# The Political Enterprise of Theory and Education within Australia's Discipline of Law

Susan Bartie
LLB (Hons 1), LLM (Cantab)

Adelaide Law School
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# ABSTRACT

This thesis explains how three prominent legal scholars, each professors of legal theory, responded to surrounding political conditions to strengthen the discipline of law in Australia. It investigates the careers of Professor Peter Brett, who held the Chair of Jurisprudence at the University of Melbourne, Professor Alice Erh-Soon Tay, who held the Chair of Jurisprudence at the University of Melbourne, and Professor Geoffrey Sawer, who headed the Department of Law in the Research School of Social Sciences at the Australian National University. As fully explained in the body of this thesis, these three scholars were selected because the positions they held and their theoretical dispositions made them obvious candidates for achieving change in the way that law was conceptualised, taught and studied within Australian universities. A central question addressed in this thesis is whether they ought to be considered pioneers and, if so, on what basis. This thesis also considers whether any of these scholars failed to capitalise on the opportunities afforded to them and whether such failures might explain why the discipline moved in one direction rather than another. By answering these questions this thesis provides a richer and deeper understanding of the way in which the discipline of law has evolved in Australia in the second half of the 20$^{th}$ century.

This thesis argues that each of these legal scholars made novel and distinctively Australian contributions to legal theory, legal education, law school management and the community that ought to be recognised as part of broader thinking about the history of the discipline. In so doing it exposes the reductionist tendencies found in other histories of the discipline. By combining life histories of three legal scholars with broader contemplation of the discipline of law within Australia, it makes a new and novel contribution to the understanding of the founding of modern university legal education and scholarship within Australia.

# DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of the degree.

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A professional editor, Rosemary Peers, has provided assistance in preparing this thesis. Her assistance has been restricted to editing assistance consistent with ASEP Standards for 'Language and Illustrations' and for 'Completeness and Consistency'. No advice has been sought or given on 'Substance and Structure'. Rosemary Peers was given a copy of the University's Specifications for Thesis and worked with a copy of the ASEP Standards.

Susan Bartie

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Some of the thinking behind, and some passages contained in, Chapter 1 (the introduction) were published in the following articles: 'Histories of Legal Scholars — The Power of Possibility' (2014) 34 *Legal Studies* 305; 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444.

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# 1 INTRODUCTION

## 1.1 The Political Enterprise

This thesis examines the way that leading legal scholars, who were well aware of the political dimensions of their enterprise, shaped the discipline of law in Australia. I argue that Australia had equivalents, although not as influential or well known, to America's Langdell and Pound, and England's Pollock and Dicey, namely, ambitious and politically astute legal scholars who assessed the intellectual integrity and standing of the discipline and advanced their careers in ways that were intended to improve its prospects and remedy its pitfalls.[1] During the founding period of Australia's modern legal academy, leading legal scholars taught, published and acted as expert counsellors, public intellectuals and moral authorities, in order to improve perceptions of the discipline and to increase both the discipline's and the law's relevance to society. These goals motivated them to develop distinctively Australian conceptions of legal phenomena and to create conditions conducive to such understandings. The context of these scholars (Australian law schools, universities, the legal profession and society), as well as the ambitions they held for the discipline, were crucial to their scholarly activities.

This thesis is novel in that, for the first time, it examines these connections between scholarly activity, politics and the growth in the discipline of law in Australia. It demonstrates that within the world of legal ideas in the Antipodes there were serious intellectual and political attempts to develop and consolidate the discipline. Such attempts were made with an appreciation of similar earlier efforts in both England and America, but they were not mere duplications. My subjects' experiences therefore also provide insights into the cross-fertilisation of legal ideas. Through a detailed examination of three scholarly lives, this thesis reveals some of the central distinctive attributes and assumptions that accompanied the expansion of modern university legal education within Australia. In doing so it highlights the shortcomings of many of the existing generalisations about the history of the discipline.[2]

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[1] The connection between the political terrain and the ideas advanced by these foreign scholars has been made in several studies. See, eg, Bruce A Kimball, *The Inception of Modern Professional Education — C C Langdell, 1826 – 1906* (University of North Carolina Press, 2009); Morton J Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History* 275; Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004); David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26.

[2] In this thesis it is assumed that law can or ought to be called a discipline.

In this study we are introduced to a Jewish man from England who studied law part-time (Peter Brett), a woman from Singapore who had just four years of formal schooling and grew up under Japanese occupation (Alice Erh-Soon Tay) and an Australian who was orphaned early in life, was brought up in a working-class home and whose formal education took place entirely within Australia (Geoffrey Sawer). Sawer began his academic career in 1940, Brett commenced in 1950 and Tay in 1958. They each channelled their theoretical interests into different fields: criminal law theory (Brett), comparative law and the sociology of law (Tay) and constitutionalism (Sawer).

Through these case studies this thesis demonstrates that the history of Australia's discipline of law is both richer and more complex than previously thought. It shows that during the founding stages of the modern Australian legal academy, scholars developed novel ways of both conceptualising and studying law and developed distinctively Australian legal theories. This thesis claims that these early scholars are worth remembering and makes a case for further studies of this kind.

I place this work into the intellectual history genre, although it also has characteristics of intellectual biography. It should be of relevance to anyone interested in the history of legal thought, the history of legal education, the lives of legal figures, jurisprudence, intellectual history, American legal realism, the Legal Process School, criminal law, constitutional law, comparative law and Marxist and sociological legal thought.[3]

### 1.2 Common Beliefs

This thesis was motivated by a strong curiosity about prior generations of Australian legal scholars and a suspicion that what had previously been written about them had not sufficiently examined their activities or openly considered their role in the advancement of modern professional legal education. In other portrayals this generation of scholars have either been subsumed under vague labels such as 'narrow positivists'[4] or swept up within larger social phenomena such as 'modernisation'.[5]

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[3] Rabban provides a similar list: David M Rabban, *Law's History* (Cambridge University Press, 2013) 1.

[4] See, eg, Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 710; John Gava, 'Introductory Essay' (1988–89) 5 *Australian Journal of Law and Society* 1, 3; Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587, 596; Margaret Thornton, 'The Dissolution of the Social in the Legal Academy' (2006) 25 *Australian Feminist Law Journal* 3, 15; Frank Carrigan, 'They Make a Desert and Call It Peace' (2014) 23 *Legal Education Review* 313, 315–16, citing Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do about Legal Education' (1991) 34(2) *Australian Universities' Review* 26; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for*

Conventional wisdom is that early Australian scholars were narrow, conservative and doctrinal in orientation, that they primarily served the interests of the profession and that there was no distinctively Australian jurisprudence or legal theory to speak of.[6] In other words, with the exception of perhaps Professor Julius Stone, early Australian scholars are thought of as unexceptional and undistinguished.

From almost the time of their conception in the 1960s and 1970s the more radical law schools — those offering alternative visions — came under attack both from outside and within.[7] The impact of such friction has been significant and negative both in terms of stifling the diversity of legal education and stunting or, even more disturbingly, cutting short individual careers.[8] To provoke change it seemed necessary for the new generation of legal scholars to condemn or else largely ignore earlier generations. If earlier generations of legal scholars were mediocre, unquestioning and prone to following old traditions, new conceptions could be adopted with slight regard for what may have been achieved in the past.

While one might sympathise with the objectives underpinning these critiques of the old order, we can lament the methods applied. Many historians would object to any strategic use of history.[9] My objections, however, to the accounts that have been made of Australian legal scholars is of a different kind. It is that they create caricatures, straw men (they do not mention many women), that present as slogans or propaganda rather than lessons. And, as a result we learn nothing.

Scholars who have subjected this earlier generation to more careful study have often been very close to their subjects and have therefore sometimes been overly sympathetic. Alternatively, they have limited their attention to certain aspects of their subject's

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*the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) [1.20] ("Pearce Report").

5 Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993).

6 Chesterman and Weisbrot, above n 4, 724.

7 Most notably the Law School at Macquarie University and the Legal Studies School at La Trobe University.

8 Not a great deal has been written about this chapter in Australian legal education. Most of what has been written has been authored by those who have in some way been involved: see, eg, Carrigan, above n 4; Margaret Thornton, 'The Dissolution of the Social in the Legal Academy', above n 4.

9 This is an issue that Kalman addresses at length with respect to the American legal academy: Laura Kalman, *The Strange Career of Legal Liberalism* (Yale University Press, 1996).

scholarship, especially those that they found the most interesting. Typical reasons for studying the work and life of a legal scholar include exploring how they advanced a particular field of disciplinary discourse,[10] reclaiming or reinterpreting their jurisprudence so that it excites renewed attention or garners attention it originally deserved but did not obtain,[11] or giving general appreciation to them and their work.[12] My primary purpose is different. I hope to bring to light their rich and inventive initiatives; to show that their contributions ought to be acknowledged in any history of Australian legal thought. I also hope to show the contingent nature of the ideas that founded the modern legal academy in Australia, not for the purposes of reigniting or suggesting new scholarly topics or arguments,[13] but for the purposes of deep reflection about the discipline.[14]

Writing dispassionately about the legal academy is difficult but for me is perhaps made easier by the fact that my own career commenced post-2000, at a time when it seemed that many different forms of legal scholarship were not only tolerated but were flourishing. The major threat to university legal education today presents largely (although not entirely) in the form of managerialism and its tendency to impose external agendas, concentrating on economic returns, rather than fostering ideas and agendas that emanate from within the academy.[15] It is a desire to search for leaders within the academy and seek out an intellectual core (or cores) for the discipline that drives this exercise in introspection.[16] A discipline that has little history or tradition and no real understanding

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[10] The examples are too numerous to set down a full selection here. By way of example, see H L A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982); G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press, 1980); Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 *Osgoode Hall Law Journal* 223.

[11] For a recent example, see Kristen Rundle, *Forms Liberate — Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012). See also William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, 1973).

[12] For a recent example, see Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford Law Books, 2012).

[13] For an example of a recent debate concerning the value of history to jurisprudence see: Nicola Lacey, 'Jurisprudence, History and the Institutional Quality of Law' (2015) 101 *Virginia Law Review* 919 and Kimberly Kessler Ferzan, 'Of Weevils and Witches — What Can We Learn From the Ghost of Responsibility Past?' (2015) 101 *Virginia Law Review* 947.

[14] Sugarman provides an explanation of the emergence of a new breed of life history in law that falls within the social-legal tradition. I believe that this projects fits within that tradition: David Sugarman, 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship' (2015) 42 *Journal of Law and Society* 7, 11-12, 17.

[15] See, eg, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Stuart Macintyre, 'Universities' in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government Is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, 2007) 41; Matthew Ball, 'Legal Education and the "Idealistic Student": Using Foucault to Unpack the Critical Legal Narrative' (2010) 36(2) *Monash University Law Review* 80, 85–90.

[16] Some of my motivations are explained further in the following article: Susan Bartie, 'Histories

of its identity or where it came from is vulnerable to external policies and at greater risk of losing its sense of self.[17]

### 1.3 Contributions to the Discipline of Law

This is not a study of influence. I am not interested in how many citations my subjects' works attracted or in judging them according to whether they succeeded in shaping the world in their own image. I do not believe that you can measure the success or failure of a legal academic's contribution to the discipline using such a simple formula. Influence is far more elusive.[18] Instead I am interested in the innovations they set out to implement, the scholarly models they created, their motivations and the importance of their contexts. Whether they operated in a manner consistent with certain tastes is a matter to consider separately once their positions are better understood. Here their innovations and models are assessed by standards arising at the time of their creation and within the context of their creation. To begin, I take each scholar on their own terms, reporting on their aspirations and what they did to fulfil them.

What amounts to a contribution to the birth of modern legal education and scholarship — what I am looking for here — is perhaps best explained by way of example, drawing from studies conducted elsewhere. Let's consider two that I have already cited. First, consider the father of American modern legal education, Christopher Columbus Langdell. He is attributed with devising a system of legal education based on meritocracy. According to Kimball:

> Langdell maintained that the just working of the legal system relies on the effectiveness of the legal profession, which depends on lawyers' expertise derived from their academic achievement in law school. These relationships among professional education, expertise, practice, and virtue presented a new understanding of professional legitimacy that was highly contested. By the time of Langdell's death in 1906, however, 'both instructors and students in the Law School … [we]re firmly convinced that rank in the School furnishes the strongest evidence of the coming professional career.'[19]

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of Legal Scholars — The Power of Possibility' (2014) 34 *Legal Studies* 305.

[17] Ibid.

[18] On the elusive nature of influence in law and the legal academy see Neil Duxbury, *Jurists and Judges* (Hart Publishing, 2001).

[19] Bruce A Kimball, *The Inception of Modern Professional Education — C C Langdell, 1826 – 1906* (University of North Carolina Press, 2009) 2 (references omitted).

> … the newly appointed Professor Langdell viewed academic merit as the means not only to elevate the legal profession, but also to safeguard the integrity of the legal system.[20]

To facilitate his vision Langdell pioneered a number of initiatives including a teaching method — the case method led by Socratic teaching — that departed significantly from the traditional didactic instruction. He encouraged the view that studying case law was akin to a 'scientific' method and therefore academic. He also employed teachers based on their scholarly credentials rather than their experience in practice.[21] Law teachers were to write scholarly books and articles rather than simply teach. Langdell therefore fostered a belief that teaching by legal academics could raise professional standards and lift the integrity of legal institutions. Viewed in a more sceptical light, he manufactured a place for university legal education that did not exist before and created a vocation for himself and his minions. He worked on the assumption that his methods, which emphasised the inherent good of the common law, were what the profession needed. Considered more sympathetically, he injected intellectual integrity and standards into legal education that raised the profile of, and trust in, lawyers and the legal system. Reflecting on Langdell's enterprise raises the obvious question: did Australian legal academics devise similar innovations and consider the enterprise of university legal education in a similar light?

To take another example, consider the Corpus Christi Chair of Jurisprudence at Oxford, Sir Frederick Pollock. By exploring the whole of Pollock's career and thickly describing his endeavour Duxbury came to discover, first, that Pollock was a great pioneering scholar; second, that even though Pollock did not devise a grand jurisprudential theory, he nonetheless provided an intellectual model of a legal scholar; and, third, that Pollock created a template for English legal scholarship — carving out a field of orthodox scholarship through his relentless case notes in the *Law Quarterly Review* — that has continued throughout English legal scholarship until the present day. Duxbury said:

> Pollock was no mediocrity. He was one of that great late nineteenth-century group of legal writers who determined, with very little in the way of indigenous precedent, what inquiry into law from an academic perspective should entail. As compared with any contemporary English academic lawyer, he was remarkably driven, creative, prolific, and bold, his interests strikingly diverse. …

[20] Ibid 5.
[21] Ibid 6.

> We find in Pollock's writing no compelling conception of legal science. … Neither do we discover within Pollock's writings the affirmation of any particular theory. But we do encounter his commitment to reason, his disposition towards nuance, his unwillingness to make grand claims, his talent for understated prescription, and an intimate, seemingly effortless grasp of legal systems and problems.[22]

Duxbury expressed one of the theses of his intellectual history as follows:

> Certainly a core argument of this book is that it is often mundane, unremitting donkey-work — the successive editions of a treatise, say, or the dripping tap of a case note campaign — that can have as deep an impact on the long term development of the law as can the insights of any genius.[23]

By choosing to study a scholar on the basis of their role in the history of legal education, rather than because they have attracted ongoing respect in legal theory circles, Duxbury too was able to reveal something new about our understanding of the trajectory of academic law. He was also able to suggest that an individual legal scholar can contribute fundamentally to the role and professional identity of legal scholars.

There are many more examples that could be cited here. Both of the studies mentioned demonstrate the futility of the question of what amounts to 'success' or 'failure' in the legal academy. The history of the discipline is complex, neither inherently good nor bad. Many would regard Langdell's educational model as misconceived, detrimental and facilitating a certain kind of elitism by closing out or marginalising other cheaper educational models that would appeal to disadvantaged groups.[24] And yet one cannot deny its inventiveness and the transformation it achieved. To be ignorant of its inception would be to ignore some of the fundamental tenets of American legal education.

Similarly, traditional jurisprudential scholars may find it difficult to judge Pollock a 'success' in circumstances where he made little attempt to devise a coherent theory for law. Others may consider that there is little worth celebrating given that the standard model he devised is in several ways out of vogue. And yet we can admit these things while still acknowledging his significant role in laying a template for legal scholarship that lasted for over a century.

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[22] Duxbury, above n 1, 326–8.
[23] Ibid 326.
[24] See, eg, the critique issued by William Chase: William C Chase, *The American Law School and the Rise of Administrative Government* (University of Wisconsin Press, 1982).

In this study I have attempted to seek out similar innovations, those that strove to transform the teaching, scholarship, management and culture of Australian law schools as well as the role of legal scholars. Whether the scholars studied here pioneered 'new theories' is important, but here such importance arises from what the theories did to raise the profile and status of the discipline. They are not judged a success or a failure on the basis of whether their theories are still subscribed to today.

To take another example, in the 1950s, and at various times since, the American legal realists have been perceived as failures. The horror and uncertainly brought by the Second World War meant that theories, such as American legal realism, that emphasised the discretionary and volatile nature of the making and application of law became unpopular. Such views of law suggested that the untrammelled instrumental law making of the Nazi regime could flourish as well in America as it did in Germany. It was important that law came with a measure of restraint. At least some of the American legal realists cast doubt on whether such restraint was possible. American legal realism therefore quickly fell out of favour.[25] Demonstrating that there are viable alternatives to the dominant model of legal education and scholarship amounts to a contribution to the discipline. Whether someone returns to such visions in 10 years, 100 years or not at all does not change the merits of the initial vision. We need to move past simplistic notions of cause and effect when investigating the rich developments of a discipline.

Recently Rabban has made some important and startling discoveries about a founding period of American legal education. These discoveries demonstrate the dangers of making assumptions about who or what is important in legal education. For example, Rabban notes that biographers of one of his subjects, Henry Adams, attached little importance to the seven years Adams spent as an academic at Harvard.[26] In contrast, Rabban argues that this period of time is crucial in any explanation of the field of American legal history and that 'Adams and his students virtually created the field and provided a model for subsequent legal historians in England as well as in their own country'.[27] Given the amount of attention American legal scholars have received, it is both startling and telling that such new and important insights could be revealed by approaching these scholars through the lens of legal education; by seeking to understand scholars based on their placement in law schools at a particular moment rather than by the way their work was subsequently remembered and incorporated into works of legal scholarship. Rabban's

[25] Duxbury provides a rich account of the rise and fall of American legal realism: Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 65 – 159.
[26] Rabban, above n 3, 153.
[27] Ibid.

work makes a case for testing conventional wisdom about the history of law schools and the discipline through open-minded exploration.

### 1.4 Who or What to Study?

The point of this study is to consider whether some of the leaders of the discipline of law in Australia — those in prominent positions with theoretical inclinations — made contributions that were similar to those outlined in the preceding section. I therefore selected scholars who held similar positions and may have had similar theoretical interests to Langdell, Pollock and the American legal realists. While Australia does not possess the equivalent of Oxford, Cambridge or Harvard, there is a group of universities ('the group of eight') that have been held up as the most esteemed. Within that group the law schools at the University of Sydney, the University of Melbourne and the Australian National University ('ANU') have consistently been among the most highly regarded. The three scholars I have chosen are from these institutions.

The selection of these three scholars should not imply that grand innovative contributions could only emerge from scholars holding prestigious posts at the leading universities, nor that this study has identified the most significant Australian legal scholars. This is not a study intended to celebrate or honour the elite. Instead these scholars were selected because they held roles that ought to have prompted them to assume intellectual leadership of the discipline and to consider the problem of university legal education from a theoretical perspective. Whether they did in fact demonstrate such leadership is relevant to any assessment of the discipline and helps to explain both what it was and what it could have been. As explained in this thesis, each of these scholars exercised such leadership and did so in novel ways that make for interesting comparisons and provide penetrating insights into the discipline.

As the existing literature about Australia's discipline of law has not identified prominent figures such as Langdell or Pollock, there was no obvious starting point. The point of this study was to work out whether people who had acted for similar motivations and engaged in similar endeavours existed. While much has been written about Julius Stone, very little of that writing was devoted to his thinking on laying the foundations of the discipline. Indeed a book chapter written by his son suggests that his father said very little about the matter.[28] One option was to study the deans of Australian law schools.

[28] Jonathan Stone, 'The Role of Universities: Views of a Scholar of the Last Century' in Helen Irving, Jacqueline Mowbray and Keven Walton (eds), *Julius Stone, A Study in Influence* (Federation Press, 2010).

However, while these figures might produce institutional leadership they have not always been the leading legal theorists nor does the post align directly with intellectual leadership. Sometimes institutional and intellectual leadership combine, but not always.

As noted earlier, I hold reservations about the ways that the newer law schools have been juxtaposed with the earlier established schools. Further, I consider that one should attempt to find out whether orthodoxy existed before examining whether and how newer law schools reacted against any such orthodoxy. I therefore believe that choosing professors of legal theory from Australia's leading law schools and research institutions is a useful first step towards gaining a better understanding of some of the central initiatives that coincided with the rise of modern Australian legal education and scholarship and why they were put in place.

I believe that the matters expounded in this study vindicate my selection. I show that there are resemblances between the objectives and pursuits of Brett, Tay and Sawer and those of Langdell, Pollock and Pound and for each of my subjects. I show that the political environment, particularly their positions as leaders of a small legal academy, influenced their careers.

### 1.5 A Potted History

Although there is some contest concerning the ordering (which largely depends on the date you place on the birth of legal education at the University of Sydney), the teaching of law in Australian universities can be traced back to the 1850s. While in some places, such as the University of Melbourne, the move towards university legal education was encouraged by rules that meant that law graduates were exempt from the admission exams of the Victorian Supreme Court,[29] law schools in Australia generally remained small until after the Second World War and until then many practitioners did not possess law degrees. There was no more than a handful of full-time academic law staff at each of the schools, and in some places lone professors sought to create curricula largely on their own, coordinating part-time practitioners to do much of the teaching.

These professors were learned men, with liberal educations and qualifications from English universities. The possibility of appointing women to such posts was not entertained. During the first half of the 20th century there were very few female students and no female legal academics. Ada Evans was the first woman to graduate from an

[29] John Waugh, *First Principles — The Melbourne Law School 1857-2007* (Miegunyah Press, 2007) 7.

Australian law school in 1902[30] and in 1957 Rosemary Norris was the first woman appointed to a full-time academic position in an Australian law school.[31]

During this early period we find several examples of scholars speaking directly to the issue of university legal education.[32] Writing of the equivalent early formative period in England, Stein has argued that a scholar from this period, in his case Sir Henry Maine, must be seen through the lens of legal education. He explained:

> Maine's basic ideas about law were closely linked to the particular needs of legal education in England in the 1850s, as he perceived them. That was the period when Maine was giving the lectures which became the basis of *Ancient Law*, and his perception of what students of law should be taught coloured what he included in his lectures. So our first concern is with the state of legal education at that time.[33]

Cosgrove has similarly argued in his work on jurisprudence from Blackstone to Hart that 'many of the controversies that have beset legal speculation since the time of Sir William Blackstone in the middle of the eighteenth century originated in issues of motivation and audience, not just definition and analysis'.[34]

I believe that much can be gained from studying the endeavours, motivations and agendas of Australia's first full-time legal scholars. I believe that worthwhile studies can be conducted on particular cohorts; for example, the first female academics. This is a very rich area ripe for study. However, my current interest lies in activities falling within the second period of the history of Australian legal education, the founding of modern legal education and scholarship. In the second half of the 20th century universities became the dominant providers of legal education.[35] While this created an obstacle to practice, insofar as it required aspiring lawyers to gain entry to a university law school and

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[30] Bek McPaul, 'A Woman Pioneer' (1948) 20 *Australian Law Journal* 1, 1-2. See also Hollie Kerwin and Kim Rubenstein, 'Law' in *Australian Encyclopaedia of Women and Leadership in Twentieth Century Australia* (Australian Women's Archive Project, 2014) <http://www.womenaustralia.info/leaders/biogs/WLE0624b.htm>.

[31] Waugh, above n 29, 164.

[32] See, eg, W Jethro Brown, 'The Purpose and Method of a Law School: Part I' (1902) 18 *Law Quarterly Review* 78; W Jethro Brown, 'The Purpose and Method of a Law School: Part II' (1902) 18 *Law Quarterly Review* 192; W Jethro Brown, 'Law Schools and the Legal Profession' (1908) 6 *Commonwealth Law Review* 3.

[33] Peter G Stein, 'Maine and Legal Education' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991) 195, 195.

[34] Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 3. See also Nicola Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945, where it is argued that philosophical analysis of law needs to be placed in its historical and institutional context.

[35] For an account of this development, see David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) ch 5.

successfully complete three and a half years or more of full-time university study, it also liberated the practice of law. Admission to practice no longer depended on the ability or willingness of the profession to employ articled clerks and the potential for prejudice that lay in such choices. Instead it depended on a student's ability to succeed along the more egalitarian path of university study. The creation of new universities, new law schools, lower university entrance cut-off scores, and Commonwealth funding[36] led to a dramatic increase in the number of student places and lawyers and has also meant that in more recent years many law graduates have sought employment outside traditional practice. Law graduates have become a distinctive and growing body of the Australian labour force operating in a range of sectors. Not only have these changes brought about a new type of university graduate, they have also created a new vocation: the professional university law teacher. Since the mid to late 1950s, a community of full-time legal academics has emerged, supplementing the handful of existing full-time teachers and replacing many of the practising lawyers who taught at law schools on a part-time basis. They represent the birth — or at least the realisation — of modern Australian legal education.

This second period can be further divided into two parts. First, the transformation of the original law schools, founded before the Second World War (Melbourne, Sydney, Adelaide, Tasmania, Western Australia and Queensland), from relatively small affairs (a small number of students taught by a small group of teachers) to much larger professionalised bodies. This provided opportunities for the new professionalised group of law teachers to realise some of the ambitions of their predecessors while pursuing some of their own. Interestingly, in this early period we also find the creation of a Chair of Law in a body created as a Research School of Social Sciences ('RSSS'), providing yet another opportunity to conceptualise the university study of law.

The second part of this period saw the creation of new law schools in the 1960s and 1970s, fuelling the further expansion of university legal education. Five new law schools at relatively new universities were created at this time: Monash, the University of New South Wales, Macquarie, Queensland Institute of Technology (now the Queensland University of Technology) and New South Wales Institute of Technology (now University of Technology, Sydney). A legal studies school was also created at La Trobe. While only presented with 10–20 years of a so-called 'orthodoxy' in Australian

[36] The funding was granted following recommendations made in the following reports: Committee on Australian Universities, Commonwealth of Australia, *Report* (1957) (the 'Murray Report'); The Australian Universities Commission's Committee on the Future of Tertiary Education in Australia, Commonwealth of Australia, *Report* (1964) (the 'Martin Report'.)

university legal education, many of these law schools sought to distinguish their approaches from the older schools. Several of the schools were staffed by teachers from the older schools who treated their move as a fresh start. The large pool of funds given to several of these schools, relative to funding at existing institutions, brought with it further opportunities to realise some other ambitions for Australian legal education and, in some instances, to 'outdo' the existing law schools by attracting staff with the offer of more favourable working conditions.[37] Again it was a period of change and re-creation bringing with it the opportunity to develop new legal theories and to think again about what and how to write and teach.

This study is located within this second period, and is particularly concerned with the transformation of the old law schools and the creation of the RSSS in the 1950s and 1960s. Each of the scholars studied here developed their academic agendas during this period. While Tay's career extended beyond the 1970s she was based at one of the older law schools that were transformed. This is a study of some of the thought and endeavour that assisted with that transformation. I am interested in the intellectual framing and answering of the problems posed by large-scale university legal education. I am attracted to the pioneering spirit of this early generation who were presented with — in a sense — untapped opportunity. For the first time in Australia, legal scholars could devise initiatives that other career legal scholars could implement in a setting where students largely studied law on a full-time basis. They could develop classes and materials and advance scholarship befitting a large and ambitious discipline. As there were so few Australian legal academics, the vocation of 'legal academic' was at this time an exceptional career choice; I am interested to learn what attracted these scholars to the legal academy and what they set out to do once established.

Another reason for studying scholars who formed their academic agendas in the 1950s and 1960s concerns the larger intellectual and social currents of that period. One might expect that scholars from this period would advance agendas that were influenced by the events of the Second World War and would respond to the challenges posed by the American legal realists. As a British colony, Australia had an obvious link to English legal and university traditions but America's much larger, better organised and more richly resourced legal academy obviously drew attention. Other important changes

[37] This occurred when a second law school was created in Victoria: see Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University, 2015).

occurring during this period included the emergence and growth of the social sciences and strong and divisive pushes for greater sexual liberation and gender and racial equality. This generation was also required to reconcile a sense of heightened responsibility engendered by the belief that their liberty came at a very high price, with the emerging values of a new generation who thought much less about the Second World War. Students of the 1960s and new academics of the 1970s embraced a sense of freedom and liberation but without the same sense of responsibility held by their predecessors. The threat of nuclear arms and possible conscription to the Vietnam War also heightened this new generation's tendency to challenge authority and live for the moment.[38] How did the first generation of legal scholars interact with subsequent generations and, more generally, how did Australian legal scholars respond to their time?

Some accounts suggest that modern legal education in Australia only really began in the late 1970s and 1980s when there were sufficient groups of legal scholars to form societies and organise larger research ventures.[39] In this way contributions to the legal academy are crudely equated with building empires, and the value of liberal and individual approaches and contributions to the academy is overlooked. This project seeks to challenge these views.

### 1.6 The Three Parts

Rather than provide a survey of groups within the legal academy to add to the broad generalisations and vague labels, I have limited my study to three scholars in order to closely investigate the whole of their careers and thickly describe their principal innovations.[40] This has meant that I have concentrated on the experience within three institutions. Australia's federal character and the geographical isolation of its major cities means that experiences may have been different in different states. In each part I have attempted to explain the local conditions.

By both necessity and choice I am a committed contextualist. As my thesis is based on what my subjects' efforts and experiences say about the building of the discipline of law in Australia, my investigation moves beyond my subjects' individual ideas to their broader careers and the contexts in which they each operated. While the scholarship of

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[38] Kalman provides a similar characterisation and a fascinating account of the interaction between these two generations within American law schools: Laura Kalman, *The Strange Career of Legal Liberalism* (Yale University Press, 1996).

[39] This is a premise that underlies the Pearce Report, above n 4.

[40] Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973) 3, 6–10.

each of the three scholars is important (and I have read all of it), this is not merely a study of how scholars have answered a set of questions arising in a field such as international law or equity. Instead I have examined their careers to find out what concerned them at particular times, why they examined certain topics, why they adopted certain strategies, what their motivations were, what traditions they followed or reacted against and what their aspirations for the discipline were.[41] Where aspects of their environment provide better explanations of my subjects' thinking, agenda, contribution or effectiveness, I have given it greater priority than their scholarship.[42]

In this thesis I concentrate on the different ways that Brett, Tay and Sawer responded to the Australian environment and how the environment, along with their personal constitutions, backgrounds and intellectual interests, combined to produce the distinctive contributions they made to Australia's legal academy. Below I introduce each part while further making my case for selecting Brett, Tay and Sawer as the subjects of this study.

### 1.6.1 Peter Brett

Part 1 of this thesis is devoted to Professor Peter Brett. Brett commenced his academic career at the University of Western Australia in 1950 and held the Chair of Jurisprudence at the University of Melbourne from 1964 to 1975. He was born in England, had Jewish parents (he was originally named Isidore Peter Bretzfelder), began practising law at the age of just 16, studied law part-time and was a soldier in the Second World War. Securing a position at the University of Western Australia prompted him and his young family to move to Australia and marked the beginning of his academic career.

The essence of Brett's contribution consisted of the various ways that he sought to bring what he considered to be scientific rigour to both Australian legal education and scholarship. He believed that his job was to provide both the study and practice of law with a strong scientific foundation; one that resembled modern understandings of the advancement of scientific knowledge. He sought to critique and instruct in law in accordance with some of the hallmarks of a scientific process and, as an important corollary, to ensure that law embodied contemporary morality. He believed that the more that law displayed scientific credentials, the more just it would become. He was the first, and perhaps the only, Australian legal scholar to bring the American Legal Process

[41] Similar questions were raised in a series of essays on legal treaties. See Angela Fernandez and Markus D Dubber, 'Introduction' in Angela Fernandez and Markus D Dubber (eds), *Law Books in Action — Essays on the Anglo-American Legal Treatise* (Hart Publishing, 2012) preface, 4.

[42] John Henry Schlegel, 'The Ten Thousand Dollar Question' (1989) 41 *Stanford Law Review* 435, 452.

School to Australia and along with his friend and collaborator, Louis Waller, wrote the first legal textbook devised entirely with students in mind. It embodied pedagogical tools designed to encourage students to think about law in accordance with the tenets of the Legal Process School. It was also the first comprehensive textbook on Australian criminal law. Brett also published the first Australian monograph on criminal law theory. His work responded to the elitism, insularity and conservatism he perceived within Australia's legal profession and judiciary and sought to put Australia's infant legal academy on a critical and questioning path buoyed by, what he considered to be, strong scientific credentials.

This part of the thesis is based on personal papers sourced primarily from the University of Melbourne and National Library of Australia, archives of the Law School at the University of Melbourne, interviews with 10 people and all of his published scholarship. Apart from book reviews and obituaries, until now no one has attempted to describe Brett's scholarship or the contribution he made to the academy. The existing literature therefore does not provide an obvious starting point nor does it suggest that certain of Brett's works or activities were more important than others. It was therefore necessary to investigate all aspects of his scholarship and career. While he did not bequeath a diary to any of the archives, the personal papers of both Brett and his colleagues at the University of Melbourne contained many letters that conveyed the flavour of Brett's personality and pointed to certain concerns and interests. In sum the large amount of evidence from these sources provided a relatively clear window into Brett's career.

### 1.6.2 Alice Erh-Soon Tay

Part 2 is devoted to Alice Erh-Soon Tay. Born in Singapore to Chinese parents, Tay commenced her academic career at the University of Malaya (now the National University of Singapore) in 1958. She moved to Australia in the 1960s where she completed a PhD at the RSSS before commencing as a lecturer in the Faculty of Law at ANU. She developed her academic agenda during this period. In 1975 she was appointed Challis Professor of Jurisprudence at the University of Sydney, replacing Professor Julius Stone.

I argue that one of Tay's primary contributions to Australia's legal academy consists of the way that she maintained, in the face of considerable opposition, the Department of Jurisprudence at the University of Sydney. Tay cut a new figure for the Australian legal academy, that of an academic entrepreneur, and funnelled her intellectual convictions into a largely managerial role. She sought to provide a safe haven for jurisprudential scholars,

freed from external pressures that she believed would fundamentally compromise their ability to advance free and fearless criticism. They were thereby empowered to serve as a counterweight to governmental agendas, prejudices and acts of oppression. Through her networking and entrepreneurial activities Tay sought to place the Australian discipline of law on a world stage and encouraged legal scholars to seek out broader horizons. She reacted against the mediocrity and complacency she perceived within Australia's legal academy, believing that this served as poor opposition to tyrannical aspects of government and promoted ideas that would erode existing safeguards in Australia's legal system.

This part of the thesis relies heavily on Tay's scholarship as well as on 18 interviews with her former colleagues, associates and students. In several ways Tay was the most difficult of the three scholars to depict. This was partly because she was the most divisive figure. As explained in this thesis, by continuing the Department of Jurisprudence she sustained a divide that had existed within the Faculty of Law at the University of Sydney. From informal conversations with current members of the Australian legal academy (especially in New South Wales), as well as from some of the formal interviews carried out for this project, it became apparent that she remains intensely disliked by some members of the academy and profession.

One obvious way to get a more objective sense of how she treated others and what her motivations were would be through an investigation of personal papers, particularly letters. As Twining relayed of his study of American legal realist Karl Llewellyn:

> Rootling through a person's papers, especially those of an untidy magpie, is one of the best ways of getting to know them. I learned more about Karl from this exercise than I did from my direct contact with him in 1957-58, or from interviews, or even from casual reading of his works.[43]

My problem, however, was that unlike Brett and Sawer, none of Tay's papers have been provided to a public library and the University of Sydney archives hold very few documents relating to Tay beyond the law school's minutes of meeting. The existence of such papers might have provided stronger evidence for making an evaluation of Tay's personality and actions.

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[43] William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge University Press, 2nd ed, 2012) 401.

The interviews were an important component of this part of the thesis, not only because of the paucity of personal papers but also because it emerged that the 'social dimension'[44] is so important to understanding Tay and her contribution to the academy. Interviews were sought with people who had had substantial dealings with Tay and who either supported or objected to the continuation of the Department of Jurisprudence at the University of Sydney. This therefore helped to fill a large part of the void created by my inability to access personal papers. Shortly before Tay's death she agreed to an oral history interview with the University of Sydney's historian, Julia Horne. Horne published aspects of that interview in two articles that have also been relied upon in this study.[45] Tay's own scholarship and shorter interviews she gave to journalists also provide insight into her motivations and personality.

Both her passion and feistiness are captured in many of Tay's scholarly works. As with my other subjects, I read all of Tay's scholarship to ascertain key intellectual threads, interests and agendas. As was the case in my investigations of Brett, it was not possible to gain a clear indication of her central works from the secondary literature. Reading the whole of her work chronologically revealed a progression of her ideas that were then channelled into her entrepreneurial activities. The window into Tay's life was blurred but not entirely obscured by the evidentiary challenges. Perhaps in time her papers will be released and more can be added to the insights presented in this thesis.

### 1.6.3 Geoffrey Sawer

Part 3 of this thesis is devoted to Geoffrey Sawer. Sawer commenced his academic career in 1940 at the University of Melbourne. In 1950 he was appointed founding Professor of Law at the newly created RSSS at the recently established ANU in Canberra. It is at the ANU that Sawer developed his most enduring scholarly agenda. He was the first Australian lawyer to hold a full-time research position and the first to be employed to work within a school of social scientists.

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[44] Klaus A Ziegert, 'AEST — An Attempt at Explaining the Phenomenon' in Gunther Doeker-Mach and Klaus A Ziegert (eds), *Alice Erh-Soon Tay — Lawyer Scholar, Civil Servant* (Franz Steiner Verlag, 2004) 7, 7.

[45] Julia Horne, 'Alice Erh-Soon Tay, The Making of an Intellectual' in Guenther Doeker- Mach and Klaus Ziegert, *Alice Erh-Soon Tay — Lawyer, Scholar, Civil Servant* (Franz Steiner Verlag, 2004) 13; Julia Horne, 'The Cosmopolitan Life of Alice Erh-Soon Tay' (2010) 21 *Journal of World History* 419.

Sawer's most remarkable contributions consisted, first, of the robust case that he made against law's autonomy and, second, the solid foundations he laid for Australian constitutional law and scholarship. Through both contributions he sought to treat law as a collection of social facts rather than a body of rules and encouraged others to study law alongside other social facts. While, for Sawer, the discipline of law was not a social science, he believed that it ought to be a subject of social science and believed that lawyers ought to consider ideas from social scientists. The historical work he performed early in his career on Australian law and politics provided irrefutable evidence of the political nature of law and legal reasoning. His books on law and politics, written for a general audience, were designed to educate both the profession and public on broader thinking about law. Rather than condemning or criticising the conservative and narrow elements of the profession who thought of law in a legalistic and mechanical way, Sawer provided materials and arguments that might persuade them to look afresh at their strongly held beliefs. He therefore sought to improve the intellectual standing of law by drawing on social science methods and learning while pitching his position in a way that did not alienate the profession and legal academy. He perceived a strong need for change and reform, both in the discipline and the political system, but he also saw merit in existing practices.

