JUDGES AND ACADEMIC SCHOLARSHIP: AN EMPIRICAL STUDY OF THE ACADEMIC PUBLICATION PATTERNS OF FEDERAL COURT AND HIGH COURT JUDGES

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I INTRODUCTION

The appropriate role of judges in exercising judicial leadership is a contentious issue. In North America, the issue of judicial free speech has been the subject of a special issue of the *University of New Brunswick Law Journal*[1] and countless government and law commission reports.[2] At the same time, at no point in history has the judicial system been under such public scrutiny.[3] In Australia this is reflected in political and popular reaction to High Court decisions such as *Mabo*.[4] Following *Mabo* 'politicians in both Federal and State Parliaments appeared to compete with each other to attack the Court. … A State Premier described [Kirby J's reasons] as nothing more than "rantings and ravings"'.[5] What is the appropriate manner for judges to respond to such criticism? One obvious approach is to increase public awareness of the role of the courts and the judiciary. In recent times, and certainly since Sir Anthony Mason, Chief Justices of the High Court have attempted to educate the public about the role of the courts.[6]

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1 'Forum: Judicial Free Speech' (1996) 45 *University of New Brunswick Law Journal*. This special issue contains nine articles on the issue of judicial free speech in Canada and the United States.

2 For an overview see J Ziegal, 'Judicial Free Speech and Judicial Accountability: Striking the Right Balance' (1996) 45 *University of New Brunswick Law Journal* 175.

3 See S Cameron, 'Silence is Golden (But My Heart Still Cries): The Case Against *Ex Tempora* Judicial Commentary' (1996) 45 *University of New Brunswick Law Journal* 91, 92; M Kirby, 'Attacks on Judges – A Universal Phenomenon' (American Bar Association Section on Litigation, Maui, Hawaii, January 5 1998) accessible at <http://www.hcourt.gov.au/speeches>; IDF Callinan, 'Courts: First and Final' (Speakers' Forum, University of New South Wales, August 17 1999) accessible at <http://www.hcourt.gov.au/speeches>.

4 *Mabo v State of Queensland* [No 2] (1999) 175 CLR 1.

5 Kirby, above n 3.

6 See P Innes and F Burstin, 'Judicial Evolution – Interview with Sir Anthony Mason' (1995) 69 *Law Institute Journal* 745; S Lobez, 'Interview with Chief Justice Sir Anthony Mason' (1994) 89 *Victorian Bar News* 44; A Mason, 'The Courts as Community Institutions' (1998) 9 *Public Law Review* 83; G Brennan, 'Courts for the People – Not People's Courts' (The Inaugural Deakin Law

Judicial leadership in the public debate over the role of the courts is manifest in at least three forms.[7] First, as judgments become more scrutinized, most judges have attempted to write their judgments in a form which is more accessible to the public. Lindell states: 'The Mason Court abandoned the "formalistic" and "legalistic" style of judicial reasoning in favour of a more accessible style'.[8] Sir Anthony Mason has argued that simpler legal writing is part and parcel of making judgments more accessible to the public.[9] Second, judges seem more willing to comment on current issues in speeches and write newspaper articles on controversial subjects for popular audiences. Australian judges, and Kirby J in particular, have written newspaper articles in support of a disparate range of human rights and liberal causes as well as issues more directly related to the administration of justice. These include aboriginal rights,[10] homosexual rights,[11] Australia's relationship with Asia,[12] whether Australia should become a Republic,[13] mandatory sentencing legislation,[14] court delays[15] and judicial independence.[16] It is worth pointing out that the most controversial statements are often made by retired judges, who presumably might not feel as constrained. It is also important to note that newspaper articles are often edited abstracts of speeches given on specific occasions such as student graduations.

A third form of judicial leadership is through judges' contributions to academic scholarship such as articles appearing in University law reviews and other legal

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School Oration July 26 1995) accessible at <http://www.hcourt.gov.au/speeches>; M Gleeson, 'Legal Oil and Political Vinegar' (1999) 11 *Sydney Papers* 51; M Gleeson, 'Judicial Legitimacy' (Australian Bar Association Conference, New York, July 2 2000) accessible at <http://www.hcourt.gov.au/speeches>. The current Chief Justice has also raised public awareness of the High Court through delivering the 2000 Boyer Lectures, broadcast on ABC Radio National and published in the *Sydney Morning Herald* in November and December 2000.

7 See P McCormick, 'Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship' (1996) 45 *University of New Brunswick Law Journal* 139, 139-140. See also I Greene, 'Judges as Leaders' in M Mansuco, RG Price and R Wahenberg (eds), *Leaders and Leadership in Canada* (Oxford University Press: Toronto, 1994).

8 G Lindell, 'Judge & Co: Judicial Law-Making and the Mason Court' (1998) 5 *Agenda* 83, 86. However, also see G Orr, 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6 *Torts Law Journal* 291 and P Cane, 'What a Nuisance' (1997) 113 *Law Quarterly Review* 515, 519 who criticize the High Court's propensity for verbosity in recent times.

9 He states: 'unfortunately judgments do not speak in a language or style that people readily understand … The judgment is so encrusted with discussions of precedent that it tends to be forbidding. The lesson to be learned is that if we want people to understand what we are doing, we should write in a way that may make it more possible for them to do so'. See A Mason, 'Opening Address to the New South Wales Supreme Court Annual Conference', April 30 1993 cited in M Duckworth, 'Clarity and the Rule of Law The Role of Plain Judicial Language' (1994) 2 *The Judicial Review* 69, 73-74.

10 H Gibbs, 'Perils of a Special Black Treaty', *Sunday Age*, July 26 1992, 15; G Brennan, 'Too Big a Gap Between the Haves and Have Nots?', *Sydney Morning Herald*, February 15 1999, 13.

11 M Kirby, 'Religious Leaders and Homosexuality', *Sydney Morning Herald*, February 25 2000, 15.

12 A Mason, 'Why our Future is in the Past', *Age*, November 5 2001, 13.

13 Gibbs, above n 10.

14 G Brennan, 'Allow the Punishment to Fit the Crime', *Sydney Morning Herald*, January 22 2001, 10.

15 M Black, 'Seeking Greater Efficiency Aids Aim of Doing Justice', *Australian Financial Review*, May 28 1997, 54.

16 M Kirby, 'The Sacking of Justice', *Age*, June 12 1992, 17; M Kirby, 'The Bulwark of our Freedom', *Sydney Morning Herald*, March 21 1997, 21; M Gleeson, 'High Court Can't Escape Being Seen as Controversial', *Sydney Morning Herald*, December 18 2000, 10; M Gleeson, 'Beholden to No-one and to No-thing, But to the Law', *Sydney Morning Herald*, December 26 2000, 16.

journals.[17] It is this third area of leadership which is the subject of this paper. In particular, this study presents the results of an empirical survey of academic articles written by judges of the Federal Court and High Court in Australian University law reviews and other law journals. The study investigates the following specific issues:

- Drawing on academic and judicial attitudes in the extant literature on the subject, is it an appropriate practice for judges to publish academic articles?
- Which Federal Court and High Court judges publish the most academic articles?
- In which journals do Australian judges publish academic articles?
- What factors explain variations in the number of academic articles judges write?

