Scholarship and Community

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> A study which ranks the nation's law schools by how often their professors write in leading law reviews has concluded for the second time that faculty members of the University of Chicago School of Law and Yale Law School outpublish their peers.
>
> *International Herald Tribune*[1]

> There cannot be too many law reviews, or at least there are not yet ... There is a lot more law out there to review these days, so growth in the number of law reviews ought to be encouraged not bemoaned.
>
> John Paul Jones[2]

> There are two things wrong with almost all legal writing. One is its style. The other is its content.
>
> Fred Rodell[3]

Legal scholarship lies at the heart of the world of legal academics and law schools. Our working days are spent reading it, discussing it and "doing" it. Law reviews[4] are perhaps the most important means of disseminating legal scholarship. It is the relationship between law reviews and legal scholarship which will be the concern of this paper.

Scholars are expected to be productive. This means publishing frequently so that scholarly research can be made public. As the quote from the *International Herald Tribune* shows, the importance of scholarly publication in law reviews has become a matter of interest, perhaps even concern, to the wider community. Jones, by calling for more law reviews, reveals another feature of the relationship between law reviews and legal scholarship apart from its centrality for legal scholars. The content of legal scholarship, as perceived by Jones, seems to be based on a direct relationship between the needs of the profession and the work of scholars. Finally, Rodell adds another perspective on the relationship — the possibility that not all is well in the world of legal scholarship. These features of the relationship between legal scholarship and law reviews will be examined in this paper.

The paper will be structured in the following way. The first section will be devoted to an analysis of the nature of legal scholarship as it is practised in the common law world. In particular, I wish to investigate the close relationship between the form and content of legal scholarship and the needs and desires of the legal profession.[5] The second section will consider the problems that I

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1 *International Herald Tribune*, 18–19 July 1992 at 3.

2 Jones, J, "In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal" (1988–89) 57 *UMKC LR* 241 at 244.

3 Rodell, F, "Goodbye to Law Reviews" (1936–37) 23 *Virg LR* 38.

4 In this paper the terms "law journals" and "law reviews" will be used interchangeably.

5 I include here solicitors, barristers, judges and other, working lawyers.

believe are besetting legal scholarship and law reviews. In the third section I will outline my proposed solution to the problems I have identified with legal scholarship and law reviews. I will conclude in the fourth section by responding to criticisms which my proposal may raise as well as evaluating other suggested solutions to these problems.

1. *The Nature of Legal Scholarship*

In a recent and influential article[6] Judge Harry Edwards of the US Federal Court of Appeal made a scathing attack on modern legal education.

> For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession .... The schools should be training ethical practitioners and producing scholarship that judges, legislators and practitioners can use .... But many law schools — especially the so-called "elite" ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.[7]

What are the implications of such a view? Giving an analysis based on Kuhnian ideas,[8] Collier describes orthodox legal scholarship as being patterned on the work of common law judges. Such work took it for granted that in the common law — the distilled wisdom of generations of lawyers — answers were to be found for all legal problems. One started, naturally, from the cases and either developed existing doctrine in slightly different ways or tidied up the work of the less gifted of the judges.

> Scholarship based on this paradigm, like the scholarship in a mature natural science, consisted mainly of brief articles devoted to doctrinal problem-solving — modest, incremental refinements of a shared, cumulative enterprise: "the common law".[9]

In other words, on this understanding the scholar is seen as a high level research assistant, formally free from the direction of the court but constrained to work within the tradition and expectations of the judiciary and the legal profession.[10]

Support for such an understanding of legal scholarship can be found by perusing the contents of any recent Australian law journal. The majority of articles fits the description offered by Collier. Certainly legal scholarship is understood in this fashion by leading scholars and judges in Australia (and overseas). For example, in a recent article by Trindade on the concept of an Australian law of torts the author quotes a Regius Professor of Civil Law at Oxford (Birks) as suggesting that the modern common law is made in partnership between the university law schools and the courts.[11] Mason CJ of the

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6 Within one year of the publication of Edwards' article papers from a symposium involving a number of prominent American legal academics and judges had been published in the Michigan Law Review. See (1993) 91 *Mich LR* 192 and following.

7 Edwards, H, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 *Mich LR* 34.

8 Kuhn, T, *The Structure of Scientific Revolutions* (2nd edn, 1970).

9 Collier, C, "Interdisciplinary Legal Scholarship in Search of a Paradigm" (1993) 42 *Duke LJ* 840 at 8–43.

10 Levinson, S, "Judge Edwards' Indictment of 'Impractical' Scholars: The Need for a Bill of Particulars" (1993) 91 *Mich LR* 2010 at 2019.

11 Birks, P, "'When Money is Paid in Pursuance of a Void Authority ... ' — A Duty to Repay?"

High Court accepts that the courts do rely on this sort of partnership with legal academia.[12] Certainly Carter and Stewart, in an unfortunately self-condescending tone, suggest that the evident willingness of the High Court to be influenced by scholarly work is to be applauded.[13]

As Collier suggests there is a similarity between this view of law and normal conceptions of the natural sciences. In the latter there is so much knowledge waiting to be discovered, catalogued and systematised that the limits to the dissemination of knowledge are physical — there is not enough money or enough researchers to do all the work. The vast increase in law (statutes, regulations and judicial and administrative decisions) which has occurred in this century and which does not seem likely to abate, would, naturally, require a similar effort in discovery, cataloguing and systematisation. As we have seen, Jones believes there is a need for more law reviews to deal with the ever increasing amount of law.[14] So, just as technical innovations like planetary probes and larger telescopes have led to increases in data and, hence, the need for more research and publication, the increase in law reports and statutes drives the need for more published legal research, especially in journals.

Is Edwards correct? Does law share a fundamental similarity with the natural sciences? Certainly he has his supporters.[15] One such supporter has argued that tenure pressure leads to more "theoretical" and less "doctrinal" pieces being published because the latter is devalued by tenure committees and the students who run law reviews in the US.[16] Brest believes, however, that Edwards has misrepresented the situation in legal scholarship. Far from being threatened, doctrinal writing is, according to Brest, healthy and still a major part of legal writing.[17] I have not done the numbers but my impression is that the same holds for legal scholarship in Australia.

Edwards also has his critics. Gordon believes that the "doctrinal" writing so vigorously promoted by Edwards is not necessarily more practical than "theoretical" work. In fact, much of what is needed for a practical understanding of how law works cannot be learned in a university.

> Much of practitioners' most valuable practical knowledge is not in the least doctrinal. Some of it is intensely local knowledge — what the judges are like, which court clerks are cooperative, local procedural custom — and there is no point trying to teach that in law school. Some is craft knowledge, best taught through apprenticeship.[18]

This is sound common sense and is the reason behind many practitioners' belief that the only place that one can learn to be a practitioner is in

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(1992) *Public L* 580 at 591 cited in Trindade, F, "Towards an Australian Law of Torts" (1993) 23 *WALR* 74.

12 Mason, A, "The Tort Law Review" (1993) 1 *Tort LR* 5 cited in Trindade, id at 100.

13 Stewart, A and Carter, J, "Commerce and Conscience: The High Court's Developing View of Contract" (1993) 23 *WALR* 49 at 62.

14 Above n2.

15 Or, at least, he claims that he has. See Edwards, H, "The Growing Disjunction between Legal Education and the Legal Profession: A Postscript" (1993) 91 *Mich LR* 2191.

16 White, J J, "Letter to Judge Harry Edwards" (1993) 91 *Mich LR* 2177 at 2184–85.

17 Brest, P, "Plus Ça Change" (1993) 91 *Mich LR* 1945 at 1949.

18 Gordon, R, "Lawyers, Scholars, and the 'Middle Ground'" (1993) 91 *Mich LR* 2075 at 2109, n82. See also Schlegel, J, "A Certain Narcissism; A Slight Unseemliness" (1992)

practice.[19] Of course, this does not tell us what the law schools should teach nor what they should write. It does suggest, however, that Edwards' concerns are misplaced.

Posner argues that the emphasis on doctrine would undermine Edwards' concern about lawyers' ethics. He does not believe that a course designed around an exegesis of the American Bar Association's code of professional ethics (or, presumably, its Australian counterparts) would provide a serious analysis of the problems and challenges facing ethical, professional practice today. Instead one would have to start at the beginning with the debates between Aristotle and Plato over agency and work through the general philosophical literature on loyalty, commitment, candour and detachment, recent discussions on the role of lawyer as friend and officer of the court as well as more wide ranging critiques of the legal profession by groups like feminist legal scholars and those associated with Critical Legal Studies. Finally, one could study an example of the legal profession in crisis, for instance, in Nazi Germany. Posner, no doubt correctly, does not believe that a purely doctrinal scholar could teach such a course.[20] He concludes by arguing that professional knowledge is characteristically narrow and generates forms of scholarship that work within an accepted set of boundaries.[21]

Posner's proposed ethics course is clearly the continuation today of a conversation, started over 2,000 years ago, discussing basic questions about law. It is, in essence, a distillation of the most interesting and illuminating things said about legal ethics in the western legal tradition. Unlike professional knowledge this approach is not narrow, for the whole of the western legal tradition, and much else beside, is within its purview. Unlike the belief that law is like the natural sciences, this understanding treats law as fundamentally similar to philosophy. This means that knowledge does not grow or progress in the way that it is believed occurs in the sciences. Rather, in law scholars are continually trying simultaneously to understand and to refine a way of ordering society and ourselves. As will be argued below, the practice of common law lawyers is to totally absorb themselves in the authoritative materials — cases and statutes. This may be an effective professional strategy, but it is totally inconsistent with scholarly traditions.