As Sawer was born in 1910 it was not possible to interview any of his contemporaries. The fact that from 1950 he did not, apart from a few exceptional occasions, teach undergraduate law also restricted the pool of potential interviewees. Five interviews were, however, conducted with some of Sawer's friends, mentees, colleagues and a doctoral student. Two of the interview participants, Sir Anthony Mason (former Chief Justice of the High Court of Australia) and Geoffrey Lindell, are leaders in Australian constitutional law and were both closely acquainted with his work. Sawer's main successor in constitutional law, Professor Leslie Zines, died during the course of this project. A student and strong admirer of Sawer and former justice of the High Court of Australia, Sir Ninian Stephen, is now in his 90s and no longer in a position to grant interviews. He has, however, published several tributes to Sawer that informed parts of this project. Another of Sawer's mentees, former Dean of ANU, Michael Coper is chronically ill. Coper's strong respect for and interest in Sawer and his work is exhibited in a life history of Sawer that he delivered at the 16th Annual Geoffrey Sawer Lecture in 2013 and published in 2014.[46] Matters addressed in that work, particularly some of his personal insights, have also provided inspiration for parts of this project. The University of

[46] Michael Coper, 'Geoffrey Sawer and the Art of the Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389.

Melbourne Archives, National Library of Australia and Australian National University Archives each hold a large number of Sawer's personal and professional papers. Sawer also wrote an unpublished and unfinished biography and a diary that, thanks to the consent of Sawer's daughter, I was able to access. In contrast to Tay there was an almost overwhelming number of personal records available that was carefully studied to inform this part of the thesis. To use the same metaphor as for Tay, the window into Sawer's career and life was largely transparent but at some times seemed so large that it was difficult to see and consider all parts at once.

Sawer published prolifically and, as with my other subjects, I read all of his scholarship. In this instance there was secondary material in the form of certain important works, primarily books in the field of constitutional law. While concentrating on this work could have accelerated my thinking and shortened my research time, I nonetheless chose to read all of his scholarship. I wanted to learn how his agenda changed over time and how his contribution extended beyond public law and referenced to broader cultural change. I did not want to simply repeat what other scholars and judges, more learned in the area of constitutional law, have said.

An important aspect of Sawer's career was the way that he sought to educate the general population through his textbooks, articles, speeches and journalism. He appeared on television as a political commentator and wrote a regular column in the local newspaper, *The Canberra Times*, on matters of law and politics as well as his other passion, gardening. Reading some of these articles enriched my understanding of Sawer's personality and motivations. However, I did not attempt to read all of his newspaper columns as this could form a thesis in and of itself. There have been agitations by some Australian constitutional scholars to undertake precisely this exercise.[47]

**Appendix A** provides a further explanation of the research design and methods used in this project. It also provides an explanation of my background and my personal views of each subject.

### 1.6.4 Comparisons

It is not claimed that the experiences and contributions of these scholars are necessarily representative or typical of scholars within Australia's legal academy. My aim is to

[47] Ibid. Geoffrey Lindell also mentioned that several Australian constitutional scholars had shown interest in this potential project: Interview with Geoffrey Lindell (Woodbridge Community Centre, Tasmania, 23 March 2015).

highlight the way that leading Australian scholars distinguished themselves both within Australia and internationally and to consider what it was about the Australian landscape that prompted them to take one approach over another. I argue that the Australian context has prompted certain innovations that are worth considering alongside those of the acclaimed American and English scholars in order to gain a better appreciation of the political enterprise of theory and education within the discipline of law. Comparing the three scholars has also prompted new lines of inquiry and thought, provided scope for making generalisations about the Australian legal academy and generally enriched this study.

### 1.7 Concluding Remarks

The objective of this thesis is not to put the discipline of law back on the course set for it by early scholars. Just as it has been recognised that the natural sciences have not advanced in a coherent or cumulative manner,[48] it would be wrong to suggest that Australia's discipline of law has been systematically built up from the contributions of successive leading scholars. This is not a chronological study of a particular idea or fashion within the discipline across three scholars. Nonetheless, it is contended that understanding the central initiatives and motivations of some of the discipline's most prominent scholars allows for a more productive and honest examination of the assumptions and ideas that have shaped the discipline during pioneering phases. These assumptions and ideas might serve as more reliable and interesting reference points than the extant vague portrayals of the discipline previously offered and may assist with more robust and critical appraisals of the current generation's contributions and practices.

In short, this thesis does as much as it can within the space afforded to explain how each of the three scholars studied and responded to their intellectual and political environments to set the discipline of law in Australia on a strong path. They wrote, taught and engaged in other activities with the infant status of the discipline in mind. While they had considerable freedom to choose the topics that played to their strengths and interests, they did not simply advance the ideas and initiatives that they found the most interesting. This thesis demonstrates that Australia has had scholars of a similar type and with similar motivations to the English and American legal scholars who have become household names. It demonstrates that some early Australian legal scholars advanced distinctively

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[48] T S Kuhn, *The Structure of Scientific Revolutions* (The University of Chicago Press, 3rd ed, 1996). Legal scholars have similarly recognised that in the disicpline of law 'the impression is not one of continuity': Roger Cotterrell, *The Politics of Jurisprudence — A Critical Introduction to Legal Philosophy* (Butterworths, 1989) 18.

Australian legal theories. The fact that Brett, Tay and Sawer and their initiatives are not widely known among Australian legal scholars raises interesting questions about both the culture of the discipline, past and present, as well as the nature of their individual contributions. This thesis explains matters that should be generally known and provides part of the basis for meaningful and critical questioning of the discipline.

# PART 1 PROFESSOR PETER BRETT

Peter Brett is the first of the three scholars considered in this study. His major contributions to Australia's legal academy and the discipline of law are presented in **Part 1** of this thesis alongside details of his background and environment that help explain the nature and significance of those contributions. **Chapter 2** explains how Brett's war experience, Jewish identity, employment at the University of Melbourne and studies at Harvard Law School led him to advance an ambitious scholarly agenda to improve the intellectual identity and credentials of Australia's discipline of law. I suggest that in many ways he had a similar agenda for the discipline as some of the great American legal scholars who sought to elevate the discipline in their country. **Chapter 3** introduces the imaginative teaching innovations Brett put in place, drawing inspiration from his experience at Harvard Law School and the talents of his friend and colleague, Louis Waller. This constituted another way that Brett sought to improve legal education and legal scholarship in Australia, as well as the practice of law. Again, through these initiatives he took responsibility for building the discipline. **Chapter 4** outlines Brett's attempt to put forward a new 'contemporary' agenda for jurisprudence and what Australian reactions to his ambitions for legal theory say about some of the central objectives of Australia's discipline of law. In this chapter I also explain how Brett assumed the role of lawyer statesman exemplar, thus expanding conceptions of legal scholars. In conclusion, in **Chapter 5**, I argue that the material presented in this part demonstrates that Brett was an ambitious scholars who, like Langdell, Pound, Pollock and Dicey, advanced his career in ways that were intended to embolden the discipline and better society.

# 2 BACKWATER BEGONE: AUSTIN, BENTHAM AND HARVARD COME TO AUSTRALIA

## 2.1 Introduction

This chapter introduces Peter Brett and explains how conditions at the University of Melbourne Law School in the 1950s and 1960s encouraged innovation among the academics employed there. I suggest that this environment, among other things, fostered Brett's belief that Australian legal scholars could contribute theories that would advance the intellectual credentials of both the practice of law and the way law was taught and studied. By arranging for him to study at Harvard, the then Dean at Melbourne, Zelman Cowen, helped Brett imagine that he could contribute to the leading debates in criminal law theory and adopt an academic agenda that resembled that of the leading jurisprudential thinkers of the common law world. This confidence resulted in a monograph that was the first of its kind in Australia. In it Brett suggested a novel solution to the problem of identifying and attributing moral responsibility in criminal law. The work also, by way of example, set forth a new agenda for Australian legal academics that involved updating the foundations of law in accordance with modern learning in the philosophy of science. Brett's experience demonstrates that during the founding stages of modern legal education in Australia there were leading legal scholars who set out to create a rich intellectual tradition within Australia as significant as, but also different from, the law faculties of Oxford, Cambridge and the great American universities. His experience also sheds light on one type of influence that American law schools, in particular Harvard, had on Australian legal scholars.

## 2.2 The Makings of a 'Liberal, Humane Scholar'

In 1950 Brett won his first academic position as Senior Lecturer at the University of Western Australia ('UWA')[1] and in 1951, along with his wife Margaret and their baby son, Robin, he moved to Perth from London to commence this position.[2] Before the move he had completed a part-time course of external studies in law at the University of London. In 1955 he was appointed as Senior Lecturer in Law at the University of Melbourne.[3] In 1963 he was made a professor and appointed to the Hearn Chair of Law[4]

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[1] Letter from Peter Brett to the Registrar of the University of Melbourne, 3 September 1954 (University of Melbourne Archives, *Law Dean's Correspondence 1953–1961*, 1984.0033, Faculty of Law 1953–54–55).

[2] Brett was married twice, first to Doris Moses in London who he later divorced and then to an Australian nurse living in London, Margaret Stobo. They had three sons together and adopted a daughter.

[3] Letter from Peter Brett to Zelman Cowen, 11 December 1954 (University of Melbourne Archives, *Law Dean's Correspondence 1953–1961,* 1984.0033, Faculty of Law 1953–54–55).

at Melbourne, and then in 1964 he was given the Chair of Jurisprudence at Melbourne. By 1963 he had published a monograph[5] and two textbooks[6] that embodied contemporary jurisprudential thought from Harvard Law School and were reviewed by eminent scholars throughout the common law world. In this chapter I will suggest that the environment and personalities at the University of Melbourne played a crucial role in Brett's innovations and rise to prominence.

Brett spent the bulk of his academic career, a total of 20 years from 1955 to 1975, at the University of Melbourne. Securing the position at Melbourne had not been easy for him. He first applied for a position there in 1949 but lost out to Norval Morris.[7] Wolfgang Friedmann, the Professor of Public Law at Melbourne, interviewed both Brett and Morris during a trip to London.[8] At age 26 Morris was the younger applicant (Brett was then 31) and had only received second class honours to Brett's first. However Morris, unlike Brett, had postgraduate qualifications, an LLM from Melbourne and a PhD in law and criminology from the London School of Economics ('LSE'). Morris's thesis was published as a book entitled *The Habitual Criminal*[9] which earned him the Hutchinson Silver Medal for Social Sciences at LSE and was regarded highly by leading criminologists.[10] He therefore had a strong publication record whereas Brett's was non-existent at that time. Brett's break into Australian academia came a short time later when he won the position at UWA. However, he had not forgotten about Melbourne. Moving to Perth gave him an opportunity to demonstrate his scholarly ability and begin plotting an academic agenda that would eventually take him east.

One way that Brett developed a close connection with Melbourne was through his Master's degree. Although UWA awarded the degree, Brett gave his greatest thanks to Morris at Melbourne with whom 'he had many valuable discussions of problems in the

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[4] Letter from Zelman Cowen to the Vice-Chancellor of the University of Melbourne, 25 September 1961 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence Series*, UM312, 1964/757, Law, Chair (Hearn)).

[5] Peter Brett, *An Inquiry into Criminal Guilt* (Lawbook, 1963).

[6] Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962); Peter Brett, *Cases and Materials in Constitutional and Administrative Law* (Butterworths, 1962).

[7] Letter from J F Foster to the Registrar of the University of Melbourne, 14 December 1949 and accompanying note entitled 'Summary of Applications for the Senior Lectureship in Law' (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence Series,* UM312, 1950/570, Law: Senior Lecturer).

[8] Note entitled 'Senior Lectureship in Law 1950' (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence Series,* UM312, 1950/570, Law: Senior Lecturer)

[9] (Harvard University Press, 1951).

[10] See, eg, John B White, 'Book Review: *The Habitual Criminal* by Norval Morris' (1952) 52 *Columbia Law Review* 435.

fields of criminology and penology.'[11] Such statements suggest no lingering bitterness between the two regarding Morris's earlier appointment and that the two had similar interests. Brett saw in Morris the brilliant criminologist that others later recognised him to be.[12]

The Melbourne connection continued with Justice Barry of the Victorian Supreme Court acting as examiner for the thesis.[13] Barry was a strong supporter of the Melbourne Law School and its academics and, once a judge, became the Foundation Chairman of the Board of Studies in the Department of Criminology at the University.[14] Barry became a close friend and mentored Brett. Barry wrote Brett references for promotions and scholarships,[15] the two corresponded on matters of the criminal law[16] and from Harvard Brett wrote to Barry and sought his views on his thesis.[17] Barry strongly encouraged Brett to publish his thesis: 'I am enjoying your thesis. It must be published; it contains too much of great value, expressed with admirable lucidity, to gather dust unpublished in a library.'[18] Towards the end of Barry's life, Brett visited him in hospital.[19] When Barry died, Brett and Waller dedicated the second edition of their criminal law textbook to him.[20]

While at UWA, Brett conducted fieldwork for his Master's thesis that took him to Melbourne. These dealings gave the University of Melbourne an opportunity to learn more about Brett's capabilities and gave Brett the chance to assess the faculty. In 1954 in a letter to the Dean of the Melbourne Law School, Zelman Cowen, Brett made reference

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[11] Peter Brett, *The Penal System of Western Australia, A Critical Study* (Master's Thesis, University of Western Australia, 1953) ii.

[12] He was described as 'the most influential American criminologist of his time'. Michael Tonry, 'Norval Morris', *The Guardian* (online), 9 April 2004 <http://www.theguardian.com/news/2004/apr/09/guardianobituaries.prisonsandprobation>.

[13] Brett, above n 1.

[14] Mark Finnane, *J V Barry — A Life* (UNSW Press, 2007) 155, 157 – 160.

[15] See, eg, letter from Peter Brett to the Registrar of the University of Melbourne, 26 October 1962 (University of Melbourne Archives, *Law Dean's Correspondence 1962–1965,* 1984.0033, File: Faculty of Law 1963).

[16] See, eg, letter from Peter Brett to Justice Barry, 3 October 1969 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 40, Barry, Sir John).

[17] Letter from Peter Brett to Justice Barry, 17 May 1959 (National Library of Australia Manuscript Collection, *Sir John Vincent Barry Papers,* MS 2505, Series 1, Box 4, File 1, General Correspondence May–June 1959).

[18] Letter from Justice Barry to Peter Brett, 22 July 1960 (National Library of Australia Manuscript Collection, *Sir John Vincent Barry Papers,* MS 2505, Series 1, Box 4, File 43, General Correspondence).

[19] Letter from Peter Brett to Justice Barry, 1 June 1964 (National Library of Australia Manuscript Collection, *Sir John Vincent Barry Papers,* MS 2505, Series 1, Box 7, File 54, General Correspondence June–July 1964).

[20] Peter Brett and Peter L Waller, *Criminal Law — Cases and Text* (Butterworths, 3rd ed, 1971).

to the 'previous good relations' he had had with all members of the faculty.[21] These connections no doubt helped Brett secure a position at the School.

For 11 of the 20 years Brett spent at Melbourne, Cowen was Dean at the School. While Cowen was not part of Brett's close circle of friends and their intellectual interests did not overlap, correspondence between the two suggests they were generally on friendly terms.[22] Cowen's leadership as Dean of Melbourne Law School has been described as 'outstanding.'[23] He was a 'great encourager of people.'[24] The flourishing of Brett's career demonstrated Cowen's close interest in members of his faculty and the strong opportunities he afforded them to develop their intellectual interests and profile. For example, because of Cowen and the connections he made as Australian Commonwealth Liaison Officer to the British Colonial Office, after just one year at Melbourne Brett was invited to travel to Borneo to review their land law and draft a land code. While for political reasons the code was not adopted,[25] Brett's good work was recognised and he was soon after commissioned to draft a land code for the Solomon Islands that was implemented.[26]

Further, it was because of Cowen and his strong professional relationship with Harvard Dean, Erwin Griswold,[27] that Brett travelled to Harvard University as an Erza Ripley Thayer teaching fellow in 1958,[28] where he completed a Doctor of Juridical Science

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[21] Brett, above n 3.

[22] In Waugh's history of the Melbourne Law School he suggests that in 1961 Brett blamed Cowen for 'failing to deliver promised support for his application' for the Chair of Commercial Law and that Cowen regarded it as 'the only bad *personal* time in my experience in the school.' Waugh explains that Brett took steps to mend the relationship and it is clear from correspondence that the two remained on friendly terms and Cowen continued to support Brett's promotion: John Waugh, *First Principles — The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 158: Letter from Zelman Cowen to Harold Ford, 1 May 1964 (University of Melbourne Archives, *Harold Arthur Ford Papers,* 2012.0292, Box 2, Manila Folder–Half–ZC 1963–64).

[23] Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University, 2015) 5.

[24] Interview with Richard Fox (Law School, Monash University, 23 October 2013).

[25] Zelman Cowen, *The Memoirs of Zelman Cowen — A Public Life* (Miegunyah Press, 2006) 201–2; Letter from Peter Brett to Zelman Cowen, 13 September 1957 (University of Melbourne Archives, *Peter Brett,* 1975.0095, Brunei, British Solomons Protectorate Land Code 1957–1966).

[26] Cowen described Brett as '[o]ne of the ablest and most versatile members of the faculty' and said that the work 'was done expertly and imaginatively': Cowen, above n 25, 201–2.

[27] The pair met at a party hosted by Professor Julius Stone in 1951. Cowen, above n 25, 178, 180. Similar arrangements were made between English and American universities: David Sugarman, 'A Special Relationship? American Influences on English Legal Education, c 1870–1965' (2011) 18 *International Journal of the Legal Profession* 7, 26.

[28] Letter from Peter Brett to the Vice-Chancellor of the University of Melbourne, 18 September 1959 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence Series,* UM312, 1959/207, Brett P: Report on Leave of Absence).

('SJD'), awarded in 1960.[29] Unlike their predecessors, who predominantly undertook studies in England, many of the Melbourne legal academics of the period took postgraduate degrees in America where, in contrast to England, legal education had become a large, proud and well-funded industry.[30] Both Cowen and Griswold were enthusiastic and a range of scholarships was sought by them to facilitate such exchanges.[31]

Cowen also took measures to ensure that his colleagues' teaching matched their scholarly interests. Cowen altered teaching arrangements so that Brett and his collaborator, Louis Waller, could teach criminal law in accordance with an ambitious plan the two had cooked up together[32] and also allowed Brett to teach the subjects that held the greatest fascination for him.[33] Brett and Waller's collaboration led to the publication of an innovative criminal law textbook that established both of their reputations. And it was with Cowen's support that Brett was appointed to a professorship.

In these various ways Cowen played an important part in Brett's elevation by giving him the freedom to develop his academic agenda as well as providing opportunities that played to Brett's strengths and interests. Cowen knew that Brett was a very bright man and got the best out of him.[34] Had Brett not travelled to Harvard, had he not been encouraged to develop an innovative criminal law course and had he not been allowed to work with a person who shared his interests and enthusiasm, it is unlikely that he would have turned as forcefully towards legal theory (a subject in which he had no prior learning) or advanced what might be described as one of the greatest Australian legal teaching initiatives of the 20th century.

By the beginning of 1956, a year after Brett arrived, the Melbourne Law School consisted of three professors, five senior lecturers and a full-time tutor.[35] Brett had chosen well to seek out Melbourne. In the 1950s the faculty had created what, on most accounts, was

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[29] Letter from Lon L Fuller, Chairman of the Committee on Graduate Studies at Harvard Law School to Peter Brett, 16 June 1960 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7, File 53 Miscellaneous Letters and Appointments etc).

[30] Ruth Campbell, *A History of the Melbourne Law School 1857–1973* (University of Melbourne Press, 1977) 146.

[31] Cowen, above n 25, 185–186, 189–190.

[32] Interview with Louis Waller (Law School, Monash University, 23 October 2013).

[33] Jurisprudence, Public Law 1 (Administrative Law) and Criminal Law.

[34] Cowen, above n 25, 201–2.

[35] Letter from Zelman Cowen to Peter Brett, 13 December 1954 (University of Melbourne Archives, *Law Dean's Correspondence 1953–1961,* 1984.0033, Faculty of Law 1953–54–55).

Australia's greatest law school.[36] The law schools at the UWA and the University of Sydney were both beset with political difficulties and did not possess the strong congenial atmosphere of Melbourne.[37] While Brett remained in contact with the Dean of the Law School at UWA, Frank Beasley, there is evidence that during Brett's tenure at UWA Beasley at times made Brett's life difficult and his treatment was a factor that prompted Brett to seek employment at Melbourne.[38] Similarly, the Law Faculty at the University of Queensland was a conservative institution that was heavily influenced by the profession.[39] In the late 1950s at the University of Tasmania all members of the law school had resigned in protest against the University's treatment of its academics.[40] The Faculty of Law at the University of Adelaide was faring better but was not yet as large or ambitious as Melbourne.[41]

Brett had therefore arrived at a confident, collegial and well-run law school. A law student at Melbourne in the 1960s, former Attorney-General, Foreign Minister and Chancellor of the Australian National University Gareth Evans suggests that 'it was probably the best Law School in the country. It had very good lecturers. It had a very vibrant deanship under Zelman Cowen. It was operating at a very high level, competent, classy.'[42] Barrister, entrepreneur and philanthropist Allan Myers, also a student at that time, refers to it as a 'very fine place' and said that as in the case of the University of Oxford, 'nothing which [was] second rate [was] passed off as first rate' and that there was 'a definite determination to maintain standards and try to be the best.'[43] Waugh, in his history of the faculty, described this generation of legal academics at Melbourne as 'founding the New Jerusalem.'[44] Dating back to Geoffrey Sawer's time in the 1940s, there was a sense that Melbourne could be as good, if not better, than the greatest law

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[36] Allan Myers who was a university medallist from Melbourne and went on to complete a Bachelor of Civil Law at Oxford said 'This would be regarded as heresy by many but I actually thought the teaching I got at the University of Melbourne was on the whole better than the University of Oxford. … I thought that the courses were more comprehensive and the teachers were better teachers': Interview with Allan Myers (Office of Dunkeld Pastoral Co Pty Ltd, Melbourne, 10 June 2014).

[37] See the chapters on Alice Erh-Soon Tay.

[38] Brett, above n 3.

[39] See Michael White, 'History of the Garrick Chair at the T C Beirne School of Law' (2010) 29(2) *University of Queensland Law Journal* 335.

[40] Richard Davis, *100 Years — A Centenary History of the Faculty of Law University of Tasmania 1893–1993* (University of Tasmania Law School, 1993) 49–52.

[41] See Alex Castles, Andrew Ligertwood and Peter Kelly, *Law on North Terrace — 1883–1983* (University of Adelaide, 1983) 62–8; Victor Allen Edgeloe, 'The Adelaide Law School — 1883–1983' (1983–85) 9 *Adelaide Law Review* 1, 32–8; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) vols 1–2.

[42] Interview with Gareth Evans (ANU House, Melbourne, 13 June 2014).

[43] Myers, above n 36.

[44] Waugh, above n 22, 143.

schools in the world.[45] This environment gave Brett the opportunity to dream big and make a strong contribution to the academic foundations of the discipline. He had come to the right place at the right time.

### 2.3 Law and Morality

In addition to the opportunities provided by the Law School at the University of Melbourne, Brett's other piece of good fortune was that his interests corresponded with the leading jurisprudential issues of the day and the law professors who were responsible for the major American jurisprudential movement of the time, the Legal Process School, inspired him. By travelling to Harvard in 1958 to undertake an SJD Brett came under the influence of three inspiring mentors and giants of American legal theory — Henry Hart,[46] Albert Sacks and Lon Fuller. It is important to recognise that Brett's experience was unique. While Cowen facilitated several other exchanges to America, Brett was the only Australian legal scholar of this era to take a strong interest in the work of Hart, Sacks and Fuller and to adopt the agenda of the Legal Process School. It is also important to recognise that Brett's experience in America was critical to the contributions he then made in Australia.

What was it about Brett that led to his attraction to the Legal Process School? From even a casual review of Brett's career two features stand out. First, there is his 'fascination with the interplay between law and morality.'[47] Every person interviewed remarked on this[48] and it is clearly evident in both his teaching and scholarship. Second, there is his standing as a 'liberal humane scholar.'[49] Myers said that Brett 'was someone who was a humanist, who was tolerant of people, although he had clear standards. He didn't want to control people's lives although he did have a strong idea of what was right or wrong.' [50] There are several aspects of Brett's background that might explain these characteristics. Most obviously there was his substantial involvement in the Second World War and his close acquaintance with the many atrocities of that war. Brett served continuously in the army from the outbreak of the war until 1946, occupying a range of different posts.[51] He was granted a commission as Second Lieutenant in the Royal Army Service Corps,

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[45] See, eg, Philip Ayres (ed), *David Derham: Talks on Universities, History and the Law* (Oryx Publishing, 2009).

[46] Where no first name is provided, a reference to Hart should be interpreted to mean H L A Hart not Henry.

[47] Waller, above n 32.

[48] For example, Myers said 'He was always interested in what's right. He wanted to argue the rights and wrongs of things': Myers, above n 36.

[49] Interview with Ian Leader-Elliot (Law School, University of South Australia, 10 February 2014); Myers, above n 36.

[50] Myers, above n 36.

[51] Brett, above n 1.

serving in both England and France.[52] He also served with the 5th Auxiliary Group Nigeria Regiment in West Africa, Nigeria and Sierra Leone.[53] Brett also had 'sporadic experience as counsel, and as judge-advocate at military courts-martial',[54] ultimately attained the substantive rank of Lieutenant and was discharged with the honorary rank of Captain.[55] At the end of the war he served 'in Germany and Belgium, first at a Brigade Headquarters and then on the staff of a prisoner-of-war camp, until [he] was demobilised in March 1946.'[56] As a Jewish man the Holocaust and widespread anti-Semitism of the time touched him personally. Because he possessed a strong intellectual curiosity, his experience and the events of this time no doubt provoked deep questioning of both his own identity and broader concepts of morality and humanity.

Religion played a part in Brett's life in several ways and might also explain his fascination with these subjects. His Jewish background was of course a central component, but Brett's scholarship suggests that he was familiar with both the Old and New Testament[57] and at St Pauls Grammar School in London he would have had a religious education founded in Christian belief. In these ways he was exposed to a range of different ideas about morality that may have challenged his identity.

By the time that Brett arrived in Australia he was no longer an observant Jew. Two of his sons, Robin and Jonathan, hold slightly different views on why this was so:

> Jonathan: He was brought up liberal Jewish in London and basically gave it away largely because he joined the British army. It wasn't a good thing to do to fight in the British army as a Jew, not if you had any chance of getting caught, and it meant nothing to him to be a Jew. I probably am saying things I shouldn't say but I think in hindsight he probably felt bad about having done that. Although I don't blame him at all.[58]

Robin considered that his father's reasons were mixed; that he did it partly to protect his children and partly because of his war experience and a sense that anti-Semitism would continue throughout the 20th century.[59] As Robin explains, their mother, on the other

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[52] Ibid.
[53] Ibid.
[54] Brett, above n 15.
[55] Ibid.
[56] Brett, above n 1.
[57] The following book review demonstrates that Brett had a strong knowledge of the New Testament: Peter Brett, 'Book Review: *The Sanctity of Life and the Criminal Law* by Glanville Williams' (1958) 1 *Melbourne University Law Review* 556.
[58] Interview with Robin and Jonathan Brett (RACV Club, Melbourne, 11 June 2014).
[59] Email from Robin Brett to Susan Bartie, 13 October 2015.

hand 'was your absolutely classic middle-class Sydney WASP. Church of England. Went to church every Sunday, it's just what you did.'[60] Somewhat curiously Brett never told his closest friend and colleague, Louis Waller, that he was Jewish. Waller, a practising Jew, discovered that Brett was Jewish by accident when he and another colleague, Mary Hiscock, called on Brett's brother, Jim, during a trip to England years into the pair's friendship.[61] Neither Robin nor Jonathan were taught anything about Judaism by their father. Jonathan says that his father had strong Jewish attributes but thought that he had learned to conceal them 'because he was petrified as he had a right to be because Jews didn't get a good time in the 1930s and 1940s.'[62] Why Brett never took up Judaism again (or any other religion) will probably never be known. Waller believes that Brett later became a Freemason because he saw it as a 'sort of spiritual anchor.'[63] One might, however, speculate that being born a Jew, later abandoning his faith and witnessing the terrible treatment of Jews meant that he wrestled with the question of faith throughout his life and that this later infiltrated his teaching and scholarship.

The 1950s and 1960s were a time of great change both within the law faculties as well as in broader Australian society. Brett wasn't the only one attracted to the interplay between law and morality and it wasn't just the Second World War that had prompted such questioning. Common views of what was right and wrong were being debated in all kinds of circles. With decades of sexual repression, followed in the late 1950s and early 1960s by strong moves towards sexual liberation, questions about common decency in art, literature and broader society were fiercely debated. Brett contributed in various ways to these and other debates.[64]

In England H L A Hart, who held the Chair of Jurisprudence at the University of Oxford, was coming to the fore as the leading jurisprudential scholar, re-injecting law with a strong philosophical foundation inspired by the fashionable ordinary-language philosophy of Wittgenstein, Ryle and others. Hart's seminal work, *The Concept of Law*,[65] was not published until 1961; however, he already had fame both in England and America through two widely publicised debates that formed the basis of much writing on jurisprudence throughout the second half of the 20th century. First, there was Hart's debate with English judge, Lord Devlin, over whether it was the function of law to

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[60] Ibid.
[61] Waller, above n 32.
[62] Jonathan Brett, above n 58.
[63] Interview with Louis Waller (Monash University, 25 November 2013).
[64] Brett's contribution to these debates is acknowledged in George P Fletcher, 'The Fall and Rise of Criminal Theory' (1998) 1 *Buffalo Criminal Law Review* 275, 277.
[65] H L A Hart, *The Concept of Law* (Oxford University Press, 1961).

intervene in matters of private sexual morality.[66] Second, there was his debate with Harvard professor Lon Fuller over whether immoral laws, such as those of Nazi Germany, were in fact law.[67] On the other side of the Atlantic, the writings of Lon Fuller, Henry Hart and Albert Sacks, all of Harvard, formed the dominant American jurisprudential school.

Brett understood both the methods and motivations of all four of these great scholars and very much wanted to be a part of their tradition. Like them, he had lived through and participated in the events of the Second World War and was committed to making the most of the liberty that the allies had won. Like them, he was fascinated with matters of law and morality. Like them, he believed that being a legal academic was a serious vocation. And like them, he believed that jurisprudence ought to extend beyond examining the concept of law to both the critique of law and law reform.[68] Holding these views it is therefore unsurprising that as a student at Harvard in 1959 Brett sought out the assistance of Fuller, Henry Hart and Albert Sacks and in his SJD thesis drew from both their work and that of H L A Hart.

### 2.4 The Legal Process School and Criminal Law Theory

> I have not attempted to conceal from my colleagues that I think I learnt more from you than from anyone else who has ever taught me law.[69]
>
> *Letter from Brett to Henry Hart, 2 May 1961*

When it comes to American influences on Australian law teaching, emphasis is most often placed on the Case and Socratic methods associated with the initiatives put in place at Harvard by Christopher Columbus Langdell and others. In the 1950s and 1960s there was much debate over the merits of these forms of instruction in law schools throughout Australia and at conferences of the newly formed Australian Law Schools Association. Most Australian scholars seemed more interested in America's system of legal education

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[66] The debate began when Lord Devlin delivered the second Maccabaean Lecture in Jurisprudence of the British Academy in 1958. Hart responded with various radio broadcasts and lectures in England and America. Many of the ideas raised during the debates were expanded upon in the following publications: Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965); H L A Hart, *Law Liberty and Morality* (Oxford University Press, 1963).

[67] H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 7 *Harvard Law Review* 630. For an excellent re-examination of the debates see Kristen Rundle, *Forms Liberate — Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) 51–85.

[68] Lacey explains that this was an aspect of Hart's agenda: Nicola Lacey, *A Life of H L A Hart — The Nightmare and the Noble Dream* (Oxford University Press, 2004) 256.

[69] Letter from Peter Brett to Henry Hart, 2 May 1961 (Harvard Law Library, *Henry Hart Papers*, Hollis 601611, Box 1–13, Series 1 Correspondence: Brett, Peter 1959–1963).

than England's.[70] The discussions centred upon the merits of these forms of instruction as opposed to more traditional didactic methods, and while the Case and Socratic methods were never wholly adopted in any Australian law schools, different manifestations of each method were trialled by many and in time casebooks became a permanent fixture of the legal textbook market.[71] What has been considered far less is whether the anxieties and fundamental questions that drove American scholars such as Langdell to adopt and populate the Case and Socratic methods were also transferred to Australia. Did Australian legal scholars simply experiment with some of the American teaching methods or did they also adopt the theory and have the motivations that lay behind them? Brett's experience suggests that, at least in some instances, Australian engagement with American ideas was more pronounced than has otherwise been believed.

At Harvard Brett not only completed his SJD, but also attended Henry Hart's Legal Process classes as well as Albert Sacks's classes in Administrative Law and found in them, as well as Lon Fuller, academic mentors.[72] Brett's greatest admiration was for Henry Hart whose teaching style and theories he hoped to emulate.[73] Brett also considered him to be a friend.[74] Henry Hart and Sacks taught together and compiled a set of teaching materials to be used in class that were entitled 'The Legal Process'. Those materials are now recognised as important both in terms of the history of American legal education as well as the development of American jurisprudence. The materials, much later published as a book,[75] demonstrate that at least in America a legal textbook — even

[70] For empirical support for this point see Susan Bartie, 'A Full Day's Work — A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67, 81–9.

[71] Ibid 88–9, citing William Morison, 'Book Review: *Cases on Private International Law* by Morris' (1954) 1 *Sydney Law Review* 85, 285; R W Baker, 'Book Review: *Cases on Constitutional and Administrative Law* by Peter Brett' (1962) 1 *University of Tasmania Law Review* 760, 760.

[72] Brett maintained an interest in administrative law: see Peter Brett, *Cases and Materials in Constitutional and Administrative Law* (Butterworths, 1962); Peter Brett, 'Book Review: *Justice and Administrative Law* by William A Robson' (1951–1953) 2 *University of Western Australia Law Review* 462; Peter Brett, 'Book Review: *The Contracts of Public Authorities: A Comparative Study* by J D B Mitchell′ (1954–1956) 3 *University of Western Australia Law Review* 183; Peter Brett, 'Book Review: *The Citizen and the Administration: The Redress of Grievances,* a report by JUSTICE' (1962) 3 *Melbourne University Law Review* 555.

[73] Brett, above n 69.

[74] Letter from Peter Brett to Henry Hart, 30 April 1963 (Harvard Law Library, *Henry Hart Papers*, Hollis 601611, Box 1–13, Series 1 Correspondence: Brett, Peter 1959–1963).

[75] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 207. An edited version of the materials was published in 1994: William N Eskridge Jr and Philip P Frickey (eds), *Henry M Hart Jr and Albert M Sacks The Legal Process — Basic Problems in the Making and Application of Law* (Westbury, 1994).

a ‘cases and materials’ book — can be so much more than an aid for the classroom.[76] The textbook ‘provided much of the agenda, analytic structure and name’[77] of the Legal Process School.

By creating these materials Henry Hart and Sacks became the only scholars to ‘devote substantial attention to the goal of grounding all [the] themes [of Legal Process] in a set of jurisprudential claims about the nature of law and legal knowledge.’[78] The book consolidated the three fundamental methodological premises that underscored the School. Put simply, for legal process scholars law was a purposive activity that ought to be directed to promoting social cohesion and curing social ills. Like the American legal sociologists of the early 1900s, legal process scholars believed that law should be treated as a policy science to facilitate this social cohesion. This is the first of the School’s three underlying premises.

The second premise involves elevating the jurisprudential importance of the question ‘What is the nature of the basic problem and how should we choose among the various procedures of social ordering that might be applied to it?’[79] Henry Hart and Sacks considered that examining and choosing among various means or processes was fundamental to the progress of jurisprudential inquiry.[80] According to the pair, America’s legal system had legitimacy only insofar as the correct democratic processes were used to make laws.[81] It was, according to Henry Hart and Sacks, this democratic foundation for the making of laws that distinguished America’s laws and legal system from that of fascist regimes. The growth of policy science prior to the Second World War and initiatives such as the New Deal had led to the disturbing conclusion that America’s legal systems had taken on some of the instrumental qualities that were now, in the postwar era, associated with Nazi Germany. It was, according to Henry Hart and Sacks, the democratic foundation of America’s legal institutions that meant that an outsider could clearly tell the two apart.[82] The legitimacy of America’s laws was therefore firmly wedded to the institutions used for lawmaking and the procedures that they followed.

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[76] In this thesis references to the book will refer to the 1958 ‘tentative’ edition: Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Tentative Edition, 1958).

[77] William N Eskridge Jr and Philip P Frickey, ‘The Making of the Legal Process’ (1994) 107 *Harvard Law Review* 2031, 2031.

[78] Charles L Barzun, ‘The Forgotten Foundations of Hart and Sacks’ (2013) 99 *Virginia Law Review* 1, 10.

[79] Duxbury, above n 75, 233 quoting from Lon L Fuller, ‘Mediation — Its Forms and Functions’ (1971) 44 *Southern California Law Review* 305, 307.

[80] Ibid 235.

[81] Ibid 256.

[82] Eskridge and Frickey, above n 77, 2031–32.

Henry Hart and Sacks went so far as to suggest that the central importance of these institutions and procedures meant that laws made by them were beyond challenge. Thus they endorsed the principle of institutional settlement which is the idea that:

> decisions which are the duly arrived at result of duly established procedures [for making decisions] of this kind ought to be accepted as binding upon the whole society unless and until they are changed.[83]

While Henry Hart and Sacks were not positivists in the narrow sense of suggesting that law exists in isolation from values and morals, they did adopt the positivist position that once law is made in accordance with 'duly established procedures' it becomes valid law.[84] Recently it has been suggested that the pair can be distinguished from H L A Hart as their position 'depends on a normative argument about the *benefits* of keeping law and morals separate.'[85] According to the legal process scholars if courts take a purposive approach to the administration of law, treating their decisions as binding fulfils the twin objectives of treating law and morality as conjoined and providing a level of legal certainty from which individuals can conduct their lives.[86]

The final premise underpinning the School is something the pair called 'reasoned elaboration'. The instrumental tendencies of the School might suggest that judges had open slather to mould the law to suit their own views of what society needed. Instead Henry Hart argued that a 'court in making law is bound to base its action, not on free judgment of relative social advantage, but on a process of reasoned development of authoritative starting-points (ie statutes, prior judicial decisions, etc).'[87] An official such as a judge interpreting a general directive such as a statute must 'elaborate the arrangement in a way which is consistent with the other established applications of it' and 'must do so in a way which best serves the principles and policies it expresses.'[88]

Recently renewed attention has been given to the work of Henry Hart and Sacks that suggests that their jurisprudential contribution has for a long time been misunderstood. The misconception has some relevance to Brett. Leading commentary has suggested that Henry Hart and Sacks were 'lawyers who were neither particularly interested in, nor capable of, engaging in philosophical debates about the nature of morality, law, or human

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[83] Hart and Sacks, above n 76, 4 quoted in Eskridge and Frickey, above n 77, 2045.
[84] Barzun, above n 78, 30.
[85] Ibid 31.
[86] Ibid 30.
[87] Eskridge and Frickey, above n 76, 2038.
[88] Ibid 2043.

knowledge.'[89] The Legal Process School was deemed naive because it was said to put forth a view that law could be analysed and prescribed neutrally and objectively, in ignorance of the fact that it embodies 'the social assumptions of a particular group of white, male, affluent, law professors.'[90] In 2013, following a thorough analysis of their work, American law professor Charles Barzun argued that this is a mistaken interpretation that ignores numerous explicit comments in *The Legal Process* which suggest that Henry Hart and Sacks recognised the role of values in both the choice of institutions as well as the laws created. Barzun argues that the 'teaching materials advance, albeit in a somewhat clunky way, a naturalistic, non-sceptical moral theory that is consequentialist in structure.'[91] The neglect of these aspects of Hart and Sacks's position has, according to Barzun, led others to underestimate its philosophical foundation and to create false distinctions between the School and other progressive moods and movements.