Because the issue of whether judges should speak extra-judicially and, if so, on what topics and through what outlets is an important point of contention, the academic publishing patterns of judges has been the subject of quantitative empirical studies in Canada and the United States. McCormick examined the publishing habits of judges of the Supreme Court of Canada in the 1980s and first part of the 1990s in Canadian, English-language University and professional law reviews.[18] Gaile examined the publication patterns of judges of the United States Courts of Appeal prior, and subsequent to, the Bork confirmation hearings.[19] There are, however, no studies of this sort for Australian judges. This represents a shortcoming in our understanding of how judges exercise academic leadership and interact with the legal profession in a period in which interest in the workings of the courts and the views of the judges is at an all time high. The paper is set out as follows. Sections 2 and 3 discuss academic and judicial views on whether it is appropriate for judges to publish academic articles. Section 4 presents the results of the empirical study and section 5 contains some concluding comments.

II ACADEMIC ATTITUDES TOWARDS JUDGES PUBLISHING ACADEMIC ARTICLES

A *Analysis of Legal Issues and Explaining the Law*

Judges have written academic articles on a range of topics. One of the most obvious is articles in academic journals which analyze or explain the law. MacKay is supportive of this practice in the Canadian context.[20] He argues that judges are entitled, and indeed should be encouraged, to discuss publicly policy issues arising under the Canadian *Charter* so that the non-legal community will have a better understanding of the men and women on the Supreme Court of Canada who are making such important decisions.[21] A number of academic commentators, however, have been critical. McCormick points out that problems arise where, in the course of discussing the law, a sitting judge discusses his/her own judgments. He states: 'Decisions, like statutes, do not apply or interpret themselves and even a light editing can give any serious writing quite a different spin. … Where a decision has already been partially misunderstood,

17 See, in general, K Ripple, 'The Judge and the Academic Community' (1989) 50 *Ohio State Law Journal* 1237.

18 McCormick, above n 7.

19 S Gaille, 'Publishing by United States Courts of Appeal Judges: Before and After the Bork Hearings' (1997) 26 *Journal of Legal Studies* 371.

20 A W MacKay, 'Judicial Free Speech and Accountability: Should Judges be Seen but Not Heard' (1993) 3 *National Journal of Constitutional Law* 159.

21 Ibid 213.

the revisions become more significant, and therefore more problematic'.[22] Cameron[23] and Russell[24] express similar concerns. Russell suggests bluntly: 'Addresses or essays by judges re-explaining or "clarifying" decisions they have previously made on the bench should be avoided like the plague. Rather than clarifying the law, such efforts would more likely set up a confusing set of authorities parallel to the judicial decisions themselves'.[25]

Cameron and McCormick suggest that the solution is that when judges take off their judicial gowns and put on their academic robes, their opinions should be given no more weight than other authors in the academic debate. McCormick further argues that if judicial contributions to academic debate are viewed from this perspective then judicial academic leadership is a positive development.[26] This view, however, is somewhat naive for several reasons. First, counsel will be more inclined to cite the extra-judicial views of judges in argument, precisely because they are the views of judges. Second, even casual inspection of the law reports suggests judges often cite their own extra-judicial views and the extra-judicial views of others in their judgments. These views expressed extra-judicially are often given more weight *because they are the views of judges* than if they were not judges. The extra-judicial views of some judges, such as Sir Owen Dixon, are treated as de facto primary authorities. Third, to be more controversial, it is easier for judges to publish their views than individuals who are not judges. It is stretching the imagination to think that if a High Court or Federal Court judge submitted an article to an Australian law review that it would be subjected to double-blind refereeing and then rejected. Rather most law reviews, and in particular the newer ones, seem to aim to publish addresses and other writings by judges because they are judges and therefore their views carry more weight than contributors who are not judges. The evidence from the United States shows that student-edited law journals give preference to academic contributions from judges over contributions from individuals who are not judges.[27]

B *Championing Social Causes or Law Reform*

A second topic on which judges sometimes write is law reform or advocating particular social causes. The situation becomes muddied if the call for reform is seen as being partisan. As Webber puts it: 'The line is crossed, I believe, when the judge identifies himself closely with a particular faction in the legislature, or when he lobbies consistently and forcefully for a specific political goal'.[28] An example is the Canadian case of Jean-Claude Angers who, while a judge of the New Brunswick Court of Appeal, wrote an open letter to the Canadian Prime Minister criticizing the government's proposed gun control legislation. Another prominent Canadian case is that of Thomas Berger who, while a judge of the British Columbia Supreme Court, criticized the

22 McCormick, above n 7, 143.
23 Cameron, above n 3, 93 and 95.
24 P Russell, 'Judicial Free Speech: Justifiable Limits' (1996) 45 *University of New Brunswick Law Journal* 155, 159.
25 Ibid.
26 McCormick, above n 7, 146.
27 See J Leibman and J White, 'How the Student-Edited Law Journals Make their Publication Decisions' (1989) 39 *Journal of Legal Education* 387.
28 J Webber, 'The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Honourable Mr. Justice Berger' (1984) 29 *McGill Law Journal* 369, 384-385.

government for abandoning the rights of aboriginals during the 1981 constitutional negotiations.[29]

In most instances, the real issue is whether a judge's personal views interfere with his/her impartiality. Russell suggests judges should avoid championing specific causes because it might create a perception of bias.[30] Some judges have expressed similar views. For instance, Sir Anthony Mason has stated: 'As for judges speaking about their personal values, I do not favour that. I do not favour it because it is likely to convey the misleading impression that the case has been decided by reference to the judge's personal values. Judges don't decide cases by reference to personal values'.[31] Other commentators, though, suggest that a blanket prohibition on judges expressing their personal opinions on particular issues goes too far. Ziegel argues that judges, just like everyone else, are entitled to express their personal views. Because judges decide cases with reference to community values, rather than personal values, the mere expression of personal views on specific issues does not create a perception that the judge is biased.[32]

C *Judgment Writing and Aspects of Decision-Making*

One of the most common forms of extra-judicial writing are articles discussing aspects of decision-making directed at other judges, such as how to write a judgment. Academic commentators have also criticized this seemingly innocuous practice. Writing for a Canadian audience, McCormick uses an Australian example 'to avoid making [his] comments unnecessarily pointed or provocative'.[33] While President of the New South Wales Court of Appeal, Kirby J wrote at least two articles on giving reasons for judgment.[34] McCormick is critical of this sort of academic writing because he suggests that articles, such as those of Kirby J, cloud the issues for trial judges on the appropriate course to take through adding to the layer of 'authorities'. McCormick begins by stating: 'It seems to me if I were a trial judge in Australia, particularly if I were a trial judge in New South Wales, I would have to take [Kirby J's] articles very seriously'.[35] Putting himself in the position of the trial judge, he then proceeds to highlight the problem:

> There may be a trial at which I would be inclined to write the briefest of *ex tempore* reasons for judgment. … In such a case, I would have to consider not only the decisions of the Australian High Court and decisions of my own Court of Appeal, as is the usual practice, but also extra-judicial comments on the issue made by a member of my own Court of Appeal. What if my reading of the case law differs subtly, but significantly from the President's, or if I can accept some of his generalized rules on writing decisions, but have serious doubts about others? …. If the legal rules emerged literally from the pages of a High Court panel then I would … simply have to live with them, whether I liked

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29 See 'Case Report: Report and Record of the Committee of Investigation into the Conduct of the Hon Mr Justice Berger and Resolution of the Canadian Judicial Council' (1983) 28 *McGill Law Journal* 378.

30 Russell, above n 24, 156-157.

31 Lobez, above n 6, 45.

32 J Ziegel, 'Judicial Free Speech and Judicial Accountability: Striking the Right Balance' (1996) 45 *University of New Brunswick Law Journal* 175, 179-180.