This view of legal scholarship as a continuing conversation is not limited to areas like legal ethics or constitutional law where some would argue that the links with ethics, philosophy and politics are obvious. Even the most black letter of legal subjects can and should be understood in this fashion. For example, in his discussion of innovations in nineteenth century contract, Simpson argues that, despite a general belief that that century saw significant change in contract, nothing much actually happened. Instead of fundamental shifts in contract, the common law in this period adopted the systematic exposition of

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63 *U Col LR* 595.

19 For an example of this view see Meagher, R, "The Scope and Limitations of Legal Practice Courses: Should They Replace Articles and Pupilage?" (Proceeding and Papers of the 7th Commonwealth Law Conference, Hong Kong, 18–23 September 1983 at 173–175).

20 Posner, R, "The Deprofessionalization of Legal Teaching and Scholarship" (1993) 91 *Mich LR* 1921 at 1924–25.

21 Id at 1926–27.

doctrine and principle in ways similar to the canon law and civil law traditions. What looked like change was just the common law using the ideas worked out by the civil and canon lawyers over hundreds of years. Simpson believes the common law was able to use this heritage partly because of the tradition of authority and partly because he believes that there is a "close connection between private law and certain moral ideas which have remained relatively static over long periods, thus constantly generating similar principles and problems ".[22]

Perillo would go further than Simpson. He believes that an examination of the trading strategies of all peoples, and the resolution of disputes surrounding them, shows the essential continuity of human nature across time and cultures. For Perillo, the trading strategies and substantive law and procedure of all societies are not very different.[23] From this perspective the philosophical and historical underpinnings of a doctrinal edifice are at least as important, if not more so, than the rules which they support.

Posner's conclusion that doctrinal teaching is narrow and avoids the important questions in law raises fundamental questions about legal scholarship. What is it that we are trying to teach and what is legal scholarship? For Kronman the answer is disheartening. He believes there is an irreconcilable tension between training for advocacy — which entails an indifference to truth — and scholarship, whose defining characteristic is the discovery of truth and the dissemination of knowledge.[24] White feels that Edwards' vision of the law is too narrow because it ignores the central role of law and lawyers in constantly defending and reshaping our basic institutions. Once it is accepted that judging involves more than a mechanical interpretation of cases or statutes, White believes that the boundaries of legal thinking are widened dramatically.[25] Because of this he rejects the view which sees legal academics as part of an extended law reform commission or research institute for the profession and, instead, believes that they constitute a community of scholars.[26]

For Reingold law lives a double life.

> On the one hand it refers to complex norms that define and describe our history and culture. In this sense, "the law" serves as a kind of magical shorthand. In two syllables we can conjure up an array of ideas and activities — relationships of power, systems of governance, methods of resolving disputes, even some of the core values — that give our society its character and shape. On the other hand the law is also something that gets practiced. Grounded in substantive and procedural rules as well as in convention, the law — the representation of clients — is a daily event. The practice of law both affects the law as a cultural construct and is equally a product of it.[27]

Reingold believes that until recently most legal scholarship was directed to the second and narrower understanding of law. In other words, legal

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22 Simpson, A W B, "Innovation in Nineteenth Century Contract Law" (1975) 91 *LQR* 247 at 254.

23 Perillo, J, "Exchange, Contract and Law in the Stone Age" (1989) 31 *Ariz LR* 17 at 51.

24 Kronman, A, "Foreword: Legal Scholarship and Moral Education" (1981) 90 *Yale LJ* 955 at 967.

25 White, J B, "Law Teachers' Writing" (1993) 91 *Mich LR* 1970 at 1971.

26 Id at 1974–75.

27 Reingold, P, "Harry Edwards' Nostalgia" (1993) 91 *Mich LR* 1998. Smith provides an il-

scholarship was written for and directed to the profession.[28] Unlike the United States, in Australia the overwhelming bulk of legal writing is still of the narrower kind. If, as James Boyd White argues, legal scholarship should not be seen in this way, it does not follow that legal practice should be ignored. Changes in practice and procedure do affect law in Reingold's wider sense and, in turn, help explain the fundamental values and features of our society. This aspect of law cannot be ignored; it has to be studied. However, this does not require us to write for the profession by providing an encyclopedic and timely coverage of developments. Yet traditionally the legal profession has expected that legal scholarship be "useful" in this narrow sense. As we have seen there is good reason to believe that this is still the predominant view of the majority of the legal profession to legal scholarship.

Schlag denies the possibility of a direct relationship between the profession and academia via the route of normative scholarship — scholarship designed to advise and direct the profession and lawmakers. He does not believe that judges pay attention to scholarly works. They are used only to buttress positions already reached.[29] Indeed, he does not believe that judges are in a position to pay much attention to academic work.

> [T]he identity, the role, and the job tasks of the judge do not typically lead to asking questions in any intellectually sustained manner about the character of law — what it is, how it works, what it does, or how it should be. The only questions of this kind that can be asked from a judge's perspective must be formulated in such a way that the questions, the answering, and the answers do not threaten the validity or the value of the judge's own sources of authority.[30]

Schlag is not attacking the judiciary but merely pointing out that judging is not a scholarly activity aimed at the pursuit of knowledge. Judging is a method of solving disputes consistent with the authoritative sources and methodology of the common law and this necessarily means that it is narrow and limited — from an intellectual point of view. It may be perfectly satisfactory from a legal and political perspective and it should be evaluated with this in mind. But it is not a scholarly pursuit. The dialogue and aims of judges (and practitioners) and scholars head in different directions.

Nor does Schlag think that normative scholarship has any more effect on bureaucratic organisations which are now a great and growing source of law. He believes that normative discourse and bureaucratic practice are incom-

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luminating (and somewhat sad) example of a scholar who cannot see beyond the narrower understanding of law described by Reingold. "In the end the harsh reality may be this: The vocation of being a law professor has its rewards, but it is not the most exciting or important calling in the world. I might prefer to be a sociologist, or a theologian, or the bold and visionary leader of a radical revolutionary movement. If so, I might even find acceptable ways to work some of these interests into my legal scholarship. But as long as I profess to be, primarily, a scholar and teacher of law, my role may require that I pay respectful attention to the kinds of realities that make up the subject matter of legal doctrine." Smith, S, "In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen" (1992) 62 *U Col LR* 627 at 640.

28 Reingold, above n27 at 1998–99.

29 Schlag, P, "Normativity and the Politics of Form" (1991) 139 *U Penn LR* 801 at 871–72.

30 Schlag, P, "Clerks in the Maze" (1993) 91 *Mich LR* 2053 at 2055.

mensurable, rendering any significant effect by the former on the latter highly unlikely.[31]

In more specific terms Dan-Cohen argues that scholarship and practice are not the same, that the nature of discourse is different. Practitioners' (including judges and bureaucrats) discourse is bureaucratic, one-sided, strategic and authoritarian while that of scholars is imaginative, truth seeking, open-ended and personal.[32] Judges decide cases in ways which are consistent with the legal materials. They are not trying to find ultimate answers. Naturally these are ideals and will not be met in all cases. Nevertheless, insofar as the actors do try to match these ideals, the incommensurability of the two types of discourse will make communication between the two problematic. He accepts that there can be communication between the two camps but it will be indirect, diffuse and its effect will be difficult to evaluate and quantify.[33] But it cannot get better than this. Following the logic of Dan-Cohen's argument it becomes apparent that as long as scholars write as researchers for the profession and law-makers generally they are not acting as scholars.[34] Thus, for someone like Dan-Cohen traditional legal scholarship directed at the profession is not a resolution of the dilemma posed by Kronman, Reingold, Schlag and himself but, rather, an abdication of the scholarly role by legal academics. The contrast with Edwards is clear. Edwards believes that legal academics are avoiding their mission if they do not write for the profession while Dan-Cohen feels this happens if they do write for the profession.

Not all agree that this dilemma cannot be resolved. Burbank suggests that the reaching out to other disciplines which so raises the ire of Edwards is a search for help in mediating the tension discussed by Kronman.[35] Rubin is cautiously supportive of the notion that scholars can and should write for the profession. He accepts that public decision-makers and legal scholars possess different social roles and motivations and that these scholars are properly understood as writing principally to each other. But he denies that this means that scholars cannot write to public decision-makers and that the latter are not capable of listening. Despite this the impact of scholarship on judges is limited.[36] Rubin believes that there is little evidence of direct persuasion and that the best that scholars can hope for is influence, an indirect effect on general thinking, which will usually be collective and the result of diffuse and complex effects on decision-makers.[37] Yet even he is wary of traditional doctrinal

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31 Above n29 at 881.

32 Dan-Cohen, M, "Listeners and Eavesdroppers: Substantive Legal Theory and its Audience" (1992) 63 *U Col LR* 569 at 570–75.

33 Id at 588–93.

34 For a specific example of this argument see Gava, J, "Review: *Statutory Interpretation in Australia* by Pearce and Geddes" (1993) 9 *Aust J L & Soc* 118.

35 Burbank, S, "Plus Ça Change ... ?" (1988) 21 *J L Reform* 509 at 512.

36 Rubin, E, "What does Prescriptive Legal Scholarship say and who is Listening to it? A Response to Professor Dan-Cohen" (1992) 63 *U Col LR* 731.

37 Id at 746–50. There are widely differing views on this question. Mary Ann Glendon, eg, believes that the Warren and Brandeis article, "The Right to Privacy" (1890) 4 *Harv LR* 193, had a significant influence on American law and public life; Glendon, M, *Rights Talk: The Impoverishment of Political Discourse* (1991) at 54–5. Marcus, on the other hand, in an extensive analysis of the (lack of) impact of a famous article, Chayes' "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv LR* 1281, does not seem to

scholarship aimed at the judges and practising lawyers. He believes that judges are perfectly able to interpret earlier cases and to construct legal arguments.[38] As we have seen, however, some Australian judges do believe that legal academics should be providing such a service. Rubin does believe that the judges do need help in social policy and empirical areas but that, unfortunately, this is where legal scholarship is weak.[39]

Rubin's major concern, however, is not that the relationship with judges is misunderstood. Rather, by structuring legal scholarship via a unity of discourse with judges (in other words, writing to and for the judges), legal academics are missing out where the action is. Rubin suggests that judges have been demoted to a subordinate position to legislators and administrative lawmakers in the law-making business because many of the major decisions which affect the law are administrative and legislative rather than judicial.