What is particularly significant to our consideration of Brett is Barzun's suggestion that Henry Hart and Sacks were engaged in a larger intellectual debate over the role of values in the natural and social sciences. Barzun argues that:

> Hart and Sacks's particular contribution to this tradition, contrary to what the standard story suggests, was to *emphasise*, rather than downplay, the role values play not only in legal analysis and decision-making, but in *all* forms of social scientific inquiry. In other words, Hart and Sacks responded to the Realist's sceptical threat by reaffirming law's scientific credentials, but they did so less by showing how legal methods of analysis were 'objective' or 'neutral' as the standard story has long held, than by redefining what it meant for a discipline to be 'scientific' in the first place.[92]

Here Barzun is suggesting that Hart and Sacks were engaging in contemporary debates in the sociology and philosophy of knowledge, raising questions 'about the foundations and scope of scientific knowledge and the possibility and desirability of separating questions of fact from questions of value.'[93] They were trying 'to define law as an academic discipline with methods that could properly be understood as *scientific*, comparable to those employed by economists, psychologists, or sociologists.'[94] Barzun groups Henry Hart, Sacks and Fuller with the leading philosophers of science, Kuhn, Wittgenstein, and

[89] Barzun, above n 78, 5–6.
[90] Ibid 14.
[91] Ibid 19.
[92] Ibid 6.
[93] Ibid 6–7.
[94] Ibid 7.

Michael Polanyi, and suggests that they were engaging in a debate beyond the discipline of law 'about the nature and methods of the human sciences generally.'[95] He points to evidence that shows that Henry Hart read the work of these scholars and speaks of Fuller's close association with and respect for Polanyi.[96] As explained below, Brett's scholarly agenda gives force to Barzun's claims. In Brett's work we find these very same ambitions. The reforms he advocated are based on analogies he draws between law and the philosophy of science that acknowledge the intuitive and value-laden nature of science.

### 2.5 Brett's Legal Theory

The immediate and most obvious result of Brett's time in America was a monograph he published from his SJD entitled *An Inquiry into Criminal Guilt*.[97] Not only was it one of the first monographs of its kind in Australia,[98] it also made a novel contribution to Australian legal theory by incorporating some of the leading thought from England into a thesis driven by American legal process theory. Much has been written about the relationship between the Americans Fuller and Henry Hart and the English H L A Hart, suggesting that the Americans and English professor were respectful of one another but held very different views on some of the most important questions of legal theory.[99] Brett's monograph makes an inventive contribution in that it seeks to draw from traditions featured in H L A Hart's work as well as those in the works of Henry Hart, Sacks and Lon Fuller to answer an important philosophical question: 'Are common-sense intuitions about blame and responsibility, on which judgment of criminal guilt and criminal liability are based, the result of genuine moral insight, or do they represent merely emotional reactions explicable only by our evolutionary past?'[100]

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[95] Ibid 50–2.

[96] Ibid 51–2. Fuller's respect for and dealings with Polanyi have been noted elsewhere: Robert S Summers, *Lon L Fuller* (Stanford University Press, 1984) 74, 87; Lacey, above n 68, 184–5.

[97] Brett, above n 5.

[98] As one reviewer said 'the publication of *An Inquiry Into Criminal Guilt* is a welcome sign that time is now being found for more purely speculative inquiry into specialised fields': Colin Howard, 'Book Review: *An Inquiry into Criminal Guilt* by Peter Brett (1963–66) 2 *Adelaide Law Review* 139, 139.

[99] See, eg, Lacey, above n 68, 181, 184–7, 197–9, 291; Summers, above n 96, 9–10, 12, 20–1, 35–6, 42–54; Rundle, above n 67, 102–8, 144–8. *Contra* Geoffrey C Shaw, 'H L A Hart's Lost Essay: *Discretion* and the Legal Process School' (2013) 127 *Harvard Law Review* 666.

[100] Barzun, above n 78, 59.

Brett's interest in criminal law was clearly evident before he went to Harvard, as was his interest in contemporary thought in philosophy, psychology and psychiatry.[101] The speed with which he chose his topic and advanced his thesis suggests that these ideas were not new to him[102] and that they represented a continuation of the scholarship he had previously advanced at both Melbourne and UWA. His SJD was distinctive, however, in one important way: it did not provide a doctrinal exposition of the leading criminal cases and legislation. Instead the thesis advanced 'thinking' and theory based on reflection on that body of law. And it is clear that this novel approach was due to the encouragement he received from the scholars at Harvard. In a letter to a friend and colleague at Melbourne, Brett explained how the teachers at Harvard had encouraged him to take a theoretical approach:

> I have … returned to my original idea of an interdisciplinary study of the bearing of modern philosophical views about the body–mind relationship on some fundamental problems of Criminal Law — mens rea and its special manifestations such as insanity, and intoxication. I had quite a bit of discussion about this with Lon Fuller and Henry Hart, and was encouraged by them to go ahead. The result is that I will be doing a lot of reading in the year, but mostly not in the law, but in philosophy, psychology, etc. I had some doubts whether this kind of work would be acceptable, as it does not lend itself to long strings of case citation in footnotes. But I have been assured by Livy Hall that the authorities are probably satisfied that I know how to handle cases, and that they are quite happy to have a thesis which concentrates on thinking rather than looking up cases. I am very pleased about this, as it is work which I have wanted to do for a long time, but one needs to get away from the daily routine of keeping up with current material in order to be able to get started. … I am abandoning my efforts to keep abreast of current cases for a year. You have no idea what a feeling of relief this creates.[103]

Brett had begun his academic career within Australia and had adopted an Australian scholar's sense of responsibility to make Australian laws accessible to legal practitioners and students. This change in approach and attitude tells us something important about the culture of the first community of Australian legal scholars. It suggests that a sense of responsibility to provide basic materials may have served to clip the wings of this

[101] Peter Brett, 'Book Review: *Criminal Law: The General Part* by Glanville Williams' (1956–58) 2 *Sydney Law Review* 199; Peter Brett, 'Abnormal Propensity or Plain Bad Character' (1953) 6 *Res Judicatae* 471; Brett, above n 11.

[102] See Letter from Peter Brett to Harold Ford, 23 February 1959 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder — Brett Professor Peter).

[103] Letter from Peter Brett to Harold Ford, 26 October 1958 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder — Brett Professor Peter).

generation of legal scholars.[104] The importance of Fuller, Hart and Hall's encouragement is also made clear in the opening to the book that was a result of Brett's SJD:

> Professors Lon L Fuller, Livingston Hall and Henry M Hart, Jnr, were always ready to discuss my ideas and offer constructive criticism of them. Their gentle provocation constrained me again and again to clarify my thoughts and to work a series of apparently disconnected ideas into a coherent theory. Above all, however, they never failed to encourage me to believe that I was doing something worthwhile, and I am deeply grateful to them.[105]

One of the central arguments of Brett's SJD was that the purpose of mens rea is to distinguish people who are morally blameworthy ('guilty') from those who are not. According to Brett the purpose of mens rea is to formulate those matters that exonerate a person from guilt. He challenged the prevailing view adopted by leading criminal law scholar Glanville Williams, and others, that the conditions of blameworthiness are formulated by an act directed by the mind. This, he believed, was to continue the myth of Cartesian dualism. Instead he believed that the law should adopt the position of one of the leading Oxford philosophers, Gilbert Ryle who in *The Concept of Mind,*[106] published in 1949, who said that bodily and mental processes are really part of the one underlying phenomenon and rejected what he called 'the ghost in the machine.'[107] Brett reasoned that this meant that it was impossible to formulate in advance conditions of blameworthiness.[108] It was impossible to precisely define the contents of mens rea. He also invoked Wittgenstein's notion that the meaning of a word can only be understood 'by seeing how the word is used in practice' and that words 'do not bear a constant meaning, but rather a series of different meanings, each apt for a particular purpose, and linked together only by a "family resemblance".'[109] Brett applied this reasoning to suggest that defining blameworthiness by collecting together the 'family resemblances' was both impossible and futile. He said 'we cannot find the "essence" of blameworthiness in this way, nor can we state any unifying principle for all the cases, except in the most vague and general terms; and these terms will afford us no more than a

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[104] For a similar argument about the conflict between the first community's ambitions and sense of responsibility see Bartie, above n 70, 76–81.
[105] Brett, above n 5, viii.
[106] (University of Chicago Press, 1949).
[107] Ibid 5.
[108] Hart took a similar position which he later qualified: see H L A Hart, 'The Ascription of Responsibility and Rights' (1949) 49 *Proceedings of the Aristotelian Society* 171, 179–180 and his later work in H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968).
[109] Brett, above n 5, 14, citing Ludwig Wittgenstein, *Philosophical Investigations* (1953) 66, 67.

guide which must be used with common sense.'[110] Brett argued that by failing to incorporate this learning and by instead attempting to precisely formulate conditions of blameworthiness, the law fell behind contemporary understandings of the mind.[111] By drawing on the work of Ryle and Wittgenstein, Brett's approach resembled that of the English Hart. However, unlike Hart Brett sought to rely on the work of these philosophers rather than seeking to advance his own philosophy. As with Henry Hart and Sacks he was not a philosopher.[112]

In addition to ordinary-language philosophy, Brett's thesis ranged over many of the debates of the time, taking a position on behaviourism and explaining the most recent contributions made by psychologists and why their theories could not be neatly translated into law. By turning to the social sciences Brett sat squarely within the legal process tradition. While he was not a legal positivist, Brett believed he was continuing the task set by John Austin and Jeremy Bentham. These jurists had sought to expound and improve upon the law by drawing widely on the best learning of their day. They treated law as an object of 'scientific' study. One of the problems Brett believed was associated with current approaches to law was that contemporary learning in other disciplines was largely ignored. Because of this the law was based on 'a seventeenth century philosophy and an eighteenth century psychology.'[113] By reading widely into the social science and philosophical literature and seeking advice from psychologists and psychiatrists Brett sought to rectify this position and bring law into line with 20th century thinking.

One of the most controversial parts of Brett's thesis, his prescription on how courts should approach the question of guilt, draws from one of the leading philosophers of science of the time, Polanyi. Polanyi's book *Personal Knowledge*[114] had been published the year before Brett commenced his thesis at Harvard. In this work Polanyi challenged conventional thought by arguing that creative endeavour, such as the creation of new knowledge, is value laden rather than objective and value free. He invoked the expression 'tacit knowledge' by which he meant knowledge based on intuition, ascertained not through reasoning from premises but from what he called a person's 'indwelling understanding' — the understanding of human motivations and actions that they had gained from their life experience and awareness of that experience.[115] Brett

[110] Ibid 42.
[111] Ibid.
[112] Barzun, above n 78, 6.
[113] Brett, above n 5, 213.
[114] Michael Polanyi, *Personal Knowledge* (University of Chicago Press, 1958).
[115] Ibid 78.

explained that 'Polanyi urges that in all human mental operations, even those which on the surface consist of articulate logical operations, it is this tacit component of knowledge which plays a decisive role.'[116]

Polanyi's theory gave Brett grounds to suggest that the law could abandon its former ill-conceived quest to precisely define mens rea and rely instead on loose notions of negligence, recklessness and intention without abandoning the claim that the law was scientific — in other words, without losing its moral or intellectual integrity. Values, rather than mere factual observations, were a part of developments in natural science. Brett believed that Polanyi's theory supported the notion that when a jury determined the question of guilt they were reasoning in a manner that was the same as a scientist. Just as, according to Polanyi, a scientist draws upon their tacit knowledge to make a creative leap so too do members of a jury when determining the moral culpability of an accused. Brett argued that jury members draw on their indwelling understanding in attempting to understand why the accused acted in the manner they did. A finding of guilt could only follow where a jury member could say:

> 'I understand why he did this, but he ought not to have done it; if I had been in his place, I would not — or I hope I would not — have done it myself.' If they cannot say this, they should absolve him from guilt.[117]

Polanyi's theory helped Brett argue that a jury's recourse to their indwelling understanding, while a freewheeling process, was really not that different to how a social or natural scientist advanced knowledge and therefore should not cause alarm. Further, a juror's tacit knowledge helped them to identify the basis of their duty, what Brett described as the 'community ethic.'[118] According to Brett, relying on a jury and deploying the notion of tacit knowledge meant that guilt could be determined in accordance with such ethics.

Brett's thesis, underpinned by a desire to inject the criminal law with the best of contemporary learning, adds force to Barzun's thesis that Henry Hart and Sacks and the Legal Process School were concerned with philosophical debates about law, morality and human knowledge. Like a large part of Brett's subsequent work, it is based on the

[116] Ibid 78.
[117] Brett, above n 5, 77.
[118] Ibid 17–18.

premise that to be just, the law must be 'scientific.'[119] By this Brett meant that it must be formed through reasoning that is akin to the natural and social sciences and must be informed by the latest and most relevant knowledge from those disciplines. Leading thought in the philosophy of knowledge determined what amounted to the best of modern learning — in other words, what had the best scientific credentials — and identified the characteristics of science that all academic disciplines ought to emulate. An important foundation of the Legal Process School, drawn out by Barzun, was that the mere existence of subjectivity in law does not mean that law is unscientific because science itself has an element of subjectivity.[120] Brett embraced this view.

### 2.6 The Reviews

Brett made an impression on his teachers at Harvard. On 16 June 1960 Fuller wrote to Brett to inform him that he had obtained the SJD, noting that Brett was the only one to have 'made the grade this year.'[121] Professor Livingston Hall regarded him as 'gifted', 'imaginative' and capable of providing 'brilliant' insights.[122] In Administrative Law, Legal Process and the Legal Education seminar he 'obtained 80% (an A grade being 75 or above) which while not a record is somewhat unusual'[123] at Harvard Law School. He also attracted the attention of Dean Erwin Griswold with whom he corresponded over the years.[124] Brett's achievements are made all the more remarkable by the fact that his wife and three young children, aged seven, five and four, accompanied him to Harvard. His son Robin remembers that they lived in a 'basement flat in a student building that got incredibly hot with central heating because they turn it up too high. There was a bank down from street level to the entrance of our place that was always covered in snow all winter.'[125]

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[119] See, eg, Peter Brett, 'The Physiology of Provocation' (1970) *Criminal Law Review* 634; Peter Brett, 'The Law and the Changing View of Man' (1971) 5 *Australian and New Zealand Journal of Psychiatry* 78; Peter Brett, 'Law in a Scientific Age' in Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honour of Sir John Barry* (Gordon and Breach, 1972); Peter Brett, 'The Implications of Science for the Law' (1972) 18 *McGill Law Journal* 170; Peter Brett, 'Legal Decision-Making and Bias: A Critique of an "Experiment"' (1973) 45 *University of Colorado Law Review* 1; Peter Brett, *An Essay on a Contemporary Jurisprudence* (Butterworths, 1975).

[120] Barzun, above n 78, 4, 6.

[121] Fuller, above n 29.

[122] Attachment to Brett, above n 15.

[123] Ibid.

[124] See, eg, Letter from Erwin Griswold to Peter Brett, 18 August 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, File 22 Beamish Case); Letter from Peter Brett to Erwin Griswold, 3 March 1967 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7, File 52 University of Texas — Criminal Law and Jurisprudence).

[125] Robin and Jonathan Brett, above n 58.

Brett had considerable responsibilities outside of his studies that were lightened somewhat by his wife, Margaret. Robin and Jonathan recall that throughout their childhood she worked very hard as a nurse during school hours and doing all of the home duties.[126] In the preface to his book Brett acknowledged that he would not have been able to complete his studies so successfully were it not for the support and sacrifice of his young family and the book is dedicated to them.[127]

Brett's monograph attracted considerable interest with reviews published in American, English and Australian journals. Most of the reviewers complimented Brett on his endeavour but took issue with the faith he placed in juries. Graham Hughes, in the lengthiest review, 15 pages, said that he believed that Brett had made his case that current approaches to mens rea were wrong but rejected Brett's solution of relying on a jury's indwelling understanding.[128] He argued that it overestimated the jury's ability to empathise and that, in some abhorrent cases, such as the actions of the Nazi Adolf Eichmann, most juries would reject the possibility of contemplating what they would have done if placed in the accused's position.[129] Brett had anticipated this line of argument and had taken a position now commonly attributed to Hannah Arendt and her phrase 'the banality of evil'.[130] He adopted the position that ordinary people are capable of doing extraordinarily evil things. He spoke of the tendency to treat criminals as outcasts and argued that this was a myth, arguing that the criminal law 'is a series of restraints on behaviour in which ordinary people would like to indulge for ordinary reasons, at some time or other.'[131] Hughes also considered that the community ethic was not an adequate touchstone given the variety of different community ethics that exist.[132] To this Brett's answer appears to have been that the community ethic is a democratic concept and that as long as the jury is representative it will fulfil its aim.[133]

Ronald Wertheim, Associate Professor of Law at the University of Virginia, believed that Brett had made a good case that the foundation of the criminal law ought to be updated in light of modern learning but also criticised Brett's prescription, again pointing to the fact that most jurors would be unwilling to empathise with the accused and that the jury

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[126] Ibid. On the significant advantages of having a wife like Brett's see Annabel Crabb, *The Wife Drought* (Ebury Press, 2014).
[127] Brett, above n 5, ix.
[128] Ibid 477–81.
[129] Ibid 478.
[130] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, 1963).
[131] Brett, above n 5, 147.
[132] Graham Hughes, 'Criminal Responsibility' (1964) 16 *Stanford Law Review* 470, 481.
[133] Brett, above n 5, 77–9, 147.

required greater guidance. He said: 'A rule which goes this far to achieve individualisation of justice could easily achieve legitimised lynch law instead.'[134] Another American, Jack Leavitt from San Francisco Law School, similarly criticised the discretion Brett placed in the jury but went further, maintaining that Brett was giving the jury a licence to determine what conduct ought to be considered criminal.[135] This seems to misrepresent Brett's position.

Brett's book was also reviewed in the *Modern Law Review* by Professor J A Coutts, alongside H L A Hart's *Law, Liberty and Morality*. The only connection Coutts drew between the two works was by way of contrast: Hart had argued that a crime must derive from something more than moral blameworthiness while Brett had argued that all crimes must require moral corruption. Coutts engaged very little with Brett's argument, expressing a general lack of interest in the matters of philosophy that Brett had raised, and seemed to miss his central arguments concerning the nature of crime and the impossibility of formal definitions, arguing instead that certainty and predictability were what was needed in this area of the law.[136]

In Australia Brett's work attracted reviews from Brett's friend Justice Barry along with Colin Howard, Senior Lecturer at the University of Adelaide. Barry praised Brett's task as an 'intellectually exciting and socially worthwhile exercise.'[137] Howard's review was significant in that it outlined some of the fundamental differences between him and Brett that went on to resurface on numerous occasions throughout their careers. Howard criticised Brett's thesis on the basis that its abstract philosophy did not provide any practical solutions and argued that the fact that courts were able to apply the present concepts rebutted Brett's suggestion that there was in fact a problem.[138] Overall Howard's review conveys the impression that he was sceptical of the usefulness of such an 'abstract and philosophical'[139] exercise and that he had little familiarity with the philosophy and psychology underlying Brett's thesis.

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[134] Ronald P Wertheim, 'Book Review: *An Inquiry into Criminal Guilt* by Peter Brett and *Law, Liberty and Psychiatry* by Thomas S Szasz' (1964) 64 *Columbia Law Review* 977, 980.
[135] Jack Leavitt, 'Book Review: *An Inquiry into Criminal Guilt* by Peter Brett' (1963) 51 *California Law Review* 1031, 1035–6.
[136] J A Coutts, 'Book Review: *Law, Liberty and Morality* by H L A Hart and *An Inquiry into Criminal Guilt* by Peter Brett' (1964) 80 *Law Quarterly Review* 279, 280.
[137] John Vincent Barry, 'Book Review: *An Inquiry into Criminal Guilt* by Peter Brett' (1963) 4 *Melbourne University Law Review* 293, 293.
[138] Howard, above n 98, 140.
[139] Ibid 140.

None of the reviewers engaged with the various philosophical or psychological schools of thought that Brett presented in his thesis or recognised the magnitude of the task that Brett had set himself. The reviews are those of 'criminal lawyers' rather than legal theorists or philosophers. The reviewers' objections to Brett's conception of the role of juries in criminal trials demonstrates that they took a more conservative approach to the role of values in decision-making than Brett, suggesting that both Brett and his mentors (Henry Hart and Sacks) were progressive by contrast. The critics were opposed to giving a jury freewheeling discretion. As pointed out by Lord Devlin, who had been subject to similar criticism, '[t]hose who have had the benefit of higher education and feel themselves better equipped to solve the nation's problems than the average person may find it distasteful to submit to herd opinion.'[140] Brett's attempt to show that scientists are equally whimsical when furthering knowledge does not appear to have fared any better than Devlin's raw appeal to democracy. It is only very recently that the importance of the philosophical and psychological strands of Brett's thesis has been publicly acknowledged.[141] And in 1999 Sanford Kadish, a professor of law at the University of California, in an intellectual history of criminal law theory described Brett's monograph as 'a work of real consequence.'[142]

## 2.7 Concluding Remarks

This early history of Brett's career, drawing largely upon the archives and a careful review of his early scholarship, demonstrates that his experience is important to any understanding of the trajectory of Australian legal theory and education. Brett's experience demonstrates and details the pivotal role that the Law School at the University of Melbourne played in lifting standards and adding to the intellectual integrity of the discipline. By facilitating a collegiate environment and enabling Brett to spend a year at the illustrious Harvard Law School, Zelman Cowen helped instil in Brett a sense of the potential and worth both of law schools and of a scholarly career. Brett was able to see where the professionalisation of legal education could lead and was inspired by scholars whose careers he hoped to emulate.

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[140] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 91–2. Brett did not share Lord Devlin's conservative outlook and generally sided with Hart in the Hart-Devlin debate. He did however agree with Devlin that juries ought to be given greater responsibility in criminal trials.

[141] Justice Mark Weinberg, 'Evidence-Based Law: Its Place in the Criminal Justice System' (2014) 1 *Judicial College of Victoria* 23, 26.

[142] Sanford H Kadish, 'Fifty Years of Criminal Law: An Opinionated Review' (1999) 87 *California Law Review* 943, 951.

This is not to underestimate Brett's own attributes. He was clearly a very capable scholar and we might speculate that he would have had success no matter where he was located. However, his travel to Harvard placed him on a path that was neither clear nor easily accessible from other Australian universities. The experience accelerated his move towards a theoretical path and gave him the confidence required to engage with the common-law world's leading theoretical scholars. As there were so few full-time Australian legal academics in the 1950s and 1960s Cowen could not facilitate the creation of networks and societies within Australia. Instead he recognised the strengths and interests of his colleagues and provided opportunities for intellectual growth overseas. He viewed graduates and staff at the Law School as part of an international, rather than merely local, enterprise.

Further, Brett's monograph demonstrates that an Australian legal scholar working at this time was motivated to create a new jurisprudential model drawing from the leading thought of the age. Julius Stone had drawn from an earlier American legal tradition — Pound's sociological school — and his intellectual agenda was founded prior to joining the Australian legal academy.[143] As Brett was self-taught and held no lingering loyalties or close proximity to either American or English legal theory he was able to draw liberally from both. The strength of this approach is that it resulted in a novel thesis that arguably drew from the best that legal thought then had to offer. The weakness was that the new combination seemed, at least to some, to be a little too peculiar and most reviewers did not appear to understand all elements of Brett's thesis. It is only by situating Brett's work in the American context, that one can appreciate its connection to the Legal Process School.

Brett's thesis had the potential to instil within the Australian legal academy the confidence to examine and critique the conceptual underpinnings of law and adopt a strong reformist agenda. His work suggested that Australian legal scholars did not have to be minor players but rather could be worthy participants in the perennial quest to strengthen the intellectual underpinnings of the law and its study and teachings. He sought to transplant to Australia traditional American concerns about the role of the university in legal education and practice and the importance of science to the legitimacy of the discipline. His experience speaks of the strength and confidence of some members of this generation of legal scholars and explains some of the central factors that contributed to the rapid transformation of the Melbourne Law School in the 1950s and

[143] Stone's scholarly agenda is considered further in the part of this thesis that deals with Alice Erh-Soon Tay.

1960s into a large professional academic enterprise, as well as the creation in Australia of a legal academic elite.

In this chapter I have therefore introduced the first of Brett's innovative contributions to Australia's discipline of law, located the source of his inspiration and identified those to whom he owed an intellectual and personal debt. I have suggested that his motivations and agenda were similar to leading American legal scholars and that his work can be distinguished from previous and contemporary traditions within Australia's discipline of law. In doing so I have begun to build a case that, during the founding stages of the modern legal academy, Australia had scholars who made an assessment of the discipline and advanced their careers in innovative ways with a desire to improve law's standing and intellectual integrity. In the following chapter I analyse Brett's second major contribution to the discipline, which also stems from his time in Harvard, namely a set of imaginative teaching initiatives grounded in legal process sentiment.

# 3 A THEORY FOR TEACHING AUSTRALIAN CRIMINAL LAW

## 3.1 Introduction

This chapter makes a case for recognising Brett and Louis Waller's textbook on Australian criminal law as one of the most imaginative teaching innovations to come out of Australian law schools in the 20th century.[1] Careful study of the impetus for the textbook, the contents of the first three editions and the context in which it was written reveals its innovative qualities and achievements. Brett not only brought to Australia the American enthusiasm about reforming the intellectual credentials of law, he also brought the distinctly American advocacy for educational reform. Just as it was important to ensure that reform of the criminal law had a strong intellectual basis, drawing the best from the philosophy of science, to Brett it was essential that in the classroom law was taught in accordance with methods that encouraged students to adopt an intellectual and scientific approach to legal reasoning.

Brett and Waller's goal, however, was not simply to produce a competent legal practitioner. The pair wished to foster a sense of moral awareness in their students and to impress upon them the onerous moral responsibilities lawyers faced. They sought to create serious, reform-orientated, critical lawyers. Their textbook represents an ambitious attempt to embody these ideals while for the very first time providing an impressive compendium of all the leading Australian criminal cases, as well as comparative material, largely from England and America.[2] The first four editions ranged from 713 to 904 pages in length. That the pair produced a textbook that was regarded by international experts in the field as an exciting work and one that is remembered fondly by students educated in the 1960s attests to its strength.

Brett, working with Waller, devised pedagogical innovations that were similar to those of Langdell and were more significant than those of the American Legal Realists. The pair drew from the Legal Process School but also added innovations of their own, drawing on other traditions and then tailoring the work to an Australian context. Until now scholars

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[1] Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962); Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 2nd ed, 1965); Peter Brett and Peter L Waller, *Criminal Law — Cases and Text* (Butterworths, 3rd ed, 1971); Peter Brett and Peter L Waller, *Criminal Law — Text and Cases* (Butterworths, 4th ed, 1978). The work was a 'cases and materials' book but for convenience will be referred to by the broader descriptor of a textbook.

[2] There was only one small (120 pages) Australian textbook on criminal law: J V Barry, G W Paton and G Sawer, *An Introduction to the Criminal Law in Australia* (Macmillan, 1948).

have not sufficiently interrogated the foundation, creation, context or content of the work to reveal its important place within the history of Australian legal education and scholarship. This chapter therefore provides greater force to the argument introduced in the previous chapter that Australian legal scholars made much more than a meagre contribution to thinking about law and legal education. Brett and Waller devised a sophisticated and intellectually robust theory for teaching criminal law.

This chapter also explores a number of factors that might explain why the early editions of the textbook have not received the recognition that they deserved. While the textbook's importance and value was recognised at the time it has not been recognised — at least to the same level — since. It is suggested that if certain intellectual currents, teaching arrangements and student attitudes had been different, the specific features of early editions of this book and the concept of law on which it was based may have been more broadly known throughout Australia. This points to the importance of these matters in any explanation of the trajectory of academic law. Comparing what occurred with what might have been can also tell us something about what has been recognised and rewarded in law, and what *ought* to be recognised and rewarded.

### 3.2 Brett and Waller

The initial impetus for Brett and Waller's textbook came from Brett. While at Harvard he took Henry Hart and Sacks's course on 'The Legal Process' and attended education seminars conducted by Elliot Cheatham. For Cheatham's course Brett completed a paper on how he proposed 'to completely revamp the Criminal Law course at Melbourne.'[3] Some of the major innovations appear to have been sourced from 'The Legal Process' classes.[4] Brett wrote to Henry Hart to ask permission to adopt the 'Hart–Sacks format' for the textbook,[5] which Hart gave.[6] Brett believed that the textbook 'bears many signs of

[3] Letter from Peter Brett to Harold Ford, 23 February 1959 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder, Professor Peter Brett).

[4] Brett's textbook on administrative law and the course in jurisprudence he taught at the University of Melbourne were also based on Hart and Sacks's classes: Peter Brett, *Cases and Materials in Constitutional and Administrative Law* (Butterworths, 1962); Peter Brett and Peter W Hogg, *Cases and Materials on Administrative Law* (Butterworths, 1967). Letter from Peter Brett to Dean Griswold of Harvard Law School, 3 March 1967 (National Library of Australia Manuscript Collection, *Peter Brett Papers* MS 5603, Box 7, Folder 52, University of Texas — Criminal Law and Jurisprudence — 1967).

[5] Letter from Peter Brett to Henry Hart, 2 May 1961 (Harvard Law Library, *Henry Hart Papers*, Hollis 601611, Box 1–13, Series 1 Correspondence: Brett, Peter 1959–1963).

[6] Letter from Henry Hart to Peter Brett, 23 June 1961 (National Library of Australia Manuscript Collection *Peter Brett Papers*, MS 5603, Box 6, File 42 Copyright Permission Book — Cases and Materials in Criminal Law).

the impression that [their] all too brief association left with me.'[7] The influence is expressly acknowledged in the preface of the textbook.[8]

To achieve his grand plan Brett, like Henry Hart, needed a collaborator and he found it in the form of a young university teacher named Louis Waller, appointed to the Law School at the University of Melbourne in 1958 after completing a BCL at the University of Oxford.[9] Before that Waller had completed an undergraduate degree in law at Melbourne. Brett and Waller were similar in that they had both fallen under the spell of an important foreign jurisprudential scholar. Brett, of course, had Henry Hart while for Waller the tutorials he had attended at Oxford conducted by H L A Hart had made a lasting impression.[10] The collaboration, provided opportunities for the pair to talk to each other about their foreign mentors,[11] and so allowed for further cross-fertilisation between English and American traditions.

When Brett returned to Melbourne from Harvard, Waller was planning his exit from teaching the criminal law course. He was going to teach torts 'which I much preferred, not this slimy bloody business about crime.'[12] Waller's low estimation of the subject was influenced, at least in part, by the way it had been taught at Melbourne:

> Criminal Law was taught in a way that I immediately thought was bizarre, with general principles before you started on crimes. There were general principles on actus reus and mens rea, textbooks like *Kenny on Crime* where you didn't get to homicide until you had read through all this twaddle. I thought straight away (but I'm a young green teacher) how can you expect young students to start to deal with this somewhat spongy and difficult stuff when they have had no exposure to what crimes are other than generalities — 'A Crime is' — and the general definition is circular.[13]

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[7] Letter from Peter Brett to Henry Hart, 22 August 1962 (Harvard Law Library, *Henry Hart Papers*, Hollis 601611, Box 1–13, Series 1 Correspondence: Brett, Peter 1959–1963).

[8] Ibid vii.

[9] Michael Kirby provides a useful summary of Waller's career in a farewell speech he delivered to Waller in 2000. It was later published as an article: Michael Kirby 'People in Criminal Law: Louis Waller AO' (2001) 25 *Criminal Law Journal* 215. Waller's contribution to the Law School at Monash is captured in Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University, 2015).

[10] Interview with Louis Waller (Law School, Monash University, 23 October 2013). Waller also provided a lengthy tribute to Brett that provides a vivid account of Brett's personality, motivations and principal achievements: Louis Waller, 'Peter Brett Remembered' (1975) *Summons* 100.

[11] Ibid.

[12] Ibid.

[13] Ibid.

Brett's vision for a new criminal law course therefore represented a significant departure from the old order and his enthusiasm for his new model infected Waller so much that Waller decided to return to criminal law.[14]

### 3.3 Teaching Innovations

Apart from the fact that it was the very first extensive Australian criminal law textbook, there were three features that distinguished Brett and Waller's textbook from others. First, the book was written primarily with the classroom in mind. Although Australian legal practitioners used the book, it was not primarily designed for them. The book was organised to accommodate a particular method of teaching. The method, now commonly known as the 'problem method', was sourced from Henry Hart and Sacks. Rather than providing an explanation of the central rules and principles emanating from the case and statute law, each chapter provided extracts from primary sources (cases and legislation) and scholarly and newspaper articles. While primarily presenting Australian materials, a substantial proportion of the textbook drew from America and England. Each chapter began with a legal problem related to the material provided in that chapter. It was for a student to consider how the materials bore on the problem and whether the solutions provided were satisfactory. As such it was designed to engender a critical mindset and convey the idea that law consisted of a series of choices. The very structure of the textbook embodied a particular concept of law.

The second distinguishing feature was the authors' aspirations for students. Brett and Waller wanted students not only to learn the law but to also to gain an appreciation of the central moral dilemmas at its heart. They wanted students to understand that decision-making and law creation involved moral choices. They wanted them to recognise the heavy onus that this placed on lawyers and that it required a serious mindset as well as empathy for the individuals whose lives were affected by the law. The book was designed to encourage students to see the criminal law as legal process scholars did, as embodying a series of moral principles that could be gleaned from a careful reading of leading authority, commentary and legislation.

Finally, the authors wished to bring strong academic qualities to textbook writing in Australia.[15] They produced a robust scholarly book that in many ways was exciting. The book was much more than a collection of doctrine and greatly surpassed the ambitions of other books written at the time.

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[14] Ibid.
[15] Waller, above n 10.

### 3.3.1 Written for the Classroom

The majority of English and Australian textbooks published in the 1950s and 1960s were designed to be reference materials for both practitioners and students. At that time there were very few Australian textbooks. Brett and Waller wished to follow in the American tradition and design a textbook that gave priority to the teaching of law students. Each chapter, representing a teaching week, was structured around an initial factual problem that, in most cases, replicated a reported case or, in some instances, presented the student with a problem for law reform. As Ian Leader-Elliot acknowledged, it was the only Australian legal textbook that adopted this format.[16] The problem was then followed by a case that raised the same issue and provided an authoritative pronouncement. Rather than leaving the student with that pronouncement, the book then presented them with other cases, commentary, newspaper articles and legislative provisions that raised similar legal issues, answered them in different ways, and encouraged students to interrogate the reach and appropriateness of the rule or principle of the authoritative pronouncement. Students were therefore encouraged to develop their own interpretation of what the law is or ought to be. Rather than indoctrinate, the book was designed to prompt students to question the law and was premised on the notion that the criminal law required reform. As the authors explained, the format was designed to

> provide material for further exploration of the matters opened up by the printed case itself. In some instances these extracts show some development of the basic issues by presenting a slightly different fact-situation, requiring modification of the basic principle. In others, a completely different approach to the same basic problem is presented. The student should consider these extracts against the background of the reprinted case and ask himself [sic] why the further case is different and what it teaches. And we think he should try to answer such questions without recourse, at least at first instance, to the reported judgment.[17]

The most obvious way that the book borrows from *The Legal Process* format is through its use of the problem method. The development of the problem method has been hailed as a significant development in American legal education. Duxbury suggests that its adoption meant that the legal process scholars succeeded where the American legal realists had failed,[18] by converting the concept of law into a teaching strategy:

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[16] Interview with Ian Leader-Elliot (Law School, University of South Australia, 10 February 2014).

[17] Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962) viii.

[18] See also Laura Kalman, *Legal Realism at Yale 1927–1960* (University of North Carolina Press, 1986) 229.

> Cavers observed … that although certain realists espoused the problem method, they failed to embrace it. '[T]he Realists have fitted their aspirations into the framework of the casebook system.' Emphasis on cases rather than on problems remained their priority. … In *The Legal Process*, by contrast, specific cases are used to illustrate general problems concerning law creation and application. Hart and Sacks were attempting to invoke the pedagogic strategy which realism had only promised.[19]

Brett and Waller's textbook presented the criminal law as a changing puzzle. Rather than merely learning what the cases and materials presented, students were encouraged to critically question them. The method encouraged the belief that the law is not static and that practitioners play a part in law reform and law creation. The reformist attitude that was strongly evident in Brett's Master's thesis and SJD thesis shaped the textbook, as did his commitment to the legal process scholars' notion of principle and reasoned elaboration.

According to Brett and Waller the criminal law should not be taught by way of leading authoritative cases because

> [w]e believe that the common law consists of principles; and that individual decisions, if inconsistent with these principles (which are to be derived from the whole body of precedent which they permeate, not from isolated instances), must be treated as wrong.[20]

The common law did not derive its authority from the doctrine of precedent but from the strength of its reasoning processes, judged by how well it adhered to overarching principles. Waller recalls that Brett 'often railed at Frank Maher and me, jointly responsible for the first-year course, ILM [Introduction to Legal Method], that we … brainwashed our students into believing that the doctrine of precedent really mattered.'[21] Brett's aversion to precedent accords with Henry Hart's characterisation of it as an 'inert, remote-from-life notion, summoning up a picture of a desiccated English solution.'[22] In contrast, the type of social ordering Henry Hart envisaged through the development of

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[19] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 253.

[20] Brett and Waller, above n 17, vii. Brett put forward a similar view in his administrative law textbook: Brett, above n 4, v–vi.

[21] Waller, above n 10, 102.

[22] Henry M Hart Jr, *Legislation Notes* (Summer Term, 1947) 2 quoted in William N Eskridge Jr and Philip P Frickey, 'The Making of the Legal Process' (1994) 107 *Harvard Law Review* 2031, 2037.

principle was 'dynamic and vital.'[23] As Duxbury explains, legal process scholars believed that 'so long as judges respect the principles of institutional competence, they ought to engage in the reasoned elaboration of principles as actively as possible in order to achieve substantive justice for the parties of any particular dispute.'[24] Such an approach challenged the prevailing view of many Australian legal practitioners who saw law as static, and reasoning as largely mechanical. In a letter to Henry Hart, Brett spoke of his jurisprudence class and said that he was:

> trying to put over to our students some of the things I learnt at your feet during my year at Harvard. You would detest the class which I have as most of them seem to have been indoctrinated with Austin and look at me as though I am slightly queer when I ask them whether a particular result is just. So I am trying hard to rebut positivism — and you will know where I learnt this attitude.[25]

Brett and Waller hoped to instil in their students a very different and dynamic conception of law from the positivist or legalist conceptions that were dominant within Australia's legal profession at that time. In this way they contributed to the movement away from mechanical jurisprudence, moving students towards a new era of law reform.