33 McCormick, above n 7, 141.

34 M Kirby, '*Ex Tempore* Reasons' (1992) 9 *Australian Bar Review* 93; M Kirby, 'Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121.

35 McCormick, above n 7, 141.

> them or not – but rules derived from an article do not have that status. [However], if I ignore [the articles], I am possibly subjecting the winners of the case to the bother and delay of an appeal, the result of which may be a new trial.[36]

These comments pose the question: to what extent do extra-judicial statements of senior judges influence the decision-making of current judges? This depends on whether one can separate the role of "judge as judge" and "judge as commentator". Of course, the views of "judge as commentator" have no precedent value. On this basis, it might be argued that McCormick is overstating the problem. However, as discussed above, in practice the distinction between the role of "judge as judge" and "judge as commentator" can be blurred. This is particularly true when the President of the Court of Appeal or Chief Justice of the Court speaks extra-judicially on procedural matters.

III JUDICIAL ATTITUDES TOWARDS JUDGES PUBLISHING ACADEMIC ARTICLES

The attitude of judges towards making public statements has evolved over time.[37] Using the example of Sir Owen Dixon, Sir Anthony Mason points out that Australian judges have long been willing to discuss the law and judicial function in academic settings.[38] In the United States, where the judicial process is more politicized than Australia, some Justices of the US Supreme Court have even appeared on televised panels.[39] Judges have offered several different reasons for becoming engaged in academic scholarship. First, some judges see the opportunity to engage in academic exchange through the pages of law journals as a useful alternative to making public statements on controversial subjects or responding to criticism through more popular outlets. Kirby J puts forward this view:

> The problem from a judges point of view …. is that you can't answer back [to criticism]. The convention is that you don't. I think it is a wise convention. … On the other hand you can sometimes get appropriate occasions such as conferences, academic meetings or graduation ceremonies where you can express in a seemly way, a point of view that helps to set the record straight.[40]

Second, some judges see the opportunity to write articles as an important part of the educational process in making courts more accessible. In Canada Sopinka J has stressed this role for academic writing. His Lordship states: 'No longer can we expect the public to respect decisions from a process that is shrouded in mystery and made by people who are withdrawn from society'.[41] In Australia, Sir Anthony Mason has probably been the major advocate of using law journals for this function.[42] Third, some judges see the exercise of writing academic articles as useful in terms of intellectual self-reflection. For instance, Kenneth Ripple, a judge of the United States Courts of Appeal states: 'Judicial intellectual enrichment through scholarship must not be underestimated. Daily

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36 McCormick, above n 7, 142.

37 For an overview of the evolution of judicial thought on this issue see Mason, above n 6, 86-87.

38 Mason, above n 6, 87.

39 M W Loper, 'Free Expression and Free Speech: A General Framework From One American Perspective' (1996) 45 *University of New Brunswick Law Journal* 105, 119-120.

40 M Kirby, 'What is it Really Like to be a Justice of the High Court of Australia' *Sydney Law Review* 514, 525.

41 J Sopinka, 'Must a Judge Be a Monk – Revisited' (1996) 45 *University of New Brunswick Law Journal* 167, 169.

42 See Mason, above n 6, 87; A Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 131.

judicial duties provide little opportunity to integrate one's learning or to engage in rigorous intellectual self-criticism. Scholarly endeavors put the jurist in touch with a broader world of ideas and provide an important source of intellectual nourishment'.[43]

Fourth, Ripple also emphasises the contribution of judges in the United States to interdisciplinary scholarship such as law and economics. Several judges in the United States – for example Bork, Breyer, Easterbrook, Ginsburg, Middlebrook and Posner – have been prominent in the law and economics movement. The law and economics movement has also caught the imagination of some judges in Australasia. For instance, Sir Ivor Richardson is patron of the Law and Economics Association of New Zealand and a long-standing advocate of the greater use of law and economics in judicial reasoning. In Australia, Michael Kirby is the patron of the Australian Law and Economics Association and both judges have made academic contributions on law and economics.[44] In the United States several studies have examined the extent to which Posner and other judges at the forefront of the law and economics movement have used economics in their decisions.[45] These studies were prompted by concerns that these judges would incorporate their conservative academic methodologies into the decision-making process. In response Posner stresses the distinction between academic and judicial functions:

> [T]here is bound to be some relationship [between the views a judge expresses in his academic writing before joining the Bench and the views he expresses in his judgments. However,] it would be quite wrong to imagine that a professor would become a judge to smuggle into the judicial reports the ideas he had developed as a professor, or that having become a judge, for whatever reason he had done so, he would then set about to see how much of his academic writing he could as it were enact into positive law. He will want to be thought of as a good judge and he will not if he uses his position to peddle his academic ideas.[46]

Overall, most judges seem to subscribe to the position of Sopinka J, of the Supreme Court of Canada. His Lordship's view is that within broad boundaries it is for individual judges to decide which topics are appropriate to write articles about.[47] However, some judges have also emphasised the need for caution when deciding what those boundaries should be. Both Lord McKay and Laskin CJ of the Supreme Court of Canada have said that political debate is outside the boundaries. Lord McKay suggests judges 'should avoid any involvement, either direct or indirect, in issues which are or

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43 Ripple, above n 17, 1241.

44 For example, see I Richardson, 'Law and Economics' (1998) 4 *New Zealand Business Law Quarterly* 64; I Richardson, 'Law, Economics and Judicial Decision-making' in M Richardson and G Hadfield (eds), *The Second Wave of Law and Economics* (Federation Press: Sydney, 1999); M Kirby, 'Law and Economics in the Courts: Is there Hope?' in M Richardson and G Hadfield (eds), *The Second Wave of Law and Economics* (Federation Press: Sydney, 1999); M Kirby, 'Economics or Law : The Second Oldest Profession? Panel Discussion Sponsored by the Economic Society (ACT Branch) and the Law Council of Australia: Canberra, 3 August 1999' (2000) 95 *Canberra Bulletin of Public Administration* 52.

45 For example, see G Cohen, 'Posnerian Jurisprudence and Economic Analysis of Law: The View From the Bench' (1985) 133 *University of Pennsylvania Law Review* 1117; W Samuels and N Mecuro, 'Posnerian Law and Economics on the Bench' (1984) 4 *International Review of Law and Economics* 107.

46 R Posner, 'Wealth Maximization and Judicial Decision-Making' (1984) 4 *International Review of Law and Economics* 131, 131.