> In a number of crucial areas, the courts have been relegated to the secondary role of updating and gap-filling, a role which steadily shrinks as the pace of legislative action increases, and as implementation becomes an increasingly administrative task.[40]

Unlike Dan-Cohen, Rubin believes that legal scholars can have a direct relationship with policy-oriented decision-makers but only if they shed their role as pretend judges and present, instead, empirical arguments connected to clear, normative positions.[41]

Atiyah's discussion of the pragmatic tradition in the common law, published as the 1987 *Hamlyn Lectures*, also sheds light on the what Rubin calls the unity of discourse between judges and legal scholars. Atiyah there conducted a profit and loss analysis of the pragmatic tradition in the common law, an analysis which seems applicable to Australia. In essence, he argued that English judges deliberately aim to be pragmatic, preferring the resolution of particular disputes to the solution of grand problems of principle; that these judges base their decisions on "common sense" rather than theory and that they look to the short term, allowing the answer to major questions to be distilled through a number of decisions, instead of consciously resolving these large problems in one fell swoop.[42]

As a judicial strategy pragmatism, in Atiyah's terms, may be a good way of doing things. It certainly is not at the top of the agenda of any political or social movements as something which needs desperately to be reformed. As an intellectual approach, however, it has distinct limitations. First, when judges talk about common sense it is difficult not to accuse them of being disingenuous. Asserting that common sense is used in the interpretation of statutes does not tell us what it is. If, for example, an industrial law question was

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think that the article has had any effect on the judiciary; Marcus, R, "Public Law Litigation and Legal Scholarship" (1988) 21 *J L Reform* 647.

38 Rubin, E, "The Practice and Discourse of Legal Scholarship" (1988) 86 *Mich LR* 1835 at 1889.

39 Id at 1889–91.

40 Id at 1886. Lawrence Friedman makes a similar argument for the law of contract. Friedman, L, *Contract Law in America* (1965) at 193.

41 Above n38 at 1887.

42 Atiyah, P, *Pragmatism and Theory in English Law* (1987).

to be resolved via the interpretation of a particular piece of legislation, what would it mean to say that one could solve it using common sense? Is John Hewson's common sense the same as John Howard's or John Fahey's or Paul Keating's or Bill Kelty's or John Halfpenny's or Norm Gallagher's? In fact, one could argue that in industrial disputes common law judges have used a "common sense" which has been consistently hostile to trade unions. However, it is clear that for these judges common sense is not seen as a contestable concept or position. Rather, the accepted position is seen as a manifestation of common sense. Whatever its advantages this is not an intellectual approach toward the understanding of law.

Secondly, pragmatism is inherently short-sighted. Limiting oneself to the particular problem at hand may wonderfully concentrate the mind of the judge to the benefit of the parties to the dispute, but it does tend to blind one to the long term consequences of a decision. For example, an investigation of cases on family law suggests that the judges have never confronted the phenomenon described by Glendon, the dejuridification of the family.[43] Even in areas often labelled "lawyers' law" the judiciary still prefers to concentrate on the short term. Judges, for example, have largely avoided analysing the glacial merging of contract and tort. Doctrinal difficulties like the duplication of remedies have been considered; the underlying philosophical and jurisprudential tensions are rarely, if ever, discussed. Is contract to be seen as a jurisprudential device to create or maintain a space in our society where individuals can exercise free will with minimal interference from the state or should it give way to a belief that increasing reliance and cooperation must allow more and more duties to be imposed? The confusions and contradictions of modern contract cases reflect this tension but it cannot be said that the law reports increase our intellectual appreciation of the fundamental problems facing contract. Scholarship should not be so limited.

Thirdly, it can be argued that pragmatism is, at best, one way of looking at law, useful for some purposes but limiting for others. Atiyah calls this the anti-theoretical prejudice of the common law; the desire to use common sense in place of theory. His point is that common law judges openly eschew any theoretical debate. This does not mean that the judiciary is not theoretical about its work. It is just that the judges either do not know what their theory is or would prefer not to articulate it if they do. My criticism is a little different. Pragmatism can work. The failure of judges to deal with theory has had no appreciable effect on the possibility of adjudication in England or Australia. Judges, after all, do decide cases. Pragmatism, as described by Atiyah, is, however, only one way of looking at law. If scholars adopted this method to study law we would restrict ourselves needlessly. A procedure which openly and proudly advertises itself as anti-theoretical does seem rather inappropriate as the working model for legal academics. We should examine the work and attitudes of the judiciary as a facet of the law and not allow its working habits and beliefs to regulate and limit the range and manner of our investigations. Articles which summarise a series of decisions or go into great detail about

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43 Glendon, M, *State, Law and Family: Family Law in Transition in the United States and Western Europe* (1989).

the doctrinal inadequacies of one or two cases are useful for the profession but do not contribute to learning. Legal scholars have fallen into the trap of seeing the increasing number of cases as an ever larger mine of data which can be converted into knowledge. Unfortunately, this is not the stuff of which scholarship is made. Regrettably, this is the approach adopted by most legal academics, at least in Australia. As Bard suggests, the complexity of legal issues and the scholarly inadequacy of most legal writing makes a close attention to published legal scholarship an exercise in futility, or of shared ignorance.[44]

However you look at it cases only contain references to more cases. As Posner argues, the barrenness of the legal materials and legal reasoning should no longer be ignored.

> It is instructive to compare traditional academic law with typical fields in the humanities, such as literature and philosophy, on the one hand, and typical scientific fields, such as biology and physics, on the other. The professor of literature or of philosophy is a student of texts created by some of the greatest minds in history, and some of the greatness rubs off on the student. The professor of biology or physics deploys, upon his or her rather less articulate subject matter, mathematical and experimental methods of great power and beauty. The professor of law is immersed in texts — primarily judicial opinions, statutes, rules and regulations — written by judges, law clerks, politicians, lobbyists, and civil servants. To these essentially, and perhaps increasingly, mediocre texts he applies analytical tools of no great power or beauty — unless they are tools borrowed from another field. The force and reach of doctrinal legal scholarship are inherently limited.[45]

Another way of describing the phenomenon discussed by Posner is to accept that cases may contain evidence of ideological, philosophical or political controversies or that judges use and illustrate such areas of thought in their decisions. There is no doubt that this is true. It is evident, for example, that one can discern in cases dealing with the common law of contract a fidelity on the part of many judges to liberal political theory. But what is contained in the cases is not the best thought on the relationship of contract to this theory. What is found is the reflection of such ideas or the working out of doctrine which, consciously or not, is based on them. Judgments are not written as scholarly investigations of the philosophical bases underpinning a particular area of doctrine. Surely one could not claim that anyone wishing to read a considered treatment of contract from a liberal perspective could obtain it from reading judgments of the High Court. This could be done reading Charles Fried[46] but not the High Court. Similarly, an intimate knowledge of case law is required to master constitutional doctrine for the purposes of High Court litigation. If one wishes, on the other hand, to gain some insight into constitutionalism the cases will contain, at best, echoes and hints about the sort of values which, again, are either consciously or unconsciously held. Exposure to the very best of constitutional history and politics modern, medieval and ancient will mean that the ideas which are hinted at, relied upon or superficially treated in courts will be available in their best treatments.

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44 Bard, R, "Legal Scholarship and the Professional Responsibility of Law Professors" (1984) 16 *Conn LR* 731 at 747.

45 Posner, R, "Legal Scholarship Today" (1993) 45 *Stan LR* 1647 at 1654.

46 Fried, C, *Contract as Promise: A Theory of Contractual Obligation* (1981).

An example from the area of contract may help illustrate the point being made. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[47] the High Court heard an appeal from the New South Wales Court of Appeal which had effectively ignored the requirement for privity in contracts. In classical treatments in Australian and English textbooks privity is treated in a fairly straightforward fashion. Only parties to a contract are considered to have the right to bring an action on the contract. This is consistent with the classical 19th century understanding of contract as the product of the wills of the parties. While complications may arise over whether multiple parties have each to furnish consideration[48] or over intricate (and, perhaps, artificial) problems of agency[49] the essential position is, or was, quite clear. In *Trident*, to simplify matters somewhat, three of the judges argued that the traditional rule should be applied, three that it should not, at least for contracts of insurance, and the final judge decided on other grounds. Viewed from a perspective which sees contract and its rules as a coherent structure based on certain axiomatic principles this decision must be a puzzle. After all, is it really likely that three judges got it completely and utterly wrong? It doesn't matter much which group is chosen. The problem with such an understanding is that it forces one to believe that three of the best lawyers in Australia could not get a basic and fundamental feature of contract right.