### 3.3.2 Aspirations for Law Graduates

Legal process scholars were known for their pragmatism. They adopted approaches that they believed would be most likely to influence law-makers and law-reformers.[26] Similarly, in the classroom they 'had the goal of maintaining and improving the social practice of law by shaping the habits and values of future lawyers, judges, and legislators.'[27] Brett was no exception. The textbook that he wrote with Waller was designed to foster a certain kind of law graduate. First, it was designed to foster in students the legal process conception of law described above. Second, it was meant to awaken students to the important moral dilemmas at the heart of law and the central role that lawyers can play in resolving those dilemmas. At Harvard, Fuller's main complaint about his students was their 'uncritical attitude towards the substance of law and their lack of interest in ethical questions.'[28] Brett made the same complaint about his students

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[23] Ibid.
[24] Duxbury, above n 19, 264.
[25] Brett, above n 5.
[26] Charles L Barzun, 'The Forgotten Foundations of Hart and Sacks' (2013) 99 *Virginia Law Review* 1, 42.
[27] Ibid 43.
[28] Nicola Lacey, *A Life of H L A Hart — The Nightmare and the Noble Dream* (Oxford University Press, 2004) 181. Lacey compares Fuller to Hart whose 'main complaint about the Harvard law students was their lack of precision.'

at Melbourne.[29] In the 1960s Brett's students were for the most part baby boomers who may have been touched by the Second World War but had not witnessed its horrors. They therefore had generally not faced the life and death conundrums that were of central concern to the criminal law. In contrast, most of the full-time legal academics at Melbourne had been in the defence forces. Brett and Waller adopted the traditional and accurate assumption that their students would become practising lawyers and hoped that their book would encourage them to become morally aware practitioners.

Brett was also, no doubt, responding to a perception he held about the way that the Australian profession thought about law and morality. In a book review in 1960 he said that:

> as a whole the profession in England and Australia has reduced itself to the status of a body of priests performing a ritual without caring what its meaning may be or even whether it has any meaning at all.
>
> … My own belief is that much of the trouble must be attributed to John Austin, who convinced our lawyers that law and morality were utterly distinct and that the lawyer's task was merely to see that the command of the sovereign is obeyed. I am here speaking of the way in which Austin has been understood by later generations; he was, in fact, well aware that lawyers, as well as legislatures, make the law and thus have a responsibility for its shape, but this part of his message has gone unheeded.[30]

The entire textbook was infused with moral problems and graphic examples of such moral problems. For example, the book began with a problem based on the case *R v Dudley and Stephens*[31] which was the case that Fuller used as a basis for his problem in 'The Case of the Speluncean Explorers'.[32] The legal issue was whether men stranded on a lifeboat who kill and eat one of their crewmates to stay alive ought to be convicted of murder. Fuller's problem concerns the same issue with the difference that the men are trapped inside a sealed cave. Brett and Waller's problem introduces students to many of the central issues of the criminal law while demonstrating the difficulty of formulating bright-line rules. As Waller explains:

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[29] Leader-Elliot, above n 16.
[30] Peter Brett, 'Book Review: *Legal Education and Public Responsibility* by Julius Stone' (1960) 2 *Melbourne University Law Review* 568, 569.
[31] (1884) 14 QBD 273.
[32] Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

> Peter had a vision. What he was absolutely fascinated by was the interplay between law and morality which of course was Lon Fuller's chef-d'oeuvre which is in all sorts of ways captured in and spewed out by *Dudley and Stephens*. Here are two respectable, experienced, decent men who find themselves in hell and who end up making a life decision: the only way we can stay alive and have, they wouldn't have put it like this, and have minuscule expectation of salvation is by using the most vulnerable and weakest man, he's going to die because he is drinking sea water. … So what happens to them? Their sentences are commuted to six months in prison. Just six months for murder. So the whole murky picture — right, wrong, life, death, crime, punishment — it's all there.[33]

It was a dramatic introduction to the study of criminal law that remained in the minds of students.[34] The book ended on a similarly dramatic note with a quote from F M Dostoevsky's *The Brothers Karamazov*, book 5, chapter 4, that prompts students to consider whether they would take a utilitarian approach and kill a baby for the sake of improving the happiness and wellbeing of society.[35] It prompted students to consider in what circumstances crimes are excusable.

The authors also encouraged students to think about the relationship between law and morality through the utilisation of allegories. Drawing on the technique made famous by Lon Fuller, Brett and Waller present students with a transcript from a cocktail party where lawyers, psychiatrists, philosophers and sociologists discuss how the issue of insanity should be addressed by the criminal law.[36] The allegory makes the learning from these other disciplines accessible to students and helps them consider the challenges faced by anyone trying to draw from those disciplines for the purpose of law reform. Through the conversation, some of the central points from Brett's SJD are made in a clear, entertaining and engaging style reminiscent of Fuller's Speluncean judgments. It is important to note, however, that there is very little other reference to the philosophical and social science thought that underpinned Brett's thesis. Brett considered that an undergraduate law degree did not permit a close consideration of other disciplines.[37] For

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[33] Waller, above n 10.

[34] 'What I do remember is *Dudley and Stephens* the criminal cannibal case and all the issues that that raised about what the criminal law was all about which was quite intriguing. … It was a very intelligent piece of legal education I think because it was an extraordinary case that raised all sorts of fascinating issues right across the spectrum. It was a subject matter that was very engaging to a young student audience': Interview with Gareth Evans (ANU House, Melbourne, 13 June 2014).

[35] Brett and Waller, above n 17, 713.

[36] Ibid 618–30.

[37] Memorandum from Peter Brett, F K H Maher and J Phillips to the Faculty of Law at the University of Melbourne, 3 July 1969 (University of Melbourne Archives, *Law Graduate LLB*

the most part students were to make their assessment of the 'justice' or morality of law based on the content of cases, statutes and legal commentary, as well as their own intuition, as opposed to material from other disciplines.

Developments in the English and Australian criminal law also gave Brett and Waller inspiration. Waller considers they were extremely lucky to have been writing when they did:

> Sometimes you have got to be lucky and there we were in the first year of teaching Crime. This horrendous judgment of the House of Lords[38] formed a wonderful kind of coda for us and then as I say again you've got to be lucky, there is Devlin's Maccabean lecture and Herbert's response in *The Listener* and then his little book on law and morals and then how much did that controversy and its manifestation in print affect the High Court in *Parker's* case?[39] When I think back to it, how lucky I was to be doing what I was doing at that time. And everything plays a role in how your scholarship develops.[40]

The textbook therefore picked up and placed at the feet of students the moral dilemmas that were being discussed by the leading American and English criminal law theorists of the day and encouraged students to take their own position and consider how that position might influence the law.

### 3.3.3 Bringing Academic Writing to Australia

Brett and Waller hoped that their efforts in devising innovative teaching materials based on a particular conception of law would help promote a scholarly approach to the writing of legal textbooks,[41] and that their textbook would encourage other Australian scholars to think of the task of textbook writing as something more than providing a compendium of authoritative sources.[42] The problem method is a regular feature of legal textbook writing today.[43] Incorporating hypotheticals and probing questions that invite critical scrutiny, in among cases, legislation and commentary, is largely taken for granted. However, Brett

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*Committee 1969–71 Legal Process Course, Graduate Studies LLD 1961–1971,* 1984.0033, Manila Folder, Graduate LLB Committee).

38 *Director of Public Prosecutions v Smith* [1960] 3 All ER 161.

39 *Parker v R* (1963) 111 CLR 610.

40 Waller, above n 10.

41 Ibid.

42 Ibid.

43 Most Australian law textbooks incorporate a materials, commentary and problem question format. See, eg, one of Australia's best-selling introductory textbooks: C Cook, R Creyke, R Geddes, D Hamer and T Taylor, *Laying Down the Law* (Lexis Nexis, 9th ed, 2014).

and Waller were the first Australians to use it and the success of their book no doubt helped its adoption.

### 3.3.4 Reception

The textbook's success can be measured in a number of ways. First, consider its longevity. In 2009, some 47 years after the first edition, Waller and his co-author Bob Williams (who took up the role a few years after Brett's sudden death in 1975) published the 11th edition of the work and then retired as authors.[44] A 13th edition was published in 2013 with six new authors.[45] Over its life the book has changed considerably but its original popularity and success was a product of Brett and Waller's pioneering approach and the hard work that went into making it Australia's first comprehensive criminal law textbook. It remained the only case-book on criminal law in Australian common law states until 1979 when A P Bates, T L Buddin and D J Meure's *The System of Criminal Law: Cases and Materials — New South Wales, Victoria, South Australia*[46] was published.[47]

Second, consider its popularity. Students and teachers found the book to be both memorable and inventive. It attracted glowing reviews[48] and students from the 1960s still remember it fondly, recalling some of its more inventive components.[49] Pat Urban, a former student of Brett's, describes the work as the 'bible' on criminal law.[50]

That the first edition of the book was held in high regard is evident not only from the reviews it received but by who was recommending its use. Brett asked the publishers to send a copy of the book to Professor Louis B Schwartz of the University of Pennsylvania. He explained that Professor Schwartz was 'going to visit Cambridge for a year beginning next September to teach a course there, and Dr Glanville Williams suggested to him that the book might be the most suitable vehicle for introducing English students to case

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[44] L Waller and C R Williams, *Criminal Law — Text and Cases* (Butterworths, 11th ed, 2009).
[45] T Anthony, P Crofts, T Crofts, S Gray, A Loughnan, B Naylor, *Waller and Williams Criminal Law — Text and Cases* (LexisNexis Butterworths, 12th ed, 2013).
[46] (Butterworths, 1979).
[47] G B Elkington, 'Book Review: *The System of Criminal Law: Cases and Materials* by A P Bates, T L Buddin and D J Meure' (1981) 9 *Sydney Law Review* 497.
[48] The reviews are dealt with below.
[49] Myers said 'I enjoyed it. I thought it was interestingly and provocatively written. I actually liked reading it and liked studying criminal law through Brett and Waller. What more can one say'. Interview with Allan Myers (Office of Dunkeld Pastoral Co Pty Ltd, Melbourne, 10 June 2014).
[50] Interview with Pat Urban (by telephone, 17 June 2014).

method teaching.'[51] Members of the profession in Australia also commended the book. For example the Solicitor General of New South Wales H A Snelling QC gave it strong praise,[52] Justice Smith of the Victorian Supreme Court said that he found the book of 'great help',[53] and Chief Justice Bray of the South Australian Supreme Court considered it a 'most valuable work' and referred to it in a judgment.[54] English Professor D W Elliot said that the book put his own work on the criminal law (co-authored with Wood) to shame[55] and Glanville Williams described it as an 'excellent sourcebook'.[56]

While none of the reviewers ever associated the book with the Legal Process School they nonetheless recognised some of the book's chief aims and believed that the authors had largely been successful. Professor Rupert Cross of Magdalen College, Oxford, reviewed the book while he was a visiting professor at the University of Adelaide. Waller had been one of his pupils at Oxford. He believed that Brett and Waller had been successful in their ambitious endeavour to incorporate '[t]hree well recognised instruments of legal education … the hypothetical case, the source-book and the narrative account of the development of the present state of the law.'[57] Cross praised the 'authors' own contributions' as 'uniformly first class.'[58] The only substantial criticism he provided was that he believed that the case extracts ought to have been longer.[59] Also, in good humour, he rebuked Waller for his criticism of both Cross and Glanville Williams as 'willing to indulge in elaborate arguments with a view to reconciling the cases.'[60] Since his time at

[51] Letter from Peter Brett to Butterworths, 25 January 1965 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 39, Butterworth & Co (Aust) Ltd 1964 — June 1965 Cases and Materials in Criminal Law (second edition)). Louis B Schwartz said that he planned to use the book at Cambridge: Letter from Louis B Schwartz to Peter Brett, 16 February 1965 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 39, Butterworth & Co (Aust) Ltd 1964 – June 1965 Cases and Materials in Criminal Law (Second Edition)).

[52] Letter from H A Snelling to F C Judson of Butterworths, 17 March 1965 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 39, Butterworth & Co (Aust) Ltd 1964 – June 1965 Cases and Materials in Criminal Law (Second Edition).

[53] Letter from Justice Smith to Peter Brett, 5 February 1965 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 39, Butterworth & Co (Aust) Ltd 1964 – June 1965 Cases and Materials in Criminal Law (Second Edition)).

[54] Letter from Chief Justice Bray to Peter Brett, 11 May 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 35).

[55] Letter from D W Elliot to Peter Brett, undated (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 35).

[56] Letter from Glanville Williams to Peter Brett, 15 July 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, File 35).

[57] Rupert Cross, 'Book Review: *Cases and Materials in Criminal Law* by Peter Brett and Peter L Waller' (1962) 3 *Melbourne University Law Review* 546, 546.

[58] Ibid 546.

[59] Ibid 546.

[60] Ibid 548.

Oxford, Waller, like Brett, had developed the belief that reconciling criminal law cases should not be an objective of common law judges or scholars.

Cross and another reviewer, E M Bingham from the University of Tasmania (a Rhode scholar who later became Sir Max Bingham QC and was, among other things, Chair of the Criminal Justice Commission in Queensland), both recognised that the book sought to avoid dogmatism and instil in students a taste for law reform. Bingham said that the method employed 'provokes the student to formulate his own solutions both to the problems specifically posed.'[61] Cross referred to the danger that the English approach to instruction 'may make students insufficiently conscious of the need for reform.'[62] In contrast, he believed that this textbook removed that danger.[63] Brett received similar high praise for the cases and materials book he published on the topic of administrative law at around the same time.[64] In the 1960s at least, Brett and Waller wrote for a very appreciative audience who believed that they had made a valuable and engaging contribution to legal education that departed from the dominant textbook tradition.

### 3.4 Intellectual and Practical Obstacles

There are a number of reasons to explain why the innovations contained within the earlier editions of the textbook have not subsequently received the recognition that they deserve. In this part I describe the intellectual and practical obstacles that might explain why this was the case. The practical obstacle is easy to state. Following Brett's death a new author, Bob Williams, took up Brett's responsibilities for updating the textbook. In the final edition of the textbook that Brett contributed to prior to his death the book had already begun a transformation to a grand treatise that sought to authoritatively expound the major principles of criminal law in all Australian states. While Waller and Williams subsequently retained some of the initial innovations of the first few editions, the legal process format had largely gone. This can be attributed to Brett's absence as well as a belief that some aspects of the problem method did not translate effectively into the classroom. According to Waller they 'took up too much time.'[65] Waller and Williams did not fall into the trap of some of the English textbooks where subsequent editions of

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[61] E M Bingham, 'Book Review: *Cases and Materials in Criminal Law* by P Brett and P L Waller' (1958–63) 1 *Tasmanian University Law Review* 761, 762.
[62] Cross, above n 57, 547
[63] Ibid.
[64] R W Baker, 'Book Review: *Cases on Constitutional and Administrative Law* by Peter Brett' (1958–63) 1 *Tasmanian University Law Review* 760; S A De Smith, 'Book Review: *Cases on Constitutional and Administrative Law* by Peter Brett' (1961–2) 3 *Melbourne University Law Review* 544.
[65] Waller, above n 10.

textbooks and treatises were poor imitations of the original, or were distorted by a subsequent author's efforts to merely 'update' the primary sources.[66] Instead Waller and Williams reinvigorated and devised their own initiatives and the book changed dramatically over the three decades the pair authored it.

The intellectual obstacle came in the form of changing expectations over what it was that criminal law teachers ought to teach, a broadening conception of the 'criminal law' and a sense that the criminal law — like other areas of law — embodied and entrenched the interests of a sexist and elitist class. While Waller and Williams were able to address at least some of these concerns in subsequent editions, they were not addressed in the original four editions that Brett and Waller authored.

One strand of thought that helps explain the lack of recognition of Brett's contribution to the criminal law is the trajectory of criminal law theory both during and after the writing of the textbook. Throughout the second half of the 20th century it was increasingly recognised that in addition to its doctrinal elements there were other components of the criminal law that were equally important in the quest for justice: for example, police powers and procedures, customary law in Aboriginal communities, racial prejudice in the administration of justice, pre- and post-trial procedures, and the workings of prisons. In a book review Fox argued that the Brett and Waller cases and materials book ought to have paid greater heed to these other matters.[67] While Brett touched on some of them in his Master's thesis and also worked directly with the police,[68] they were not a central concern of his first monograph or the cases and materials book and he did not consider himself to be a criminologist or a sociologist.[69] As greater attention turned to these broader fields and to the rights and interests of victims as well as minority groups, Brett's writings appeared narrow and out of touch with some of the major problems of the criminal law. As noted earlier, Brett and Waller's book drew from learning in the social sciences and was based on a theory for teaching law graduates, but did not present raw social science or philosophical material to students.

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[66] Australian scholars of this period were generally critical of the English practice of 'propping up works of long dead colleagues rather than writing new texts': Susan Bartie, 'A Full Day's Work — A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67, 90, 91. See also David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26, 52.

[67] Richard Fox, 'Book Review: *Cases and Materials on Criminal Law and Procedure* edited by M L Friedland' (1969) 7 *Melbourne University Law Review* 146, 146–147.

[68] This is discussed further in the following chapter.

[69] Letter from Peter Brett to Zelman Cowen, 15 December 1954 (University of Melbourne Archives, *Law Dean's Correspondence 1953–1961,* 1984.0033, Faculty of Law 1953–54–55).

Earlier I mentioned that critics of the Legal Process School suggest that it did not prompt deeper questioning of the social assumptions underlying the law. In this sense the School appeared to stand in sharp contrast to the Marxist sentiment that was popular in the 1970s and 1980s and influenced some components of the Critical Legal Studies movement. Barzun argues, and I agree, that this is a mistaken assumption. Brett's career and a careful reading of the Legal Process materials suggests that he and scholars like him were aware of the value-laden nature of the law and its institutions. It is clear from his writing and his broader endeavour that Brett was both very conscious of and repelled by the elitism and conservatism both within the law and within universities. He believed that an individual's place in a hierarchy should be earned not inherited and that institutions should not proceed on the basis of what he saw as the self-satisfied and self-serving assumptions of certain individuals.[70] On numerous occasions he sought to expose elitist and complacent practices that worked against the good governance of those institutions.[71]

On the other hand, there were areas where Brett was clearly blind to some of the prejudices being perpetrated through the law. In particular, there are some passages of his scholarship and aspects of his teaching that were insensitive to the interests of women and blind to the sexism inherent in law. Brett, like several scholars of his time, did little to quell, and indeed did much that most probably fuelled, the complaints later made by feminist legal scholars of criminal law and criminal law scholarship. This is most evident in his teaching and writing on the law of rape. Some students at Melbourne in the 1960s remarked on the way that Brett frequently drew on the law of rape in class and they suggested that he made insensitive jokes on the subject.[72] The chapter on sexual assault in the first edition of the Brett and Waller book contains passages that treat instances of sexual assault in a humorous fashion, implicitly trivialising the effect of sexual assault on the lives of women.[73] These passages do not appear in the second or subsequent editions, perhaps indicating that the authors subsequently realised their error of judgment.

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[70] See Peter Brett, 'The Allocation of Resources between the Teaching Role and the Research Role of the Universities, between Undergraduate and Postgraduate Education, between Liberal and Vocational Education, between Applied and Fundamental Research' (Paper presented at the Third Australian Universities Conference, August 1970).

[71] The following chapter provides several examples.

[72] In a short magazine produced by the Law Students' Society at the University of Melbourne students caricatured Brett's teaching of law with descriptions such as: 'According to Professor Brett, (our first-year reporter tells us) 'Criminal Law embraces; murder: rape: arson: rape: burglary: rape: manslaughter: rape etc …': Mike McInerney and Danny Marsh (eds), 'Lecturers' Quotes', *De Minimis* (Law Students' Society of Victoria) 6 May 1969.

[73] Brett and Waller, above n 17, 217.

In the course of the interviews undertaken for this project, Ian Leader-Elliot, a student and then colleague of Brett's at Melbourne, provided thoughtful and incisive comments on the way the law of rape was taught at the University of Melbourne. Consistent with other student impressions from the time Leader-Elliot recalls that:

> The crime of rape was taken by Brett, Howard and Norval Morris … as kind of archetypal in terms of analysis of criminal liability. Why rape, the most atypical of all the criminal offences, was treated this way was bizarre. So if we were giving an example of a crime, rape would be used as an instructive example in teaching criminal law in the early days. In trying to get a point across to students we would say 'Now take rape as an example.' … Rape was centrally important to a Melbourne criminal lawyer's understanding of criminal liability and that was true of Norval Morris as well. … many of us involved in criminal law theory at that time could switch from talking about criminal responsibility in rape to criminal responsibility in illicit drug possession with no apparent awareness of incongruity. To anyone other than a criminal lawyer, this juxtaposition of such very different sorts of crime must have seemed very strange indeed.[74]

Leader-Elliot put forward a number of factors that explain how criminal law and the sex offences were taught at Melbourne. First, '[t]here was then an attitude among some teachers (myself among them) that criminal law dealt with often shocking instances of depravity and students ought to be jolted out of what we assumed to be their complacency.'[75] It is evident from the Brett and Waller textbook that Brett set out to make his Criminal Law course shocking and, according to Leader-Elliot, Brett 'delighted at being shocking in his delivery of the rape classes.'[76]

Second, 'there was also a Rabelaisian element of crude humour.'[77] Leader-Elliot recalls:

> When I went to teach at Boalt Hall Law School, Berkeley in 1974–75 my American law students — who were so much more assertive and socially adept than my Australian students — very quickly pulled me up on this and many other things and devoted themselves to re-orienting me.[78]

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[74] Leader-Elliot, above n 16.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.

Third, 'there was also a significant theoretical element in the concentration on rape.'[79] One of the central debates at the time concerned whether it was necessary to establish that an accused had actual knowledge that a woman had not consented to the sexual act. The requirement of actual knowledge, of course, made it more difficult for the prosecution to establish its case. While Brett's monograph on criminal guilt had generally supported a widening of the scope of defences and stressed the central importance of moral wrongdoing in all crime, he did not suggest that the prosecution must establish actual knowledge on the part of the accused. The Brett and Waller textbook also encouraged students to question the fiction behind the immunity for rape in marriage rather than accept it.[80] Hence, while in several ways his efforts seemed to have worked against the feminist cause and in fact inadvertently encouraged some of the sexism already proliferating within the Law School, these aspects of his doctrinal prescriptions should not have evoked the ire of later feminists.

These parts of the criminal law and the way that the teaching of them fed into a sexist culture hostile to women were, with hindsight, clearly unfortunate. While the historical context provides a partial explanation for the insensitivities of some lawyers and academics, it is nonetheless deeply regrettable that Brett played a part in this chapter of the criminal law and the legal academy. In this Brett was indeed blind to the plight of women's rights. The attitude of feminist legal scholars to this aspect of Brett's work might have lessened the influence of Brett's criminal law scholarship more generally. According to Fletcher 'one should not underestimate the importance of articulate opponents or intellectual enemies in developing the profile of an academic field.'[81] While the enemy in this instance was ultimately the legal system itself, scholars such as Brett, by apparently legitimising sexist practices and doctrine through their teaching, could be deemed complicit.[82] Brett's attitudes and actions stand in stark contrast to the

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[79] Ibid.

[80] Brett and Waller, above n 17, 226; Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 2nd ed, 1965) 298. See Kos Lesses, '*PGA v The Queen* — Marital Rape in Australia: The Role of Repetition, Reputation and Fiction in the Common Law' (2014) 37 *Melbourne University Law Review* 786, 816, 818.

[81] George P Fletcher, 'The Fall and Rise of Criminal Theory' (1998) 1 *Buffalo Criminal Law Review* 275, 281.

[82] In an article on rape in legal scholarship Ngaire Naffine critiqued aspects of the sixth edition of the textbook dealing with rape. She criticised the authors for suggesting, without sound evidence, that Hale was correct in his statement that women (both within and outside marriage) could easily make false claims of rape: Ngaire Naffine, 'Windows on the Legal Mind: The Evocation of Rape in Legal Writings' (1992) 18 *Melbourne University Law Review* 741, 744–5, 746–7. Brett was not alive at the time that the sixth edition was published. The quote from Hale singled out by Naffine appeared in the first edition; however, it was followed by questions rather than propositions about the potential for reform in this area: Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962) 209a–210, 217, 226.

strong activism and compassion he displayed in other aspects of his career. For example, Brett wrote to support the rights and interests of Aboriginals within the justice system, he wrote publicly against the aversion 'treatment' of homosexuals (also appearing on television to do so) and supported a right to protest in the context of hostilities over the Vietnam War. He engaged in such protests. In several areas Brett seemed ahead of his time.

### 3.5 Student Impressions

Brett was a dedicated teacher. He was not by any stretch a professor who neglected his teaching in order to advance his scholarship. Teaching was extremely important to him as shown by the aspirations he held for criminal law students and the effort he expended in devising materials for his students. He was critical of some of his colleagues who he believed let their own interests override those of students. For example, in a manifesto for the Deanship at Melbourne he said that he opposed the Law School becoming a graduate school, where students had to complete two years in another degree before commencing law, as he believed such proposals were 'educationally unsound; an indulgence of teacher preferences to the detriment of student and community interests and an attempt to export our own problems and difficulties to other parts of the university or other institutions.'[83] In line with their textbook Brett and Waller pursued a highly interactive teaching style in class, adopting a Socratic method where students were assigned a seat and called on pursuant to a seating chart Brett and Waller asked the law school manager to arrange.[84] They sat in on each other's classes and rigorously critiqued each other's performance.[85] Waller considered that the experience was critical to his early development:

> After the first two classes [with Brett attending my lectures] I stopped being terrified, and found his presence a comfort, and at the same time a challenge — to ask the most effective question, put the clearest, most accurate proposition and overall make each class a learning occasion for me and for my students. That's what he tried to do in every class. I learned my craft from watching him and from the discussions we had after each of his and my classes.[86]

Students at Melbourne did not, however, always appreciate Brett's efforts in the classroom. The mixed — and often negative — reception Brett's teaching received is one

[83] Letter from Peter Brett to Colin Howard, 16 August 1973 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder, Professor Peter Brett).
[84] Waller, above n 10.
[85] Ibid.
[86] Waller, above n 10, 101.

obvious factor that explains why his conception of law and reforms for the discipline are not well known.

While several legal academics at the University of Melbourne experimented with the Socratic method of teaching, many students took exception to Brett's approach. The idea that students were required to question and assemble for themselves an understanding of the principles from the materials presented and then discuss them during a lecture proved too onerous for many.[87] Despite the negative reviews, of which Brett was well aware (in some instances large numbers of students stopped attending his classes[88]) Brett continued to take a hard and robust approach designed both to shock students and to impress upon them the seriousness of their future career. Some former students describe Brett's teaching in various critical ways, from fierce and aggressive to scattered and unhelpful.[89]

Reading correspondence between Brett and a student alongside letters Brett wrote to colleagues, lawyers, politicians and others one is struck by the severity he reserved for students.[90] It seems that the warmth and encouragement he often extended to others were not extended to most of his students. While some recall the generosity Brett extended to some students, taking private tutorials for those who were genuinely struggling, it seems that this kindness was rarely on view to the general cohort.[91] The general view was that Brett was intelligent and witty[92] but that his dramatic presentation and method was at times too challenging and menacing for his undergraduate classes.[93] In contrast, in a reference based on Brett's teaching at Harvard, where students were more used to a robust Socratic method, Livingston Hall spoke of the high regard in which students held Brett.[94]

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[87] It is interesting to note that Glanville Williams also failed in his experiment to teach students using the Socratic method: David Sugarman, 'A Special Relationship? American Influences on English Legal Education, c 1870–1965' (2011) 18 *International Journal of the Legal Profession* 7, 25.

[88] Interview with Richard Fox (Law School, Monash University, 23 October 2013).

[89] See, eg, Stuart Campbell and Denis Grace (eds), '"Munchies" Fauna of Australia', *De Minimis* (Law Students' Society of Victoria) 3. Brett is depicted as a monkey who has thick skin, is aggressive and who, rather than packaging material for students, expects them to assemble the material for themselves.

[90] See, eg, Letter from Peter Brett to Simon Wynn, 21 January 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 4, File 28).

[91] Waller, above n 10; Interview with Robin and Jonathan Brett (RACV Club, Melbourne, 11 June 2014).

[92] One former student wrote to me with recollections of various witticisms Brett delivered during his classes: Letter from Catherine Turner to Susan Bartie, 2 October 2014.

[93] Campbell and Grace, above n 89, 3.

[94] Letter from Peter Brett to the Registrar of the University of Melbourne, 26 October 1962 (Application for the Hearn Chair) (University of Melbourne Archives, *Law Dean's Correspondence 1962–1965*, 1984.0033, Faculty of Law 1963).

Few students undertook postgraduate studies at the Law School at the University at Melbourne during Brett's tenure. Two students who had Brett as a supervisor, one for an honours and another for a Master's thesis, were interviewed for this project. They each had very different experiences, again demonstrating that both in undergraduate teaching and in the supervision of doctrinal theses Brett's teaching methods received mixed reactions. One student, Richard Fox, spoke of Brett's general lack of pastoral care and his dogmatism.[95] While at first the exchanges were pleasant, with Brett providing favourable comment on a research topic, during the second and third meetings Fox became frustrated by what he perceived as Brett's dogmatic attitude.[96] During the third meeting Brett pressed Fox to develop a conclusion for his LLM thesis on the legal concept of obscenity.[97] Fox believed that Brett's approach worked against the basic tenets of university research, those of dispassionate and open inquiry.[98] He also considered that Brett's later treatment of him — ignoring him in corridors and making no further inquiries about his thesis — spoke of a general lack of pastoral care.[99] Pat Urban, a former solicitor with the Legal Services Commission in Victoria, undertook an honours thesis in 1972 under Brett's supervision. In contrast to Fox, she describes him as an 'amazing supervisor' who went out of his way to provide her with opportunities to speak to police officers and scientists working in the field of her thesis — on blood alcohol and drivers.[100] Overall Urban reflects on her thesis as a very positive, perhaps *the* most positive, aspect of her legal studies.[101] Both Fox and Urban received first class honours.

In Waugh's history of the University of Melbourne, Brett, along with Sawer, was singled out for the way that he treated women in class.[102] Some former women students believe that Brett picked on them. When asked about Brett's treatment of women in class several former students — each of them men — suggested that Brett treated both men and women alike, subjecting both to the same harsh treatment.[103] They speculated that women felt picked on because they were not accustomed to having the same expectations placed upon them. While there is evidence of sexism in some of Brett's scholarship

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[95] Fox, above n 88.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Urban, above n 50.
[101] Ibid.
[102] John Waugh, *First Principles — The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 167.
[103] While efforts were made to find former women students to speak to this issue none came forward.

(considered earlier), Brett's friendships, admiration for particular women scholars and the way that he promoted and engaged with clever women students suggests that he would not have wanted to stunt the progress of bright women at law school or in the law more generally. His actions also, however, suggest that he was not sympathetic to or aware of the disadvantages that flowed from the minority status of women in law, and that he did little to smooth the road.

### 3.6 Fracturing the Teaching Team

The vision that Brett and Waller had for the teaching of criminal law at Melbourne and the creation of a certain kind of university graduate was fractured when Waller resigned from Melbourne in October 1964[104] to take up a professorship at Monash University. While the two remained close and were in daily contact, it meant that Brett lost his closest collaborator at Melbourne and that the teachers of criminal law at Melbourne no longer took a unified approach. While Waller might have been replaced by a similarly minded colleague that is not what eventuated. The new Hearn Professor, Colin Howard, took up the role. Friction and intellectual differences between Howard and Brett meant that Howard did not embrace Brett's philosophy for the teaching of criminal law and the pair did not work together to create a new pedagogical vision.

All who knew Brett and Howard recognised that despite their similar academic interests the two were not close. There are, however, signs that Brett respected Howard's intelligence and that their relationship was good prior to Howard's arrival at Melbourne. For example, in a letter to Henry Hart written in 1963 Brett said that he had 'a very high opinion of [Howard's] abilities as a criminal lawyer'[105] and asked Henry Hart to make Howard welcome during his year at Harvard.[106] Similarly, in a review of Howard's monograph *Strict Responsibility* Brett praised the work as being of the 'highest merit.'[107] The two not only both studied criminal law, they also shared concerns about prevailing trends towards strict liability for crime. Brett followed in Jerome Hall's footsteps by strongly refuting Oliver Wendell Holmes's earlier suggestion that fault was not a necessary component of all crime.[108] While Howard was not opposed to Brett's position,

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[104] Letter from Louis Waller to Zelman Cowen, 8 October 1964 (University of Melbourne Archives, *Law Dean's Correspondence 1962–1965* 1984.0033, File: Faculty of Law 1964).

[105] Letter from Peter Brett to Henry Hart, 20 April 1963 (Harvard Law Library, *Henry Hart Papers*, Hollis 601611, Box 1–13, Series 1 Correspondence: Brett, Peter 1959–1963).

[106] Ibid.

[107] Peter Brett, 'Book Review: *Studies in Criminal Law* by Norval Morris and Colin Howard, *Strict Responsibility* by Colin Howard and *A Casebook on Criminal Law* by D W Elliott and J C Wood' (1965) 5 *Melbourne University Law Review* 106,107.

[108] Peter Brett, *An Inquiry into Criminal Guilt* (Lawbook, 1963) 48–9; Louis Waller, 'Book Review: *General Principles of the Criminal Law* by Jerome Hall' (1961) 3 *Melbourne University Law Review* 86, 86.

he modelled his own criminal law scholarship on that of Glanville Williams rather than Hall or any of the other Americans who excited Brett.

Rather than turning to modern learning, Howard was fascinated by the logical puzzles in law and sought to break the law down into logical propositions. Leader-Elliot remembers Norval Morris once saying that Brett was the 'poet or mystic' and Howard the 'logician or technician'.[109] Allan Myers, who took on Howard as a pupil when he came to the bar, has similar recollections.[110]

Over the course of almost 10 years of teaching criminal law at the same institution it is clear that Brett and Howard did little to collaborate. In 1971 Brett published an article in the *Modern Law Review* that heavily criticised the reasoning Howard deployed in suggesting that the High Court of Australia had abandoned strict responsibility in favour of liability for negligence. Brett sought Howard's comments on a draft of the article and was concerned to ensure that his criticisms did not cause offence. The interchange between Brett and Howard is recorded entirely in memoranda, suggesting that at no time did they speak face-to-face about the paper and Howard displayed little sign of wishing to engage Brett in debate.[111]

Some former students and colleagues remember Howard as having charisma and believe that he took greater care than Brett to cultivate certain junior members of staff.[112] His warmer public persona meant that several members of the next generation of legal scholars were recruited to his camp and to his approach to studying criminal law.[113] While Brett had a group of close and loyal colleagues from the Law School,[114] Howard's stronger relationship with junior scholars and students had the potential to diminish the influence of Brett's ideas. Howard's presence was not fatal to Brett and Waller's

[109] Leader-Elliot, above n 16. This was also consistent with the impression of Allan Myers. Brett and Myers became friends while the pair taught in Canada at Osgoode Hall Law School. Howard became Myers's pupil when he went to the bar: Myers, above n 49.

[110] Myers, above n 49.

[111] See, eg, Memorandum from Colin Howard to Peter Brett, 25 August 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 4, Folio 36, Modern Law Review: Strict Responsibility: Possible Solutions); Memorandum from Peter Brett to Colin Howard, 17 September 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 4, Folio 36, *Modern Law Review*: Strict Responsibility: Possible Solutions); Memorandum from Peter Brett to Colin Howard, 20 September 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 4, Folio 36, *Modern Law Review*: Strict Responsibility: Possible Solutions).

[112] Fox, above n 88; Leader-Elliot, above n 16.

[113] Leader-Elliot, above n 16.

[114] Brett's sons Robin and Jonathan mentioned the following academics as forming part of Brett's close circle of friends: Louis Waller, Harold Ford, Frank Maher and Mary Hiscock. Robin and Jonathan Brett, above n 91.

initiatives in that the pair continued to collaborate and publish new editions of their cases and materials book and the book was prescribed reading for criminal law students at Melbourne, as well as at several other law schools. However, the nature of Brett and Howard's relationship nonetheless diminished the possibility of further strong Melbourne initiatives in the teaching of criminal law and meant that not all Melbourne students at this time received an instruction in the criminal law overlaid with legal process sentiment. Had Brett and Howard reconciled their differences or Waller stayed on it is possible that more dynamic teaching initiatives would have ensued and the legal process sentiment would have become more widely known and appreciated.

### 3.7 Concluding Remarks

While Brett supported a number of his colleagues, including Waller, and was a dedicated teacher, the mixed reaction his ideas and presentation received from both colleagues and students limited the potential reach of his legacy. His experience illustrates how personality, factions and popularity can strongly influence the way that ideas and innovations are remembered. Once these factors are removed and Brett and Waller's *Cases and Materials in Criminal Law* is considered on its own terms and in context it becomes clear that during the founding stages of modern legal education in Australia Brett and Waller wrote an extremely important textbook that in many ways put Australian scholars on the map and served as a model for future teaching.

As one of the seeds of modern university legal education in Australia, it promoted vocational education[115] that was reformist in orientation and encouraged the development of practitioners who believed that law and morality were intimately intertwined. Doctrine and superior court decision-making formed the book's focus but it also took account of legislation, process and critical commentary from around the globe. While it may have been insufficiently broad according to the criteria set by the subsequent generations of critical — or critically orientated — legal scholars, it nonetheless signalled that Australian legal education should reject the traditional formalist paradigm that favoured the reconciliation of precedent. It suggested that Australian legal education should be more like that of the elite US law schools than the English.

In 2003 Justice Heydon argued that in Australia a new class of judges had emerged, 'a segment of ambitious, vigorous, energetic and proud judges' who 'think that they can not

[115] By this I mean that the focus is to educate legal practitioners rather than create a generalist degree.

only right every social wrong, but achieve some form of immortality in doing so.'[116] He attributed this new class as arising 'partly because almost all modern judges were educated in law schools staffed by professional law teachers as distinct from practitioners teaching part-time, and a critical analysis of the merits of legal rules was a significant aspect of that education' and also partly because of an increased interest in American law.[117] His gaze was set largely on Australian judges educated in the 1950s and 1960s. Irrespective of whether Heydon's criticisms of these changes and allegations of arrogance are warranted, his comments suggest that Brett and Waller's approach was important and influential. The pair contributed to the change in mood that swept over several elements of the Australian judiciary and profession in the late 20th century.

In this chapter I have therefore explained another of Brett's central initiatives. His teaching initiatives resembled those of his American mentors but were adapted to the Australian environment. I have also acknowledged factors that explain why this contribution is not well known or well understood. The following chapter introduces two further contributions that Brett made. First, he contributed the beginnings of a new jurisprudential theory. Second, he modelled the role of a lawyer statesman exemplar. The next chapter also explains how Brett's career provides insight into the Australian reception of American legal ideas.

[116] Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 2 *Australian Bar Review* 1, 29.

[117] Ibid. In a less critical vein Weber has argued that the 'rational, systematic character' and 'relatively small degree of concreteness' of the 'legal concepts produced by academic law-teaching' 'result in a far-reaching emancipation of legal thinking from the everyday needs of the public'. Max Weber. *Economy and Society* (1978) quoted in David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1989) 123.

# 4 AUSTRALIAN LEGAL THEORY AND THE STANDING OF THE LEGAL ACADEMY

## 4.1 Introduction

In this chapter I argue that Brett's experience provides a crucial insight into how and why the trajectory of legal theory in Australia has differed from that of either America or England. I suggest that the first community of Australian legal scholars — or at least those located in Melbourne — were not concerned with proving the discipline's intellectual credentials in the same manner as their English or American contemporaries and predecessors and I provide several possible reasons to explain why this was the case. Since establishing law as a science provided the impetus for classical English legal scholars and the elite American scholars to build their theories, the fact that Australian scholars did not share this concern partly explains why there were few moves towards the creation of new and uniquely Australian schools of jurisprudence. Brett's efforts — attempting to devise new theories to explain the scientific underpinnings of both the practice and study of law — constituted an exception to the rule.