47 Sopinka, above n 41, 169.

might become politically controversial'.[48] Addressing the Canadian Bar Association following the Berger comments, Laskin CJ states that 'a judge has no freedom of speech to address political issues which have nothing to do with his judicial duties. His abstention from political involvement is one of the guarantees of his impartiality, his integrity, his independence. …. He cannot be allowed to speak from the shelter of a Judgeship'.[49]

Laskin CJ's comments leave the door ajar slightly for judges to comment on politically controversial issues related to their judicial duties. The difficult issue is deciding how broadly 'judicial duties' should be defined. Kim Santow, of the Supreme Court of New South Wales, makes the point: 'Debates about legal aid, minimum sentences and the size of the prison population are all matters of the fiercest public controversy, both in public debate and even as election issues. Yet they can be the very matters on which judges feel the strongest reason to think'.[50] His Honour goes on to argue: 'If the judiciary are constrained from speaking at all about such politically controversial matters, though within their daily experience, then the public debate and resultant legislation runs the risk of being driven by fear rather than fact'.[51] However, as Santow J, acknowledges, perhaps the real issue is not *whether* judges should contribute to such debates, but *how* judges make themselves heard. In this context a press release from the court's media officer or a single statement from the Australia-wide judicial conference speaking for all judges will often be more appropriate than statements from individual judges.[52]

Sopinka J states that commenting on a case before the court or cases about to come before the court is also out of bounds.[53] Dealing with decided cases is more problematic. Sopinka J makes the point: 'For years, it has been accepted that judges can give prestigious lectures on the law at law schools and to professional bodies. This would be impossible if commenting on decided cases was prohibited'.[54] His Lordship goes on to suggest, though, that judges should be cautious when commenting on controversial decisions. Sir Anthony Mason subscribes to a similar position. He states: 'I don't think judges are disqualified from entering the fray, participating in the public discussion of a judgment which has become the subject of strong criticism, but personally I think a judge is ill-advised to do so'.[55] Gleeson CJ puts the prohibition on speaking about controversial cases that many judges adhere to in stronger terms: 'Judges may not engage in public debate over the merits of their decision or their reasons for their decisions – once. If it were otherwise, their impartiality would be questioned'.[56]

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48 *Daily Telegraph*, November 3 1987.

49 B Laskin, 'Berger and Free Speech of the Judge' (Address to the Canadian Bar Association Annual Meeting September 2, 1982) cited in MacKay, above n 20, 213.

50 GFK Santow, 'Transition to the Bench' (1997) 71 *Australian Law Journal* 294, 298.

51 Ibid 298-299.

52 Ibid.

53 Sopinka, above n 41, 171.

54 Ibid.

55 Lobez, above n 6, 44.

56 M Gleeson, 'Current Issues for the Australian Judiciary' (Supreme Court of Japan, January 17 2000) accessible at <http://www.hcourt.gov.au/speeches>.

This issue was the focus of the Scottish case of *Hoekstra* v *HM Advocate*.[57] The appellants in this case, which concerned drugs, objected to a judge sitting on the appeal who had been critical in his extra-judicial writings of the European Convention on Human Rights. The appellants claimed that if the judge sat on the appeal, it breached their right under the Convention to adjudication by an impartial tribunal. The High Court of Justiciary, sitting as the Court of Criminal Appeal in Scotland, upheld the appeal. Lord Rodger, the Lord Justice General, gave the reasons of the Court, consisting of himself, Lord Sutherland and Lady Cosgrave. His Lordship stated that the article, published very shortly after the decision in the appeal, would create in the mind of an informed observer an apprehension of bias on the part of the author against the Convention even if in fact no bias existed.[58] Lord Rodger said that as a general proposition: 'Judges were entitled to criticise developments in the law, whether in the form of legislation or judicial decisions. But what judges could not do with impunity was to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their duties to apply that particular branch of law, they would not be able to do so impartially'.[59]

IV THE ACADEMIC PUBLISHING PATTERNS OF FEDERAL COURT AND HIGH COURT JUDGES

A *Data Set and Methodological Issues Associated with Collecting the Data*

Between June and September 2001 information was collected on articles published in journals by current and past members of the Federal Court and all High Court judges since 1970. Information was collected on the publishing behaviour for all Federal Court judges, irrespective of whether their primary commission is, or was, with the Federal Court. Thus, information was also collected for judges such as Nicholson CJ (primary commission with the Family Court) and Miles CJ (primary commission with the ACT Supreme Court). The principal source of information was articles collated in the AGIS and APAIS databases, which contain articles published since 1975. To ensure that information was collected on all articles covered in the databases written by a judge a range of variations on the judge's name were entered into the search engine. To illustrate, when collecting information for Wilcox J, all of the following were tried: M. Wilcox, Murray Wilcox and Justice Wilcox. Where there was any doubt about whether a particular judge was the author of an article, we looked up the article. There is considerable overlap between the AGIS and APAIS, so records of articles from each database were collapsed into a single file for each judge listing all their publications to avoid double counting. Additional searches were also conducted of journals which we expected to carry a high proportion of articles written by judges, such as the *Australian Bar Review*, *Australian Law Journal* and the *Journal of Judicial Administration*. These searches were used to check the information obtained from the databases.

There are two limitations on the coverage of the data set, which need to be made clear from the outset. First, it is restricted to articles published since 1970. Initially I tried to collect information on the publishing patterns of High Court judges prior to 1970 through searching journals such as the *Australian Law Journal* and *Res Judicatae* and

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57 [2000] TLR 298. The case is also discussed in a comment at (2000) 74 *Australian Law Journal* 584-585.

58 Ibid.

59 Ibid.

various judicial biographies, but the information obtained was sporadic. It was impossible to be certain if we had obtained all or most of the articles written by judges prior to 1970 using this method and for some judges no information at all was available which would have made it difficult to make meaningful comparisons with judges after 1970. Second, because the main source of information is articles listed on the AGIS and APAIS databases, our data is largely restricted to publications in Australian journals.

B *Which Judges Have Published the Most Articles Pre-and Post-Appointment?*

Table 1 shows the publishing profile for all Federal Court judges pre-and post-appointment since the Court's inception. Just over 80% of Federal Court judges have published one or more articles and 66% of Federal Court judges have published two or more articles. Among the heaviest publishers, one judge (R Nicholson) has published more than 60 articles, two other judges (Lindgren and Sackville) have published more than 50 articles, nine judges (10.3%) have published more than 20 articles and 22 judges (25.3%) have published 10 or more articles.

Table 2 shows the publishing profile for High Court judges pre-and post-appointment who have been members of the Court since 1970. On average, High Court judges are heavier publishers than Federal Court judges, which is likely to reflect, at least in part, their higher profile. A total of 22 of the 25 High Court judges listed in table 2 have published at least one article. Over half have published at least 10 articles and there are five High Court judges who have published more than 50 articles. Heading the list in table 2, Kirby J has published over 300 articles, which is almost three times as many as the next highest, Mason CJ, who has also published over 100 articles. The figures for Kirby J, who has published 40 articles in the *Australian Law Journal* alone, documents in a quantitative fashion, the well-known fact that he is a 'prolific legal commentator'.[60]

When interpreting the results in tables 1 and 2, the reader needs to be aware that no attempt was made when collecting the data to take into account the length of the article. Thus notes and full-length articles were treated the same. In addition, the tables do not take account of whether the judge was a regular contributor to a short-notes section of a journal. In table 2 the publications of Lindgren, R Nicholson and C Sweeney who are at the top of the list are, in a sense, inflated because each was a regular contributor to a short-notes section. In the 1980s Lindgren and R Nicholson JJ regularly contributed short notes to the *Australian Business Law Review* and C Sweeney wrote a number of short notes in the *Australian Law Journal*.[61] Apart from the *Australian Business Law Review* Lindgren and Nicholson JJ have also published in a number of journals; however in C Sweeney J's case 38 of his 41 publications are in the *Australian Law Journal*.

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60 Orr, above n 8, 298.

61 C Sweeney was assistant editor of the *Australian Law Journal* from 1977 to 1987. Lindgren was the "consumer dealings" section editor of the *Australian Business Law Review* from 1973 to 1991. R Nicholson was the "administrative law" section editor of the *Australian Business Law Review* from 1984 to 1988.