Another way to approach the decision is to ask why the judges either wanted to follow or ignore the accepted rule of privity. Despite the length of the judgments not much of the reasoning is devoted to explaining why the respective positions were reached. Nevertheless, there is enough to reach some conclusions. Basically, the judges who wanted to follow the rule felt that it led to fairness and justice. Brennan J, for example, stated that he felt that no injustice ensued if a person, to whom a promise had not been made, was denied the right to bring an action on a promise made to another.[50] On the other hand, those judges who wanted to discard the rule believed that its application would lead to unfairness and injustice. Mason CJ and Wilson J, for example, argued that the expectations of the business community ran counter to the rule and that it should be modified in light of these expectations.[51]

However, if one casts about more widely than the reports the reasoning and rationale behind the two positions becomes clearer. The position of the Chief Justice reflects the ideas of contract expressed by, amongst others, Hugh Collins. In general terms, he perceives the: "purpose of the law of contract as the channelling and regulation of market transactions according to the ideals of social justice".[52] More specifically, for our purposes, he claims that: "the courts have replaced the doctrine [of privity] by a principle which permits persons to recover benefits under a contract whenever it was reasonably foreseeable that they would wish to take such a benefit".[53] This leads to a test of

47 (1988) 165 CLR 107.
48 *Coulls v Bagot's Executor and Trustee Ltd* (1967) 119 CLR 460.
49 *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446.
50 Above n47 at 127 per Brennan J.
51 Id at 123–4 per Mason CJ and Wilson J.
52 Collins, H, *The Law of Contract* (1986) at 1.
53 Id at 105.

reasonable foresight similar to that used in tort.[54] Collins sees common law contract moving away from a will-based conception which emphasises personal responsibility, self-reliance and freedom to one which is happy with the notion of the courts imposing obligations of fairness and good faith on contracting parties. A similar argument is made by Adams and Brownsword in their recent discussion of the principle of consideration.[55] Placing the judgment of Mason CJ and Wilson J in the context of Collins' arguments makes it much easier to understand.

Similarly, Brennan J's judgment becomes much more comprehensible if we place it in a broader context. Charles Fried has argued that contractual obligations are self-imposed. These obligations are grounded in the moral principle of promise and the will-theory of contract is the legal working out of this principle.[56] Unlike Collins, Fried does not believe that the courts are moving away from a will-based notion of contract, nor does he believe that they should. For Fried, will-based contract is an essential feature of our legal and political structures, creating and maintaining a space where individuals can freely enter into obligations knowing that the courts will not impose new obligations on them. The judgment of Brennan J slots rather easily into such a general understanding of contract.[57]

Viewed from a broader perspective the opposing judgments in *Trident* become easier to understand. For a judge like Brennan J, the basic rule of privity leads to justice and fairness because it embodies the values and aims of his understanding of contract and its place in today's society. For someone like Mason CJ the application of the rule of privity would inevitably lead to unfairness and injustice because it is inconsistent with his conception of contract and its purpose in today's society. Yet what is of interest is the conflict between competing rationales or ideological underpinnings of contract and not the particular manifestations of them found in the case. *Trident* is interesting, but not because of what the judges have to say about these fundamental beliefs — after all, they say relatively little about them. It is interesting because the judgments contained in it are evidence of the profound jurisprudential, philosophical and political disputes which are at the centre of the debates over contract in the 1990s. Any serious discussion of these debates, however, must proceed beyond the case and into the many works of history, philosophy, sociology, jurisprudence, economics, politics, indeed all learning which has considered the questions raised by contract.

To treat cases as scholarship is to profoundly misunderstand the nature and history of common law judging. Dixon's call for a complete legalism was a

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54 Id at 114.

55 Adams, J and Brownsword, R, "Contract, Consideration and the Critical Path" (1990) 53 *Mod LR* 536, discussing the English Court of Appeal decision in *Williams v Roffey Bros* [1990] 1 All ER 512.

56 Above n46 at 1–2.

57 Keen students of contract may be uneasy with the use of Fried to explain a defence of the rules of privity since American courts have, following *Lawrence v Fox* 20 NY 268 (1859), allowed third-party beneficiaries to sue on a contract. Although Fried does try to square this third party right with his understanding of contract as based on contract, it surely is inconsistent with its underlying premises. See Kincaid, P, "Privity and the Essence of Contract" (1989) 12 *UNSW LJ* 59 at 71–5.

judicial pronouncement which stated unequivocally that the judges did not want to enter into political and philosophical debate.[58] Of course, few would deny that judgments reveal and are based on political and philosophical positions. But we should take judges at their word when they claim that they do not want to enter into such debates. Judges are not interested in giving scholarly and illuminating discussions on anything other than case law. Given this predilection, it is hardly likely that judges, working in this tradition, would create lasting works of value when considered from a scholarly perspective. Evidence of philosophical, jurisprudential and political beliefs yes: scholarly discussion of these beliefs no.

For practitioners, though, cases are very important. The analytical development of case law is the accepted method for resolving legal disputes in the common law. Posner calls it "debaters' reasoning".[59] There is nothing inherently wrong with this; one method is as good as another as long as results are fair. What cannot be argued in its favour is that it gives a scholarly understanding of the law. Classical apologists of the common law like Llewellyn and Eisenberg are best understood as defending the common law method as a practice which gives tolerably predictable results and which fits into the ethos, experience and expectations of the legal profession.[60] The criticisms of the Legal Realists and, more recently, Critical Legal Studies and Law and Economics make most sense when they are seen as illustrating that the common law method is not a closed, logical system. Clearly that system does reflect predominant views in our society and the legal profession. The more perceptive defenders of the common law method, like Llewellyn and Eisenberg, not only accept this, they recognise the openness of the common law as a strength which allows for the predictable and orderly development of the law.

Once cases are understood in this way, scholarly concentration on the logical deficiencies or otherwise of a case or a series of cases seems misplaced. Common law judging is an art, as Llewellyn so brilliantly explained. It is a means of resolving disputes in a way which seems consistent, as the judges and practitioners see it, with the traditions and changes within society. While this calls for investigation — the judges' received wisdom may not be to everyone's taste — it does not necessitate a comprehensive catalogue and analysis of every judgment handed down. This is, of course, another way of saying that scholars and practitioners do different things and that we should be intelligent enough (and brave enough) to accept this.

However, the relationship has not always been like this. Anyone who reads the great constitutional decisions of Marshall CJ will be struck by the lack of reliance on cases.

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58 See the speech given by Sir Owen Dixon at the ceremony given for his swearing in as Chief Justice of the High Court of Australia on 21 April, 1952. Reported in (1951–2) 85 CLR xi. See also, Dixon, O, "Concerning Judicial Method" (1956) 29 *ALJ* 468.

59 Above n45.

60 Llewellyn, K, *The Common Law Tradition: Deciding Appeals* (1960); Eisenberg, M, *The Nature of the Common Law* (1989). See also the recent discussion of the concept of "conventionalism" which "posits that the shared understandings of the legal profession (about the method and the implications of doctrine) as the source of constraint in legal interpretation". Millon, D, "Objectivity and Democracy" (1992) 67 *NYULR* 1.

> [H]is five greatest constitutional opinions as chief justice of the Supreme Court failed to cite a single previous court decision as authority. Each argument was grounded instead upon appeals to the *principia* of American civilisation and upon the grand, inclusive style glimpsed in Adams and Blackstone.[61]

As Millon comments:

> Such rhetorical strategies were not based on a conception of the judiciary as possessing a monopoly over the special knowledge needed to understand the constitution's requirements. Moral and political persuasion, rather than "claims of espistemological certainty" ... would legitimate the court's decisions. Disclaiming the authority of elite professional learning ... judicial review offered an opportunity for dispassionate, impartial consideration of constitutional questions, in a language accessible to all Americans. Judges acted as fallible mortals rather than Olympian oracles, engaged in a dialog with the public about justice.
>
> Under this model, legal judgment was a dialogic process, an endless conversation about what the law should be.[62]

Unfortunately, this is not the way law is understood by practising lawyers in Australia today. If it were the nature of the relationship between scholarship and legal practice would be fundamentally different and immensely richer.

Even if these arguments about the nature of scholarship are accepted it can be argued that this would not necessarily mean that anything has to change. One response suggests that amidst all the unnecessary writing there will be found important work and that the mammoth production of legal scholarship is a necessary, if somewhat unfortunate, precondition for quality work to be produced. Posner makes a claim of this sort when he compares scholarly production to the reproductive strategy of salmon. Like salmon breeding in the wild, where of 6,000 fertilised eggs laid by a female on average only two salmon who are born live to adulthood, legal scholarship is a high-risk, low-return activity.[63] As will be argued below I believe there is a better, more efficient way of carrying on legal scholarship.

A second response accepts the view of scholarship argued above but suggests that what should attract the attention of legal scholars is empirical work and practical advice to decision-makers. Gordon describes this well.

> Sometimes I think I would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency enforcement process, or legal transaction actually works.[64]

Caution and thought still have to be exercised in following through the implications of Gordon's plea. Potentially the number of articles that could be

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61 Ferguson, R, *Law and Letters in American Culture* (1984) at 23, cited in Millon, D, "Juries, Judges and Democracy" (1993) 18 *L & Soc Inquiry* 135 at 146. (Review of Stimson, S, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (1990)).

62 Millon, above n61 at 146.

63 Above n20 at 1928.

64 Gordon, above n18 at 2087.

written to satisfy this demand is infinite. One is entitled, however, to ask whether this type of scholarship has delivered.

Tennenbaum has his doubts about this in the area of criminology. His argument can be summed up in his comparison of two studies carried out to find out why there is so little crime in Switzerland and Japan. The first concluded that Switzerland's low crime rate could be explained by, inter alia, the decentralised, lightly urbanised nature of the society with a weak central government which encouraged local responsibility and, surprisingly, almost total and uniform gun ownership. The second stated that Japan's low crime rate could be explained by the heavily urbanised nature of Japanese society combined with a strong central government involved in all aspects of life and a virtual absence of firearms in the community.[65] He cites a number of prominent criminologists, including Leon Radzinowicz, who entertain doubts about the usefulness of criminology. One of these, Braithwaite, feels that criminology is an abject failure. It has not provided us with convincing explanations for the causes of crime or for its elimination. Nor is there any evidence that those countries who spend more on criminological work get any value for their money. According to Braithwaite, where criminology has been "successful", in its discussions of justice, for example, the ground had already been well worked over by philosophers and jurisprudes.[66] Tennenbaum's gloomy conclusion is that criminology's utility to society is similar to that of astrology.[67]

The lessons to be gained from Tennenbaum should not be ignored. Empirical scholarship is a great temptation for those disenchanted with doctrinal writing. But it appears that the same problems plague the other side of the fence as well.