Second, I explain that Brett was a lawyer statesman who believed that he was at least of equal standing to judges and barristers. He was a very public figure who moved easily between the world of ideas and the world of legal practice. He was also a very frank critic of judges, police officers and legal practitioners. By examining Brett's own motivations and self-belief alongside the reactions of others I suggest that to understand the standing of this first generation of Australian legal scholars it is necessary to do something more than simply draw an analogy between them and the image of deferential English legal scholars.

## 4.2 Brett and Science

Much has been written about how the fathers of modern legal education in both England and America endeavoured to present law as an academic discipline.[1] One way that these scholars did so was by highlighting similarities between the methods and techniques of the study and practice of law (primarily judicial decision-making) and the methods of a natural scientist. During Brett's time as Chair of Jurisprudence at the University of

[1] For a recent American example see Bruce A Kimball, *The Inception of Modern Professional Education C C Langdell, 1826–1906* (University of North Carolina Press, 2009) 5–9. For an English example see Peter G Stein, 'Maine and Legal Education' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991).

Melbourne he published two new editions of the criminal law textbook (the final edition was published after his death), a new edition of his administrative law textbook, 14 articles, five book reviews, a pamphlet and a monograph. Across the breadth of this work he continued to advance the agenda he set while at Harvard. Like his English and American predecessors one of his primary concerns was developing arguments in favour of a conception of law that he believed would improve the intellectual — which he interpreted to mean scientific — credentials of law and lead to justice. He believed that there was a clear connection between these two objectives. This section details how Brett pursued this agenda and the reaction he received from Melbourne contemporaries.

The most obvious manifestation of Brett's desire to bolster the academic credentials of the study and practice of law was the monograph he completed at the very end of his career. As his friend and colleague Waller explained in the foreword to the book:

> When he finished he told his secretary, Miss Muriel Bennett, that he was immensely pleased about it, that it was almost as if he had waited to complete it. He died suddenly the next day.[2]

The monograph was published in 1975. By that stage the world of legal ideas was very different from that of Brett's Harvard days. Henry Hart had died and Lon Fuller had retired and died just three years later. The jurisprudence of the United States Supreme Court under the leadership of Chief Justice Earl Warren ('the Warren Court') had eroded previous enthusiasm for the Legal Process School. Decisions such as the school segregation case, *Brown v Board of Education,*[3] encouraged many Americans, especially law students who graduated in the 1960s, to believe that the path to progressive laws lay in progressive judges who were willing to make openly instrumental decisions. Reasoned elaboration was viewed as unnecessarily restrictive.

On the other side of the world Brett viewed these developments with considerable concern. When on sabbatical in America he sought to understand the developments a little better and on his return to Australia completed articles[4] and then finally a monograph that attempted to uphold the scientific credentials of reasoned elaboration and stem the American tide towards the strong politicisation of superior courts. Brett's

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[2] Peter Brett, *An Essay on a Contemporary Jurisprudence* (Butterworths, 1975) vii.
[3] 347 US 483 (1954).
[4] Peter Brett, 'Free Speech, Supreme-Court Style: A View from Overseas' (1967–8) *Texas Law Review* 668; Peter Brett, 'Reflections on the Canadian Bill of Rights' (1969) 7 *Alberta Law Review* 294.

monograph, A*n Essay on a Contemporary Jurisprudence*, consisted of two central arguments. First, Brett mounted an argument based on institutional settlement. He argued that modern learning from the philosophy of science demonstrated that law was a dynamic, open and hierarchical system that interacted with other similar systems, such as the moral and the economic. He therefore continued to maintain that law could not be separated from morality. He put forth a conceptual apparatus devised by Karl Popper and complemented by Konrad Lorenz's writing on the mind and human and animal behaviour, to demonstrate the type of multifaceted study required to truly understand the law, its effects and to fashion reform.[5] He believed that the study of law could be equated with a scientist's study of biological systems. Based on the complexity associated with understanding and monitoring the effects of law reform he argued that courts were not suited to law reform functions. Therefore their law-making responsibilities ought to be kept to a minimum.

Brett also sought to solve the primary challenge confronted by the legal process scholars and made more acute by the Warren Court: how to reconcile their progressive beliefs and desire for law reform, with their counsel for judicial restraint. Brett's response was that by injecting greater intellectual muscle into non-judicial law reform bodies, by making legislative and administrative reform a matter of serious jurisprudential study and attracting great minds to their advancement, constructive and rapid law reform would follow.

The second component of Brett's thesis was that judicial method, in particular the reasoned elaboration propounded by legal process scholars, was analogous to the scientific method as then explained by the philosophers of science. Rather than precedent, Brett believed that judicial method was based on a science-like 'hypothetical-deductive process' consistent with the understanding of science advanced by Popper and others.[6] According to Brett, judges draw a hypothesis when reading cases and then rigorously test that hypothesis by scrutinising it against the existing case law and by questioning how the hypothesis might apply to future cases. As with the method expounded in Brett and Waller's casebook and consistent with the concept of 'reasoned elaboration', judicial method involved searching out and critically examining principles.

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[5] Brett, above n 2, 35–8. In a letter to the playwright and paleoanthropologist Robert Ardrey, Brett thanked him for his hospitality while Brett and Margaret were in Rome and said 'I envy you your visit to Konrad Lorenz who, from his writings, must be all that you found him to be': Letter from Peter Brett to Robert Ardrey, 23 July 1974 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7, File 53, Miscellaneous Letters and Appointments).

[6] Brett, above n 2, 49–71.

According to Brett the fact that this was not an entirely logical process did not diminish its scientific credentials, as the scientific process also did not follow along purely logical lines. Science, after all, involved the making of subjective judgements. Brett drew support from Lorenz's theory about perception, the idea that humans perceive wholes rather than individual items, something he called 'Gestalts'.[7] Neither the scientist, according to Lorenz, nor the judge, according to Brett, work through a process of inductive or deductive logic but rather perceive 'Gestalts'.[8] For judges these are guiding principles or impressions formed from a collection of data or case law that they then scrutinise for error. So long as judging is neither wholly formalistic nor wholly instrumental, it is akin to a scientific process.

In this small monograph Brett therefore sought first to challenge the American resurgence of sociological jurisprudence and the naked instrumentalism of the Warren Court and, second, demonstrate the scientific nature of reasoned elaboration and encourage the upcoming generation along a new theoretical path: the jurisprudence of non-judicial law reform bodies. He sought to strengthen the discipline with new intellectual credentials.

Brett's career is full of examples of his strong commitment to ensuring that law kept up with the best of modern learning and thereby maintained — or regained — its intellectual credentials. When fashioning prescriptions for law reform he drew from a range of social scientists, particularly psychiatrists and sociologists and their work on the mind. Many of Brett's friends within the university were natural or social scientists and he sought out their assistance and advice for various projects.[9] He was a member of scientific associations, delivered papers at scientific conferences[10] and taught alongside a member of the medical school.[11] In a paper delivered to an audience of Australian and New Zealand psychiatrists, at their annual conference, Brett said

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[7] Ibid 52–3, 59–62.

[8] Ibid.

[9] Brett put his honours student Pat Urban in touch with Dr N E W McCallum, Reader in Chemical Pathology at the University of Melbourne; Dr J Birrell, Police Surgeon, Victoria; Miss A Raymond, Research Officer, Australian Road Research Board; Mr L K Turner, Director, Police Forensic Science Laboratory, Victoria; and Professor S H Lovibord, Department of Psychology, University of New South Wales: Interview with Pat Urban (by telephone, 17 June 2014). He also sought the assistance of his science friends at Melbourne to scrutinise the evidence in the *Ratten* case (described later in this chapter). In the course of the interviews interviewees mentioned Brett's friendship with professor of physiology Roy Douglas ('Panzee') Wright and psychologist Elwyn Aisne Morey and noted that at lunch Brett would move beyond the circle of lawyers at Melbourne and sit with his friends from the sciences.

[10] See, eg, Peter Brett, 'The Law and the Changing View of Man' (1971) 5 *Australian and New Zealand Journal of Psychiatry* 78.

[11] Brett taught a course in forensic medicine with Norman E W McCallum, a Reader in Forensic Medicine at the University of Melbourne. The pair compiled a detailed set of lecture notes,

> that an institution or system of social control that disregards or turns its back on the method of science is likely to wither away. For it is the method of science that provides the basis for our trust in its powers, and we are not likely to continue to endure an institution in which we can no longer place our trust.[12]
>
> …
>
> Science is the dominant feature of our age, and its methods account for its success and consequent pride of place. *If we wish our legal system to achieve similar success and public respect, we should adopt its methods and established teachings wherever we can*.[13]

When giving advice to a father who wanted to know what subjects his son should take to prepare for a career in law Brett said that the 'lawyer of the future ought to have some understanding of how the scientist goes about his work.'[14]

Brett was also, however, concerned to guard against ill-informed use of the social sciences by legal scholars on the basis that such work would undo law's scientific credentials. He drew liberally from Karl Popper's criterion of scientific status, which depends on the theories of 'falsifiability, or refutability, or testability',[15] to determine the credentials of both law and legal scholarship. In one article he strongly condemned the work of a group of Harvard legal scholars who carried out an empirical study to test the relative merits of the adversarial and inquisitorial methods.[16] Having failed on all of Popper's criteria Brett branded the work pseudo-science. Like his legal process mentors, and Jerome Hall, Brett believed that thinking about law must be scientific and that traditional jurisprudential thinking did not achieve that goal.[17]

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which they had reviewed by Dr A W Burton C St J, MBBS, LLB, FACMA, Medical Secretary of the Victorian Branch of the Australian Medical Association; Dr J F J Cade, Superintendent Psychiatrist, Royal Park Psychiatric Institutions; and Dr Vernon Plueckhahn, Director of Pathology, Geelong: Peter Brett and Norman E W McCallum, 'Lecture Notes on Forensic Medicine (Excluding Forensic Pathology)' (1972) (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6).

[12] Peter Brett, 'The Implications of Science for the Law' (1972) 18 *McGill Law Journal* 170, 172.

[13] Ibid 204–5 (emphasis added).

[14] Letter from Peter Brett to Dr J R W Bryce, 6 October 1972 (University of Melbourne Archives, *Law Dean's Correspondence H A J Ford* 1984.0033 Box 84, Manila Folder: Correspondence Sept–Dec 1972).

[15] Brett, above n 12, 172.

[16] Peter Brett, 'Legal Decision-Making and Bias: A Critique of an "Experiment"' (1973) 45 *University of Colorado Law Review* 1. Brett criticised the following articles: Thibaut, Walker and Lind, 'Adversary Presentation and Bias in Legal Decision-making' (1972) 86 *Harvard Law Review* 386; Walker, Thibaut and Andreoli, 'Order of Presentation at Trial' (1972) 82 *Yale Law Journal* 216.

[17] See Jerome Hall, *Studies in Jurisprudence and Criminal Theory* (Oceana Publications, 1958).

Brett therefore expended considerable energies attempting to critique and improve upon law's scientific credentials by drawing from advances in natural science and critiquing law and legal scholarship against the latest theories from the philosophy of science.

### 4.3 The Trajectory of Australian Legal Theory

What is curious about Brett's career is that despite the importance he attached to jurisprudence and to the role of Chair of Jurisprudence at the University of Melbourne, he is remembered primarily as a criminal law scholar and theorist. He is best known for his textbook, his first monograph and his involvement in murder trials. The way that scholars have remembered Brett and how his colleagues viewed him tells us something about the intellectual climate in both America and Australia in the 1960s and 1970s and the trajectory of Australian legal theory.

Brett's final monograph did not achieve its goal of reinstating the legal process project. In the battle for the hearts and minds of the next generation of elite American legal scholars, emerging in the 1960s and 1970s, the experience of the Warren Court largely triumphed over the scholarly theory of the legal process scholars. In her history of American legal liberalism Laura Kalman explains how this new generation of legal scholars kept faith with what she describes as the 'cult' of the Warren Court, the intellectual enemy of the legal process scholars.[18] A by-product of this victory was the marginalisation and mischaracterisation of legal process sentiment.[19] While a handful of scholars remained faithful to the Legal Process School, it is only recently that legal theorists have devoted significant attention to the work of Henry Hart and Albert Sacks, discovering that it was something more than the narrow, epistemologically barren and conservative affair that the next generation of scholars believed — or at least presented — it to be.[20] While Brett was never as popular in America as Hart or Sacks, his work was nonetheless known there and he had taught at various elite American universities. He was also offered several academic positions in America.[21] The fate of legal process scholarship therefore diminished the potential proliferation of Brett's work in America.

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[18] Laura Kalman, *The Strange Career of Legal Liberalism* (Yale University Press, 1996) 4.
[19] Ibid 26–7, 231, 232, 235.
[20] The changing attitudes were discussed in Chapter 2 of this thesis.
[21] He was offered a permanent position at the University of Texas: Letter from Peter Brett to Erwin Griswold, 16 March 1967 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7 Folder 52, University of Texas — Criminal Law and Jurisprudence — 1967). His sons also recall that he was offered a permanent position at a university in Nova Scotia: Interview with Robin and Jonathan Brett (RACV Club, Melbourne, 11 June 2014). He was also offered a permanent position at the University of Toronto, 24 February 1964 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7 Folder 52, Miscellaneous Letters and Appointments).

Differences in the Australian trajectory of legal ideas to those in America meant that the reception to Brett's scholarship was also different. Brett was the only Australian legal scholar in the 1960s and 1970s who sought — at least consciously — to advance a legal process agenda. While his career embodied the tenets of the Legal Process School this fact was not clearly recognised. Discovering Brett's agenda takes some digging, something Australian scholars appear not to have done. Waller, of course, knew of Brett's interests and their influence on the way he sought to advance the cases and materials book. Another of Brett's colleagues and friends, Harold Ford, was also told of Brett's admiration of Henry Hart, Sacks and Fuller. Australian scholars had greater familiarity with American legal realism from the 1930s and 1940s than the school that superseded and grew from it. No one else from Melbourne Law School was troubling themselves about the epistemological foundations of law.

There is little evidence to suggest that in the 1950s and 1960s there was a band of elite Australian legal scholars who believed that the integrity and growth of the discipline depended upon the 'scientific' credentials of law. The Professor of Jurisprudence at Melbourne was not charged with that particular responsibility. It was an agenda that Brett adopted and advanced independently of any encouragement from his colleagues. To understand why this was the case it is necessary to consider both the history of the Chair of Jurisprudence and the circumstances of Brett's appointment.

The Chair at Melbourne was created in 1927 at the instigation of William Harrison Moore, a graduate of Trinity College, Dublin, where he studied both philosophy and law.[22] In 1927 Kenneth Bailey was the first person appointed. He was no jurisprude. When funding was found for a second professor in 1931 he gladly relinquished the position in favour of the Chair of Public Law.[23] His successor, George Paton, was the longest standing jurisprudential Chair[24] and, of the three prior to Brett's appointment, was the most distinguished in the area of jurisprudence. In 1954 his book on jurisprudence won him the English Swiney prize and together with Bailey he designed a curriculum that was 'directed more towards the social and theoretical context of law.'[25] Rather than aspiring to advance and enhance law's academic credentials the work is more in the

[22] John Waugh, *First Principles — The Melbourne Law School 1857–2007* (Miegunyah Press) 108.
[23] Ibid 111.
[24] Paton was Chair in Jurisprudence from 1931 to 1951 with a short interruption for services in the Second World War.
[25] Waugh, above n 22, 112.

nature of a comprehensive textbook that catalogues, with great clarity, all of the major schools of jurisprudential thought and includes Paton's commentary. Paton's successor, David Derham, while a top student at Melbourne, held no postgraduate qualifications and when appointed had no real profile or publications in the area of jurisprudence.[26] He updated Paton's textbook and developed an interest in the Scandinavian Realists but otherwise did not advance a strong jurisprudential agenda.[27]

Before Brett's appointment, two of the three previous appointments to the Chair of Jurisprudence were made on the basis of the candidate's academic ability rather than their interest or reputation as jurisprudential scholars. When a vacancy arose following Derham's departure Cowen viewed it as an opportunity to recruit a new professor of strong potential and had his mind set on Colin Howard. The fact that Howard had not demonstrated an interest or reputation in theory or jurisprudence did not concern Cowen. He said: '[s]o far as special skills in jurisprudence are concerned, these can be developed. When we took David [Derham] he had done no special work in jurisprudence and he developed into a splendid teacher.'[28] The fact that the number of law professors was limited by legislation no doubt influenced Cowen's view that the emphasis should be on appointing the most able legal academic rather than the person whose credentials best fit the Chair.[29] The primary reason why Brett was moved from the Hearn Chair to the Chair of Jurisprudence was because the standing committee believed Howard to be unsuitable for a jurisprudential role.[30] By putting up his hand for the Chair of Jurisprudence, the Hearn Chair that Brett occupied became vacant which made way for Howard's appointment.

While Brett attached considerable importance to the Chair, it seems that he was alone in this belief. A Chair was valued simply because it brought with it the opportunity to become a professor. Several colleagues wondered why someone who had already been

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[26] Ibid 155.

[27] David Derham, *George Paton's A Textbook of Jurisprudence* (Oxford University Press, 3rd ed, 1964).

[28] Letter from Zelman Cowen to Harold Ford, 13 May 1964 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder — Half — ZC 1963–64).

[29] Brett explained the importance of named Chairs in Australia in the following letter: Letter from Peter Brett to Cecil A Wright, Dean of the Faculty of Law at the University of Toronto, 24 March 1964 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 7 Folder 53, University of Texas — Miscellaneous letters and appointments etc).

[30] Letter from Zelman Cowen to Harold Ford, 1 May 1964 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder — Half — ZC 1963–64); Letter from Harold Ford to Zelman Cowen, 7 May 1964 (University of Melbourne Archives, *Harold Arthur Ford Papers* 2012.0292, Box 2, Manila Folder — Half — ZC 1963–64).

appointed to a professorial role would wish to move sideways.[31] The idea that the Chair of Jurisprudence would provide a beachhead for legal theory, would distinguish the academic from the professional and establish the discipline's academic credentials was absent from the thinking of Brett's colleagues. While in the late 1940s and 1950s Australian scholars, including Derham, had predicted the growth of jurisprudence in law schools and it had been a compulsory subject, over the period from 1967 to 1969 the subject became optional at Melbourne.[32] When Brett died in 1975, the new professor was made a Professor in Law not a Professor in Jurisprudence. The role effectively ceased.

Why did Brett's colleagues show so little interest in one of his central concerns? If viewed purely as a matter of politics, one explanation might be that the battle had already been fought and won. By 1962 the majority of lawyers in Victoria were university graduates.[33] Three early justices of the High Court of Australia held law degrees from the University of Melbourne: Sir Isaac Isaacs, Henry Higgins and Frank Garan Duffy.[34] Australia's greatest High Court justice (at least to that time), Sir Owen Dixon, had graduated from Melbourne in both Arts and Law and spoke fondly of his law professor, Harrison Moore.[35] Further, in the late 1950s and 1960s Australia experienced two decades of continual growth. The government commissioned inquiries into Australia's universities that resulted in scholarships and greater funding, effectively securing the place of law schools.[36] Brett's tenure as Chair of Jurisprudence therefore coincided with a growing sense of security within Australia's universities and law schools. This gave Brett the opportunity to study at Harvard and spend sabbaticals overseas. It helped instil in him a pioneering spirit that led to his alignment with the Legal Process School. At the same time it suggested, at least to the majority of his contemporaries, that in a political sense the agenda Brett had set for himself was not necessary to secure the place of Australian university legal education or to help build scholarly empires. The profession's general resistance to establishing centres for professional legal education similar to the Bar Association in America or the Inns of Court in London further helped guarantee the presence of university legal education.[37]

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[31] Robyn Campbell, Interview with Harold Luntz (University of Melbourne, 19 February 2003).
[32] Waugh, above n 22, 172
[33] David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1989) 121.
[34] Ibid 93.
[35] Waugh, above n 22, 93.
[36] Committee on Australian Universities, Commonwealth of Australia, *Report* (1957) ('the Murray Report'); the Australian Universities Commission's Committee on the Future of Tertiary Education in Australia, Commonwealth of Australia, *Report* (1964) ('the Martin Report').
[37] Weisbrot, above n 33, 148–151.

But if we think beyond practical and political manoeuvring, was there something about the intellectual environment at Melbourne that deterred a quest to examine the idea of legal knowledge? Unlike the University of Sydney, there is little to suggest that the first community of Melbourne legal scholars were sceptical or hostile towards jurisprudence or legal theory. Many were taught by Paton as well as Sawer. Sawer took a keen interest in jurisprudence and both he and Paton were generally well regarded.[38] Brett's predecessors were not, however, infected with the 'vision thing' that, at least since Langdell, had acted as a central motivating force for legal theory.[39] Paton and Sawer advocated a 'constructive' jurisprudence.[40] While interested in jurisprudence, Brett's colleagues had therefore not been encouraged to pursue a similar agenda to Brett's. While some, like Brett, undertook postgraduate studies in America, unlike him they did not study under the leading American legal theorists of the time or inherit the American anxieties.

While Melbourne was home to ambitious scholars who believed that if given greater resources law at Melbourne could be as good, if not better, than Harvard, the strength of the school came from the general enthusiasm, hard work and abilities of the scholars working there rather than through attempts to imitate Harvard's great legal theorists. The practical necessity of keeping up and providing basic resources for Australian students and practitioners, with little help from the profession, no doubt also dulled potential enthusiasm for questioning the credentials of their enterprise.

Reviews of Brett's final monograph suggest that scholars, both domestic and international, either did not appreciate what it was that he was setting out to do or were sceptical about incorporating new learning from the philosophy of science. Baron Lloyd of Hampstead, a legal scholar at the University of London, who had himself written textbooks on jurisprudence, summarised the essence of Brett's thesis well and considered it a stimulating work.[41] He was not, however, convinced by Brett's suggestion of taking up more of the philosophy of science, saying instead that Brett was 'prone to overstate

[38] Zelman Cowen, *The Memoirs of Zelman Cowen — A Public Life* (Miegunyah Press, 2006), 72, 88–9.

[39] Duxbury writes that 'English academic lawyers tend to steer clear of theories and accounts which are, in one way or another, grandiose, experimental, highly controversial or marked by what George Bush called "the vision thing". Those English legal academics who are receptive to such theories usually end up on the faculties of law schools in the United States, Canada or Australia'. Neil Duxbury, 'When Trying is Failing: Holmes's Englishness' (1997) 63 *Brooklyn Law Review* 145, 148 (references omitted). If this is a reference to the past, he may need to strike Australia from his list.

[40] This is explained in Part 3 of this thesis.

[41] Baron Lloyd of Hampstead, 'Book Review: *An Essay on a Contemporary Jurisprudence* by Peter Brett' (1976) 39 *Modern Law Review* 742, 742.

both the novelty of invoking the "new science" in the field of jurisprudence, and the extent of the contribution such forays are likely to achieve'.[42] His thesis therefore provoked scepticism — was it science or an aversion to the Warren Court that drove Brett's prescriptions?

G H L Fridman, a professor at the University of Western Ontario who had begun his career at the University of Adelaide, concentrated on what the work proposed with respect to judicial decision-making, ignoring Brett's larger proposals about reorientating the study of jurisprudence so that law was conceptualised as one system among many.[43] He characterised Brett's alleged focus on judicial law-making as old-fashioned and suggested that a better approach would be to construct a new jurisprudence encompassing what legislatures, administrative bodies and governmental or corporate agencies were doing. He seemed to miss Brett's point that the new jurisprudential project he was advocating would focus attention on precisely these things.

Neither of the reviewers named seemed familiar with the philosophy of science that Brett was expounding and Fridman was a private lawyer rather than a jurisprudential scholar. Perhaps a more informed critique would have questioned Brett's failure (like that of other legal process scholars) to examine the political dimensions of legislative law reform and whether a dynamic jurisprudence directed at legislative and administrative reform would receive a warm reception from politicians.[44]

A further reason why Brett's work on jurisprudence was not widely appreciated in Australia is perhaps because he was responding to developments in America rather than Australia. In a handwritten note to Justice Barry, Brett said:

> I have now received and read your judgment in *Atkinson* for which many thanks. It will be particularly helpful to me, since I have been much abused in the past 10 days for saying that judges are influenced by their 'value preferences.' Quoting Sawer in support would not help me — he's just another academic lawyer — but when a judge says the same thing in a judgment it's not so easy to dismiss it. So, many thanks![45]

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[42] Ibid 743.

[43] G H L Fridman, 'Book Review: *An Essay on a Contemporary Jurisprudence* by Peter Brett' (1976) *Canadian Bar Review* 220, 222–3.

[44] See, eg, George P Fletcher, 'The Fall and Rise of Criminal Theory' (1998) 1 *Buffalo Criminal Law Review* 275, 282.

[45] Letter from Peter Brett to Justice John Barry, 16 October 1968 (National Library of Australia Archives, *Sir John Vincent Barry Papers*, MS 2505, Box 9, File 76 'General Correspondence Sept–Oct 1968).

As the likelihood of a Warren Court emerging in Australia seemed remote, anything that drew the profession away from a formalist conception of legal reasoning seemed progressive. In this environment few would understand the relevance or significance of Brett's attempt to restrain the Warren Court's style of adjudication.

The reception to Brett's ideas and agenda at the University of Melbourne is important to any understanding of the history of legal education in Australia. The Chair of Jurisprudence at Australia's most collegial and ambitious law school in the 1950s and 1960s sought to advance the agenda of an elite American scholar and secure the discipline's credentials. His colleagues regarded the attempt as neither essential nor something they ought to do. Brett's personality as well as divisions within the faculty no doubt also played a role in reducing opportunities for collaboration or mentoring. These facts are important because they suggest that the primary impetus for the development of legal theory in both America and England — securing the scientific credentials of law — was largely absent from the foundation of modern Australian legal education. There were, of course, other great jurisprudential scholars in Australia (Julius Stone being an obvious example) but rather than turning to the leading philosophers of science at the time to develop new scientific foundations they followed within existing traditions.

Brett's experience provides a partial explanation of why in Australia legal scholars have not banded together and devised new jurisprudential movements. During the founding of large-scale modern university legal education the primary impetus for this type of legal theorising was absent. Perhaps if Brett had lived longer, completed more monographs and played a hand in appointing a successor the situation may have been different.

### 4.4 The Standing of Australian Legal Academics

Comparisons and contrasts are often drawn between English and American legal scholars on the basis of their standing in the legal profession and legal system. In the 20th century American legal academics were considered leaders of the profession and academy while English legal academics were roundly regarded as second-class citizens.[46] The strength of England's legal system, built largely in the absence of law schools and law graduates, suggested that a legal academy was unnecessary. Rather than studying law a future

[46] For an account of the rise and dominance of university legal education in America see Robert Stevens, *Law School — Legal Education in America from the 1850s to the 1980s* (University of North Carolina, 1983). For an explanation of the lowly status of English legal academics see David Sugarman, 'A Special Relationship? American Influences on English Legal Education, c. 1870–1965' (2011) 18 *International Journal of the Legal Profession* 7, 12–15.

lawyer was considered better off obtaining a liberal education followed by a period of technical training either in the Inns of Court or by apprenticeship. This played to the profession's conservative inclinations.[47] The Inns and apprenticeships were more likely to perpetuate existing practices rather than challenge them.[48] The rule against citing a living author diminished the potential for courts to draw on the learning of legal scholars.[49] In these circumstances it is unsurprising that English legal scholars held a low self-image and were largely deferential towards the judiciary.[50] In the late 19th and early 20th century many English scholars sought to distance themselves from earlier legal scholars such as Bentham who sought to 'dethrone the traditional "oracles of the law", the judiciary.'[51] Sugarman suggests that the founders of modern legal university education in England constructed a 'narrow ledge of expertise'[52] that distinguished them from the profession. Such expertise was based on a '[c]onception of education that ultimately elevates exposition, systematisation, conceptualisation and the production of lawyers as traditionally conceived as its core.'[53]

In contrast, the birth of modern American legal education is typically portrayed as saving the American legal profession by raising standards.[54] In the 19th century Americans had largely lost faith in their legal system.[55] It was therefore easier to make the case for university legal education and the need for the enterprise to be richly resourced. The rapid rise and burgeoning confidence of modern American legal education resulted in a large number of career academics in law who viewed themselves as expert counsellors. Their occupation was not merely to assist legal practitioners learn the law but to lead them. They were both practical reformers and visionaries.

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47 Sugarman, above n 46, 12–14.

48 Ibid.

49 Alexandra Braun, 'Burying the Living? The Citation of Legal Writings in English Courts' (2010) 58 *American Journal of Comparative Law* 27; Alexandra Braun, 'Professors and Judges in Italy — It Takes Two to Tango' (2006) 26(4) *Oxford Journal of Legal Studies* 665. In another extensive study of the relationship between judges and jurists Duxbury contrasted the position in England, where there was a common law rule against citing a living author with the position in Australia: 'in countries such as Germany and Australia, to name but two examples, legal scholarship can be seen to have had considerable influence on judicial thinking.' Neil Duxbury, *Jurists and Judges* (Hart Publishing, 2001) 3. For the Australian position Duxbury cites Sir Anthony Mason, 'The Tort Law Review' (1993) 1 *Tort Law Review* 5.

50 Ibid.

51 David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26, 37.

52 Ibid 33–6.

53 Ibid 33.

54 Stevens, above n 46, 10, 23–8.

55 Ibid.

Brett's career clearly suggests that he took the American lead and ran with it. His experience indicates that there was at least one member of this generation who had a very healthy self-image, similar to that of his American counterparts. Part of this regard can be attributed to Brett's own attributes and personality. However, it is also linked to the atmosphere and confidence created through Cowen's leadership of the Melbourne Law School and the opportunities he provided for academics to visit America. Brett's experience also suggests that while some members of the profession believed that the legal academy was inferior and their role limited, others believed in and supported the more expansive role that Brett undertook. Brett advanced a model of academic as expert lawyer and suggested that legal scholars could move between the world of ideas and the practice of law without compromising either.

### 4.4.1 Brimming with Confidence

Throughout his tenure at the University of Melbourne Brett took on several roles beyond teaching and scholarship. He believed that it was his duty to do so. The range of activities Brett engaged in suggests that he believed he was as — if not more — capable as a practising lawyer or judge and had special expertise that could bring about practical justice. The activities and attention that such activities drew raised the profile of Australian legal scholars in the eyes of the community. In this work Brett presented as immensely able — a clear 'can-do' man who was unfazed by the varying levels of responsibility thrust upon him. While Brett was clearly a self-assured man who had considerable practical and life experience, his association with Zelman Cowen, Norval Morris and Justice Barry, who were all also heavily influenced by their respective experiences in the United States, must have fed both his 'readiness for public intervention' and belief in himself as an intellectual 'who would advance understanding of law, society and government through a variety of media and personal performance.'[56] Finnane has recently detailed Morris, Barry and Cowen's activities and sense of obligation.[57] In this section I explain how Brett pursued the same agenda with substantial vigour and applied his unique talents to various tasks in furtherance of the public good. Brett's career therefore attests to the importance of the institutional climate created by Cowen and others at the time of the creation of the Australian legal academy.

One of Brett's most significant yet largely unacknowledged achievements came about in the 1960s when he served as President of the Federation of Australian Universities' Staff

[56] Mark Finnane, 'Law as an Intellectual Vocation' (2015) 38 *Melbourne University Law Review* 1060, 1060, 1061, 1062, 1076.
[57] Ibid.

Association ('FAUSA') at a very turbulent time. FAUSA was involved in attempts to broker a settlement between one of its members, a philosophy professor, Sydney Sparks Orr, and the University of Tasmania in what became known as the 'Orr dispute'.[58] The matter was of immense significance in the history of Australian universities as it had at its heart the protection of academic freedoms which, it was perceived, the University of Tasmania had been eroding for a substantial period of time. The treatment of Orr was viewed as an act of silencing one of the university's fiercest critics. As a representative body for university staff across Australia, Brett's role as President of FAUSA was to represent the interests of both Orr and his former colleagues.

Despite the seemingly intractable nature of the dispute Brett was able to obtain assurances from the Vice-Chancellor of the University of Tasmania that the university would conclude with Orr a settlement amount.[59] After almost a decade of prior conflict between the parties, a satisfactory settlement with Orr occurred shortly after Brett's negotiations took place. Brett also obtained the Vice-Chancellor's agreement to implement a set of tenure rules that would give academics at the University security and would hopefully prevent or at least reduce the risk of another case of unfair dismissal.[60] Brett played a part in amending previously proposed tenure rules to ensure that the bar for dismissal was set sufficiently high, with the primary grounds being 'gross misconduct', and in implementing procedures to ensure that decision-makers had a sufficient level of impartiality.[61] If the University agreed to the tenure rules FAUSA would lift the censure that was damaging the University's reputation and deterring academics from seeking employment there. Brett secured the Vice-Chancellor's agreement and the censure was lifted. He was also instrumental in the University subsequently making a public statement to clear Orr's name. Brett was a lawyer statesman exemplar.

Brett's most public and notable work arose in connection with three high-profile murder cases. Like Norval Morris, he had a 'lifelong interest in the fate of the incarcerated.'[62] First he, along with David Derham, intervened to prevent the execution of Robert Tait,

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[58] Space does not permit a lengthy exposition of the Orr dispute. There are several books devoted to the subject: see, eg, W H C Eddy, *Orr* (Jacaranda, 1961); Cassandra Pybus, *Gross Moral Turpitude: The Orr Case Reconsidered* (William Heinemann, 1993).

[59] Letter from Peter Brett to Professor S W Carey, Chairman of the Staff Association, 20 September 1965 (University of Melbourne Archives, *Brett Staff Associations (Orr Case)*, 1975.0095). Pybus has also detailed aspects of Brett's involvement in her history of the Orr dispute: Cassandra Pybus, above n 58, 193–7.

[60] Ibid.

[61] Ibid.

[62] Finnane, above n 56, 1061.

who had been convicted of the brutal murder of an 82-year-old woman.[63] While the court never finally concluded the matter, the litigation served as a successful piece of political advocacy that led the executive, without explanation, to commute Tait's sentence to life imprisonment.

Brett's involvement in a second murder trial, the *Beamish* case, was far more extensive. He adopted the role of activist and expert counsel and was largely responsible for drawing public attention to the matter over a number of years and for Beamish's eventual release from prison. The case concerned the conviction of a deaf and intellectually disabled man, Darryl Beamish, for the brutal murder of Ms Carol Brewer. Beamish had been sentenced to death, his sentence had been commuted and then while he was in prison another man, Eric Edgar Cooke, a serial killer, confessed to killing Brewer. Following the confession Beamish's solicitors were successful in their petition to have the matter brought before the Western Australian Supreme Court for a second time. The court did not, however, order a retrial.

Brett was so incensed by the various injustices he believed had been committed by the police, prosecution and justices in handling the case that he was moved not only to assist Beamish's counsel but to also write a short pamphlet about the case. Among other things, in the pamphlet Brett criticised the police for the way that they interrogated and elicited a confession from someone with Beamish's disability;[64] the Crown for failing to bring forth medical evidence that would have strengthened the accused's case;[65] and the Western Australian Supreme Court for the way that they handled the law and facts, their confused interpretation of principle and their bias.[66] He alleged that by hearing the case a second time the Court had participated in a hearing of an appeal against its own decision and, further, that the judgments demonstrated actual bias.[67] Brett concluded his pamphlet on a note of strong condemnation, leaving the reader in no doubt that he believed that the legal officials had infringed both the law and morality: 'The judges, Crown Law officers, and police who participated in the sorry proceedings which I have described can be left to live with their own consciences.'[68] He appealed to the executive to grant a pardon.

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[63] For an exposition of the case see Creighton Burns, *The Tait Case* (Melbourne University, 1962).
[64] Peter Brett, *The Beamish Case* (Melbourne University Press, 1966) 7–8, 57.
[65] Ibid 23, 24, 52, 56, 57.
[66] Ibid 16, 18–19, 21, 22–3, 56, 57.
[67] Ibid.
[68] Ibid 57.

In 1970 Brett's reputation earned him an invitation to assist another man, Leith Ratten, who had been convicted of murder in Brett's home state, Victoria. The request for assistance came from a politician, Don Chipp, who, at the time, was Federal Minister for Customs in the Liberal-Country Party government and later became the first leader of the Australian Democrats. On 7 May 1970 Ratten's wife, who at the time was eight and a half months pregnant, died of a gunshot wound. Ratten did not deny that he fired the shot but argued that it was a result of his carelessness rather than an intentional act. He said he had been cleaning his double-barrelled shotgun at the time. He called the police as soon as the incident occurred. The Crown's case consisted of circumstantial evidence that they argued proved Ratten's act was deliberate. They also argued that Ratten had a motive. He was having an affair with a woman, Jennifer Kemp, who had told her husband that she was leaving him and had placed her house on the market. The Crown suggested that Ratten believed his wife's death would enable him to begin a life with Kemp free of moral condemnation. Ratten was sentenced to death, which was later commuted to 25 years imprisonment.[69]

In both the *Beamish* and *Ratten* cases Brett mastered the legal and factual points and devised strategies to have the matters challenged in both the courts and through appeals to the government. Papers from this time read a little like a Sherlock Holmes novel, with Brett discovering arguments and avenues that Ratten's lawyers had not.[70] The relationship that Brett had fostered with various scientists and medical researchers and his own interest in science helped him scrutinise the Crown's case, in particular their claim that Ratten's account of events could not be reconciled with expert evidence.[71] Brett also engaged in an extensive media and political campaign. He wrote to politicians, wrote newspaper articles and, in one instance, appeared on television. He kept both causes alive. In the *Beamish* case, Brett's efforts were, in one sense, successful. When the Labor Government was elected, Brett wrote to the new Premier, John Tonkin, to remind him of the pledge he had made to release Beamish.[72] While the Premier was true to his word and Beamish was released, he was placed on parole rather than granted a pardon. Beamish's

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[69] For a further exposition of the case see Tom Molomby, *Ratten: The Web of Circumstance* (Outback Press, 1978).

[70] See collection of correspondence in National Library of Australia Manuscript Collection (*Peter Brett Papers*, MS 5603, Box 5, File 25 Beamish Case).

[71] Brett sought assistance from one of Australia's leading pathologists, Dr K M Bowden, and a specialist in anatomy at the University of Melbourne, Professor L J Ray: Report from Peter Brett to D L Chipp, 29 October 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 1, File 1, The Honourable D L Chipp MP, Llewellyn Reserve MP).

[72] See collection of correspondence in National Library of Australia Manuscript Collection, (*Peter Brett Papers*, MS 5603, Box 5, File 25 Beamish Case, Tonkin).

parents believed that this meant that the stigma on Beamish remained.[73] It also meant that Beamish's ongoing liberty was less assured. Their fears were not unwarranted. When a year later Beamish was charged with a minor offence his parole was revoked and he returned to prison to serve the remainder of his sentence. He was finally released in 1976, a year after Brett's death.[74]

While ultimately Brett's efforts in the *Ratten* case ended in vain and Ratten served out his sentence, Brett's innovative strategies kept the matter alive (for example, he was successful in his application to the Attorney-General to have Mrs Ratten's body exhumed[75]) and led others to believe in Ratten's innocence, or at least doubt his guilt. This was important. As Ratten wrote in a letter to Brett:

> After you visited, something awakened in me again. It was not so much the fact of your efforts and report, but the knowledge that not all of humanity was against me, and that in you I could find saneness in a seemingly mad world.[76]

Similarly, in the *Beamish* case Brett had considerable success turning public opinion. Following a television programme on Beamish, the host, a journalist Syd Donovan, wrote to Brett to tell him that his appearance was met

> with overwhelming approval of you and your point of view. Peter, my telephone has run hot at the office and at home — with people wanting to tell me how much they enjoyed the programme and how convincingly you argued your case. You will be interested to know that a number of them have been lawyers who, without exception, were loud in

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[73] Letter from Mr and Mrs Beamish to Brett, 4 May 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, File 22 Beamish Case).