C *Which Judges Have Published the Most Articles While on the Bench?*

Tables 1 and 2 provide information on lifetime publications for each Federal Court and High Court judge, but do not distinguish between publications while the judge was a member of the Federal Court or High Court and publications prior to appointment or since retirement. Thus, for judges which had relatively long academic careers prior to appointment, such as Lindgren and Sackville JJ, their position at the top of the publications list in table 1 might tell us little about the publication patterns of judges while on the Bench if many of their articles were published prior to appointment. To address this issue, tables 3 and 4 provide information on the journal publications of each judge while he/she was a member of the Federal Court or High Court. For judges who have been members of both the Federal Court and High Court (Brennan CJ, Deane, Gummow, Kirby and Toohey JJ) we list their publications while members of the Federal Court in table 3 and publications while members of the High Court in table 4. For judges who have been both a puisne justice and Chief Justice of the High Court (Brennan, Gibbs and Mason CJJ), we separate out their publications accordingly in table 4.

If we compare tables 1 and 3, the absolute number of publications drops considerably. In table 1 approximately 20% of judges had no publications. In table 3, the comparable figure is over 40%. This suggests that many judges who published extensively prior to appointment have curtailed their publishing while members of the Federal Court. However, while the number of publications are generally less across the board, the most prolific lifetime publishers in table 1 are also among the most prolific publishers while on the Bench in table 3. Seven of the 10 most prolific publishers in table 1 also appear in the top 10 in table 3. The differences are that Lindgren, Finn and Katz JJ drop out of the top 10 and are replaced by Heerey, Wilcox and Beaumont JJ.

While Sackville J continues to be ranked highly in table 3, suggesting that as an academic prior to appointment, he has continued to consistently write articles since appointment, Lindgren and Finn JJ's drop down the order suggesting that they wrote the majority of their articles as academics prior to appointment. Nicholson CJ's position at the top of table 3 reflects his role as Chief Justice of the Family Court. Most of his articles are written to increase awareness of the Family Court. Sweeney J continues to be near the top of the list in table 3 with nearly all of his articles in the *Australian Law Journal.* This reflects the fact that he was Assistant Editor of the *Australian Law Journal* for about half of the period he was actually on the Federal Court. In contrast, Lindgren and Nicholson JJ had resigned as "consumer dealings" and "administrative law" section editors of the *Australian Business Law Review* prior to being appointed to the Federal Court.

If we compare tables 2 and 4, Kirby J again tops the list in table 4 with the chief justices figuring prominently at the top of both lists. With the exception of Stephen J in table 2, the chief justices are all ranked immediately behind Kirby J in both tables. Stephen J ranks highly in table 2, but had few publications while a member of the High Court. Most of his publications were in his role as Governor-General, which he assumed on retirement from the Court. Through breaking down the High Court terms of Brennan, Gibbs and Mason CJJ as chief justice and puisne justice in table 4, we can see that in each case the majority of their publications while members of the High Court were as chief justice. Gibbs and Mason CJJ both wrote about five times as many articles as

chief justice than they did as a puisne justice. Many of the articles written by chief justices of the High Court have been directed towards increasing understanding of the role of the High Court and Australian courts more generally. The figures for the High Court chief justices contain a number of "State of the Australian Judicature" addresses, which are published in the *Australian Law Journal* and occasionally in other journals as well.

Several judges have published heavily in one particular area of law. Some examples are Heerey (defamation), Hill (taxation), Lindgren (contract), Wilcox (environment and planning) and Wilson (human rights). There are also a number of articles on the function and role of courts and judges. Apart from substantive law articles and articles designed to increase the role of the courts, consistent with the discussion in section two, Australian judges have published in a disparate range of other topics. For example, several articles assess the contributions of other judges (these are almost always positive in nature),[62] the role of women in the law[63] and aboriginals and the law.[64] In general, the subjects on which Federal Court and High Court judges have published in journals are very similar to what McCormick found for judges of the Supreme Court of Canada.[65]

D *What are the Main Journals in which Judges Publish?*

Table 5 shows the 20 journals in which judges have most often published while on the High Court or Federal Court in the 1980s and 1990s.[66] The *Australian Law Journal* published the most articles and the *Australian Bar Review* published the second highest number of articles in each decade. There are five other journals that feature among the top 20 in the 1980s and 1990s; namely, the *Australian Law News*, *Law Institute Journal*, *Melbourne University Law Review, Monash Law Review* and *University of New South Wales Law Journal*. Some journals, such as the *Australian Journal of Forensic Sciences* and *Federal Law Review* are prominent in the top 20 in the 1980s, but do not appear in the top 20 in the 1990s. Others such as the *Journal of Judicial Administration* do not appear in the top 20 journals in the 1980s, but were favourite outlets in the 1990s.

There are several features of table 5 on which it is worth commenting. First, journals of law societies are prominent in each of the two decades. In addition to the *Australian*

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62 For example, see G Hill, 'Barwick CJ: "The Taxpayer's Friend"? [Analysis of the High Court Tax Cases of Sir Garfield Barwick.]' (1997) 1 *Tax Specialist* 9; G Hill, 'Barwick's Legend' (1997) 32 *Taxation in Australia* 150; R Sundberg 'Two Views on the Judgements of Lionel Murphy J.' (1987) 60 *Victorian Bar News* 16; M Kirby, 'Kitto and the High Court of Australia' (1999) 27 *Federal Law Review* 131; M Kirby, 'Sir Anthony Mason Lecture: A F Mason: from Trigwell to Teoh' (1997) 20 *Melbourne University Law Review* 1087; M Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253; M Kirby, 'Sir Edward McTiernan - A Centenary Reflection', (1992) 20 *Federal Law Review* 165; M Kirby, 'H.V. Evatt, the Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93; M Kirby, 'Sir Edward Aloysius McTiernan, 1892-1990 : Parliamentarian and Judge' (1990) 65 *Australian Law Journal* 320.

63 See J Mathews, 'Women in the Law' (1991) 41 *Refractory Girl* 27; M Gaudron, 'Speech to Launch Australian Women Lawyers' (1998) 72 *Australian Law Journal* 119.

64 There are a number of articles on this topic by Brennan CJ, Gaudron, Muirhead and Toohey JJ.

65 McCormick, above n 7, 140-141.

66 We do not report results for the 1970s because the AGIS and APAIS databases only start in 1975, making comparison with the latter decades difficult.

Law News and *Law Institute Journal*, which feature in each decade, these journals include the *Law Society Journal* and *Queensland Law Society Journal* (1980s) and *Bar News* (1990s). Second, a few of the journals which figure prominently are due to the publishing habits of a small number of judges. In the 1990s Nicholson CJ was responsible for most of the publications in *Australian Family Lawyer* and Hill J was responsible for most of the articles in *Taxation in Australia*. Third, Australian University law reviews constituted about one-third of the top 20 journals in which judges published in the 1980s, but this dropped to one-fifth in the 1990s. Three of the seven journals which make it into the top 20 in both decades are University law reviews.

Turning to the sorts of articles published in these outlets, there are clear differences in the articles judges contribute to University law reviews and journals of law societies. Judges' contributions to University law reviews tend to be substantial articles on legal issues or legal procedure or, in a trend that is becoming more common in recent times, judicial addresses. Judicial addresses published in law reviews take the form of speeches at graduation ceremonies, distinguished public lectures affiliated with the university, addresses to groups of students and even addresses to Christmas services.[67] The proclivity of journals to publish judicial addresses is also common in Canada. McCormick's study suggests that about one-third of articles published by Canadian Supreme Court judges in the 1980s and first part of the 1990s in law reviews were judicial addresses.[68] While there are exceptions, in most instances, the style of writing, topic and outlet mean that the intended audience for articles published in University law reviews is a fairly narrow academic one. Judicial contributions to the journals of law societies, on the other hand tend to be much shorter, sometimes taking the form of an interview, and clearly designed to communicate with the profession more generally.