If Gordon is wrong and greater concentration on empirical and sociological work is not problem free are we forced to accept Posner's argument about waste? Is it a sad fact that much needs to be written for the occasional "pearl" to be created? I believe that the problems and costs associated with traditional legal scholarship are so great that we cannot fall back on this tempting position.

2. *The Problems of Legal Scholarship*

Rodell's famous critique quoted at the beginning of this paper captures neatly the criticisms commonly levelled at law journals.[68] Since its publication many scholars have complained that law articles are boring and poorly written. Nowak, for example, believes that bad legal writing is caused by the overuse of footnotes, the impersonal tone used and the reversal of normal grammatical

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65 Tennenbaum, A, "The Crisis in Criminology" (1992) 92 *Telos* 51 at 51–2.

66 Id at 52–3 citing Braithwaite, J, "The State of Criminology: Theoretical Decay or Renaissance" in Laufer, W and Adler, F (eds), *Advances in Criminological Theory, Vol 2* (1990), 155.

67 Id at 62. Although Weisberg believes that the ills of criminal law scholarship could be cured by moving away from doctrinal writing and toward criminology, his recent paper on the inadequacies of modern criminal law scholarship is full of reasons explaining why not much would be gained from doing so. Weisberg, R, "Criminal Law, Criminology, and the Small World of Legal Scholars" (1992) 63 *U Col LR* 521.

68 Above n3.

rules.[69] One writer has claimed that the dominant law article style, with its emphasis on detail and copious footnoting, actively inhibits speculative and innovative writing.[70] Footnotes are a particular concern. Raymond suggests that the trajectory of contemporary articles is toward a page with no text and just footnotes.[71]

While the footnote fetish is not as prevalent or as developed in Australia, complaints about poor writing and boring articles ring true. Unfortunately we do not have the benefit of surveys registering the feelings of readers, but it is my impression that the law journals have a poor reputation. It seems that if they are read, a sense of duty or necessity rather than pleasure or excitement is the reason.[72]

Criticism of the poor quality of articles is also widespread and is made by a wide range of scholars. Lasson believes that legal scholarship is of questionable worth,[73] while Nowak suggests that law review articles are badly written because most legal scholars have nothing to say.[74] Murray claims that good scholarship is being swamped by coerced writing for the purposes of tenure and promotion,[75] while Zenoff feels there is general agreement that published articles are too long and boring, that there are too many of them, that they lack originality and have too many long and boring footnotes.[76]

Commentary on Australian legal scholarship is meagre but hardly positive. Hutley described Australian law schools (and, implicitly, legal scholarship) as mediocre.[77] Wade's gloomy analysis of Australian legal education damns legal scholarship with faint praise. "Research — particularly the work of just keeping up with the comments on legislation, case law and reform proposals — is constant."[78] Similar claims are made by Weisbrot.[79] David Fraser is less charitable (or more honest). "Australian legal scholarship is boring. More important, however, than its continuing lack of aesthetic appeal, is its continuing irrelevance."[80]

One feature of law journals which Rodell did not address is that most law articles do not seem to be read. Certainly, the overwhelming majority of articles are not cited by other scholars. Finet has investigated the citation patterns of

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69 Nowak, J, "Woe unto You, Law Reviews!" (1985) 27 *Ariz LR* 317 at 318.

70 Cane, B, "The Role of Law Review in Legal Education" (1981) 31 *J Leg Educ* 215 at 227.

71 Raymond, J, "Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal" (1985) 12 *Pepperdine LR* 371 at 376. For the curious, Raymond proposes that articles be readable.

72 Criticism of poor writing is not limited to legal periodicals. Elizabeth Geake has suggested, only half in jest, that scientific papers be written in verse to make them more interesting. See (1991) "May the Muse Be With You ", 132, 1791 *New Scientist* at 51–2.

73 Lasson, K, "Scholarship Amok: Excesses in the Pursuit of Truth and Tenure" (1989–90) 103 *Harv LR* 926.

74 Above n69 at 319–20.

75 Murray, J, "Publish and Perish — by Suffocation" (1975) 27 *J Leg Educ* 566 at 566–68.

76 Zenoff, E, "I Have Seen the Enemy and They are Us" (1986) 36 *J Leg Educ* 21.

77 Hutley, F, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) *ALJ* 63 at 68.

78 Wade, J, "Legal Education in Australia — Anomie, Angst, and Excellence" (1989) 39 *J Leg Educ* 189 at 202.

79 Weisbrot, D, *Australian Lawyers* (1990) at 148.

80 Fraser, D, *The Man in White is Always Right: Cricket and the Law* (1993) at 1.

legal periodicals in the US. He found that a few titles were cited frequently, but most rarely or never. Articles published in the "prestige" journals from Harvard, Yale, Columbia and other "elite" universities were regularly cited while those in less prestigious, more "provincial" periodicals tended to be ignored.[81] Similar results were found by Leonard when he analysed the citation patterns of a randomly selected number of articles published in law reviews in 1984.[82] Surveys of other disciplines show comparable results. A study analogous to Leonard's for papers on physics found that 35 per cent of all papers published in a particular year had not been cited at all.[83]

Such studies are not indisputable proof that articles are not being read but they are suggestive. A walk along the shelves of any moderately-sized, law library filled with rows of rarely opened volumes of law reviews (the level of dust accumulated on top of a volume is a dead give-away to its last use) is also suggestive. Nearly 40 years ago Havighurst gave a good explanation for this. Law reviews are not demand driven by a reading public waiting breathlessly for the next law article. They are supply driven by large numbers of academics wanting to be published for a variety of reasons.[84]

Aside from the reasons given by Rodell there is one further reason for the failure of articles to attract readers — their sheer number. In the United States it has been estimated that there are at least 250 student-edited law reviews publishing over 150,000 pages annually.[85] Lasson has found that the *Index to Legal Periodicals* lists over 800 journals (the majority, one could assume, from the United States) containing over 5,000 articles each year.[86] The Harvard Law School alone contributes 8 journals and between 5,000 to 6,000 pages of articles, casenotes, reviews, and so on, each year.[87] It is not only the number of journals that is large and increasing; they are putting on weight as well. From 1954 to 1984 the *Harvard Law Review* increased in size by 34 per cent.[88]

Of course, nowhere near this number of journals is published in Australia but the trends are ominous. I have conducted a preliminary survey of the number of law journals published in Australia from 1960 to 1994 and, although the results may not be entirely accurate, they are indicative of a trajectory of accelerating growth. In 1960 eight journals were published in Australia. The list had increased by one in 1970 and to fourteen by 1980. In 1994 the figure is around 50.[89] With the recent establishment of a number of law schools and

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81 Finet, S, "The Most Frequently Cited Law Reviews and Legal Periodicals" (1989) 9 *Legal Ref Serv Q* 227.

82 Leonard, J, "Seein' the Cites: A Guided Tour of Citation Patterns in Recent American Law Review Articles" (1990) 34 *St Louis U LJ* 181.

83 Holub, H, Tappeiner, G and Eberharter, V, "The Iron Law of Important Articles" (1991) 58 *Southern Econ J* 317 at 318, citing De Solla Price, D, "Networks of Scientific Papers", *Science,* 30 July 1965, 510.

84 Havighurst, H, "Law Reviews and Legal Education" (1956) 51 *Northwestern U LR* 22 at 24.

85 Cramton, R, "'The Most Remarkable Institution': The American Law Review" (1986) 36 *J Leg Educ* 1 at 2.

86 Above n73 at 928.

87 Preckshot, G, "All Hail Emperor Law Review: Criticism of the Law Review System and its Success at Provoking Change" (1990) 55 *Missouri LR* 1005 at 1010.

88 Ibid.

89 I have not included in these figures publications like the *Law Institute Journal*, the *Law Society Journal* and the *Queensland Lawyer* although these have many of the features one

the promise of more to come we can expect the number of journals to increase. If Australian law schools adopt the growing tendency of their American counterparts to publish more than one review (and in the United States there are 12 universities which collectively publish sixty journals)[90] it is possible that we will have 100 or more journals by the year 2000. The emergence of desk-top publishing has also given commercial publishing houses the chance to publish law journals inexpensively. The recent proliferation of titles suggests there is a market for professionally oriented journals, especially if payment for legal writing becomes more acceptable in Australia.[91] The fantastic growth of E-Mail and computer noticeboards suggests that electronic journals will provide another fillip to the growth of the number of journals.[92]

Given the vast number of articles published each year it is not difficult to believe that many articles lie unread.[93] Of course, as we have seen, the number of articles produced in Australia is much smaller than in the United States. Nevertheless, anyone who attempted to read all or even a significant proportion of published Australian legal writing, as well as keeping up with developments abroad, would soon find it was an impossible task. This information explosion is not limited to law alone. Scientists often complain of the impossibility of keeping up with the literature in their special areas of interest, let alone in their discipline or across the sciences generally.

My argument so far is as follows. A vast amount of scholarship is produced. This scholarship is the product of an understanding of law which sees it as fundamentally similar to the natural sciences. This has resulted in legal scholarship operating to catalogue, systematise and analyse cases and statutes as well as acting to promote law reform to judges, legislators and administrative law-makers. But, as suggested above, there is a more convincing argument to suggest that law is not like the natural sciences. It is a mistake to equate scholarship with the practice and discourse of judges and other law-makers. Scholars are not practitioners; they do different things and work with different ideals and aims. Orthodox legal scholarship, in effect, prevents us from being scholars. Not only is legal scholarship misconceived, it is also ignored. Partly this is due to widely held beliefs about its poor quality. Mainly, however, articles are ignored because so many are published.

In the remaining sections of this paper I will argue that there are tremendous costs associated with the present system of scholarship. I will then outline a solution to the problems raised by law reviews and legal scholarship. The final section will respond to likely criticisms my proposal may generate as well as considering alternative solutions.