[74] In 1998 an investigative journalist, Estelle Blackburn, published a book about Eric Cooke, the man who had confessed to the Beamish murder. She also approached a solicitor and convinced him to make an application to reopen Beamish's case. A Full Court of the Western Australian Supreme Court found that Beamish's conviction was unsound. In 2011 the State Government of Western Australia announced that it would make a $425,000 ex gratia payment to Beamish who was then 69 years of age. Blackburn's part in having the matter reopened was acknowledged. She received a Medal of the Order of Australia and a Walkley Award for her investigations and the book. In this final chapter of the Beamish saga Brett's name was barely mentioned. See Estelle Blackburn, *Broken Lives* (Hardie Grant, 2001); 'Ex Gratia Payment for Wrongly Jailed Man', *The Sydney Morning Herald* (online), 2 June 2011, <http://www.smh.com.au//breaking-news-national/ex-gratia-payment-for-wrongly-jailed-man-20110602-1fhq6.html>; Tom Percy, 'John Button and Darryl Beamish Cleared of Murder Four Decades after Serial Killer's Execution', *Justice Denied* (online), 6 June 2011 <http://justicedenied.org/wordpress/archives/1204>.

[75] Letter from G O Reid, Attorney-General, to M R Reese, 17 April 1972 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, File 1, Peter Brett Ratten Case).

[76] Letter from Leith Ratten to Peter Brett, 8 July 1972 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, File 2, Leith Ratten, Mrs J Kemp).

> their praise of you. … TVW managing director Jim Cruthers was elated with the whole deal and considers it probably the most important programme TVW have undertaken.[77]

Because the Premier did not see the programme, the episode was repeated.

Brett's dedication to these various causes is also reflected in letters he wrote to both Ratten and Beamish and their families and the visits he made to prison.[78] In these dealings he displayed a great deal of compassion. He deployed a deliberate strategy to give hope while keeping expectations in check. He also responded individually to a mountain of correspondence he received from members of the public, both thanking them for their support (where provided) and providing clarification on matters where correspondents were confused.[79] He continued to write, campaign and provide expert advice even when in America and Canada on sabbatical and following his heart attack in late 1973. During the months before his death, Brett wrote to Ratten with constructive advice on how to deal with the Surveyor Board's decision to suspend Ratten's surveyor's licence[80] and he wrote to the Solicitor-General, Daryl Dawson, requesting permission to give Ratten a lie detector or polygraph test.[81] The request was refused.[82]

While there are signs that the *Beamish* and *Ratten* cases, in particular, took their toll[83] it is clear that he had an extremely strong political constitution. He was not afraid to place himself in a position where criticism and personal and public conflict would inevitably

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[77] Letter from S J Donovon to Peter Brett, 1 June 1967 (National Library of Australia Manuscript Collection, *Peter Brett Papers,* MS 5603 Box 5 File 24 Beamish Case WA Television Channel 7).

[78] See, eg, Memorandum by Peter Brett regarding visit to Ratten in Pentridge Jail, 2 March 1972 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Folder 2, Leith Ratten Mrs J Kemp); Letter from Brett to Mr and Mrs Beamish, 1 July 1971 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).

[79] See folder of correspondence in National Library of Australia Manuscript Collection (*Peter Brett Papers*, MS 5603, Folder 4, Correspondence with Public).

[80] Letter from Peter Brett to Leith Ratten, 21 April 1975 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Folder 2, Leith Ratten Mrs J Kemp).

[81] Letter from Peter Brett to Daryl Dawson, Solicitor-General, 9 April 1975 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Folder 1, The Hon D L Chipp MP, Llewellyn Reserve MP).

[82] Letter from Daryl Dawson, Solicitor-General, to Peter Brett, 10 April 1975 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Folder 1, The Hon D L Chipp MP, Llewellyn Reserve MP).

[83] In a letter to Chipp Brett acknowledged that he had at times struggled to continue with the cause: Letter from Peter Brett to D L Chipp, 28 February 1973 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Folder 1, The Hon D L Chipp MP, Llewellyn Reserve MP).

follow.[84] Brett's compassion and commitment to these various causes is in many ways startling.

The intensity of Brett's work and his public exposure helped to firm up this image of legal academic as expert adviser and advocate. If some Australian legal academics had inferiority complexes, the affliction had not touched Brett or his colleagues.

### 4.4.2 Mixed Reception

In 1990 Weisbrot, drawing support from the Pearce Report, suggested that the relationship between the profession and legal academics was strongly divided and unhealthy. He thought that this was, at least partly, because legal academics 'have been far more actively involved in progressive legal and social issues than the profession.'[85] He also considered that Australian legal scholars were largely shut off from shaping the legal system.[86] In light of these comments it is worth considering how members of the profession reacted to a legal academic's attempt to criticise judges, lawyers and police officers and hold them to account.

Brett received encouragement and support, in the form of letters and offers of assistance, from members of the profession[87] as well as the legal academy. Many held him and his efforts in very high esteem. In a letter to Brett, Julius Stone, Chair of Jurisprudence and International Law at the University of Sydney, wrote

> Your thoughtful gift of the important and exciting Beamish piece accelerates the intention that I already had to write and congratulate you on the public service you are doing by reopening the question of miscarriage of justice. I trust that the parliamentary move in Western Australia is followed through and has some result.[88]

Sir Owen Dixon said that he admired 'the great industry and hard work of Professor Brett'[89] and the Dean of the Law School at Harvard, Erwin Griswold, said

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[84] Brett's son Jonathan attested to his strong political constitution, saying 'Dad liked the politics' in academia: Robin and Jonathan Brett, above n 21.

[85] Weisbrot, above n 33, 146.

[86] Ibid 147.

[87] See, eg, Letter from R E McGarvie to Peter Brett, 12 October 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).

[88] Letter from Julius Stone to Peter Brett, 25 August 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).

[89] Letter from Sir Owen Dixon to Peter Brett's publisher, Mr Ryan, 15 August 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).

> I expect that you will get some violent and unhappy reactions, particularly from some of the more conservative members of the bar. It is very good, though, that there are persons like you who are willing to dig into these matters, and to speak up about them. Keep up the good work.[90]

Griswold's predictions and understanding of the Australian legal profession proved sound. One member of the Western Australian Bar, and legal academic at UWA, Douglas Payne, was so affronted that he wrote a long review essay of Brett's pamphlet, issuing a blistering attack on its central argument as well as Brett personally.[91] He accused Brett of failing to disclose the work he had undertaken to advise Beamish's counsel in the second trial, suggesting that Brett was himself biased. He stated that the 'pamphlet reveals a disposition not to accept the ordinary processes of the law which is reminiscent of the *Tait* and *Orr* cases.'[92] It was clear that Payne represented the strong conservative element within Australia's legal profession that believed that open criticism of judges and the working of the system served to erode its legitimacy. Brett found Payne's position puzzling: 'It defeats me why an academic should decide to enter the lists on behalf of judges who sit on appeal from themselves.'[93]

Some police officers also took issue with Brett's criticisms of the police force. However, Brett had the support of some of the force's most senior members. When an officer wrote a negative review of Brett's pamphlet on Beamish, describing it as 'sensational', the Victorian Acting Chief Commissioner wrote a formal apology to Brett which concluded: 'I look forward to a lifetime of friendship, and hope that you will defend our police force when warranted in the future.'[94] This letter suggests that Brett's voluntary efforts to educate police officers were highly valued.[95]

### 4.5 Concluding Remarks

Brett's experience highlights that attitudes within the profession and the police force towards the Australian legal academy were mixed. While Brett himself acknowledged

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[90] Letter from Erwin Griswold to Peter Brett, 18 August 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).
[91] Douglas Payne, 'Book Review: *The Beamish Case* by Peter Brett' (1966) *Western Australian Law Review* 583.
[92] Ibid 604.
[93] Letter from Peter Brett to Frank Beasley, 30 June 1967 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 5, Folder 22, Beamish Case).
[94] Letter from C H Petty, Acting Chief Commissioner to Brett, 28 September 1966 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 6, Folder 41, Reviews (By P Brett)).
[95] Ibid.

that academics were not given the same credence as judges,[96] his experience suggests that the profession was not uniformly hostile to academics playing the role of expert adviser or counsel. Some strongly admired Brett's devotion to these various causes. Therefore, while there are similarities with the English experience in that there were conservative elements that suggested that criticisms by academics were impertinent, the Australian context seems to have been far less oppressive and appraisals of legal academics far less severe. The environment had not served to kill morale and efforts such as Brett's countered any suggestion that legal academics were failed practitioners. Through such activities he became a role model to students (despite what they thought of him in the classroom there is evidence that they appreciated his external activities[97]) and heightened general perceptions about the role and expertise of legal academics, leading to the further growth of law schools and opportunities for legal academics. The chapter draws some general conclusions from the whole of this part on Peter Brett and explains its role in this thesis.

[96] Brett, above n 45.

[97] See, eg, letter from Simon Wynn (student) to Peter Brett, 24 December 1970 (National Library of Australia Manuscript Collection, *Peter Brett Papers*, MS 5603, Box 4, Folder 28).

# 5 CONCLUSION: PETER BRETT

As a founding member of Australia's first community of legal scholars Brett made a significant and lasting contribution to the Australian legal academy that was inspired by his Harvard legal process mentors, in particular Henry Hart. His vision was for the Australian legal academy to be a large, confident and reformist enterprise that would act as conscience to the Australian legal profession and produce morally aware practitioners. His objective was to serve society. Like the elite American professors, he adopted and advanced a coherent vision for both law schools and graduates. The textbook he wrote with Waller provided a vehicle for exporting this attitude to other Australian law schools and law graduates. Future legal practitioners would not so easily see law as divorced from the moral conundrums at its core. Future Australian legal academics were challenged to take an intellectual approach to teaching law where the material and exercises were fashioned to encourage students to adopt a particular conception of law and to critically question doctrine. Brett's scathing criticism of aspects of the administration of justice and his advocacy work signalled to the public and profession that Australian scholars would not behave like what many Australian legal scholars perceived to be their deferential English counterparts.[1] His monographs suggest that it was permissible for Australian scholars to engage with the leading legal thought of the age and to engage in debate over what the correct intellectual capital and credentials for their discipline should be.

We now largely take for granted the capacity for legal academics to assume the roles so passionately and imaginatively pursued by Brett. But in the 1950s and 1960s, the emergence of an academic-lawyer-statesman was both new and challenging. Some did not approve. Brett therefore helped break new ground. He created the model of a constructive legal theorist whose privileged position obliged him to both 'venerate' and 'freely criticise'[2] the law and work towards the betterment of Australian society.

Brett's experience also suggests that the rise of the Australian legal academy was not accompanied by angst about its legitimacy and that factors that had served as a primary impetus for legal theory in America (and England) were absent in Australia. It is remarkable that at a time when the Australian legal academy had only just begun and there was no real orthodoxy to speak of, Brett took on such an ambitious enterprise by

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1 See Susan Bartie, 'A Full Day's Work - A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67, 90-93.

2 Peter Brett and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962) v.

seeking to reconfigure the discipline's intellectual credentials. Unfortunately it was not something his colleagues believed was needed. Perhaps this explains the caution in Australia towards abstract theorists throughout the 20th century. Or perhaps it simply explains why Australia's second Chair of Jurisprudence was so easily abandoned.

In Brett we find a clear correlation between his life, the times and the academic agenda he pursued. Issues of law and morality were not merely an academic fascination. He had risked his life in order to conquer fascist regimes. The moral fibre of a society was important to him and explains why he was so devoted to defending those most vulnerable to injustices. In Brett we also find that many of his activities were fuelled by his appraisal of what the discipline required in order to perform an important social function. His attempt to advance legal knowledge was both an intellectual and political strategy born of the responsibilities he felt were inherent in his post. His role in history and the infant status of the academy were both central to his thinking.

This thesis has suggested that there are several reasons that explain why Brett's contribution is now not widely known or understood. I have suggested that it has less to do with the merit of his scholarship or broader endeavour than changes in intellectual trends, politics, personal factors and the reaction of students. This study of Brett's career therefore also helps make the case that such contextual factors ought to be given equal consideration in any history of legal ideas.

In the following chapter I turn to the career of Alice Erh-Soon Tay. Like Brett she was a legal émigré and the Second World War significantly shaped her life. Like Brett, she was deeply committed to the project of raising standards within both the Australian legal academy and profession and to lifting the international and domestic profile of the academy. There are, however, important differences in how they sought to achieve these goals. While Brett's efforts were largely that of an individual seeking to set up a new and robust jurisprudential paradigm to underpin the discipline,[3] Tay sought to inculcate within the Australian legal academy a set of scholarly values by creating and advancing an elite scholarly community. Unlike the case of Melbourne, the University of Sydney has continued to have a Chair of Jurisprudence and the Department of Jurisprudence existed as an independent entity until 1998. Studying Brett's career alongside Tay's therefore provides several useful comparisons and contrasts.

[3] He did, of course, collaborate with Louis Waller and work on various committees and boards.

# PART 2 ALICE ERH-SOON TAY

**Part 2** of this thesis concentrates on the life and career of Alice Erh-Soon Tay. As with the previous part, Tay's primary endeavours are contextualised in order to explain her significance to Australia's discipline of law. **Chapter 6** introduces Tay and identifies the formative experiences and influences that shaped her career. I explain how these motivations are evident in her early scholarship. **Chapter 7** makes an argument about the significance of the Department of Jurisprudence at the University of Sydney to Tay's career. It lays the groundwork for my later claims that, in several respects, Tay's contributions to Australia's legal academy were synonymous with those of the Department. In this chapter I also explain the nature of the challenges that Tay faced when deciding to preserve the Department of Jurisprudence rather than see it merged with the rest of the faculty. **Chapter 8** identifies Tay's primary objectives and endeavours in running the Department of Jurisprudence. It explains how her running of the Department facilitated her larger goal of reforming Australia's legal academy. **Chapter 9** provides a conclusion to this part, raising questions about what we might learn from Tay's leadership of the Department and the fact that this is where she placed a large part of her intellectual energy. I argue that Tay's experience demonstrates the importance of taking a legal scholar of their own terms and looking beyond their scholarship for contributions to the discipline.

# 6 MORALITY AND THE LEGAL ACADEMY

## 6.1 Introduction

Professor Julius Stone is a name well known among Australian legal academics, lawyers and even the current generation of law students. Today it has even been suggested that the High Court's approach to legal reasoning in the 1980s and 1990s was, at least in part, a product of Stone's teaching.[1] Stone's former pupils were encouraged to abandon strict legalism in favour of Stone's version of American legal realism, captured most readily in his phrase 'leeways of choice'.[2] Stone is often depicted as Australia's foremost jurisprudential scholar and the greatest Australian contributor to international law.[3] By comparison we know little about Stone's successor, Alice Erh-Soon Tay, holder of the Challis Chair of Jurisprudence at the University of Sydney, who is the subject of this part.[4]

Tay's appointment as Professor of Jurisprudence in 1975 was a momentous event in the trajectory of the Australian legal academy even if viewed purely as a matter of gender and cultural divergence. She was the first woman to hold a Chair of Jurisprudence at an Australian university and the first person from Singapore/China (she was born in Singapore in 1934 to Chinese parents), and second woman, to become an Australian law professor.[5] If we add to the mix that prior to undertaking a Doctor of Philosophy at the RSSS at ANU in the 1960s she had undertaken just four and a half years of formal education (her schooling in Singapore was cut short by the Japanese occupation and she qualified for law at an Inns of Court in London rather than through a university); that her work departed from the dominant analytical jurisprudential tradition; that she was recognised globally in elite philosophical, sociological and jurisprudential circles; that

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[1] See, eg, Michael Kirby, 'Review Essay: HLA Hart, Julius Stone and the Struggle for the Soul of the Law' (2005) 27 *Sydney Law Review* 323, 334; Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 20–3, 32, 180.

[2] This is a theme that Stone advanced throughout his career. See, eg, Julius Stone, *Legal System and Lawyers' Reasoning* (Stanford University Press, 1964) 202, 234, 304, 321.

[3] Stone 'can lay claim to being one of this country's greatest writers, teachers and public figures in law': Robert Shelly, 'Book Review: Leonie Starr, *Julius Stone an Intellectual Life*' (1993) 16 *University of New South Wales Law Journal* 601, 601.

[4] For example, there is no entry on Tay in 'Australia's pre-eminent dictionary of national biography' being the *Australian Dictionary of Biography* (Melbourne University Press, 1966–) http://adb.anu.edu.au. Fiona Cownie, in the context of writing about the United Kingdom's first woman law professor, Claire Palley, considered that it was unsurprising that so little had been said about her as most often biographies have been written about men: Fiona Cownie, 'The United Kingdom's First Woman Law Professor: An Archerian Analysis' (2015) 42 *Journal of Law and Society* 127, 128.

[5] At the time of her appointment there were only two other women professors at the University of Sydney and one other law professor, Enid Campbell, in Australia: 'First Woman Professor in Faculty of Medicine' *Sydney News* (Sydney) 7 June 1983, 87.

she did not apply for the Chair at Sydney but was instead sought out; that in 1985 she was made Member of the Order of Australia for contributions to teaching and research in law; that in 1990 she, along with a colleague, Klaus Ziegert, established the Centre for Asian and Pacific Law at the University of Sydney ('CAPLUS'); and that in 1998 she was appointed President of the Human Rights and Equal Opportunities Commission ('HREOC') where she served until a year before her death, then this relative lack of attention becomes all the more puzzling.

While many of the threads of Tay's career are fascinating, this part (as with the previous part devoted to Peter Brett) concentrates primarily on the novel ways that Tay contributed to the discipline of law in Australia. From an extensive review of all of Tay's scholarship and an analysis of the transcripts from 18 interviews it became apparent that the most interesting and significant aspect of Tay's career is that she subscribed to a particular scholarly model and sought to elevate the intellectual credentials of Australia's discipline of law in accordance with that model. She believed that there were certain values and environments that should be fostered within universities to equip academics with the courage and independence required to perform their important role. According to Tay — at least in the context of law, philosophy and sociology — academics were important because of their capacity to provide free and frank criticisms of government, ideologies and each other. She believed that this capacity sprang not only from their intelligence but also from their commitment to a strong set of scholarly — and moral — values.

In essence Tay believed, first, that a scholar should take their lead and draw inspiration from the world's leading intellectuals. Second, they should refuse 'to bow to the demands of fashion, convenience or authority.'[6] Third, they should favour conflict over coherence. Finally they should aspire to lead 'perilous and fighting lives.'[7] Ultimately, Tay believed that being a legal academic was a high calling and should be pursued with due seriousness and devotion.

The motivations and moral principles underpinning Tay's model of a legal scholar were a product of her upbringing as well as a peculiar mix of academic mentors: the Professor of Philosophy at the University of Sydney, John Anderson; intellectual historian and Tay's husband, Eugene Kamenka; Marxist philosopher, Yevgeni Bronislavovich Pashukanis;

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[6] Eugene Kamenka, 'Australia Made Me — But which Australia is Mine?' (John Curtin Memorial Lecture, Australian National University, 16 July 1993) 21.

[7] This was a mantra associated with John Anderson. See Mark Weblin (ed), *A Perilous and Fighting Life: From Communist to Conservative — The Political Writings of Professor John Anderson* (Pluto Press, 2003).

and social scientist Ferdinand Tönnies.[8] In this chapter I explain how each school of thought initially contributed to Tay's thinking and I suggest that her personal characteristics — her upbringing, tough constitution and strong sense of self-belief — resulted in a strong commitment to reform the academy in the ways described in Chapters 7 and 8. Ultimately she was a formidable character who advanced a robust critique of the Australian legal academy and example for other legal scholars to follow. Her career raises interesting questions about the strengths and shortfalls of Australia's legal academy and Tay's contribution to it.

## 6.2 The Makings of an Academic Warrior

> I just don't think you can understand what is being written unless you understand the person and that person and his or her environment is what really creates that person. So you referred in the questions you sent me to what scholarship or scholars influenced [Tay] most, I think it is her life and her first husband's life.[9]

Two of the most frequent remarks made about Tay's constitution by interview participants were that she was a fighter and that her career was her life.[10] For Tay the professional and personal bled into one another. Her early experiences fed her intellectual agenda and shaped the model of a legal scholar she later embodied. This intellectual agenda dominated her later life. Tay fought against a number of institutions and practices but her primary enemies were governments — first the government of Singapore, then the USSR, then China and then Australia. The most obvious impetus for this fighting spirit was her experience as a child and adolescent as a member of an oppressed minority in Singapore.

Tay was born in Singapore a few years before the Second World War, on 2 February 1934.[11] Her parents were from Guangdong Province in Southern China.[12] Her father had been a civil servant, a clerk for the Australian Water Pipe Company, but was stripped of his professional standing and job when the Japanese, who then occupied Singapore,

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[8] While her scholarship contained relatively few citations she frequently referred to Pashukanis.

[9] Interview with Participant A (11 June 2014).

[10] Interview with Martin Krygier (Law School, University of New South Wales, 7 February 2014); Interview with Christopher Birch SC (Garfield Barwick Chambers, Sydney, 28 July 2014); Interview with Klaus Ziegert (Law School, University of Sydney, 5 February 2014); Interview with Wojciech Sadurski (Law School, University of Sydney, 31 July 2014; Participant A, above n 9; Interview with Gabriel Moens (by telephone, 30 September 2014); Interview with Hamish Redd (by telephone, 5 August 2014); Interview with Ron McCallum AO (by telephone, 4 November 2014).

[11] Curriculum Vitae of Alice Erh-Soon Tay, 1965 (Australian National University Archives, 19, Box 19, Folio 2609).

[12] Julia Horne, 'The Cosmopolitan Life of Alice Erh-Soon Tay' (2010) 21 *Journal of World History* 419, 430.

interned his employers.[13] While Tay spoke of happiness in her childhood[14] it was in many ways grim. The experience of being the subject of prejudice, denied opportunities and a comfortable existence, stayed with her throughout her life. Tay spent much of her childhood not in school but working as a seamstress to support the family.[15] One of her sisters was given up for adoption to a childless couple, as without her father's wage her parents could not afford to support her.[16] She later, while still a child, died of bone cancer.[17]

Remarkably, Tay spent just four and a half years in formal education at Raffles Girls' School in Singapore.[18] Her education was cut short as her father refused to have his children educated within a school system operated by their Japanese oppressors[19] and after the Japanese occupation she spent a year hospitalised with what was then a 'horrible' and 'shameful' disease, tuberculosis.[20] Her mother was nonetheless determined to ensure that her children gained independence through education[21] and the family provided the financial support needed for Tay to complete her training to become a lawyer at the Inns of Court in London.[22] Tay explained:

> When I was a child, growing up in a family that knew little English and not much of Western tradition or of culture in China, deprived for four years of food, books and schooling by a brutal Japanese occupation, I was quite clear what I and my family admired — a concept of culture, of the significance of literature and philosophy, history and art, of the possibility of transcending one's situation.[23]

In the few short years Tay spent at school she demonstrated strong intellectual abilities such that she was awarded a scholarship to study in America for a short period.[24] She undertook additional studies to make up for her year in hospital but it meant that she did

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[13] Julia Horne, 'Alice Erh-Soon Tay, The Making of an Intellectual' in Guenther Doeker-Mach and Klaus Ziegert, *Alice Erh-Soon Tay — Lawyer, Scholar, Civil Servant* (Franz Steiner Verlag, 2004) 16–17.
[14] Ibid 17.
[15] Ibid 17.
[16] Sonia Humphrey, 'Alice Tay's Top Brain in Law's Wonderland', *The Australian* (Sydney) 15 March 1984, 10.
[17] Ibid.
[18] Horne, above n 13, 18.
[19] Horne, above n 12, 430–1.
[20] Humphrey, above n 16.
[21] Ibid.
[22] Ibid.
[23] Alice Erh-Soon Tay, 'Women, Culture and the Quality of Life' in L Sandell and EE Schmidt (eds), *Women of the Year — A Collection of Speeches by Australia's Most Successful Women* (The Watermark Press, 1987) 23, 27.
[24] Horne, above n 13, 18.

not have the subjects needed for her first choice, medicine.[25] Studying at the Inns meant that she could qualify for practice in a much shorter period of time than at a university — just 18 months — and thereby reduce the financial burden imposed on her family.[26] Tay's upbringing was largely free of privilege. She made the most of the few opportunities she was given. She was intelligent and she was tough.

When Tay returned to Singapore from London it was with a view to shaking up its legal and political system. It is therefore no coincidence that she went to work for David Marshall. Tay joined Marshall in 1957, a year after he resigned office as Singapore's first Chief Minister in a government formed by coalition.[27] Marshall's primary agenda had been to demand Singapore's self-governance.[28] When talks in London failed to deliver this outcome he resigned and returned to work as a barrister.[29] Marshall, a Singapore-born Iraqi Jew, was a very successful barrister, known for winning a majority of cases.[30] However, Tay soon became frustrated with the work she performed, finding it dull and repetitive and believing that it would be many years before she would be able to lead more exciting superior court proceedings.[31]

Academia, in contrast, provided opportunities for even junior scholars to take on grand causes and level criticism at both Singapore's legal system and government. Tay was angered by the persecution of the Chinese in South-East Asia.[32] Her family's treatment under Japanese occupation was just one example of the many instances of hardship inflicted on the Chinese diaspora.[33] In an article published in 1962 she quoted the Chinese Foreign Minister who, at a press conference in Taipei in 1957, said '[w]e Chinese … are being looked on as the Jews of Asia.'[34] Tay endorsed this sentiment and added that just as 'the anti-Semite saw only the rich Jew, so the South-East Asian nationalist speaks only of the rich Chinese.'[35] The worst example of prejudicial treatment she cited was in West Java, Indonesia, where a decree

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[25] Humphrey, above n 16.
[26] Ibid.
[27] Alice Erh-Soon Tay and Eugene Kamenka, 'Singapore-City State' (1960) 20 *Current Affairs Bulletin* 146, 156; Tay, above n 11.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Dorian Wild, 'The Law is No Fossil, says a New Professor', *The Australian* (Sydney) 21 January 1975, 3.
[32] Alice Erh-Soon Tay, 'The Chinese in South East Asia' (1962) 4 *Race* 34.
[33] Ibid.
[34] Ibid 41.
[35] Ibid 41.

> meant the expropriation of some 300,000 Chinese shopkeepers from villages. Officially, they were given eight months to sell their businesses … Military authorities in West Java not only cut short the period, but interpreted the decree to prohibit Chinese from living in the countryside altogether. Chinese were driven to the main towns and placed in camps. Violence flared up in several areas. In Tjimahi, near the Afro-Asian peace and friendship town of Bundung, Indonesian troops entered the village at 5am and began rounding up Chinese. Two Chinese women were shot and killed. Chinese who now 'wished' to leave Indonesia were encouraged to do so; they were forbidden to take either property or cash.[36]

Turning to Singapore, Tay cited policies requiring strong English language skills for employment and an education taught in English as drastically reducing the employment prospects of most Chinese people[37] and documented the numerous fundamental rights and freedoms eroded by the radical People's Action Party, elected in 1959.[38]

Tay's movement into academia in 1958, as an Assistant Lecturer at the newly created Department of Law at the University of Malaya (now the National University of Singapore), meant that she could freely and publicly criticise Singapore's government. Her one independently authored publication while at the University of Malaya was a doctrinal analysis of the Preservation of Public Security Ordinance.[39] Tay argued that the ordinance gave the government too much power and discretion to detain people in the absence of transparent grounds, gave citizens little scope to challenge detention orders and denied them natural justice. In another article that she co-authored with a colleague, J M H Heah, the pair boldly criticised the local judiciary, suggesting that its jurisprudence was unremarkable and inferior to that of the great judges of the common-law world, including Sir Owen Dixon and Benjamin Cardozo.[40] In both articles criticisms are expressed frankly and speak of a sense of frustration with Singapore's governance, legal system and laws.

The single most important event in Tay's early career was her introduction to a young Australian scholar, Eugene Kamenka. He was then aged 30 and she was 24. Kamenka had moved to Singapore from Canberra to take up a position as a lecturer in philosophy.

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[36] Ibid 36.
[37] Tay and Kamenka, above n 27, 155.
[38] Ibid.
[39] Alice Erh-Soon Tay, '"Conditional Release" under the Preservation of Public Security Ordinance' (1959) 1 *Malayan Law Review* 341.
[40] Alice Erh-Soon Tay, and J M H Heah, 'Some Notes on the Malayan Law of Negligence' (1960) 9 *Cleveland-Marshall Law Review* 490.

At the time he was two-thirds of his way through a PhD at the RSSS at the new ANU. His thesis was entitled 'The Ethical Foundations of Marxism' and an Australian philosophy professor, Percy Herbert Partridge, supervised it. Tay and Kamenka's friendship began when he sought her help. He asked her 'for examples of legal situations and cases for his students to explore their logical validity.'[41] A friendship and then romance soon followed.

Tay's relationship with Kamenka initially brought turmoil, imposing considerable personal and professional costs. Kamenka arrived in Singapore with a wife and two children. While only six years her senior, the relationship was considered taboo and she was labelled a 'scarlet woman'.[42] Their colleagues thought that the pairing was immoral and they were summoned by the Vice-Chancellor of the University of Malaya and asked to explain themselves.[43] This led to their resignation and departure from Singapore and dramatically (if temporarily) suspended their financial and professional security. At the time neither Tay nor Kamenka held postdoctoral qualifications. Kamenka was a good way through his PhD thesis at the RSSS but had not finished it. The extension he obtained in 1958 to allow him to take up his appointment at the University of Malaya was extended a number of times and he did not submit his thesis until March 1961, some time after the pair left Singapore.[44] From Singapore Tay and Kamenka took refuge in London.[45] Kamenka's strong writing skills enabled him to write pieces for the press and provided them with an income.[46]

While they may have held other ambitions, they ultimately looked to Canberra for refuge, and as a place where they could salvage their academic careers. Kamenka had a network of friends and colleagues at the RSSS and applied a number of times for a position there but was initially rejected.[47] He nonetheless eventually obtained a short-term contract as a Research Fellow[48] and throughout the early 1960s the pair survived on the scholarship

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[41] Horne, above n 13, 25.
[42] Horne, above n 12, 434.
[43] Ibid.
[44] Minutes of the Faculty of the Research School of Social Sciences, 21 March 1961 (Australian National University Archives, 206, Box 1, Research School of Social Sciences, Faculty and Faculty Board Minutes 15 February 1961 to 10 December 1964).
[45] Horne, above n 13, 25.
[46] Ibid.
[47] See, eg, Letters from Eugene Kamenka to the Registrar of ANU, 3 December 1960 and 28 June 1961(Australian National University Archives, 19, Box 19, Folio 2609); letter from the Registrar to Eugene Kamenka, 16 February 1961 (Australian National University Archives, 19, Box 19, Folio 2609).
[48] Minutes of the Board of the Faculty of the Research School of Social Sciences, 20 September 1961 (Australian National University Archives, 19, Box 19, Folio 2609).

money Tay received to complete a PhD at the RSSS and the income Kamenka received from subsequent short-term junior appointments.[49] Money was especially tight as Kamenka sent money overseas to support his two children.[50] It was not until 1965 that he was granted some permanency as a Senior Fellow.[51]

The turbulence of Tay's childhood therefore continued into her early career. Her departure from the University of Malaysia coupled with her frustration with its political system erased fond memories of Singapore and once in Australia she renounced her Singapore citizenship.[52] While the experience of leaving Singapore brought hardship it also brought a level of freedom and a broader perspective. Tay and Kamenka were later regarded as 'citizens of the world'[53] and much of their scholarship was written from the perspective of critical outsiders. The experience perhaps cemented in Tay the idea that success in life was the product of struggle and that an individual cannot rely on the support of others or expect to be treated fairly. Instead, she believed, one must fight.

### 6.3 An Open Mind — John Anderson

Tay's relationship with Kamenka played a critical role in shaping her academic agenda. He introduced her to several intellectuals who influenced Tay's scholarly beliefs and the work she performed throughout her career. One of her central beliefs was that scholars should devote themselves to studying 'big ideas … important ideas.'[54] She said '[y]ou don't work on some Wagga Wagga scientist, you work on Marx, Darwin, Lenin — if you must, although I don't like him — people like that. You open your mind, you don't close it.'[55] This was perhaps a lesson that Tay learnt from Kamenka who was grateful for his Australian schooling where teachers introduced him to the leading thinkers of great civilisations.[56] It was also something Kamenka's chief academic mentor, John Anderson, had instilled in him, encouraging his students to concentrate on older philosophical traditions rather than 'bow to the demands of fashion, convenience or authority.'[57] From

[49] Letter from Eugene Kamenka to the Registrar of ANU, 21 October 1964 (Australian National University Archives, 19, Box 19, Folio 2609).
[50] Letter from Eugene Kamenka to the Registrar of ANU, 3 December 1960 (Australian National University Archives, 19, Box 19, Folio 2609).
[51] Minutes of the Board of the Faculty of the Research School of Social Sciences, 8 September 1964 (Australian National University Archives, 19, Box 19, Folio 2609).
[52] Horne, above n 12, 434.
[53] John Passmore, 'Citizen of the World Whose Gift Was Liberty', *The Australian* (Sydney) 21 January 1994, 11; John A Moses, 'Eugene Kamenka 1928–1994 — The Great Cosmopolitan Australian' (1994) 40 *Australian Journal of Politics and History* 295. Horne argues that Tay too should be described as cosmopolitan: Horne, above n 12, 426, 427.
[54] Horne, above n 13, 18.
[55] Ibid.
[56] Kamenka, above n 6, 14.
[57] Ibid 21.

Anderson Kamenka said he had learnt that the 'first-class academic measures himself against first-class minds, against Plato, Hume, Hegel, Marx, Freud, Maitland, Keynes.'[58]

As Tay had not completed an undergraduate degree she had not been formally instructed about any particular contemporary school of thought. While she may have conducted her own independent studies (although there is no clear evidence of this) the absence of a strong intellectual mentor suggested that she was open to advice — such as that she received from Kamenka drawing on his mentor Anderson — on who and what was worth studying. Seeking refuge in grand intellectual traditions would also help Tay in her quest to wage war against the radical changes in governance and the general malaise she perceived in the societies she studied. Looking to the intellectual elite of an earlier age represented an escape from provincialism and provided an important weapon against oppressive politics, propaganda, complacency and mediocrity. It represented the key to both widening horizons and lifting standards.

Tay and Kamenka's relationship was no marriage of convenience. Those close to the pair speak of the relationship as one of affection and love. Kamenka is said to have clearly 'adored' Tay[59] and Tay was devastated when Kamenka died in the early 1990s.[60] However, as the professional and private were, for both of them, so closely intertwined it is necessary to speak of both a personal and intellectual alliance. They no doubt saw in each other an intellectual equal. While Kamenka's chief interest was in philosophy not law, his studies of societies and the philosophical foundations of social policies and attitudes required some consideration of law. Tay could provide such knowledge and she could also provide an insight into the culture and attitudes circulating within South-East Asia and China. The fact that Kamenka took up an appointment at the University of Malaya suggests that he wanted to learn more about the region.

What Kamenka offered Tay was a path into an intellectual tradition that rewarded lived experience as opposed to formal learning. Kamenka's studies were motivated by a sense of injustice similar to that felt by Tay over the treatment of her family and Chinese migrants more generally. Kamenka was born in Cologne, Germany, in 1928 to Russian Jews.[61] In 1937, just before the outbreak of the Second World War, his family migrated from Berlin to Sydney, Australia.[62] The Second World War and the treatment of Jews

[58] 'A Man who Learnt a Hell of a Lot', *The Canberra Times* (Canberra), 27 February 1975, 3.
[59] Krygier, above n 10; Ziegert, above n 10.
[60] Ziegert, above n 10.
[61] Kamenka, above n 6, 4–5.
[62] Ibid.

had a lasting impact on his scholarship. It ignited in him an interest in world politics, governance and social structures and ideas.[63] Coming from a culture that had been subject to strong and sustained attack and prejudice was something the pair had in common and paved the way for the political and social histories that they later wrote together. Further, the Bolshevik Revolution had played a central role in Kamenka's early life, leading to his fascination with Marxism.[64]

Kamenka was, however, different from Tay in that for much of his adolescence he lived in Australia, where he was shown kindness and given opportunities that he believed were absent in Europe[65] and, according to Tay, Singapore. Unlike Tay he had an academic mentor, John Anderson, and he was part of an exclusive club, what later became known as the 'Andersonians'.[66] As Anderson published very little, his ideas being bestowed primarily on his students through his teaching, it has been difficult for non-Andersonians to understand and interpret his ideas.[67] Kamenka identified a set of academic values that he received from Anderson's teaching and, as is evident from Tay's career and scholarship, he passed these on to Tay. They served as a motivating force. One of the clearest enunciations of these values is found in the following passages from a speech Kamenka delivered shortly before his death:

> We, who then called ourselves 'Andersonians', believed in free thought, in criticism and enquiry, in enterprise, in the natural cooperativeness of social and moral goods, in the integrity and independence of universities and academic institutions. We were pluralists. We elevated conflict, rejecting compromise and the illusion of a common interest. We fought censorship (whether religious, sexual or political) as well as government interference. We rejected both bourgeois commercialism and socialist planning. We repudiated obscurantism, the attempt to conceal or to palliate social and intellectual conflict by glossing over difference and distinctions. We rejected 'essentialism' and 'reductionism' as the attempt to reduce complex states of affairs to one fundamental essence, principle, or material base. We rejected 'atomism' as the elevation of pure particulars — there were none — and 'holism' as the attempt to make organisms or systems logically primary and what goes on in them always subordinate and derivative.

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[63] Ibid.
[64] Martin Krygier, 'Four Visions of Post-Communist Law' (1994) 40 *Australian Journal of Politics and History* 104, 104.
[65] Kamenka, above n 6, 9–10.
[66] Ibid 18–19.
[67] Creagh McLean Cole, 'John Anderson', in *The Stanford Encyclopedia of Philosophy* (Edward N Zalta (ed), Winter 2012 edition), <http://plato.stanford.edu/archives/win2012/entries/anderson-john/>.

> We pitted — or thought we pitted — sound logic and good argument against all appeals to the fashionable, the 'accepted, the comforting'.[68] …
>
> [Anderson's] outstanding characteristic was a clear-minded intellectual intransigence, a refusal to bow to the demands of fashion, convenience or authority. To use the language these sought to impose — the language of politicians, educational administrators, social reformers — was to already give the game away. Education was not the imparting of skills, business was not service but the search for profit, advertising was not the provision of information but the attempt to influence, by any, means.[69]

We can see these values reflected in various aspects of Tay's career.

Another important intellectual influence that emerged in the course of Tay and Kamenka's early Soviet studies was Pashukanis. In the very first article the pair wrote together and published in 1959 they drew liberally from Pashukanis's concept of Western law.[70] Much later, during a trip to USSR, the pair were given a copy of one of Pashukanis's books that had been hidden away by a Russian academic.[71] One interviewee, Klaus Ziegert, noted Pashukanis 'was one of those rare people who was not just a functionary in the machinery of Soviet law but also an accomplished legal theorist before and after the Sovietisation of Russia.'[72] Tay and Kamenka admired him for his serious attempt to examine, rather than caricature, Western law and for his integrity. He refused to adopt the political propaganda that Stalin and his minions, most notably Andrey Vyshinsky, advanced to replace scholarly thinking about law.[73] He paid for his convictions with his life — he was executed under Stalin's orders. While ultimately unsuccessful, he represented the potential for academics and their ideas to provide important opposition to governments. He firmed up Tay's belief that ideas were important; intellectuals were important. Like Kamenka, she believed that 'ideas and ideologies have consequences and are major contributors to socio-political change.'[74]

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[68] Kamenka, above n 6, 19.
[69] Ibid 21.
[70] Alice Erh-Soon Tay and Eugene Kamenka, 'Karl Marx's Analysis of Law' (1959) 1 *Indian Journal of Philosophy* 19.
[71] Horne, above n 13, 20.
[72] Ziegert, above n 10.
[73] See, eg, Alice Erh-Soon Tay and Eugene Kamenka, 'The Life and Afterlife of a Bolshevik Jurist' (1970) 19 *Problems of Communism* 72, 73.
[74] Nicolaas A Rupke and David W Lovell, 'Introduction' (1994) 40 *Australian Journal of Politics and History* 1, 1.