E *What Factors Explain How Many Articles Judges Publish?*

In order to investigate the relative importance of factors that explain variations in the number of articles which judges publish, the number of publications for each judge while a member of the Federal Court or High Court in tables 3 and 4 was regressed on a series of explanatory variables. Thus, we only consider journal articles actually published while on the Federal Court or High Court. Where a judge has served on both the Federal Court and High Court or as both a puisne justice and chief justice of the High Court this was treated as two variables. For Brennan who served on both the Federal Court and on the High Court as a puisne justice and chief justice three variables were created, spanning the three periods of his judicial career. The dependent variable for "Brennan, the Federal Court judge" was seven publications, the dependent variable for "Brennan, the puisne High Court Justice" was 14 publications and the dependent variable for "Brennan, Chief Justice of the High Court" was 19 publications. This treats him as three virtual judges.

The variables and expected sign are given in table 6. EXPERIENCE is defined as the number of years that the judge has been on the High Court or Federal Court. To stress the point above, in the case of judges such as Brennan, their career was broken down into periods reflecting the number of years they were in each role and this was attributed

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67 As an example of the latter see M Gleeson, 'St James Church Sydney Christmas Service for Lawyers' (2001) 6 *Deakin Law Review* 66.

68 McCormick, above n 7, 140.

to the relevant virtual judge. We hypothesize that editors of journals are more likely to solicit articles from judges and accept articles for publication if they are written by judges than if they are written by non-judges. Judges are also likely to have more opportunities to make public addresses which can be converted into journal articles. If this is the case, the longer the judge is on the bench, the more opportunities he/she will have to become known to editors and the more likely it is that the judge will be asked to deliver addresses at graduation ceremonies and public orations at law schools.[69] Thus, we expect a positive sign on EXPERIENCE. We hypothesize that judges with academic backgrounds will be more interested in publishing journal articles, once they become judges. We use two variables to denote academic background; namely ACADEMIC and POSTGRAD. ACADEMIC is a dummy variable set equal to 1 if the judge was an academic prior to being appointed to the bench. POSTGRAD is a dummy variable set equal to 1 if the judge has a postgraduate degree in law. We expect a positive sign on both variables.

CHIEF is a dummy variable set equal to 1 if the judge is, or was, chief justice. In the case of judges who were both a puisne justice and chief justice, the virtual puisne justice takes the value zero, while the virtual chief justice takes the value 1. We expect a positive sign on CHIEF for two reasons. First, the chief justice will often have a higher profile than the puisne judges and therefore be more recognizable by journal editors and more in demand to give addresses. This is particularly true for courts other than the High Court, where the profile of puisne judges is not as high. Second, the chief justice has an important role to play in educating the profession and greater public about the role of their court and judges. The raw figures suggest that this often translates into publishing more articles. HIGH COURT is a dummy variable set equal to 1 if the judge was a member of the High Court. For judges who were members of the Federal Court and High Court, the virtual Federal Court judge takes the value zero, while the virtual High Court judge takes the value 1. We expect a positive sign on this variable. If, as speculated above, journal editors are more likely to solicit and publish articles written by judges, this applies *a fortiori* to High Court judges because of their higher profile. EDITOR is a dummy variable equal to 1 if the judge performed an editorial role at a journal, while a member of the Federal Court or High Court. We hypothesize that if the judge performs an editorial role, such as a section editor, he/she is more likely to be a regular contributor to that journal. Therefore, we expect a positive sign on this variable.

Table 7 presents ordinary least squares estimates treating publications as the dependent variable. The underpinning theory makes no prediction about appropriate functional form so the model was estimated in both linear and log-linear functional forms. Prior to running the regressions, Pearson correlation coefficients were calculated to detect the presence of multicollinearity between explanatory variables. Multicollinearity is generally not a problem for interpreting the results with only two independent variables – ACADEMIC and POSTGRAD - having a Pearson correlation coefficient greater than or equal to 0.3. The correlation coefficient for these two variables was 0.41. For this reason three specifications are reported in both linear and log-linear functional forms. These are the full model, which includes all variables, and partial models omitting either ACADEMIC or POSTGRAD. Specifications I-III use a linear functional form and specifications IV-VI use a log-linear functional form. In preliminary regressions,

[69] D Klein and D Morrisroe, 'The Prestige and Influence of Individual Judges on the US Courts of Appeal' (1999) 28 *Journal of Legal Studies* 371, 383 make a similar argument in the US context.

White's heteroskedasticity test suggested that the null hypothesis of homoskedasticity was rejected in all specifications. Thus the results are reported with White's heteroskedastic-consistent t-values. Finally, The F-statistic is significant in each specification, which rejects the null hypothesis that the true slope coefficients are simultaneously zero.

Turning to the statistical significance of the explanatory variables, the results for CHIEF, EDITOR and HIGH COURT are consistent with prior expectations. CHIEF and EDITOR have a positive sign in each specification and are statistically significant at 5% or better. HIGH COURT has the expected sign and is significant at 10% or better in five of the six specifications. The results for the two proxies measuring academic background provide mixed support for the notion that academic background is a predictor of the number of publications when the judge is appointed to the Bench. ACADEMIC has an expected positive sign and is significant in three of the four specifications in which it is entered. It is not significant in specification I, but this probably reflects multicollinearity with POSTGRAD, which is dragging the t-value down. POSTGRAD, the other academic background variable, has an expected positive sign, but is consistently insignificant. EXPERIENCE is also insignificant in each case and there is a negative sign on the EXPERIENCE coefficient in specifications I and II using a linear functional form.

These results can be compared with the findings of Gaile's econometric study of the determinants of publishing patterns of US Courts of Appeal judges prior, and subsequent to, the Bork confirmation hearings.[70] There are some differences between the studies. Gaile has some explanatory variables, which are not relevant in an Australian setting, such as a dummy variable set equal to 1 if the judge is on senior status and a dummy variable for the Bork hearings. At the same time, Gaile does not include EDITOR, POSTGRAD, CHIEF or an equivalent for HIGH COURT because he was looking at the US Courts of Appeal in isolation. The two variables which are common to both studies are ACADEMIC and EXPERIENCE. He finds that both variables have a positive statistically significant effect on the number of articles written by US Courts of Appeal.

V CONCLUSIONS AND FUTURE RESEARCH

Interest in the views of judges and what judges do is at an all time high. Writing articles in law reviews and other journals is an important avenue through which judges can be heard. This paper represents the first empirical study of the publishing habits of Australian judges and it adds to the previous empirical literature on judicial publishing patterns for courts in Canada and the United States. The paper has examined trends in publishing over time, which are the most popular outlets for judges, which judges publish the most and what explains differences in the number of articles which judges write.

Future research could focus on other determinants of variations in publication rates. For example, one interesting issue might be to consider to what extent propensity to write academic articles is correlated with dissent rates. One might hypothesize that judges who are big dissenters are more likely to write academic articles because they are

[70] S Gaille, above n 19, 375-376.

looking for an outlet for their views which are not finding favour among their colleagues. McCormick makes this argument in the Canadian setting based on his findings:

> [A]rguably [big dissenters are] seeking … an alternative outlet for those ideas that majorities could not be persuaded to share and to endorse, possibly in the form of contributions to the academic literature. To put it perhaps more bluntly than it is fair to do, those judges who are delivering the largest number of the Court's significant decisions are too busy to be writing articles for submission to academic journals, and they know that those decisions will have more impact.[71]

At the crudest level of casual empiricism there seems to be some support for the view that higher than average dissenters publish more articles with Kirby J publishing many more articles than any other High Court or Federal Court judge and, at the same time, being a frequent dissenter. Whether this relationship holds up more generally is mere speculation and would need to be rigorously tested before firm conclusions could be reached.