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associates with scholarly legal periodicals.

90 Above n87 at 1010.

91 I would like to thank Phil Thomas of University College, Cardiff, for bringing this point to my attention.

92 As this paper was being written a message on E-Mail was flashed around the country informing academics that a new journal, the *Murdoch University Electronic Journal of Law*, was calling for contributions.

93 Of course, the problem is not only limited to law journals. Derricourt estimates that there are currently over 1 million books in English available in print in North America with 67,000 new titles being added each year. Derricourt, "Are we Publishing too many Titles?" *Campus Review*, March 3–9, 1994 at 9.

The Costs and Disadvantages of Legal Scholarship

The costs associated with research and publication are large and should not be ignored. Millions of dollars are spent in Australia each year to allow libraries to maintain immense and ever expanding serial collections. Vast amounts are allocated to legal scholars to fund publishable research. A substantial and growing proportion of academics' time is diverted from the wide reading and compilation of teaching materials required of a good teacher. Finally, enormous pressure is placed on all academics to publish, whether or not they have something to say and despite the fact that they may not like publishing an obligatory number of articles each year.[94]

One result of this pressure is the growing number of academic misconduct cases in recent years. Such is the need to publish that plagiarism and invention are now significant features of scholarship. A recent survey carried out by the American Association for the Advancement of Science indicates that academic misconduct may be more common than we think with up to one third of the scientists who responded to the survey having encountered at least one case of suspected fraud in the previous ten years.[95] We should not, of course, unthinkingly extrapolate from scientific scholarship to legal scholarship. But, if the pressures to produce are the same, and they appear to be, this survey gives cause for concern.

The criticisms levelled at law reviews are harsh. Too many articles are being published in too many journals with very few being read. Too few are read, not only because there are too many, but also because most articles are boring and of poor quality. Even if all were of good quality there are far too many for more than a small proportion to be read. Journals consume an immense amount of money as well as diverting a significant amount of time and energy away from teaching and reading. Finally, publication now seems inextricably linked with academic misconduct.

It is time to acknowledge that law reviews are a problem. This may be difficult to accept for those like Jones who think that there never can be enough law journals. After all, since so much of modern society is based on the notion that more is better, it is unrealistic to believe that it does not apply to legal scholarship as well. It will be particularly difficult to accept for those whose careers and self-esteem are bound up with successful publication. Post, writing for an American audience, believes that any move away from traditional, doctrinal scholarship will be resisted by most scholars because this will mean a loss of power and prestige for law schools. This would occur because such a change in the practice of scholarship might break the link with the profession and threaten the effective monopoly of law schools in training lawyers.[96] However, before describing my solution to the problems posed by law reviews, it is appropriate to identify their cause. Why have law reviews become a problem?

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94 McDowell, B, "The Audiences for Legal Scholarship" (1990) 40 *J Leg Educ* 261 at 265–66.

95 Lewin, R, "Pressure to Publish leads to Increase in Fraud" (1992) 134, 1815 *New Scientist* at 7.

96 Post, R, "Legal Scholarship and the Practice of Law" (1992) 63 *U Col LR* 615 at 621, n25.

The conclusions drawn by a study of economic literature which found that most articles were ignored seem apposite to legal periodicals as well. The authors of the study suggest that, if the role of journals is to communicate the results of research, this is being done in a most uneconomic way. Why then, they ask, do economists publish?

> One possible hypothesis is that, due to the doctrine of "publish or perish", the classical function of informing the members of the scientific community about the state of the discipline has been taken over more and more by the role of publications as a filter of scientific careers. The fact *that* a scientist publishes, *how much* he publishes, and especially *where* he publishes, has become much more important than *what* he publishes.[97] (Emphasis in original).

As we have seen such is the strength and attraction of this attitude to scholarship that it has penetrated the popular press.[98] As the report from the *International Herald Tribune* shows, it is easy and "rational" to evaluate scholarship in this fashion. There is an historical explanation to this trend as well. The expansion in the number of law schools in the common law world since the 1960s has resulted in a vast pool of untenured and low tier staff under pressure to publish their tenure and promotion pieces.[99] Murray believes that the bulk of published legal scholarship in the United States is produced under some sort of tenure pressure.[100] The irony of this situation is that this forced writing is the product of those who need time to think about and develop their ideas.[101]

Publication is also being used more and more as the sole performance indicator for hiring, tenure and promotion applications and the allocation of university money and staff. "Whatever law schools say, their behaviour sends strong signals to their faculty that teaching, institutional activities, and public service are to be done at the professors' own risk. Only publication is safe."[102] In Australia the emphasis on publication is accentuated by calls for productivity increases and "practical" research. Publication is an easy measure of productivity; more articles per academic must mean academics are becoming more productive. Teaching, in comparison, does not allow itself to be measured in such a neat and simple way. Economic concerns have also meant that universities have downgraded teaching in favour of directed, "practical" research. More research means, of course, more articles. As we have seen above, if legal scholarship is understood as the continuation of a conversation about law and its place and operation in our society and not as a surrogate law reform commission, productivity and practical will have different meanings when used in an academic setting.

Any proposal to remedy this situation can only respond to some of the symptoms of what is a deep-seated malady. The problems with legal scholarship which affect law reviews reflect the malaise facing universities. In Australia,

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97 Above n83 at 326.
98 Above n1.
99 Jensen, E, "The Law Review Manuscript Glut: The Need for Guidelines" (1989) 39 *J Leg Educ* 383 at 384.
100 Above n75 at 567.
101 Above n44 at 734.
102 Id at 733–4.

in particular, universities have become, in effect, government agencies and they direct their activities according to perceived and received government wishes. One result is the production line mentality — huge numbers of graduates "produced" with not enough regard for academic standards. Another is changed perceptions of university governance. Instead of a belief that a university should be run as a community of scholars, we now have a situation where university administrators see themselves as managers and bureaucrats rather than as academics. A reform of law reviews will not, by itself, remedy these more fundamental problems. But it is a start. Most important, it is a step within the province of law schools. In other words, reform of legal scholarship and law reviews are steps toward reforming law schools and, indirectly, universities.

3. *A Suggested Solution*

I wish to propose a scheme that requires every university law school to publish a law review. Every academic member of staff of the law school would be required to publish one article every three years in the school's journal. Only members of a law school would be allowed to publish in their journal. In effect, this claims law reviews as the property of legal academics. Contributors could write as many book reviews as they liked but these would have a limit of five pages — otherwise book reviews would reproduce the problems now presented by articles. Scholars would be allowed, say, two replies to responses to their work, with a ten page limit.

Such a scheme will no doubt raise fears about academic freedom and criticisms of an almost Luddite response to the inevitability and necessity of the dissemination of increasing amounts of knowledge. When the problems surrounding law journals and legal scholarship are considered and when the implications of my scheme are understood it will be seen that these concerns are misplaced. In fact, adoption of my scheme will lead to more academic freedom.

A Community of Scholars

Any reform of law reviews in response to the problems outlined above must reflect their essential nature or purpose. I believe that the true and best role for law reviews is as a means of communication for legal academics. Law journals allow us to speak to each other even though we are physically separate. We all have ideas and opinions; articles in law journals provide a mechanism for their rapid dissemination. Journals are ideally placed to act as an integrating device for academics. We can become an academic community by talking to each other, through journals, about what is important to us — legal scholarship. One can publish an article in Sydney knowing that colleagues in Perth will soon be able to comment on it, either personally or through a journal. Debates can be held between colleagues at the same institution for the benefit of scholars around the country (and elsewhere, of course). Or, debates can take place across the continent, with the community of scholars participating as an audience. Through the public airing of arguments and debates all legal academics can become involved. Instead of isolated groups of scholars communicating through channels of friendship or interest, journals could provide an opportunity for all of us to know what the rest of us are doing, arguing and thinking.

The sad fact is that most of us are lucky if we know the names of a minority of legal academics in Australia, let alone have any familiarity with their work. Apart from the authors of the leading textbooks or casebooks used during our undergraduate studies, the only links with scholars outside one's institution is likely to be with those who write in a shared field of interest. This is a lamentable situation.

This vision of community has been described well by White:

> It is as an educational institution that the law school exists first and foremost ... I do not think of the law school as a think tank on policy questions or as a research institute for the profession, but as a community of scholars engaged in the process of their own legal education.[103]

However, White's vision is an aspiration rather than a reality. Aspirations alone, however, will not reconstitute our law schools into a community of scholars.[104] There will have to be changes to institutional practices and structures for this to come about. My proposal is aimed at changing some of the practices of legal scholarship. It would begin by dramatically reducing the number of articles published in Australian university law reviews. If, for argument's sake, the number of legal academics in Australia were estimated as 650 and each were to publish an article a year, 650 articles would be published every year. It is difficult to believe that anyone in Australia would read all, or even a significant proportion of this, especially when other reading, like books, legal and otherwise, foreign journals, cases and the like was considered. If, on the other hand, publication was restricted to one article every three years, only 215 articles would be published each year. This would allow one to read a large proportion or even all the periodical writing of Australian legal scholars — in university law reviews. It would be possible to expect all of us to be familiar with our colleagues' work.

If this scheme were adopted it could be seen as a foundation or constitution of a community of legal scholars in Australia. As I have suggested, it is possible to teach in one of the four law schools in Sydney (or six, if Wollongong and Newcastle were included) and not even know the names of fellow law teachers, let alone know their work. Unbridled publication has worked to isolate us, not unite us.

Of course, an argument outlining how a community can be created is not a justification for doing so. Why is the creation of a community of legal scholars a good thing?

This is obviously a big question and one which, in turn, raises fundamental questions about learning and the role of intellectuals and universities. It is also a question which can be answered briefly if certain assumptions are made. First, learning or scholarship are important. They represent one of the few ways known to us to try to find the truth. By truth I mean the search for meaning, even if one does not believe there is any meaning or truth to be found or that such a quest is misconceived or dangerous. After all it may be the truth that there is no truth or meaning to be found. Secondly, the truth is important even if we

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103 Above n25 at 1974–5.