### 6.4 Possession

Tay's PhD thesis provides the first piece of tangible evidence of Anderson's influence on her career. In 1962 she was awarded a scholarship by the RSSS and began her thesis under the supervision of Sam Stoljar, one of two legal academics in the Department of Law.[75] Tay chose to write on 'The Concept of Possession in the Common Law'.[76] Many jurisprudential scholars from the common-law world had been attracted to the problems thrown up by the law of possession. In Australia the Professor of Jurisprudence at Melbourne, George Paton, had written on the topic[77] and it was something that the great legal writers Salmond, Pollock, Goodhart, D R Harris, Bentham, Dias and Hughes had studied in depth.[78] It was not, however, an emerging area. By choosing this topic, in accordance with Andersonian beliefs Tay placed herself within an old established tradition rather than looking to developments in modern learning.

One of the dominant intellectual traditions of Anderson's age was ordinary-language philosophy. Anderson was, for example, a direct contemporary of Gilbert Ryle. Anderson, nonetheless, rejected this school of thought in favour of older approaches to philosophy.[79] When Tay wrote her thesis Hart's scholarship, which drew liberally from the linguistic tradition, had become prominent within the common-law world. Hart believed that his 'jurisprudential predecessors, in seeking to illuminate the meaning of terms of legal art such as a "corporation" through definition, had been both asking the wrong question and using the wrong methods to answer it.'[80] As Lacey explained, '[i]nstead, he counselled a return to Bentham's and Frege's insight that such words can only be understood in the context of sentences in which they have meaning.'[81] An emerging scholar with jurisprudential ambitions, attracted to the elite, and looking to investigate a central common-law doctrine would, surely, have considered adopting Hart's approach to their study of possession. Yet Tay did not follow Hart's lead. Her approach suggests quite a different influence.

Tay's thesis was, in the words of Sir John Salmond, to attempt a 'complete theory of

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[75] Minutes of the Faculty of the Research School of Social Sciences, 3 March 1964 (Australian National University Archives, 206, Box 1, Research School of Social Sciences, Faculty and Faculty Board Minutes 15 February 1961 – 10 December 1964).
[76] Alice Erh-Soon Tay, *The Concept of Possession in the Common Law* (PhD Thesis, Australian National University, 1964).
[77] George Whitecross Paton, *A Text-Book of Jurisprudence* (Clarendon Press, 2nd ed, 1951) 454.
[78] Tay, above n 76, 5–7.
[79] Cole, above n 67.
[80] Nicola Lacey, *A Life of H L A Hart — The Nightmare and the Noble Dream* (Oxford University Press, 2004) 156.
[81] Ibid.

possession', one that provided 'an analysis of the conception itself' and an 'exposition of the manner in which it is recognised and applied in the actual legal system.'[82] While the other great jurisprudential scholars, including Salmond, had attempted such a theory Tay argued that their efforts had fallen short. Her argument was that the concept of possession 'enters the law not as a technical term but as an infra-jural relation of fact, recognised and protected by the law and used by it as the basis for obvious but important rights and obligations.'[83] By infra-jural relation she meant something that 'exists in fact independently of its recognition by law and which the law can only adopt as a fact (to which it then ascribes certain legal consequences).'[84] From an extensive analysis of case law dating back to the 1400s she deduced that 'the concept of control … provides a basis and an explanation for the important uses of "possession" in the common law.'[85]

Tay's thesis was therefore based on what she described as a conceptualisation rather than on linguistic analysis. Her work was an intellectual history of doctrine in the context of various common-law legal systems (English, Australian, Canadian) over many hundreds of years. She sought to challenge existing approaches by treating possession as an enduring logical concept, as one of many 'fundamental "rational" principles' lying at the heart of the common law.[86] In this respect she rejected the dominant view of the leading scholars of her age who suggested that such rational analysis was not possible.[87] Tay's approach had much in common with the work of German legal scholar Friedrich Carl von Savigny whose seminal work *The Law of Possession* was based on a historical study of the Roman Law of possession from which he, like Tay, developed his own concept of possession.[88] Tay's method, attempting to define the concept on the basis of an intellectual history, is very similar to his and her ultimate concept of possession — based on control — bears some resemblance to his concept of possession as resting on an intent to possess.[89] At the time of Tay's writing, Savigny's work was out of vogue. Rudolph von Jhering, another German legal scholar who is most famously known for his advocacy of instrumental approaches to law which gained particular traction in America in the first half of the 20th century, had challenged this body of thought.[90] In the course of his career Jhering came to reject Savigny's methods and theories, believing that they placed too

[82] Glanville L Williams (ed), *Salmond — Jurisprudence* (Sweet and Maxwell, 10th ed, 1947) 287, quoted in Tay, above n 76, 3.
[83] Ibid i.
[84] Patrick Keenan, 'Finders, Occupiers and Possession' (1983) 10 *Sydney Law Review* 180, 185.
[85] Tay, above n 76, 342.
[86] Ibid 7.
[87] Ibid.
[88] For a recent interpretation of Savigny's approach see David M Rabban, *Law's History* (Cambridge University Press, 2013) 94–7.
[89] Ibid 96.
[90] Ibid.

great a faith in logic.[91] Jhering came to see private rights such as possession as ultimately resting on social needs, not logical analysis.[92] Tay passed over the instrumental school in favour of Savigny's historical method. She preferred the old greats to popular writers.

In her work on possession Tay presented as a confident scholar who was frank (perhaps to a fault) in her attitude towards other scholars. Nothing was held back. At this time — the 1960s — her criticism of her leading contemporaries would have been interpreted by the legal academy as blistering. Perhaps the bluntness of her attack could be attributed to her feisty personality, another of her often remarked upon qualities.[93] However, the confidence with which she challenged the established, old, predominantly white and male, guard and boldly proclaimed a better view must also be attributed to Kamenka and Anderson. Following these intellectual influences she 'elevated conflict', 'reject[ed] compromise and the illusion of a common interest' and 'pitted … sound logic and good argument against all appeals to the fashionable, the "accepted", the comforting.'[94]

Parts of Tay's thesis were published in several prestigious law journals.[95] Her condemnation of fellow scholars, embodied in these articles, did not go unnoticed. Harris, a Fellow of Balliol College, Oxford, made specific reference to how Tay had assigned him (and the other scholars she critiqued) to the 'intellectual ice age' and branded him as 'an adherent to "nihilism".'[96] He argued, among other things, that Tay had begun with a false preconception, approaching 'the problem with the tacit assumption that there must be a unitary concept to explain the various uses of the same verbal symbol, "possession".'[97] He therefore believed that her approach was liable to oversimplify rather than elucidate the concept of possession. While her larger doctrinal thesis suggested that she had in fact comprehensively investigated and tested her assumption, his remarks suggest that she was nonetheless brave to submit such a

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[91] Ibid 109.
[92] Ibid 106–114.
[93] Tay's sometimes fierce and feisty nature is explained further in the following two chapters.
[94] Kamenka, above n 6, 19.
[95] Alice Erh-Soon Tay, 'Bailment and the Deposit for Safe-Keeping' (1964) 6 *Malaya Law Review* 229; Alice Erh-Soon Tay, '"Bridges v Hawkesworth" and the Early History of Finding' (1964) 8 *American Journal of Legal History* 224, Alice Erh-Soon Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1963-64) 4 *Melbourne University Law Review* 476; Alice Erh-Soon Tay, 'Possession and the Modern Law of Finding' (1962-64) 4 *Sydney Law Review* 383; Alice Erh-Soon Tay, 'Possession, Larceny, and Servants — Towards Tidying up a Historical Muddle' (1965-66) 16 *University of Toronto Law Journal* 145; Alice Erh-Soon Tay, 'Problems in the Law of Finding — The US Approach' (1964) 37 *Australian Law Journal* 350; Alice Erh-Soon Tay, 'The Essence of a Bailment: Contract, Agreement or Possession?' (1965-67) 5 *Sydney Law Review* 239.
[96] D R Harris 'Comment' (1963–64) 4 *Melbourne University Law Review* 498, 498.
[97] Ibid 498.

controversial work. It transpired that one of her examiners, David Derham,[98] was also of a 'prehistoric' mindset (to use Tay's characterisation) and therefore was opposed to her central thesis.[99] Her second examiner, on the other hand, the highly regarded English scholar, Glanville Williams, gave her thesis a favourable review.[100] Given his stature this would have provided Tay with a strong vote of confidence.[101] Her thesis passed without the need for amendments.[102]

### 6.5 The Sociological Tradition

Once Tay had completed her PhD she abandoned the jurisprudential 'greats' in favour of a school of thought that sat outside the discipline of law: the sociological tradition. This was Kamenka's chief interest. In a reference written for Kamenka, Anderson spoke of Kamenka's talents in the history of ideas rather than analytical philosophy.[103] Unlike other Andersonians, Kamenka wished to combine learning from the social sciences with philosophy and was particularly drawn to Ferdinand Tönnies (1855–1936). As one of the fathers of modern social science, Tönnies was, according to Anderson's criteria, a worthy subject of study and also a worthy intellectual mentor. Tönnies was a German sociologist and philosopher who, despite having a lesser reputation than Max Weber, is said to have provided 'arguably the first systematic sociological account to sketch an evolution from ancient to modern society.'[104]

Tönnies's interests and methodologies fitted Tay and Kamenka's interests and lives. Their intellectual paradigms legitimised theorising about societies based on observation. It suggested that there were robust and valuable ways to study political currents. We can postulate that Tay, having studied neither law nor philosophy at a university, was attracted to a scholarly tradition that gave credence to a person's lived experience and allowed for the study of a society. She did not have to start from scratch but could instead draw on the curiosity and frustrations that had beset her childhood and adolescence. As a former doctrinal student of Tay's astutely observed 'if you look into

[98] Minutes of the Faculty of the Research School of Social Sciences, 13 March 1964 (Australian National University Archive, 206, Box 1, Research School of Social Sciences, Faculty Board Minutes 15 February 1961–10 December 1964.
[99] Horne, above n 13, 27.
[100] Ibid 27.
[101] Ibid 27.
[102] Minutes of the Faculty of the Research School of Social Sciences, above n 98.
[103] Letter from John Anderson to the Registrar of ANU, 11 January 1961 (Australian National University Archives, 19, Box 19, File 2609).
[104] Mathieu Deflem, 'Ferdinand Tönnies (1855–1936)' *Routledge Encyclopaedia of Philosophy* (online), 2001, <http://www.rep.routledge.com/article/R048>.

the life and theories [of Max Weber and Ferdinand Tönnies] they are the closest to the way in which Alice Tay and Kamenka conducted their life.'[105]

Tay's subsequent studies combined doctrinal studies of particular laws and constitutions of Chinese and Soviet legal systems with an intellectual history of Marxist thought and a political history. Paradoxically, after leaving the RSSS Tay sat squarely within the social sciences, drawing connections between changes in politics and values within a society and their mode of governance. By prompting her to firm up her views on the common law and consider the concepts underlying the property law doctrine that was the antithesis of Marxist studies, her PhD helped shape some of her later sociological and comparative studies (discussed in the following chapter). However, it was not an obvious transition and suggests that initially she sought to explore an issue that accommodated the traditional legal methods she learnt as a practitioner.

While Tay and Kamenka did not subscribe to Marxist philosophies their methods nonetheless resembled those of Marx whose elucidation of the 'distinctions between feudal law, bourgeois law and the regulation of human affairs under communism' constituted 'an important example of the macro sociological approach.'[106] Tay's studies sat outside that of her colleagues in Australian law schools. As she and Kamenka noted, common lawyers have 'traditionally been ill at ease with the macro sociology of law.'[107] Her intellectual partnership with Kamenka therefore encouraged her to adopt an intellectual agenda that was different from other modes of study within Australian law schools.

### 6.6 The Australian Legal Academy

Joining the law faculty at the ANU in 1965 made very little impression on Tay.[108] Later in life she painted her colleagues in narrow terms suggesting that they were part of a boys' club.[109] There were no other full-time women in the faculty and Tay did not feel that she belonged. As explained in a later chapter on Sawer, the faculty did not have the interdisciplinary focus of the RSSS and had very little contact with the research school where Tay had completed her PhD. She did not, however, consider her differences to be a disadvantage. A large part of her tenure at ANU was spent abroad. She spent large

[105] Participant A, above n 9.
[106] Alice Erh-Soon Tay and Eugene Kamenka, 'Beyond the French Revolution: Communist Socialism and the Concept of Law' (1971) 21 *University of Toronto Law Journal* 109, 110.
[107] Ibid 109.
[108] Tay was made a part-time tutor in 1965, a senior tutor in 1966, a lecturer in 1967 and a senior lecturer in 1970.
[109] Horne, above n 13, 27, 30.

swathes of time in Russia and America studying Soviet law. She also visited leading universities around the globe (for example, Toronto and Cologne). While at ANU she taught across the curriculum and enjoyed her teaching.[110] She did not seek friendship, reward or recognition from her colleagues but instead sought to build her profile and reputation through prestigious publications and international connections.[111]

When reading about Tay's achievements it is easy to forget that she was a young Chinese woman in a sea of white, mostly Australian, men. Tay never drew attention to this fact nor suggested that it limited her horizons. Others noticed. Former High Court justice, Michael Kirby, for example, said that when he stood to defend his Master's thesis in front of his examiners, Tay and Kamenka, she commanded his respect and also instilled an element of fear:

> First of all remember we are talking about 1967 or thereabouts. At that time feisty women were thin on the ground in the law. It was a very unusual experience for me to be interrogated in such an assertive, confident, upfront and dynamic way by a then still quite young person who was a woman. Secondly, the times were still in the midst of white Australia, so not only did I have to grapple in my psyche with the fact that my interrogator was a woman she was an Asian woman. She was not in the least lacking in confidence because of that. On the contrary she was assertive and obviously in charge of the examination. Thirdly, she was someone whom I had not met before and was somewhat different to the quiet, reflective, contemplative atmosphere of the Jurisprudence Department at the University of Sydney.[112]

Tay's endeavour was not shaped by a sense that she ought to fit in or conform to scholarly norms within Australia. Her attitude would suggest that her minority status, rather than being a disadvantage, provided her with a unique vantage point from which she could appraise disciplinary practices and avoid any compromises that might come from a sense of group belonging. She was a tough, independently spirited woman whose academic mentors and partners no doubt buoyed her confidence and belief that scholars should scrutinise existing conventions and modes of governance rather than join them.

At least until 1975 it therefore appears that the Australian legal academy had very little influence on her formative development and subsequent career. Tay's later career

[110] Horne, above n 13, 31.
[111] Ibid 27.
[112] Interview with Michael Kirby (by telephone, 14 March 2015).

suggests that if it had any influence at all it was to encourage Tay to stand apart from, rather than fit in with, her colleagues.

### 6.7 Concluding Remarks

In many ways Tay's early life was difficult. It is staggering that someone from such humble beginnings could achieve such prominence both in the Australian legal academy and the world of legal theory. The success she achieved points to both a sense of resilience and strong intelligence. Her life and early mentors explain why she put so much store on her career, why she wished to embody and advocate for a strong set of academic values and why she had such a strong aversion to complacency.

The scholarly values that she developed in this early formative period sustained Tay's career and fed into what, I argue, was her greatest contribution to the Australian legal academy: the governance of the Department of Jurisprudence at the University of Sydney. It is to that contribution that this thesis now turns.

# 7 TAY AND THE DEPARTMENT OF JURISPRUDENCE — PART 1

## 7.1 Introduction

Identifying Tay's contribution to the Australian legal academy during the remaining 26 years of her academic career raises controversial political and intellectual questions that have not, until now, been fully explored. The controversy stems primarily from her appointment as Challis Professor of Jurisprudence at the Faculty of Law at the University of Sydney where she chose to lead the Department of Jurisprudence ('the Department') — being one half of the Department of Jurisprudence and International Law that Julius Stone created and headed. It is tempting to align Tay's contribution with that of the Department. This is problematic because those who opposed the Department's existence argued that it contributed little to either the University of Sydney or the Australian legal academy.[1] While former critics of the Department acknowledge Tay's significant achievements they are attributed to her personal attributes and the opportunities that stemmed from her position as Professor of Jurisprudence, rather than the culture and community of the Department.[2] Similar arguments are made about the achievements of her colleagues in the Department. If we accept these views then equating Tay's contributions to the legal academy with that of the Department may mean that she contributed very little. Others, most obviously those who were formerly in or associated with the Department, suggest that Tay's leadership of it was critical to their contributions and successes.[3]

In one sense this thesis sympathises with those who supported the continued existence of the Department. In this and the following chapter I argue that the Department both enabled Tay to make important contributions to the legal academy and explains many of her contributions. Of course, the mere appointment to such an esteemed position as the Professor of Jurisprudence at Sydney — becoming Stone's successor — might have encouraged anyone to strive to live up to the role by publishing strong works of scholarship. However, by giving Tay the autonomy to work with a small carefully chosen group of scholars, the responsibility for a small but compulsory part of the law curriculum and the ability to host accomplished academic visitors, Tay was empowered to drive initiatives and shape the Faculty of Law in ways that she may not have done

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1 This chapter provides a detailed account of such views.

2 Interview with Jeremy Webber (By telephone, 22 October 2014); Interview with James Crawford (by telephone, 25 November 2014); Interview with Ron McCallum (by telephone, 4 November 2014).

3 This is detailed in Chapter 8.

merely as a Professor of Jurisprudence. Rather than working as an individual she now had the authority and resources to advance initiatives directed by the scholarly beliefs identified in the previous chapter.

Even if such additional effort was not the logical or natural consequence of merely heading the Department, it is the logical and natural response of someone who believed that Department to be under threat. Within the first three years of Tay's tenure at Sydney the precarious position of the Department was made very clear to her. As a consequence, in the first 15 years of her leadership much was done to drive ambitious teaching and scholarly initiatives, promote the Department and win allies. While securing the Department's survival was not Tay's only motivation there is evidence to suggest that it was central to her thinking. In this sense the existence and context of the Department played a crucial role in enabling and motivating Tay to make a number of important contributions to Australia's legal academy.

This chapter supports this argument in two ways. First, it explains that Tay made a conscious choice to maintain and run the Department throughout the whole of her tenure. She did so knowing that her decision would reignite divisions and hostilities within the Faculty of Law. Her choice to head the Department, coupled with the effort she subsequently expended ensuring its existence, suggests that she believed that the Department had special qualities that were of value to her, her colleagues and the legal academy.

Second, this chapter draws connections between Tay and Stone's leadership of their respective departments. Something that ought to be recognised is that Tay was not merely Stone's successor in name only. While Tay's scholarship was markedly different from Stone's — her work sat within a different tradition and she published many articles and book chapters but never any weighty tomes similar to Stone's — she carried on Stone's legacy in a different way, through her management of the Department. She embedded in the Department many of the characteristics that Stone had pioneered and there is evidence to suggest that she looked to Stone's model for guidance. By carrying on the Department for a further two decades Tay extended this aspect of Stone's legacy. Controversy over the Department and its importance to the Faculty of Law at Sydney has meant that this connection between Tay and Stone has not been properly acknowledged.

## 7.2 Reigniting Decades of Division

### 7.2.1. The First Challenge

The Department of Jurisprudence and International Law was created shortly after Kenneth Owen Shatwell was appointed Dean of the Faculty of Law at Sydney in 1947.[4] As explained later in this chapter, there had been significant friction between the previous Dean of Faculty, Professor James Williams, and Stone. Shatwell approached the Vice-Chancellor, Sir Stephen Roberts, with the proposition that the Faculty should be divided into two separate departments, the Department of Law and the Department of Jurisprudence and International Law.[5] He believed that providing Stone with autonomy over his sphere of academic activity (both teaching and research) would reduce the potential for conflict between Stone and other members of the Faculty.[6] The Vice-Chancellor acquiesced.[7] However, contrary to Shatwell's original motivations tensions between Stone and the rest of the Department remained throughout the ensuing decades and in some ways were transformed from a conflict between personalities to a conflict between the two departments.[8]

That Tay would embody and honour some of Stone's central beliefs and attributes was soon made known to critics of what became the Department of Jurisprudence. Tay took up her appointment as Professor of Jurisprudence on 10 January 1975.[9] Before her appointment it had already been proposed that upon Stone's retirement the departmental structure be abolished.[10] Three years later, in 1978, the Vice-Chancellor, Bruce Williams, returned to the issue of whether the departmental structure ought to be maintained.[11] He commissioned a report by the Deputy Vice-Chancellor, Professor O'Neil, who recommended that the Department of Jurisprudence and International Law be changed to a Department of Jurisprudence.[12] Williams accepted the recommendation.[13]

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[4] W L Morison, 'Professor K O Shatwell 1947–73' in John and Judy Mackinolty (eds) *A Century Down Town — Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 105, 116; Bohdan Bilinsky, 'Shatwell, Kenneth Owen (1909–88)' in *Australian Dictionary of Biography* (Melbourne University Press, 2012) vol 18 <http://adb.anu.edu.au/biography/shatwell-kenneth-owen-15518/text26730>.

[5] Ibid.

[6] Morison, above n 4, 116.

[7] Ibid.

[8] This is detailed further later in this chapter.

[9] Professorial Board Minutes, 18 November 1984, 1172 (University of Sydney Archives G2/1); 'Appointments', *The University of Sydney News* (Sydney), 5 March 1975, 30.

[10] Starr suggests that it was proposed in early 1972: Leonie Starr, *Julius Stone – An Intellectual Life* (Oxford University Press, 1992) 242.

[11] Faculty of Law Minutes, 8 December 1978, 12 (University of Sydney Archives, G3/2).

[12] Ibid.

[13] Ibid.

Tabling the Vice-Chancellor's recommendation at a meeting of the Faculty of Law provided an opportunity for those who wanted to abolish the Department of Jurisprudence and those who had a strained relationship with Stone to make themselves known to Tay. Professor P H Lane tabled a motion that the Vice-Chancellor 'delay the implementation of the recommendation until the Faculty had an opportunity to discuss the separation fully' and noted the 'Vice-Chancellor's omission to seek the Faculty's formal view on this separation.'[14] The Professor of International Law who was appointed shortly after Tay, David Johnson, was Acting Dean and Chair of the meeting. He ruled the motions out of order, stating his view that the Vice-Chancellor 'had acted properly within an area which was solely within his competence for the balance of his recommendations.'[15] A motion was made for Johnson to vacate the Chair, which he did, and John Mackinolty was elected Chairman for the purpose of presiding over the question of whether Johnson's ruling was appropriate.[16] William (Bill) Morison then put a case for returning to Lane's original motion and the Faculty redrafted it. On the critical question of whether to invite the Vice-Chancellor to reconsider his recommendation, the votes were tied with 16 votes for and against.[17] The motion was lost in the absence of a clear majority and the meeting adjourned. At the following meeting the central part of the motion, to question the Vice-Chancellor's decision, carried, 15 votes to 13.[18] The Vice-Chancellor did not, however, reconsider his decision and, as explained below, the Department of Jurisprudence remained in existence for another two decades.

Although Tay was present at both meetings there is no record of any views she expressed concerning the motion. One of Tay's new colleagues in the Department of Jurisprudence and the first of Tay's academic appointments, Martin Krygier, remembers that it was an important moment in marking the continuation of divisions between the two departments, recalling an argument between him and Morison over the matter.[19] He recalled that at around that time Tay 'had completely lost faith in Morison and the others on grounds of, as she put it, academic principle.'[20] It was the first time they had quarrelled.[21] He also believed that at that time the attempt to abolish the Department weighed heavily on Tay and that despite her tough disposition 'she almost broke' and 'was much more fragile.'[22]

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[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Interview with Martin Krygier (Law School, University of New South Wales, 7 February 2014).
[20] Ibid.
[21] Ibid.
[22] Ibid.

As indicated in the minutes of the meeting, Professors Morison and Lane presented as the leading protagonists.[23]

Morison had a long history within the Faculty and at the University of Sydney. He was a student of the University of Sydney, beginning his studies in 1937, graduating in 1940 with first class honours and the university medal in both history and philosophy and graduating in l944 in law again with first class honours and a swag of scholarships and prizes.[24] In 1946 following time as an articled clerk and work in the Department of External Affairs as part of the war effort, he was appointed a lecturer in law at the University of Sydney where he remained until his retirement in 1985.[25] In 1949 he accepted a scholarship from ANU to conduct a doctoral thesis into tort law at Lincoln College at Oxford.[26] He taught in the Faculty of Law at the University of Sydney from 1946 until 1985, having been appointed a professor in 1959, and wrote scholarship in the fields of torts, jurisprudence, evidence and procedure.[27] Like Kamenka, Morison studied philosophy under John Anderson and attributed Anderson as a significant ongoing influence in his work.[28] He was a man of obvious intellectual ability with a strong interest in philosophy and history that perhaps either equalled or surpassed his interest in law. He was admired by many people: for example, Australian torts scholar Professor Carolyn Sappideen, who spent time as Morison's research assistant, described him as 'the most outstanding intellectual and scholar I ever met.'[29]

Several interviewees for this project attested to the personal and professional animosity between Stone and Morison that carried forward into relations with Tay.[30] Krygier recalled Morison 'bitterly' telling him that he had come to 'Sydney hoping to teach jurisprudence and Stone blocked him on the grounds that he was an Andersonian.'[31] Given Morison's strong interest in both history and philosophy one would have thought he would have earned a place in Stone's department; yet he remained in the Department

[23] Minutes, above n 11.
[24] Curriculum Vitae of William Loutit Morison (Professor W L Morison Memorial) <http://www.nealemorison.com/wlmorison/cv.htm>.
[25] Ibid.
[26] Ibid; Julie Robatham, 'Obituary for W L Morison' *Sydney Morning Herald* (Sydney) 14 April 2000, 32.
[27] Ibid; Jeremy Webber, 'In Memoriam — William L Morison' (Professor W L Morison Memorial) <http://www.nealemorison.com/wlmorison/webber.htm>.
[28] Webber, above n 27.
[29] Carolyn Sappideen, 'Eulogy for W L Morison' (Professor W L Morison Memorial) < http://www.nealemorison.com/wlmorison/sappideen.htm>.
[30] Krygier, above n 19; Crawford, above n 2; Interview with Christopher Birch SC (Garfield Barwick Chambers, Sydney, 28 July 2014).
[31] Krygier, above n 19.

of Law teaching jurisprudence in a first-year law subject. There are some signs that when Morison joined the Faculty in 1946, and over the ensuing decade, he was on good terms with Stone, with Stone approaching Morison for his views on various topics and putting him forward for some teaching opportunities.[32] Yet it is equally clear that the pair had quite different views on jurisprudence and that Morison objected to the division of the Faculty into two departments, describing it as a 'pioneer in unintelligible developments, which subsequently spread over the tertiary educational system of the State generally.'[33] There is also some suggestion that Stone treated Morison badly. For example, Morison describes an incident where the former Professor of Jurisprudence at Oxford, Arthur Lehman Goodhart, visited the University of Sydney and delivered to Morison a note from Hart that read '[s]ay a word of encouragement to W L Morison, I think Stone bullies him.'[34] In print at least Morison, however, maintained that he did not feel that Stone treated him any worse than anyone else.[35]

In Starr's biography of Stone she quotes Morison saying that his colleagues' criticisms of Stone were merely 'academic' commentary,[36] however students and others characterised arguments as intensely personal.[37] When Starr compiled her biography several of Stone's adversaries in the Faculty were still alive and were employed at Sydney. This would have made it difficult to fully investigate the dispute between Stone and Morison and between the two departments. Comments made by some of the interviewees for this study suggest that Starr's biography does not convey the full extent of the hostility over the departmental structure that existed throughout Stone's tenure.[38]

The staff meeting in 1978 and Lane's motion reignited the previously strained relationship between the departments and from that moment forward Tay was in no doubt that the position of her Department was anything but secure. Not only did this recreate divisions between the two departments, this sense of being under threat also, as I will explain, fed back into Tay's agenda for her Department. While Tay and Morison had Anderson in common and, indeed, Morison published a chapter in a book Tay edited,[39] it

[32] Morison, above n 4, 114, 119, 122.
[33] Ibid 116.
[34] Ibid 126.
[35] Ibid.
[36] Starr, above n 10, 110.
[37] Ibid.
[38] Birch, above n 30; Crawford, above n 2.
[39] W L Morison, 'Frames of Reference for Legal Ideals' in Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay, *Law and Society* (Edward Arnold, 1978).

appears that her decision brought a strain to that relationship as well.[40] In these respects her position at Sydney and the precarious nature of the Department began to mirror the conditions that Stone had operated under for many decades.[41]

### 7.2.2 Origins of the Division

The divisions can in fact be traced to before Stone's time. In the 1940s and 1950s the Faculty of Law at Sydney University showed little signs of becoming a liberal ambitious law school like Melbourne, with its Jewish Dean and great enabler of the people, Zelman Cowen, and strong American ambitions. Speaking of the 1930s and 1940s former judge of the Supreme Court of New South Wales, Rae Else-Mitchell made the following comparison:

> This was a period of stimulating influence in the University of Melbourne which manifested a spirit of liberal thought not equalled by the other universities and law schools in Australia. At a time when law teaching in Sydney was dominated by Peden's black-letter conservatism and attempts were made to muzzle John Anderson as an atheist and anti-imperialist, students in Melbourne were being introduced by teachers like Kenneth Bailey and 'P D' Phillips to Holmes and Pound, both of whom were hardly known in Sydney.[42]

From 1910 to 1940 Sir John Peden had been Dean at Sydney. Generally feared by students[43] and considered strongly parochial,[44] Peden's principal interests lay in the technical doctrinal aspects of law and he did not attempt to write or publish any strong works of scholarship.[45] He was a practitioner teacher rather than a scholar. He had strong connections to both bench and Bar and was a member of the Legislative Assembly.[46] For Peden one of the principal roles of the law schools was to ensure that

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[40] Krygier, above n 19.

[41] In the late 1980s the division was also reflected in an assessment of the discipline of law in Australia commissioned by the Commonwealth Tertiary Education Commission. The committee suggested the abolishment of the Department of Jurisprudence: Pearce, Dennis, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), lxxxvi.

[42] R Else-Mitchell, 'Introduction' in Leslie Zines (ed), *Commentaries on the Australian Constitution — A Tribute to Geoffrey Sawer* (Butterworths, 1977) xix, xxi.

[43] Judy Mackinolty, 'Learned Practitioners — Professor John Peden 1910–41' in John and Judy Mackinolty (eds), *A Century Down Town — Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 57, 77.

[44] Ibid 76.

[45] Ibid 77–8.

[46] Ibid 57, 76.

future practitioners had an accurate understanding of the law.[47] Perhaps as a consequence, his lectures were considered dull.[48]

Peden's one other full-time colleague, Archibald Charteris, appointed to the new Challis Professor of Jurisprudence and International Law in 1920, was in many ways Peden's opposite. Charteris had spent his formative years overseas, as a student then teacher at various Scottish universities, was interested in the broader aspects of law and wrote and published in a literary style.[49] He was charismatic and his teaching appealed to students whose faces were said to 'light up with affection and admiration at Charteris's name.'[50] He did much to advance the study of international law in Australia and, at a time when overseas travel from Australia was long and difficult, attended several international conferences in places from Japan to Canada.[51] He also became a public figure, being a regular and very successful radio broadcaster.[52] He has been described as 'one of the most colourful legal and academic figures in Sydney: "a great scholar and a very lovable man"'.[53]

It would have come as quite a surprise to these two men that throughout the 20th century caricatured versions of Peden and Charteris — the narrow technocrat and the broad-minded theorist — came to represent some aspects of the central division within the Faculty of Law. In the late 1940s Sawer noted the friction he observed between Shatwell, then the Dean of the Faculty of Law at Sydney, and Stone during one of the Australian Law Schools Association ('ALSA') conferences.[54] He astutely observed that 'one of the curses of the Sydney Law School has been the inability of the senior professors to get along with one another.'[55] While only a brief sketch of the various conflicts can be outlined in this study that is devoted to Tay's role in the Faculty post-1975, it is nonetheless worth noting some of the events and attitudes as they help explain the task that lay ahead of Tay once she decided to maintain the Department.

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[47] John M Ward, 'Peden, Sir John Beverley' (1871–1946) in *Australian Dictionary of Biography* (Melbourne University Press, 1998) vol 11 <http://adb.anu.edu.au/biography/peden-sir-john-beverley-8008>.
[48] Ibid.
[49] Ibid 77.
[50] Ibid 77.
[51] J G Starke, 'Charteris, Archibald Hamilton' (1874–1940) in *Australian Dictionary of Biography* (Melbourne University Press, 1979) vol 7 <http://adb.anu.edu.au/biography/charteris-archibald-hamilton-5564>.
[52] Ibid.
[53] Ibid.
[54] Mel Pratt, Inteview with Geoffrey Sawer (Oral History Interview, Canberra, 16 November 1971) <http://nla.gov.au/nla.oh-vn765219 >.
[55] Ibid.

The more unseemly aspects of this division began in 1941 when, under a cloud of controversy, Stone was given the Chair. Starr has documented the objections that were made to Stone's appointment by members of the profession as well as Peden who resigned from the Senate following the appointment.[56] She explains that motivations included anti-Semitism and conservatism over Stone's particular brand of sociological jurisprudence.[57] While Stone and his supporters, including many of his future students at Sydney,[58] triumphed and he commenced his appointment in 1942, the animosity did not dissipate. The professor appointed at the same time as Stone and succeeding Peden as Dean, James Williams, objected to Stone's presence in the Faculty of Law for personal reasons including some that were racist.[59] Williams did not want to work with a Jew.[60]

The two were also divided on matters of governance. Stone hoped to build a large academic enterprise where teaching was conducted full-time by career academics with the time to devise inventive teaching initiatives.[61] Williams, on the other hand, even after the war was content to leave matters largely as they had previously been with much of the teaching being conducted by legal practitioners who taught part-time.[62] His loathing of Stone meant that he attempted to avoid him wherever possible.[63] The division led to the pair governing two separate spheres of the law school: the Department of Law and the Department of Jurisprudence and International Law.

While Williams did not stay long at Sydney, resigning in 1945 following further animosity and tension with Stone,[64] the division between the theoretical and technical teaching of law that began with Peden and Charteris and was transferred to Williams and Stone continued over following decades. As noted above, there were signs of friction between Stone and a subsequent Dean, Shatwell, and there were also signs of tension between Morison and Stone. Rather than harmonising the Faculty and limiting the potential for tension between professors within the Faculty as Shatwell had planned, dividing the Faculty into the two departments was instead viewed as an arrangement that

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[56] Starr, above n 10, 56 – 67.
[57] Ibid 59–60.
[58] Ibid 63.
[59] Ibid 64.
[60] Ibid 64. Starr quotes correspondence from Williams: 'I don't want to be plagued by a Hebrew for the rest of my life.'
[61] Ibid 79–80.
[62] Ibid.
[63] Ibid 80.
[64] Ibid 103–7.

privileged members of Stone's Department.[65] In 1953 Shatwell and Stone had taken steps to ensure that:

> the spheres of the Professor of Law and the Professor of Jurisprudence and the International Law be finally and authoritatively defined on the basis of the complete separation and the autonomy of each Professor in his respective field.[66]

What, perhaps, could not have been anticipated at this time was that Stone's scholarly reputation would grow in strength, particularly among his students who went on to become leading members of Australia's legal profession and the division at least in the 1960s began to represent the demarcations between the enlightened (Stone's Department) and the technocratic (the Department of Law).[67] Further the small nature of Stone's Department meant that he and his few, handpicked colleagues could more easily pursue their own goals. Stone's Department therefore took on an appearance of elitism and privilege.

The lingering tension between the two parts of the Faculty is illustrated by the fact that Stone's retirement from the university was almost as controversial as his appointment. As Starr has dealt extensively with the disputes that erupted at that time the detail will not be repeated here.[68] Ructions within the university arose from two key matters. First, there was a suggestion that Stone's Department should be abolished following his retirement.[69] Second, Stone was excluded from a meeting of the Professorial Board where a decision concerning the appointment of a new Professor of Jurisprudence and International Law was to be made. The exclusion spoke of yet another instance of anti-Semitism. The Professorial Board's meeting was scheduled on the 'Jewish Day of Atonement, the most sacred day of the religious calendar, on which no secular work can be undertaken by any practising Jew.'[70] The bitterness was compounded by the fact that the university did not offer Stone an office or honorary position so that he could continue his association with Sydney.[71]

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[65] Future members of Tay's Department said that arguments for its abolishment were sometimes based on the suggestion that those in the Department had lighter workloads and benefited from greater autonomy in their affairs: Krygier, above n 19. Interview with Klaus Ziegert (Law School, University of Sydney, 5 February 2014).
[66] Starr, above n 10, 112.
[67] See, eg, Michael Kirby, 'The Graduating Class of Sydney Law School 1962: Talented, Lucky, Unquestioning' (2012) 36 *Australian Bar Review* 189, 196, 199–200.
[68] Ibid 243–50.
[69] Ibid 243.
[70] Ibid 244.
[71] Ibid 249–50.

### 7.2.3 Tay's Appointment

Tay was not appointed Professor of Jurisprudence until after Stone's retirement. At the controversial Professorial Board meeting the Board had decided to appoint Professor Clive Parry to Stone's former professorship but he later declined the offer.[72] The Board then decided to split the professorship and advertise for both a Professor of Jurisprudence and a Professor of International Law. Tay filled the former position in 1975 while David Johnson from the LSE commenced his new role as Professor of International Law in 1976.[73]

Securing the appointment of Tay and Johnson could have signalled the end of bitterness and divisions within the Faculty of Law. Johnson decided to abandon the notion of a separate department so that left Tay to decide whether to do the same. Starr speculates that Johnson's decision was 'possibly because of his belief that his lifelong struggle to have his subject recognised as an academic discipline would be enhanced by association with black-letter law subjects.'[74] In response to the advertisement for the two professorships the university received four applications from scholars with an interest in the jurisprudential role.[75] Two of the applicants had formerly been part of Stone's department and one such person, Tony Blackshield, was shortlisted for the position.[76] His referees included Julius Stone along with a number of strong foreign scholars.[77] The appointment committee, however, did not appoint Blackshield but instead sought an application from Tay.

Given that they were both strong applicants with impressive international referees there is nothing particularly odd about Tay being chosen over Blackshield. However, the fact that Tay did not apply but was sought out at a time when references had been sought in relation to Blackshield's application suggests that some members of the university may have taken steps to prevent the appointment of a member of Stone's camp. This may have been because they either disliked Stone or opposed the Department. It might have been because they believed that such an appointment would have furthered, rather than ended, the bitterness between the two departments. Some may also have thought that given his history Blackshield would be less amenable to merging the two departments. Tay, being

[72] Ibid 248.
[73] Ibid 248–9.
[74] Ibid 249.
[75] Professorial Board Minutes, 21 October 1974, 1004 (University of Sydney Archives G2/1).
[76] Ibid. For an account of Blackshield's accomplishments see Michael Kirby, 'A R Blackshield and Realism in Australian Constitutional Law' (2013) 11 *Macquarie Law Journal* 7.
[77] Ibid.

someone who was not closely associated with Stone, presented as a safer bet on all of these fronts.