This study focuses solely on publications in journals. Future studies could examine publications by judges pre-and post-appointment in outlets other than journals. It is arguable that as works of scholarship, treatises such as Meagher, Gummow and Lehane's, *Equity, Doctrine and Remedies* and Byrne and Heydon's Australian edition of *Cross on Evidence* are much more significant than most of the journal articles considered in this study. Future studies could also consider the publication of judge's speeches and other shorter pieces in forms other than journal articles, such as in collected essays.[72] Some judges, of which Callinan J is a notable example, have also written novels and plays for popular audiences, which have legal themes, that could be included in such a study.[73]

Alternatively future research could look at the publication patterns of judges on other Australian courts or conduct surveys of journal editors to gauge whether editorial policies do in fact differ depending on whether an author holds judicial office. Another line of research might be to investigate whether there is any correlation between the proclivity of a journal to publish articles by judges and its impact factor measured by citation counts, holding other factors constant. In other words are journals that regularly publish articles by judges also the most influential amongst legal academics and, if so, are they influential because they publish an above average number of articles by judges? The fact that the *Australian Law Journal* publishes the most articles by judges and is also the most cited Australian law journal by academics[74] and judges[75] gives this

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71 McCormick, above n 7, 146.

72 For an overview of High Court judge's extra-judicial writings in a range of outlets see J Thompson, 'Extra-judicial Writings of the Justices' in T Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court* (Oxford University Press: Melbourne, 2002) 265.

73 See N Hasluck, 'Ian David Francis Callinan' in T Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court* (Oxford University Press: Melbourne, 2002) 78-80.

74 See I Ramsay and G Stapledon, 'A Citation Analysis of Australian Law Journals' (1997) 21 *Melbourne University Law Review* 676; D Warren, 'Australian Law Journals: An Analysis of Citation Patterns' (1996) 27 *Australian Academic and Research Libraries* 261.

75 R Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164.

suggestion some credence, but it would need to be systematically examined using a data set on several journals.

VI TABLE 1
PUBLISHING PROFILES OF JUDGES OF THE FEDERAL COURT PRE-AND POST-APPOINTMENT[a]

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
R. NICHOLSON	7	2	8	4	43	64
LINDGREN	5	1		1	44	51
SACKVILLE	5	4	2	6	34	51
A. NICHOLSON				4	37	41
C. SWEENEY	38				3	41
HILL	3			2	34[c]	39
O'CONNOR	2			2	28	32
FINN	5			5	20	30
KATZ	2	5		4	10	21
FRENCH	1			4	14	19
HEEREY	2			4	10	16[b]
PINCUS	3				12	15
WEINBERG			1	7	7	15
WILCOX		1		2	12	15
DAVIES			1	3	10	14
Von DOUSSA	1				11	12
GYLES	1			1	9	11[b]
JACKSON	2	3		1	5	11
BEAUMONT	3	2	1	1	3	10[b]
GRAY					10	10
SHEPPARD	1	1			8	10
BLACK					8	8
MUIRHEAD					8	8
EINFELD				1	6	7
GOLDBERG					7	7
KENNY				2	5	7
MATHEWS	1			1	5	7
MOORE					7	7
BLACKBURN	2			1	3	6
FITZGERALD				1	5	6
LEHANE				1	5	6
LOCKHART		1		2	3	6
SUNDBERG	3				3	6
BEAZLEY				1	4	5
BRANSON	3				2	5
COOPER	1			1	3	5[b]
FOSTER					5	5

Table 1 continued

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
MERKEL	1				4	5
MILES	2				3	5
STONE	1			3	1	5
ALLSOP					4	4
BOWEN	1	1		1	1	4
BURCHETT	1	3				4
CARR					4	4
DRUMMOND				1	3	4
EMMETT		3			1	4
KELLY					4	4
FOX					3	3
KIEFEL	1	1		1		3
MARSHALL					3	3
DOWSETT				1	1	2
FISHER					2	2
GIUDICE					2	2
HIGGINS					2	2
NEAVES					2	2
WOODWARD	1				1	2
CONTI					1	1
EVERETT	1					1
GALLOP					1	1
LEE					1	1
MADGWICK					1	1
MANSFIELD					1	1
McGREGOR					1	1
MORLING					1	1
NORTH					1	1
O'LOUGHLIN					1	1
RYAN		1				1
SPENDER					1	1
TAMBERLIN					1	1
WARD					1	1
ELLICOT						_
EVATT						_
FINKELSTEIN						_
FORSTER						_
FRANKI						_
HARTIGAN						_
HELY						_
JENKINSON						_
KEELY						_
NIMMO						_
NORTHROP						_
OLNEY						_

Table 1 continued

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
RILEY						_
SMITHERS						_
ST. JOHN						_
J. SWEENEY						_
WHITLAM						_

Notes:

(a) Includes all judges of the Federal Court including those whose primary appointment is with another court such as the Family Court or Supreme Court of the ACT.

(b) Contains one or more articles with the same title published in different journals.

(c) The majority of “other” are published in Taxation in Australia.

VII TABLE 2
PUBLISHING PROFILES OF HIGH COURT JUSTICES SINCE 1970
PRE-AND POST-APPOINTMENT

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
KIRBY	40	15	4	34	213	306[a]
MASON	7	5	1	19	75	107
GIBBS	9	1		9	52	71
STEPHEN	2			5	53	60
BRENNAN	8	3	1	9	33	54
GLEESON	7	2		2	26	37
BARWICK	5			2	18	25
DAWSON		1	1	4	9	15
GAUDRON	1			1	12	14
McHUGH	4	2			8	14
GUMMOW	1				11	12
TOOHEY	1	1		2	8	12
WILSON	1				9	10
WINDEYER	6				3	9
DEANE					7	7
MURPHY					6	6
CALLINAN	1			1	2	4
KITTO	3			1		4[b]
AICKIN					2	2
MENZIES	1				1	2
HAYNE	1					1
WALSH	1					1
JACOBS						–
McTIERNAN						–
OWEN						–

Notes:

(a) Includes five articles with the same title that are published in multiple journals.

(b) One article appears in both the Australian Law Journal and Melbourne University Law Review.