104 As Post suggests, a move away from traditional scholarship requires institutional structures similar to those for the humanities. Above n96 at 620–1.

cannot explain why this is so in any detailed or exact manner. Thirdly, for better or worse, universities represent one of the few places where the search for truth is the accepted (even if ignored) aim of those who work and live within it. Fourthly, it is more likely that a collective enterprise of all those involved in scholarship (and, hence, the search for truth) will be more effective than one based on isolated individuals.

If we move away from seeing legal scholarship as the product of scholars who see themselves as researchers for the profession and law makers or as members of think tanks on policy questions, and move to a position where it is seen as the means by which a community of scholars continues a conversation about law and how it operates, it becomes plausible to believe that the creation of such a community should be a priority for our law schools. Apart from this are other advantages which would flow if my scheme were to be adopted.

A restriction on publication would dramatically improve hiring and promotion in university law schools. A selection committee, or at least the law school members in it, could be expected to be familiar with the work of all domestic applicants. This would be a vast improvement on present practice, where a rushed perusal of a few articles is usually the first time we meet an applicant intellectually. From the applicant's perspective a restriction on publication would represent opportunities and challenges. No longer would a worthy applicant be disadvantaged by another's scholarship of immense quantity but dubious merit. All would be judged against the same standard, with selection committees being given a realistic amount of material to evaluate. Of course, such a restriction would also place an onus on each of us. With only one paper expected every three years scholars would have to stand by their work. One could not rely on a Curriculum Vitae padded with numerous, unread articles. A restriction would allow scholars to read and evaluate work, rather than having publication reward those who can write the most.

Finally, rather than writing unnecessary tenure and promotion pieces and ploughing through an immense number of articles on the off chance of finding something important, we might have the time to read widely in and across disciplines. This is central to our roles as teachers and scholars. While we cannot all be like Renaissance scholars with a command of a broad range of disciplines, we should have enough time to read the accepted works of quality as well as challenges to orthodoxy.

4. Responses

The proposal outlined above is a revolutionary challenge to the accepted way of things. It is appropriate to consider objections to it. The obvious one is that such a scheme will stifle the dissemination of knowledge. As shown above I do not believe that law is like the natural sciences. This means that there is no need for a vast amount of legal scholarship. What is required is thought and careful consideration of law and how it operates. As suggested above, on this view of legal scholarship, a little goes a long way.

A second criticism of restricting publication in the way proposed is that it will unduly restrict those who want to write. Many legal scholars enjoy writing. Should they be denied the opportunity to do so? Surely not. My scheme is designed to unclog the journals so that they may become an integrative device

for the creation of a legal-academic community in Australia. It is not designed to stop academics from writing. If scholars wish to write they should recognise the various avenues open to them. Books provide one means of debating and communicating knowledge, especially for serious, sustained research. Another which has already been mentioned is an increased attention to book reviews. The reinvigoration of book reviews in Australian law journals would provide a welcome stimulus to a communal dialogue among law scholars by providing a common ground for discussion and debate. It might also reinvigorate the informal essay in Australian intellectual life.[105] As indicated above, a limit of five pages is suggested. Longer pieces would lead us back to the position we are in now, swamped by too many words of dubious value. Essays of this length should be long enough for informed and stimulating comment. Reviewers who felt that a book deserved more than five pages worth of comment could write a major article about it.

Another medium is the popular press. Judith Brett has argued that academics, especially in the humanities, should strive to become public intellectuals. By this she means that they should write for a wide readership and avoid the existing pattern of self-centered, jargon-infested publication aimed at career improvement.[106] All writers like to be read, especially in a field like law which is so intimately linked to the ordering of our society. Once it is understood that legal scholarship is mainly about ideas, it becomes clear that many important things are best dealt with other than in law reviews. After all, as has been said many times, very few people read law reviews. If something is important enough a more suitable medium such as journalism — in radio, television or print — should be considered. The recent proliferation of law review articles on environmental issues provides an unfortunate example. Many of these articles were prescriptive in nature or were designed to show how legislation or case law operated. It would have been much better if these had reached a wider audience than the couple of hundred people, at most, which was achieved.

Certainly, if the aim was to persuade legislators or bureaucratic law makers, the law journals seem a particularly poorly chosen vehicle to transmit such views. There are many areas of immediate social concern about which legal scholars could (or should) have something to say. Is it not better that the public be included in debates about these issues? All areas of law, from the Constitution to contracts, might usefully contribute to public discussion about the way in which we are governed and the role law should play.

It must be emphasised that this is not a call for journalism and popular writing to replace either traditional writing or traditional scholarship. Rather, it is a suggestion that the two types of writing and disseminating ideas and information should complement each other. A restriction on publication as proposed will allow important legal scholarship to be published. At the same time it will stimulate legal academics into becoming public intellectuals. It may

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105 Allen, F, "In Praise of Book Reviews" (1981) 79 *Mich LR* 557 at 558–9. See also Donovan, S, "Perchance to Scrutinize the Field" *New Scientist*, 20 November 1993 at 55, where the author, a palaeozoologist, laments the decline of book reviews in scientific periodical literature.

106 Brett, J, "Our Hidden Thinkers" *The Weekend Australian*, 25–6 January 1992.

also prod them into seeing that it is often better if important things are popularised than left unread in scholarly journals.

Critics may also argue that restricting publication will prevent legal academics from carrying out an important public function; helping the judiciary, the profession and the legislature. The point is made succinctly by Jarvis:

> Judges ... use law review articles when looking for solutions to novel problems. Practitioners use law review articles in conducting the research necessary to construct briefs and memoranda ... Legislators use law review articles as prods or supports for new legislation.[107]

Richardson is more down to earth in his advice to law review editors:

> [In] your selection of materials do not forget the little guy with the small solo practice who can periodically use some help in the day-to-day, practical, bread and butter responsibilities of his practice.[108]

Can legal academics absolve themselves of this responsibility? The best answer, and the only one consistent with the arguments presented in this paper about the nature of legal scholarship is a denial of this responsibility. Practice and scholarship are different, with disparate needs and duties. Law reviews should be seen as an integral part of the community of legal scholars. To use them as practice manuals is to prostitute them entirely. They should be seen as part of the scholarly domain, with the public (including practitioners) as a welcome audience. Perhaps the increasing separation between legal academics and practitioners which leading scholars, such as Paul Carrington and Roger Cramton, have observed as emerging from the growing academic focus of legal scholarship, is to be welcomed rather than feared.[109]

But what of the deserted practitioners, judges and legislators and the authors who like writing for them? There are numerous professional publications as well as forms of continuing professional education which would allow as much involvement with the profession as any scholar would wish. Those wishing to influence the legislature or bureaucratic decision-makers would be better advised to ignore law journals and use more popular outlets for their ideas and opinions. There is nothing in my proposal which discourages or denigrates such activity. But at the same time, consistently with the discussion of legal scholarship made above, it cannot be claimed that work of this kind is scholarship. It may be useful (and, remunerative); it may be time consuming and require thought and imagination — but so does the design and manufacture of a jet engine and yet this cannot be called scholarship. It may be that this type of work should be lauded and encouraged. But we should never allow such activities to overwhelm our basic scholarly duties of wide and informed reading, dedicated teaching and involvement in the community of scholars via scholarship.

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107 Jarvis, R, "Law Review Authors and Professional Responsibility: A Proposal for Articulated Standards" (1988–89) 38 *Drake LR* 889 at 890 citing Ellis, "Student Edited and Faculty Edited Journals in the Marketplace of Legal Ideas: A Reply to Prof Dekanal" (1989) 57 *UMKC LR* 246.

108 Richardson, F, "Law Reviews and the Courts" (1983) 5 *Whittier LR* 385 at 392.

109 Carrington, P, "The Dangers of the Graduate School Model" (1986) 36 *J Leg Educ* 11 at 11–12; see also Cramton, above n66 at 10.

One criticism of my proposed scheme comes from the opposite direction. What of scholars who have nothing to say, or who would prefer to read and concentrate on teaching rather than contribute to law journals? Would not a duty to write result in the publication of a large number of mediocre articles? Isn't this the very problem my scheme was supposed to cure? There is much to be said for the belief that a scholar can contribute without writing much or anything at all. Socrates is the obvious example. Teaching, debate and discussion are all valid ways of disseminating ideas and information.[110] Are there good reasons for forcing people whose skills and preferences are in these areas to write, especially when they do not want to do so?

There are if we want to foster the formation and growth of a community of legal scholars inside particular institutions and across the country. The tendency at present is the other way; privatised research conducted by career oriented academics little interested in the running of their institutions. Structuring publication and research around an article every three years would allow us to become familiar with our colleagues' ideas, and encourage the interchange and debate which is at the heart of a community of scholars. At the same time it would not be so time consuming as to divert us unduly from teaching. These articles need not be the only, or even major, part of our dealings with each other. Conferences provide a forum for the exchange of ideas, as do sabbatical leaves, academic exchanges and visits to other law schools to participate in teaching and research. Once academic writing is seen from this perspective the reasons for fearing and disliking it disappear. A conception of law and legal scholarship which does not see law as a science and has as its rationale the nurturing of a community of legal scholars dedicated to continuing the conversation about law might even broaden the range of scholarship and the enthusiasm of writers. Traditional articles could still be written as well as articles explaining how courses are taught, what materials are used and why, and the reasons for choosing to investigate particular problems. Or one might give a reaction to scholarship which one finds interesting or stimulating, provocative or just plain wrong. Certainly we must accept that only a small minority is going to have original ideas which provoke strong debate. It would, in fact, be counterproductive to expect work of this kind from all legal academics. I do not think, however, that it is too much to expect that all should be able to explain how and what they teach or what their reactions are to others' work. Once legal writing is understood in this fashion it is not unreasonable to expect from all an article every three years.

