this impression overpowers any argument that a judge can be trusted to put such predispositions to one side once in a court of law. The views are formed outside of court, without the benefit of argument make by lawyers representing real parties with genuine interests, and disclose a strong commitment by the judge to a conclusion on a point of law, thereby neutering any future arguments of counsel. Such concluded extrajudicial views constitute a very real threat to a fair trial.

The problems associated with committed extrajudicial writing that canvasses and pronounces upon doctrinal legal issues are real and serious. Prejudgment of matters before the court is rightly condemned in our society. The common law in both Australia and the UK has developed strong prohibitions on such conduct. But the prejudgment that is so intimately tied to committed extrajudicial writing has somehow slipped under the radar. As we have seen, judges and legal academics are generally supportive of such writing, at least for that which is published in learned journals or scholarly books. Perhaps this is because until recently very few judges wrote much extrajudicially on doctrinal issues and because often there were no legal academics writing in particular areas. After all, until the middle of the 20th century there were not that many legal academics in either Australia or the UK. But in a world where there is no shortage of academic commentary, there is no necessity for extrajudicial comment which in any event comes at too great a cost.

Why do judges write so much? One reason appears to be a desire to signal to the profession and potential litigants what particular judges want litigated (as well as prefiguring the answer that will be given). Even if that is not the intention of all, or even most, judges, this signalling will be a real consequence flowing from the committed extrajudicial writing that has been the focus of this article. Such signalling represents a change from the primarily reactive role of the judges in common law litigation where the judges responded to cases that came before them. By sending out signals on what cases they would want to hear and what law they would apply the judges will become the catalyst for legal change. Such a dramatic structural change in the nature of litigation and the common law is one that should be debated and analysed rather than unthinkingly accepted.

These problems of prejudgment and signalling by judges which are raised by committed extrajudicial on doctrinal issues are real. They can be solved easily if we all agree that extremely busy judges stick to judging and avoid writing about legal issues that might confront them in the courts.