VIII TABLE 3
PUBLISHING PROFILES OF JUDGES OF THE FEDERAL COURT WHILE MEMBERS OF THE FEDERAL COURT

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
A. NICHOLSON				4	37	41
C. SWEENEY	38				2	40
HILL	2			2	15	19
SACKVILLE	1	4	2	4	8	19
FRENCH	1			4	13	18
O'CONNOR					12	12
R. NICHOLSON	2		4	1	4	11
HEEREY	1			4	6	11
WILCOX		1		1	9	11
BEAUMONT	3	2	1	1	3	10
DAVIES			1	3	6	10
GRAY					10	10
KIRBY	1			1	8	10
PINCUS	1				9	10
BLACK					8	8
SHEPPARD	1	1			6	8
BRENNAN	1			2	4	7
LINDGREN	2	1			4	7
EINFELD				1	5	6
FINN					6	6
GUMMOW				2	4	6
LOCKHART		1		2	3	6
MOORE					6	6
BLACKBURN	1			1	3	5
BRANSON	3				2	5
MILES	2				3	5
BOWEN	1	1		1	1	4
BURCHETT	1	3				4
COOPER	1				3	4
FOSTER					4	4
MATHEWS					4	4
MUIRHEAD					4	4
VonDOUSSA					4	4
KENNY				2	1	3
BEAZLEY					2	2
CARR					2	2
EMMETT		2				2
FOX					2	2

Table 3 continued

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
HIGGINS					2	2
KATZ					2	2
KIEFEL	1	1				2
LEHANE				1	1	2
TOOHEY					2	2
WOODWARD	1				1	2
DRUMMOND					1	1
FITGERALD					1	1
GALLOP					1	1
GIUDICE					1	1
GOLDBERG					1	1
MERKEL	1					1
MORLING					1	1
RYAN		1				1
SPENDER					1	1
SUNDBERG					1	1
ALLSOP						_
CONTI						_
DOWSETT						_
ELLICOT						_
EVATT						_
EVERETT						_
FINKELSTEIN						_
FISHER						_
FORSTER						_
FRANKI						_
GYLES						_
HARTIGAN						_
HELY						_
JACKSON						_
JENKINSON						_
KEELY						_
KELLY						_
LEE						_
MADGWICK						_
MANSFIELD						_
MARSHALL						_
McGREGOR						_
NIMMO						_
NORTH						_
NORTHROP						_

Table 3 continued

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
O'LOUGHLIN						_
OLNEY						_
RILEY						_
SMITHERS						_
ST. JOHN						_
STONE						_
J. SWEENEY						_
TAMBERLIN						_
WARD						_
WEINBERG						_
WHITLAM						_

IX TABLE 4
PUBLISHING PROFILES OF HIGH COURT JUSTICES SINCE 1970 WHILE MEMBERS OF THE HIGH COURT

JUDGE	AUSTRALIAN LAW JOURNAL	AUSTRALIAN BAR REVIEW	JOURNAL OF JUDICIAL ADMINISTRATION	AUSTRALIAN UNIVERSITY LAW REVIEWS	OTHER	TOTAL
KIRBY	6	6	3	19	64	98
MASON (CHIEF)	4	4	1	9	33	51
GIBBS (CHIEF)	4	1		4	23	32
GLEESON	2	2		1	18	23
BRENNAN (CHIEF)	1	1	1	2	14	19
BARWICK	5				12	17
BRENNAN (PUISNE)	3	1		2	8	14
DAWSON		1	1	4	6	12
GAUDRON	1			1	7	9
MASON (PUISNE)	2			4	3	9
TOOHEY		1		1	6	8
MURPHY					6	6
GIBBS (PUISNE)	2			1	2	5
McHUGH	2	1			2	5
STEPHEN					5	5
WINDEYER	4					4
WILSON					3	3
AICKEN					2	2
GUMMOW					2	2
HAYNE	1					1
MENZIES	1					1
CALLINAN						–
DEANE						–
JACOBS						–
KITTO						–
McTIERNAN						–
OWEN						–
WALSH						–

X TABLE 5
THE MAIN JOURNALS IN WHICH JUDGES PUBLISHED WHILE MEMBERS OF EITHER THE FEDERAL COURT
OR HIGH COURT- 1980-1999

1980-1989		**1990-1999**	
Australian Law Journal	55	Australian Law Journal	30
Australian Bar Review	10	Australian Bar Review	21
Law Institute Journal	10	University of New South Wales Law Journal	14
Australian Journal of Forensic Sciences	9	Australian Family Lawyer	12
Federal Law Review	8	Journal of Judicial Administration	12
Australian Law News	7	Victorian Bar News	12
Sydney Law Review	6	Commonwealth Law Bulletin	9
Canberra Bulletin of Public Administration	4	Taxation in Australia	9
Legal Reporter	4	Australian Law News	7
Queensland Law Society Journal	4	Criminal Law Journal	7
Adelaide Law Review	3	University of Western Australia Law Review	7
Monash Law Review	3	Bar News	6
University of New South Wales Law Journal	3	Judicial Review	6
University of Queensland Law Journal	3	Law Institute Journal	6
Australian Crime Prevention Council Journal	2	Monash Law Review	6
Commercial Law Quarterly	2	Melbourne University Law Review	6
Law Society Journal	2	Refresher	6
Melbourne University Law Review	2	Brief	5
Newsletter of the Law Society of the Australian Capital Territory	2	Judicial Officers Bulletin	5
Trade Practices, Advertising and Marketing Law Bulletin	2	Public Law Review	5
		Reform	5

XI TABLE 6
DESCRIPTION OF VARIABLES USED IN MULTIPLE REGRESSION

Variable	Definition	Expected Sign
PUBLICATIONS	Number of journal articles which each judge has published while a member of the Federal Court or High Court	
EXPERIENCE	Number of years that the judge has been on the High Court or Federal Court	Positive
ACADEMIC	Dummy variable equals 1 if the judge was an academic prior to being appointed to the Bench; otherwise zero	Positive
CHIEF	Dummy variable equals 1 if the judge was chief justice; otherwise zero	Positive
POSTGRAD	Dummy variable equals 1 if the judge has a postgraduate degree in law; otherwise zero	Positive
HIGH COURT	Dummy variable equals 1 if the judge was on the High Court; otherwise zero	Positive
EDITOR	Dummy variable equals 1 if the judge performed an editorial role at a journal while a member of the Federal Court or High Court	Positive

XII TABLE 7
ORDINARY LEAST SQUARES ESTIMATES OF THE FACTORS WHICH EXPLAIN JUDICIAL PUBLICATION PATTERNS

Explanatory Variable	I	II	III	IV	V	VI
	Dependent Variable =PUBLICATIONS			Dependent Variable =log(PUBLICATIONS)		
CONSTANT	3.0390* (2.4869)	3.7000** (2.1718)	3.2617* (2.9817)	1.0280* (3.6669)	1.0330* (3.6117)	1.1416* (4.2671)
ACADEMIC	2.0676 (0.7170)	3.7134** (2.0352)	_	0.5240*** (1.6003)	0.5301*** (1.7271)	_
POSTGRAD	2.9822 (0.9070)	_	3.4926 (1.2549)	0.0136 (0.0532)	_	0.1351 (0.5520)
EXPERIENCE	-0.1002 (0.6187)	-0.1106 (0.6378)	0.1080 (0.7008)	0.0175 (0.7399)	0.0173 (0.7186)	0.0128 (0.5526)
CHIEF	13.0063* (2.5248)	12.9204** (2.5314)	12.9051** (2.5254)	1.1200* (3.6278)	1.1186* (3.6276)	1.0855* (3.4333)
HIGH COURT	6.4182*** (1.6830)	6.8445*** (1.6193)	6.1341 (1.5242)	0.5767** (2.0459)	0.5788** (2.0116)	0.4705*** (1.6692)
EDITOR	38.7652* (18.1859)	38.2908* (21.7382)	38.6819* (17.7889)	2.3467* (9.0134)	2.3446* (9.4900)	2.3170* (8.9024)
R^2	0.2408	0.2304	0.2385	0.2467	0.2467	0.2231
F-statistic	5.7084$^+$	6.5246$^+$	6.8290$^+$	3.7125$^+$	4.5198$^+$	3.9628$^+$

Notes:
Figures in round parenthesis are White's heteroskedastic consistent t-statistics.

* t-statistics are significant at 1%
** t-statistics are significant at 5%
*** t-statistics are significant at 10%
\+ F statistic is significant at 1%