As an added bonus my scheme will remove what are quite insidious barriers to the free expression of ideas. To have an article accepted for publication today one has to run a gauntlet of editors and (often anonymous) referees. This favours those with a name, connections or who are writing within safe or fashionable areas or in safe and fashionable ways.[111] Under the proposal outlined above,

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110 Norman Stone believes that some "of the outstanding university figures have never really written anything, or at most one item", *The Australian — Higher Education Supplement*, 15 December 1993.

111 A recent study of publication in economics suggests that there is little reason to believe that gender bias plays a significant role in the decision to accept or reject a manuscript but that "mutual affiliations between authors and journal editors and co-editors do play a role.

all these barriers would be removed, with each scholar standing naked (intellectually) before the world, unmediated by editors and referees. We need no longer fear the perhaps apocryphal situation of someone like Marc Galanter having his article "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change"[112] rejected by a number of mainstream journals and then going on to become one of the most cited articles in recent times. Every scholar will have the right to have published what they desire to write and to have it judged by other scholars and not have to be screened by a self appointed caste of guardians. Unlike the present situation which defines scholarly freedom by allowing a scholar to publish as many articles as desired as long as they are said to be acceptable by a small group of editors and referees, I would prefer to see a situation where there was freedom to write as one wished but a limit on the number of articles that would be published by each scholar.

It is clear from what has been written above that I have a particular belief of what constitutes a convincing understanding of law and legal scholarship — an understanding which leaves me quite comfortable which a proposed restriction on the quantity of legal scholarship published. However, there appear to be persuasive arguments for restricting the volume of scholarship even if the traditional focus on doctrine and prescription are valid. Because of this I would have no problem with traditional or, indeed, any other form of scholarship, from being written and published. The most important thing is that we engage in a scholarly debate over law and scholarship. At present we are so swamped by material that we don't talk to each other. Yet, almost paradoxically, we are affected by a hidden form of censorship which controls what we wish to say. My proposal could not raise concerns which were felt by Stefancic in a recent study on law review symposiums: "Community may be ennobling, even necessary, but it may also pose the risk of conformity and group-think".[113] Once decisions on what can be published are removed from editors and referees and returned to authors these fears are groundless.

Finally, my scheme does not provide for those who teach law outside law schools. This may appear elitist but any scheme which attempts to create community has to create boundaries. This does not mean, of course, that legal scholars should become insular. Far from it. Legal academics should read widely across disciplines and should, as far as possible, contribute in the same manner. But, if the journals are to act as a constitutive institutional device, some sort of boundary is necessary. Permeable, but there nonetheless. One would hope that those who teach law outside law schools would try to create their own community which could have fruitful dealings with the community of scholars within the law schools. In fact, the very act of reconstituting the law reviews may induce a similar move amongst non law-school, legal academics to the mutual benefit of both groups.

The networks established in graduate school or through current employment appear to be a significant factor which affect[s] editorial decisions regarding space allocations among competing manuscripts". See, Piette, M and Ross, K, "A Study of Scholarly Output in Economics Journals" (1992) 18 *Eastern Econ J* 429 at 434.

112 Galanter, M, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *L & Soc R* 95.

113 Stefancic, J, "The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy?" (1992) 63 *U Col LR* 651 at 669 (footnote omitted).

Other Responses Compared

One measure of the worth of the proposal outlined above is to compare it to suggested remedies for the problems facing law reviews and legal scholarship. These vary from exhortations for improved writing, recommendations that writing become optional for law academics, to resigned acceptance of the status quo. It will be argued that these suggestions do not take into account the publish or perish syndrome, that they are based on a faulty understanding of the nature of legal scholarship and that they ignore the role of reviews as an integrative device for the creation of a community of scholars.

There is no shortage of writers calling for better and fewer articles. Kester believes two dozen journals could easily contain all that is worthwhile saying in the United States each year[114] while Delgado expresses what must be a commonly held thought when he laments that editors seem unable to stop publishing articles that have nothing to say.[115] Scordato feels we should move away from expecting all scholars to write. Under his plan some would specialise in teaching, others in writing, while the rest could both teach and write.[116] Church suggests that law reviews should set aside a number of pages for short, provocative pieces to stimulate discussion and debate about law.[117] McDowell proposes the establishment of a legal equivalent of the *New England Journal of Medicine*. This would create a common base for the publication of important work and would give legal academics a basic minimum to be read.[118]

These writers ignore the strength and pervasiveness of the publish and perish syndrome. Moral exhortation will only get us so far. Presumably the desire amongst legal scholars to have scholarship of a consistently high standard has been constant over the years. Since most agree that many articles of poor or mediocre quality are now published it is clear that other forces are at work which have overwhelmed the general desire to maintain high quality scholarship. Without a doubt the publish or perish syndrome is the culprit. Any plan which ignores it is doomed to failure. In addition, such exhortations ignore the traditionally accepted link between doctrinal analysis and scholarship. Without a fundamental reassessment of the nature of legal scholarship the enormous increase in the number of cases and statutes will inevitably lead to pressure for more and more articles. Problems of quality will remain and, of course, there is no guarantee that many of them will be read.

Giving academics freedom to choose whether to concentrate on teaching or writing (or a mixture of both) may appeal to some. However, given the overwhelming importance of publications in the modern university, is it likely that many would take up the option of renouncing writing? One can easily imagine universities adopting such a model but with increased teaching loads,

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114 Kester, J, "Faculty Participation in the Student-Edited Law Review" (1986) 36 *J Leg Educ* 14 at 17.

115 Delgado, R, "Legal Scholarship: Insiders, Outsiders, Editors" (1992) 63 *U of Col LR* 717 at 720.

116 Scordato, M, "The Dualist Model of Legal Teaching and Scholarship" (1990) 40 *Amer U LR* 367 at 410–16.

117 Church, W, "A Plea for Readable Law Review Articles" [1989] *Wisc LR* 739.

118 Above n94 at 276.

lower prestige and less chance of promotion for those who opted out of writing. However, as argued above, there are also good reasons for expecting some writing from all scholars. As long as there are limits on the quantity and total freedom for the writer, an expectation that each would contribute an article every three years should not present problems and will help create and maintain a community of legal scholars in Australia.

A call for short, provocative pieces would only result in more articles being published. It is difficult to imagine anyone within the grasp of the publish or perish syndrome (in effect, all who are not satisfied with their present position) concentrating on these short pieces. Short articles would be published in addition to what we have now, not in substitution. This does not seem an improvement.

The creation of an Olympian journal is essentially an admission of failure. Nothing would change except that in addition to the innumerable unread articles we have now there would be also a ritzy, high-prestige journal for the benefit of academic "stars".

Of course, some do not think it is possible, or that there is a point in, reforming law reviews. McDowell, for example, believes that the rewards of scholarship are personal, that they are a form of self education.[119] The implications of this view are profound. Is he suggesting that it does not matter that the vast bulk of legal scholarship is not read, that a lot of money is spent on it and that much valuable time is diverted from teaching and reading? Is not this view self-indulgent to an extreme? Cramton claims that traditional scholarship, even if largely mediocre, is possibly the only form of writing legal scholars can do. According to Cramton, it is useful because law teachers can do it, judges and practitioners like it and it helps in teaching the basics at law school.[120] If ever there was a cry of despair this is it. Nothing is suggested to overcome the present situation of too many mediocre, unread articles with all its attendant problems. There are even more depressing responses. Bryden sinks into cynicism.

> Instead of wringing our hands about rational selfishness, perhaps we should accept it as a fact of life, just as we do when considering, say, the deviousness of politicians, or the materialism of people in general. And this, I submit, is pretty much what most of us do, except when called upon to propound a theory about the deficiencies of legal scholarship.[121]

Schlegel feels that the best way of dealing with the problems created by law reviews and legal scholarship is to make fun of them.[122] Tushnet has argued that academics should continue to do conventional work because this makes as much sense as anything else.[123] Thus we can be clever and cheeky or completely indifferent because all choices are illusory.

I think we can do better than despair or be resigned to human failings. Nor should we accept Posner's argument about the necessity for waste.[124] The number and quality of articles do matter. We certainly can control their number. This

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119 Id at 277.
120 Cramton, R, "Demystifying Legal Scholarship" (1986) 75 *Georgetown LJ* 1 at 14.
121 Bryden, D, "Scholarship about Scholarship" (1992) 63 *U Col LR* 641 at 650.
122 Schlegel, J, "Revenge, or Moon (Over) Your Law School" (1990) 40 *J Leg Educ* 467.
123 Tushnet, M, "Legal Scholarship: Its Causes and Cure" (1981) 90 *Yale LJ* 1205 at 1223.
124 See the discussion above associated with n63.

could be done in a way which ensures total freedom in what we write and which improves our teaching and writing through the development of a community of legal scholars.

5. *Conclusion*

The debate over law journals is important. Too many articles are being written and too few are being read. What is published is, in the opinion of many, mediocre. The costs, material, psychological and pedagogical, are immense. Something needs to be done, but a response must consider the purpose of law journals and the nature of legal scholarship. In particular, attention has to be paid to the cause of the ever increasing volume of articles — the publish or perish syndrome.

Legal scholarship is not the same as research in the natural sciences. Law is not like astronomy, with an almost infinite amount of data waiting to be catalogued and analysed. Like politics and philosophy, it deals in arguments and understandings about how we can govern ourselves and live together in peace with justice. Good legal writing and teaching require time and an environment that encourages the continual honing and challenging of ideas and arguments. Mindless concentration on publication absorbs too much of our time, and is seriously detrimental to the establishment of a true community of scholars. Law journals should help to create and maintain such a community, rather than simply soaking up an ever increasing number of unread tenure and promotion pieces.