There are rumours that certain members of the Faculty believed Tay, like Johnson, would be more amenable to a merger and, as a young woman, seemed a soft target. On the one hand the rumours seem plausible. Tay and Kamenka were known to the Faculty of Law as in the first half of 1974 they had both spent a semester teaching jurisprudence at Sydney to fill part of the hole created by Stone's retirement.[78] Tay's networking skills may have helped her establish rapport with members of the Faculty during this time. One of the leading opponents to Stone's Department, Morison, was a known Andersonian and so one imagines that he would have appreciated Tay's link with Kamenka and believed that their shared outlook meant that she would be more amenable to the merger that Morison wanted. Krygier believes that when she joined the Faculty she was prepared to close the Department but then changed her mind.[79]

On the other hand, the sexism implicit in this theory — that as a young woman she was weak and therefore an easy target — seems less likely. As Tay had already spent six months teaching at Sydney the Faculty would have become acquainted with her personality. Almost everyone interviewed about Tay for this project commented on her strong disposition. They referred to Tay's scathing frankness[80] and 'fierceness'.[81] Klaus Ziegert, Tay's colleague in the Department, said that she never conveyed a sense that she 'felt intimidated or inferior or any of these, let's say, female attributes.'[82] Shortly after Tay's appointment to the professorship a Sydney newspaper, *The Daily Mirror*, began an article with:

> Professor Alice Tay is tiny, dainty and possibly the toughest woman in the southern hemisphere — and that includes the Philippines' Steel Butterfly, and Vietnam's Dragon Lady.[83]

This confidence and strength were therefore evident to others long before she arrived at Sydney.[84] She was anything but demure.

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[78] Professorial Board Minutes, 18 March 1974, 103 (University of Sydney Archives G2/1).
[79] Krygier, above n 19.
[80] Ziegert, above n 65; Interview with Wojciech Sadurski (Law School, University of Sydney, 31 July 2014).
[81] Interview with Michael Kirby (by telephone, 14 March 2015).
[82] Ziegert, above n 65.
[83] 'Brains-and-beauty Alice Has Her Life All Mapped Out', *The Daily Mirror* (Sydney), 28 April 1975, 12.

If part of the thinking that led to Tay's appointment was that she would acquiesce to the closure of the Department, her appointees could not have been more wrong. Not only did Tay decide to relentlessly defend the existence of her Department, she did so in a way that was destined to reinforce divisions within the Faculty. Perhaps unbeknownst to her appointees she possessed several of Stone's attributes and values that meant that rather than erasing memories of Stone's presence, many of the characteristics of Stone's Department were, to a large extent, reincarnated.

### 7.3 Stone's Successor

In this section I explain how Tay's agenda and methods in sustaining the Department were similar to Stone's. In other words, I explain how she continued Stone's legacy. I explain that there were good reasons for maintaining the Department as a 'beachhead' for jurisprudence and that its existence ensured that Sydney law students were introduced to broader ways of thinking about law. I also detail two of the key aspects of Stone's Department that Tay preserved: its diversity and international orientation. Finally I suggest that during the later chapter of Tay's tenure some of the reasons for opposing the Department changed and that these changes made it more difficult for Tay to defend its existence.

#### 7.3.1 Tay's Credentials

When applying for the Chair Tay's resume and scholarly record spoke of her strong intelligence and international reputation. Her referees — Harold Berman of the Law School at Harvard, John N Hazard of the Law School at Columbia University, Colin Howard of the University of Melbourne and H Whitmore, the Dean of the University of New South Wales — were each loud in their praise of Tay.[85] Commendations included that in 'her combination of legal scholarship, linguistic ability, capacity for handling abstract ideas and power of analysis, she is unique in this country'; that she 'brings to her studies not only a thorough knowledge of Soviet and Western literature but also a very keen mind both in the analytical and philosophical sense'; that she is 'a very good lawyer and at the same time is capable of stepping back from legal analysis to examine its philosophical implications'; that she is an 'excellent speaker and teacher who is patient with students, but demanding, and she succeeds in getting a very good response from them'; and 'she has contributed a great deal to faculty discussion on such matters as

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[84] Kirby, above n 81.
[85] Professorial Board Minutes, 21 October 1974, 1004 (University of Sydney Archives G2/1).

course content, curriculum revision and faculty management.'[86] We can assume that the final two comments are from Whitmore who had previously been Tay's Dean at ANU.[87]

Berman and Hazard were each highly accomplished scholars who had written much in what was at that time Tay's primary field of interest. In the decade following the completion of her PhD (1965–75) the focus of her studies was providing a framework for comparative lawyers so that the unstable and seemingly alien Soviet and Chinese legal systems could be compared with those of the West. This was a task that she began with Kamenka during her first trip to Russia in 1965. In addition to her lived experience described in the prior chapter, the trip served as a kind of apprenticeship.[88] Soon after she began to study China on her own.[89] Tay's attitude towards opening up these cultures and legal systems is captured neatly by Marx's favourite moral principle and motto: 'Nothing human is alien to me.' She and Kamenka quoted it in several of their works.[90] Using a kind of sociological method that involved a historical study of the major social and legal changes within each society,[91] Tay endeavoured to identify and understand modes of governance in the USSR and China and the ideas and political events on which they were based. By gaining stronger understandings of the core characteristics behind each of these systems and the commonalities and differences between them she believed that she

[86] Ibid.

[87] For an account of aspects of Whitmore's life and career see Don Harding, 'Professor Harry Whitmore' (1982) 5 *University of New South Wales Law Journal* 189; Michael Kirby, 'Three Law Deans — and What They Teach of Deanship' (2014) 42 *Federal Law Review* 589, 597–99.

[88] In his letter to the Registrar of ANU, Kamenka said that Tay would 'want to be given an intensive course in Russian language and considerable aid and guidance in her researches into Soviet law and jurisprudence': Letter from Eugene Kamenka to the Registrar of ANU, 21 October 1964 (Australian National University Archives, 19, Box 19, Folio 2609, Kamenka Personnel files).

[89] Alice Erh-Soon Tay, 'Law in Communist China — Part 1' (1969) 6 *Sydney Law Review* 153. The work was part of a trilogy: Alice Erh-Soon Tay, 'Law in Communist China — Part II' (1971) 6 *Sydney Law Review* 335; Alice Erh-Soon Tay, '"Smash all Permanent Rules": China as a Model for the Future' (1976) 7 *Sydney Law Review* 400.

[90] See, eg, Alice Erh-Soon Tay , 'Introduction', in A E S Tay (ed), *Australian Law and Legal Thinking between the Decades* (University of Sydney, 1990) viii; Alice Erh-Soon Tay, 'The Role of the Law in the Twentieth Century: From Law to Laws to Social Science' (1991) 13 *Sydney Law Review* 247, 248.

[91] Tay provided a detailed account of the major political and social events in China's history in the first two of the trilogy of articles listed in note 89 above. She repeated aspects of these events in various other works. She outlined some of the political and legal aspects of Russia's governance in some of the early works following her first stay in Russia from 1965–1966: Alice Erh-Soon Tay, 'The Law of Inheritance in the New Russian Civil Code of 1964' (1968) 17 *International and Comparative Law Quarterly* 472; Alice Erh-Soon Tay, 'The Foundation of Tort Liability in a Socialist Legal System: Fault versus Social Insurance in Soviet Law' (1969) 19 *University of Toronto Law Journal* 1. She benefited greatly from being able to access literature in both Russia and then at the Russian Institute of Columbia Law School where she was able to access Professor John Hazard's private library of Soviet books.

could identify the features that were most likely to accommodate oppression.[92] The work therefore furthered the intellectual agenda she had set at the very beginning of her career — to critique and reform tyrannical regimes.

Tay and Kamenka's greatest scholarly contribution was to devise a conceptual apparatus for comparing communist and other modes of governance that went beyond traditional distinctions. The apparatus is imaginative and unique in that it combines the pure sociology of European social scientists, Weber and Tönnies, with Marxist legal theorising about Western law.[93] Its foundation consists of the two types of legal-administrative-social regulative systems, *Gesellschaft* and *Gemeinschaft*, that Tönnies devised as conceptual tools to understand the transition from ancient to modern society. Tay and Kamenka's use of these types are, however, in accordance with Weber's who commandeered them in his work *Economy and Society*.[94] Rather than mere conceptual

[92] The first indication of Tay's approach to conceptualising and categorising different strains in the regulative systems of Russia and China was in 1971. She argued that in the previous 50 years the Soviet regime in Russia had successfully manipulated all three major strains (what she and Kamenka called the 'ideal types') of regulatory systems to achieve the dominance and control required to oppress its subjects: Alice Erh-Soon Tay, '*Gemeinschaft, Gesellschaft*, Mobilisation and Administration: The Future of Law in Communist China' (1971) 1 *Asia Quarterly* 257, 280.

[93] Tay and Kamenka published numerous articles and book chapters that laid the foundations for, refined or repeated the ideal types. From a close review of all of Tay's work I have identified the following works as falling within this category: Ibid; Alice Erh-SoonTay and Eugene Kamenka, 'The Life and Afterlife of a Bolshevik Jurist' (1970) 19 *Problems of Communism* 72; Alice Erh-Soon Tay, 'Law and Morality: Communist Theory and Communist Practice' (1971) 21 *Philosophy East and West* 395; Alice Erh-Soon Tay, 'Law in Communist China — Part II' (1971) 6 *Sydney Law Review* 335; Alice Erh-Soon Tay and Eugene Kamenka, 'Beyond the French Revolution: Communist Socialism and the Concept of Law' (1971) 21 *University of Toronto Law Journal* 109; Alice Erh-Soon Tay, '"Smash all Permanent Rules': China as a Model for the Future' (1976) 7 *Sydney Law Review* 400; Alice Erh-Soon Tay and Eugene Kamenka, 'Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and Neale (eds) *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975) 126; Alice Erh-Soon Tay and Eugene Kamenka, 'Participation, "Authenticity", and the Contemporary Vision of Man, Law and Society' in R Cohen et al (eds), *Essays in Memory of Imre Lakatos* (D Reidel, 1976) 335; Alice Erh-Soon Tay 'Socialism, Liberty and Law' (with Eugene Kamenka) in Owen Harries (ed), *Liberty and Politics: Studies in Social Theory* (Pergamon Press, 1976); Alice Erh- Soon Tay and Eugene Kamenka, 'Freedom, Law and the Bureaucratic State' in Eugene Kamenka and Martin Krygier (eds), *Bureaucracy: the Career of a Concept* (Edward Arnold, 1979) 112; Alice Erh-Soon Tay and Eugene Kamenka, 'Social Traditions, Legal Traditions' in Kamenka and Tay (eds), *Law and Social Control* (Edward Arnold, 1980) 105; Alice Erh-Soon Tay and Eugene Kamenka, 'Editor's Introduction: Law, Lawyers and Law-Making in Australia' in Tay and Kamenka (eds), *Law-Making in Australia* (Edward Arnold, 1980); Alice Erh-Soon Tay and Eugene Kamneka, 'New Legal Areas, New Legal Attitudes' in Tay and Kamenka (eds), *Law-Making in Australia* (Edward Arnold, 1980) 247; Alice Erh-Soon Tay and Eugene Kamenka, 'Marxism-Leninism and the Heritability of Law' (1980) 6 *Review of Socialist Law* 261; Alice Erh-Soon Tay and Eugene Kamenka, 'Public Law — Private Law' in S I Benn and G F Gaus (eds), *Public and Private in Social Life* (Groom Helm, 1983) 67; Alice Erh-Soon Tay and Eugene Kamenka, 'The Sociology of Justice' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, 1983) 107.

[94] Max Weber, *Economy and Society* (University of California Press, revised ed, 1978).

tools Weber used them as 'ideal types.'[95] Weber said that 'an ideal type is formed by the one-sided *accentuation* of one or more points of view' according to which '*concrete individual* phenomena … are arranged into a unified analytical construct … in its purely fictional nature, it is a methodological utopia [that] cannot be found empirically anywhere in reality.'[96] Weber's ideal type is said to validate and provide a suitable vehicle for ascertaining and describing subjective values: for 'only as an ideal' can subjective value — 'that unfortunate child of misery of our science' — 'be given an unambiguous meaning.' [97] As Tay and Kamenka explain, they are 'mental constructs, but constructs derived from observable reality, suggesting hypothesis and lines of investigation in dealing with reality.'[98]

By building upon Weber's and Tönnies's types they sought to make a contribution to applied sociology, providing theoretical conceptions that they believed were needed to understand society. To Tönnies's two types they added a third, 'administrative-bureaucratic', drawing on Weber's detailed writing on the phenomena of bureaucratisation, as well as Marxist theorising.[99] And in their later work they added a fourth 'extra-legal' type that they named 'domination-submission'.[100] Their work is unique in that it attempts to apply these types to both Soviet and Western legal systems.[101] By recognising that all legal systems, from the democratic and stable to the revolutionary and tyrannical, share similar characteristics they sought to enable comparisons and contrasts that would allow for more serious considerations of both systems and the identification of the attributes that erode rights and freedoms.

Stone also wrote on Soviet legal systems and has been described as sitting within the school of sociological jurisprudence. His school of sociology was, however, different

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[95] Sung Ho Kim, 'Max Weber', *The Stanford Encyclopedia of Philosophy* (Edward N Zalta (ed), Fall 2012 Edition), <http://plato.stanford.edu/archives/fall2012/entries/weber/> quoting from Max Weber, 'Objectivity in Social Science and Social Policy' in E A Shils and H A Finch (eds), *The Methodology of the Social Sciences* (Free Press, 1904).

[96] Ibid.

[97] Ibid 107.

[98] Alice Erh-Soon Tay and Eugene Kamenka, 'Social Traditions, Legal Traditions' in Kamenka and Tay (eds), *Law and Social Control* (Edward Arnold, 1980) 105, 111.

[99] This type was included within Tay and Kamenka's comparative apparatus from the time they first began writing of the ideal types: Tay, above n 92, 280.

[100] As first introduced in Alice Erh-Soon Tay, 'Law and Morality: Communist Theory and Communist Practice' (1971) 21 *Philosophy East and West* 395

[101] Once Professor of Jurisprudence at the University of Sydney her, and Kamenka's, work turned to comparing the two systems and what they described as a 'crisis of legal ideals' in the West. This was first clearly explained by Kamenka: Eugene Kamenka, 'Introduction' in Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay (eds), *Ideas and Ideology, Law and Society, The Crisis in Legal Ideals* (Edward Arnold, 1978) vii, vii. This aspect of their work is considered further in the following chapter.

from Tay's. Stone took his lead from Dean Pound whom he worked with at Harvard and was the leader of the school of sociological jurisprudence. As Paton argued:

> it is unfortunate that the term 'sociological' was ever used in this connection — to speak of the functional method would have been more accurate and less confusing. The fundamental tenet of this school is that we cannot understand what a thing is until we study what it does.[102]

Tay followed within the more appropriately named 'sociology of law' tradition. Again Paton's definition of this tradition proves useful in explaining the differences between the two traditions. He said that:

> its main difference from functional jurisprudence is that it attempts to create a science of social life as a whole and to cover a great art of general sociology and political science. The *emphasis of the study is on society and law as a mere manifestation*, whereas Pound rather *concentrates on law* and considers society in relation to it.[103]

While Tay and Kamenka's work was primarily based on secondary accounts of the laws and legal systems in the USSR and China they also spent time in Russia observing life under communist rule first-hand.[104] In 1968 they also spent time at the Institute on Communist Affairs at Columbia University in New York.

Tay and Stone's methodologies were therefore very different in orientation. While they both sat outside the dominant Western analytical tradition, Tay followed in the sociological traditions founded by Weber and Marx while Stone took his primary lead from Pound. Further, the fact that Tay through Kamenka respected John Anderson and had adopted some of his central scholarly tenets also distinguished them.[105]

Stone, when appointed to the professorship, was also more accomplished than Tay and had stronger academic credentials. He had studied at some of the world's leading universities (both Oxford and Harvard), held a philosophy degree as well as a postgraduate degree in law and had published several large works of scholarship. Tay had published 27 articles/book chapters but not a book. It would have been difficult — perhaps even impossible — to find a scholar of similar ilk to replace Stone. Nonetheless

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[102] George Whitecross Paton, *A Textbook of Jurisprudence* (Clarendon Press, 1946) 18.
[103] Ibid 22 (references omitted) (emphasis added).
[104] See Tay, above n 91.
[105] Starr, above n 10, 167.

Tay shared some of Stone's qualities and her resume suggested that she had potential. Like Stone she was an outsider with high ambitions. While she was not Jewish, at the time of her appointment she was a young Asian woman married to a Jew and had experienced considerable turbulence and hardship in her life. Like Stone, being a scholar mattered greatly to her. It was her vocation. It is therefore unsurprising that the two of them believed that the Department could provide them with an opportunity to create an environment where broader thinking about law could flourish.

### 7.3.2 A Beachhead for Jurisprudence

Before Tay's arrival the dispute between Stone's Department and the Department of Law, following on from Peden and Charteris, was partially depicted as a division between the technocratic and theoretical aspects of law. Those in the jurisprudential camp feared that merging the departments would result in the contraction of legal theory. Concerns included that jurisprudence would be mainstreamed in a way that diluted its potency, with half-hearted attempts to consider the theoretical sides of law labelled 'jurisprudence'.[106] Or perhaps, without this 'beachhead' jurisprudence would simply be 'washed away'.[107] If there was nothing in the institutional makeup to preserve jurisprudence, if the jurisprudence teachers formed a small minority at Faculty meetings and were outnumbered by personalities who either disliked Stone or were suspicious of legal theory, then it is easy to appreciate why without a Department the teaching and advancement of jurisprudence would be at risk. These provided good reasons for preserving Stone's Department.

Some, for example, viewed his Department as an essential 'antidote' to the narrow technocratic and conservative elements of the Department of Law. Michael Kirby, who began as an undergraduate law student at Sydney in the late 1950s and became a research assistant to Stone, believed that the Department played a crucial role in ensuring that Sydney law students — many who went on to some of the highest legal and political posts in the country — were encouraged to think more broadly about the study of law:

> I think it is necessary to have such a Department particularly in a country which has the common-law tradition, in a community that has long taught law as a positivist isolated activity divorced from social impact and unconcerned with the deep values which inform decisions that are made in that discipline. I think it is necessary as an antidote. There is a

[106] Some perceived that for a short period after the abolishment of the Department in 1998 this dilution occurred: Krygier, above n 19; Birch, above n 30; Ziegert, above n 65.
[107] Krygier, above n 19.

> similar debate on the issue of statutory interpretation. Do you teach it as a separate topic or do you simply teach it where it is relevant in particular legal categories? For me the problem of the latter approach is that so busy will you be in teaching the categories that you just don't have time to stop and teach either what are the values that underline the categories or whether they are good values or out-dated values or values that should be reformed; that you don't end up ever thinking about such issues.[108]

On the other hand, some people believed that the Department had become an exclusive club that promoted a particular brand of jurisprudence and kept Sydney legal scholars who also defined themselves as jurisprudes out. By depicting the Department as an antidote this suggested that something was missing from the Department of Law. In this way the Department's very existence might be seen as denigrating the Department of Law and its members.[109] Hiving off a small minority of academics and providing them with a special department also seemed undemocratic and elitist. There were therefore also strong arguments for changing the human architecture of the Department.

The risk that jurisprudence would be marginalised and diluted if left to mix with the larger Faculty remained at least up until 1998 which is when Tay left to become President of HREOC. Each of the three former Sydney Deans interviewed for this project acknowledged that even in the 1990s components of the Faculty of Law were narrowly technocratic and insular. For example, James Crawford (Dean from 1990 to 1992) suggested that some members of the Faculty in the late 1980s and early 1990s believed that academics were 'subservient to the profession.'[110] Webber (Dean from 1998 to 2002) similarly said:

> My sense at Sydney was that Sydney's ambitions were too framed by service to the bar, service to the profession. While that was an extraordinarily important dimension of what any law school should do, we shouldn't see ourselves as relating to the profession exclusively in a training role but should be contributing to the development of legal knowledge in the Australian context.[111]

Reflecting on the Faculty when he joined in 1993 Ron McCallum (Dean from 2002 to 2007) agreed that Sydney's orientation was narrow:

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[108] Kirby, above n 81.
[109] This formed part of the thinking that led to the abolishment of the Department: Webber, above n 2.
[110] Crawford, above n 2.
[111] Webber, above n 2.

> Sydney was not a happy law school …. I can't speak about jurisprudence but what was seen to be good for promotion was getting an article in the *Australian Law Journal*, which was not refereed. I think Sydney had appointed too many of its own and hadn't looked internationally enough.[112]

There is therefore evidence to suggest that the need for an antidote to the parochial and technocratic elements of Sydney remained throughout Tay's tenure.

### 7.3.3 The Antidote

In several ways Tay responded to her environment in a similar manner to Stone. Like Stone one of Tay's primary concerns was to act as a counterweight to perceived deficiencies in the Department of Law and she approached this task by reinstating several of Stone's early initiatives.

First, she recruited scholars from diverse backgrounds, something that stood in stark contrast to the parochial aspects of the Department of Law.[113] Her Department was tiny. As Klaus Ziegert, a sociologist who worked with Tay for over 24 years and who acted as Head of the Department for much of Tay's time, explained:

> At the height of our budget we had three permanent staff and often only two because Alice was always somewhere in the world and the rest of us went on sabbatical leave every seven years. We filled the places with temporaries and casuals, but we never had enough money to have more than [the equivalent of] around four full-time permanent staff.[114]

The attributes of the core staff of the department were therefore critical to its shape and contribution.

The three full-time members of the department Tay recruited — Martin Krygier, Ziegert and Wojciech Sadurski — were (at least initially) primarily interested in ideas outside the dominant British legal theory of the time, analytical jurisprudence. Tay recruited two of these scholars during trips overseas (Sadurski from Poland[115] and Ziegert from Germany[116]) and many of the Department's doctoral students were foreigners. Tay also

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[112] McCallum, above n 2.
[113] As Krygier explained, in contrast to other elements of the Faculty of Law, Tay 'was never parochial': Krygier, above n 19.
[114] Ziegert, above n 65.
[115] Sadurski, above n 80.
[116] Ziegert, above n 65.

gave the Department a strong interdisciplinary quality. She rewarded learning from outside of the discipline of law. Krygier held a doctorate in the history of ideas but only an undergraduate qualification in law and Ziegert did not have a law degree but a doctorate in the sociology of law.

Tay had therefore created a department of interdisciplinary outsiders that resembled Stone and his colleagues. Stone recruited to his Department a range of foreign scholars including 'Ilmar Tammello, an Estonian, Giovanni Tarello, an Italian, Charles Boasson, an Israeli, Charles Alexandrovitz, a Pole, Bob Moffat, an American, Stevan Glichitch, a Yugoslav, René Marcic, an Austrian, and Upendra Baxi, an Indian.'[117] They too were able to create a diverse teaching agenda that introduced students to a range of ideas on law extending beyond Australia's territorial boundaries and English and common-law heritage.

The second way that Tay was similar in her approach to Stone was that she believed that diversity in the composition of his department was of immense importance as it allowed for a broadening of the curricula.[118] One of the most remarkable features of Stone's career is the change in attitude of eminent members of Sydney's legal profession towards Stone. At the beginning of Stone's tenure judges and senior practitioners were among those who strongly opposed his appointment.[119] At the end of his tenure members of a large part of this same demographic were his closest allies.[120] His teaching, and that of his Department, was largely responsible for this considerable change of heart. In the 1990s leading Sydney practitioners and judges believed that it was important for law students to have sound instruction in matters of theory and supported the broadening of Sydney's curricula to accommodate greater theoretical study.[121] Some donated substantial funds to create a research institute in Stone's name.[122] That Stone and his Department convinced high achieving graduates of the importance of theory was no small feat and demonstrated his commitment to students.

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[117] Starr, above n 10, 116.
[118] Ibid.
[119] Ibid 58–63.
[120] Jeremy Webber referred to several practitioners and judges who supported his intention to reclaim Stone's legacy: Webber, above n 2.
[121] Two Deans at the University of Sydney in the 1990s spoke of conversations they held with various members of the profession who supported the widening of the curricula and orientation of the Faculty to embrace more legal theory: Crawford, above n 2; Webber, above n 2.
[122] For example, former Judge and President of the New South Wales Court of Appeal and Supreme Court, Dennis Mahoney.

Third, connecting the Faculty of Law and Australian legal academy with the larger world of ideas, and publicising it to that world, was also a central platform of the Department. Tay, again like Stone, had numerous international connections that she built upon and she also drew upon existing links to Stone's Department as well as Kamenka's networks. During Tay's time as Professor of Jurisprudence she was twice elected President of the International Association for Philosophy for Law and Social Philosophy ('IVR') and in 1988 was the first Australian elected a full member (Academicien Titulaire) of the Paris-based International Academy of Comparative Law.[123] She travelled frequently and extensively, always with the purpose of furthering her work. She also took measures to ensure that certain of her colleagues benefited from her international connections and by establishing opportunities for them to present papers or go overseas to teach, she encouraged them to broaden their studies beyond Australia's territorial borders.[124]

Tay also promoted the Department in a way that made it attractive to foreigners and made it more likely that they would come to Australia to attend conferences or workshops or as visiting scholars. Several of Tay's former students and colleagues said that when travelling overseas they learnt that Tay was in regular contact with foreign scholars:

> I went to my first academic conference in 1984 and it was a conference held at Bologna in Northern Italy on legal reasoning sponsored by the University of Bologna … What struck me was that everyone I spoke to, no matter where they came from in the world, whether it was Iceland, Argentina or Poland to name just three, all knew Alice and knew her quite well and said 'I just sent Alice a letter the other day' or something like that. This was before email or they would be emailing her all the time.[125]

> It is interesting now to think about it, that these were years when there was no internet and so the way you contacted someone was through letters to them and the letter arrives maybe two weeks after, so the response might come a month after. But she managed to maintain these incredibly thick continuous contacts with the outside world.[126]

Ziegert explained that despite his initial strong reluctance his comparativist colleagues at the Max Planck Institute talked him into coming to Australia. Tay and Kamenka had

[123] 'International Role for Professor Tay', *The University of Sydney News* (Sydney) 1 March 1988, 8.
[124] Allars recalls that Tay invited her to teach in the Masters of Law programme she established with Friedrich Schiller Universität Jena, Germany and that through that exercise she was encouraged to look at other aspects of European law: Interview with Margaret Allars SC (Law School, University Sydney, 1 August 2014).
[125] Birch, above n 30.
[126] Sadurski, above n 80.

spent long periods of time at the Institute and were well known to the scholars there. Their positive views of Australia were in part attributable to Tay's networking:

> They were great admirers of Australia. They had been there. Alice was clever in hosting a conference of comparative lawyers in Sydney. All my German comparativist colleagues came because Australia in Germany is a big thing.[127]

Not only did international scholars come to conferences and workshops in Australia arranged by Tay and Kamenka, they also occupied visiting posts. Tay, copying a scheme that Kamenka had implemented in the History of Ideas unit at the RSSS, kept one of the full-time posts at the Department free. She kept the post filled with visiting scholars who contributed to the teaching of the Department and delivered papers at events arranged for both the Faculty and broader scholarly community. Short and longer term visitors to the Department included a range of internationally acclaimed scholars: Chaim Perelman, William Twining, Joseph Raz, Bernard Rudden, Neil MacCormick,[128] Pierre Ryckmans (who used the pen-name Simon Leys), Jan Broekman and C B Macpherson.[129] For example, in 1981 she arranged for MacCormick, Regius Professor of Public Law and Law of Nature and Nations at Edinburgh University, to spend three months teaching in the Department.[130] He indicated a willingness to teach across the curriculum[131] and his correspondence speaks of affection for both Tay and Kamenka.[132] In 1989 he organised for Tay to receive an honorary LLD (*honoris causa*) from the University of Edinburgh. Tay and Kamenka's posts and the Department's strong reputation provided an incentive for foreign scholars to come to Australia and the pair were known for their hospitality.[133]

Tay therefore followed closely in Stone's footsteps and developed a strong and diverse department with a rich network of elite, foreign and theoretically inclined scholars. Her vision for the Department was based on her desire to enrich the education of Sydney law graduates.[134]

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[127] Ziegert, above n 65.
[128] 'Neil MacCormick Visits the Department of Jurisprudence', *The University of Sydney News* (Sydney) 7 July 1981, 13.
[129] Interview with Roger Wilkins AO, (Attorney Generals Department, Canberra, 19 August 2014); Birch, above n 30; Interview with Gabriel Moens (by telephone, 30 September 2014).
[130] Letter from Neil MacCormick to Alice Tay, 21 January 1981.
[131] Ibid.
[132] See, eg, letter from Neil MacCormick to Alice Tay, 19 February 1981; Letter from Neil MacCormick to Alice Tay, 23 October 1981.
[133] See, eg, John Passmore, 'Citizen of the World Whose Gift was Liberty', *The Australian* (Sydney) 21 January 1994, 11.
[134] This is considered further in the following chapter.

### 7.3.4 New Protagonists

In these various ways Tay therefore maintained these parts of Stone's legacy for another two decades. Tay's environment within the Faculty of Law nonetheless changed over this time in ways that meant that her position on the importance of the Department's survival became weaker. One of the most significant changes was the emergence of new protagonists with different agendas. Rather than representing the traditional components of the Faculty, the new protagonists were motivated by a desire to change the culture of the Faculty at Sydney so that the antidote supplied by Stone, then Tay, would no longer be needed. During Tay's time as Professor of Jurisprudence three Deans — Colin Phegan, James Crawford and Jeremy Webber — each sought to abolish the Department. The first two were met with strong opposition from Tay and were ultimately unsuccessful. Webber, who began his tenure the year that Tay left for HREOC, succeeded.[135]

Rather than marginalising legal theory it was Phegan's,[136] Crawford's and Webber's aim to change the culture of the Faculty in part by mainstreaming and increasing its importance. Crawford expressed his reasons for merging the departments as follows:

> My view was that Law was better off having Jurisprudence as part of its activity and Jurisprudence was better off having Law as part of its empire so to speak. That was an English view of things. I'm a believer in unitary law departments so I'm a believer in the connection between public international law and private international law. Obviously one makes distinctions and subjects have their own provenance and methodology, but they should learn from each other and they are part of a tradition of universal thinking about law which is very important.[137]

Webber largely shared Crawford's motivations and views:

> One of the problems that I became increasingly concerned with, in relation to the departmental structure, was that there were people who were seriously committed to legal theory and were doing very strong work in legal theory who were not part of the department and so were structurally defined away from legal theory precisely at a time when legal theory had become an essential mainstream function of any decent law school — one which had to be woven into substantive areas of law. The structure tended to treat

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[135] This was achieved following a consultative process with the whole of the Faculty.
[136] 'Law Meeting on Jurisprudence', *The University of Sydney News* (Sydney) 1 August 1989, 170.
[137] Crawford, above n 2.

> legal theory as though it were a separate thing that should be hived off — not something that needed to pervade the way we dealt with law…[138]

In a report to Faculty Webber said that he saw:

> [T]he chief benefit in a single-unit structure to be an expansion, not a contraction, of the presence of legal theory within the Faculty. I am strongly committed to the maintenance of rigorous legal theory within both the research and teaching missions of the Faculty.[139]

Crawford and Webber were both scholars who took a keen interest in legal theory and whose scholarship departed from the traditional model. Their diverse scholarly interests and the fact that they had not been educated in law at the University of Sydney suggest that they were sincere in their desire to change the intellectual culture of the Faculty of Law and Sydney and to improve — rather than restrict — the profile of jurisprudence, or at least legal theory, within the Faculty. They both suggested that senior members of the legal profession supported their effort to rejuvenate the Department of Law so that it embraced broader concerns.[140] Their positions seem more enlightened than some of the objections and agendas of some of the Department's earlier opponents. It was also by that point clear that some strong jurisprudential scholars in addition to Morison were precluded from teaching jurisprudence.[141] For these reasons Crawford and then Webber presented an argument that was more difficult for Tay and her colleagues in the Department to rebut.[142] While throughout the 20th century there were good reasons to support the desire to insulate the Department from the wider Faculty, the presence of Deans who were themselves outsiders (vis-à-vis the University of Sydney) and who sought to broaden the horizons of the larger Faculty by encouraging the spread of legal theory throughout the curricula, made the Department's position less tenable. Rather than an antidote it began to present as an obstacle to the reconciliation and enlightenment of the Faculty as a whole. This cast doubt over the wisdom of continuing this part of Stone's legacy into the 21st century.

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[138] Webber, above n 2. Webber made similar comments in his report to faculty: 'Deans Report to Faculty', 11 August 1998 (University of Sydney Archives, G3/2) 2–3.

[139] Deans Report, above n 138.

[140] Crawford, above n 2; Webber, above n 2.

[141] For example, even though Margaret Allars had obtained a PhD in jurisprudence at Oxford studying under Joseph Raz she was employed in the Department of Law and so did not teach in the jurisprudence streams: 'Removing the departmental structure would have been advantageous in that people like myself would have been able to teach jurisprudence, so I saw it as a negative in that sense, but I felt some sense of loyalty to Alice in terms of preserving her empire.' Allars, above n 124.

[142] At the time of the consultations and meetings that led to the abolishment of the department Tay was at HREOC and therefore was not included in the discussions.

Whether abolishing the Department has achieved or will achieve the aims pursued by Phegan, Webber and Crawford is something that is difficult to measure or predict. Some certainly hold the view that Sydney is a very different place to what it once was. What is clear, however, is that even if the merger achieved the goal of 'mainstreaming jurisprudence'[143] Tay believed that the integration would simply place current and future jurisprudential scholars at Sydney along the mediocre and compromising path that she considered most Australian academics were being encouraged to follow. Her attitude is described further in the next chapter.

### 7.4 Concluding Remarks

It might seem that Tay's position was stronger than Stone's in that she did not face the anti-Semitism that he faced throughout his career. If some of Tay's colleagues held prejudices against her on account of her Asian background or the fact that she was a woman, then this was not something Tay drew attention to[144] or something that was noticed by others close to her. At least externally she seemed unaffected by prejudice. However, in other ways the Department was more vulnerable during Tay's tenure than Stone's.

This chapter has identified the central ways that Tay sought to preserve Stone's legacy in the face of considerable opposition. It has suggested that she made deliberate choices that guaranteed that her tenure at Sydney would be turbulent. By doing so she ensured that Sydney graduates throughout the remainder of the 20th century would reap the benefit of some of the central initiatives that Stone had instilled in his Department. The fact that many of these graduates went on to serve in high office suggests that in doing so she performed a considerable service to both the profession and society. Whether the Department ought to have continued into the 1990s remains open for debate. There were good reasons to propose its abolition in spite of its success.

The following chapter explains that while Tay followed in Stone's footsteps and believed that the Department was a necessary antidote to the technocratic and parochial aspects of the Faculty, she also believed that the Department was necessary to insulate her colleagues from a far greater evil: the corporatisation of universities. By reigniting divisions within the Faculty Tay wanted not only to wage a war against her colleagues at

[143] Ibid.
[144] Julia Horne, 'The Cosmopolitan Life of Alice Erh-Soon Tay' (2010) 21 *Journal of World History* 419, 436.

Sydney but against the entire legal academy and the larger global trends that have fundamentally changed the way that universities operate.

# 8 TAY AND THE DEPARTMENT OF JURISPRUDENCE – PART 2

## 8.1 Introduction

This chapter concentrates on what was, perhaps, Alice Erh-Soon Tay's greatest contribution to the legal academy: the creation of a department that embodied and was solely governed by academic values. Tay believed that for a discipline to have integrity and strong intellectual credentials scholars must be situated in an environment that provides both confidence and security to say what they think and be placed in a position to progress knowledge and education for its own sake. Further, she believed that to be deserving of such conditions such scholars must exercise their own self-scrutiny and self-criticism. They must have the courage and freedom to offer intellectual criticism of their colleagues and acknowledge their own shortcomings. Tay believed that Australian universities did not provide these conditions and that the situation was becoming worse. Her contribution to the legal academy consisted of the creation of a department that stood in opposition to the management trends that she believed were preventing scholars from fulfilling their important role of combating harmful ideologies and governance. This chapter explains Tay's approach to creating such a department, details her central motivations and identifies some of the central innovations and achievements that resulted from Tay's distinctive academic agenda. Her experience — in conjunction with that of Julius Stone —raises important questions concerning how disciplines should be run and the role of academic imperatives.

As this aspect of Tay's contribution comprises largely of intangible qualities and is based primarily on her engagement and networking and the impressions she made on others, this chapter draws heavily from interviews. As Klaus Ziegert astutely observed:

> I believe … an explanation of [Professor Tay] cannot be found on the personal or psychological level. One has to look further and to the social dimension, that is, to the interactions that Professor Tay commanded with the people she worked with, communicated with, supervised, advised, challenged and confronted. The closest category that comes to mind and which could cover the phenomenon in this respect is 'institution' — if it were sociologically possible that a person 'is' an institution. In this wider sense, then, the Department of Jurisprudence of the Faculty of Law at the University of Sydney, which formed the launching-pad for her work and life, was not the

institution where she worked: she was the institution which energised the work of the Department and radiated far beyond the boundaries and into the world.[1]

## 8.2 The Rise of an Academic Entrepreneur

The mere existence of the Department did not guarantee its independence or autonomy. Tay, however, seemed well qualified to create the conditions required to engender these attributes in the Department. One of her most distinctive and most remarked upon qualities was that she assumed the role of academic entrepreneur.[2] By building up a strong network of distinguished lawyers, academics and judges, as well as competent and talented teachers, Tay was able to insulate the Department from external threats. She did this by building strong initiatives, by making more with less and by signalling to the Department's adversaries that in order to abolish the Department they would have to contend with some of the profession's and academy's eminent leaders.

It is telling that Roger Wilkins, someone who has occupied several high posts in both government and its bureaucracy including Director General of the New South Wales cabinet office and head of the Attorney General's department, said that he learnt a great deal from Tay:

> Most of the other things [Tay] did [beyond teaching and scholarship] was as an entrepreneur who really got other people to do stuff. I don't use the term entrepreneur glibly because she really was an entrepreneur. I learnt a lot about how to get things done and how to manage things from her. *I probably learnt more from her about how to handle bureaucracy than I did from working in the bureaucracy*. …
>
> She got into the business of selling the Department. She developed … debate and juristic thinking but not directly herself. She got other people in and put them together. … she would bring all these people from the judiciary and legal practice and academics into this and she would organise it or get you to organise it. She would organise the money and

[1] Klaus A Ziegert, 'AEST — An Attempt at Explaining the Phenomenon' in Gunther Doeker-Mach and Klaus A Ziegert (eds), *Alice Erh-Soon Tay — Lawyer Scholar, Civil Servant* (Franz Steiner Verlag, 2004) 7, 7.

[2] Interview with Roger Wilkins AO, (Attorney Generals Department, Canberra, 19 August 2014) (emphasis added). Other interviewees strongly supported this view: Interview with Martin Krygier (Law School, University of New South Wales, 7 February 2014); Interview with Wojciech Sadurski (Law School, University of Sydney, 31 July 2014; Interview with Gabriel Moens (by telephone, 30 September 2014); Interview with Hamish Redd (by telephone, 5 August 2014); Interview with Michael Kirby (by telephone, 14 March 2015); Interview with Christopher Birch SC (Garfield Barwick Chambers, Sydney, 28 July 2014); Interview with Klaus Ziegert (Law School, University of Sydney, 5 February 2014).

> she would organise the terrific dinners and organise the infrastructure. Around this, dialogue and teaching happened.[3]

Ziegert said that Tay 'combined … vision and … leadership with an eminent sense, not usually found in academics, for the practicalities of translating a design into a programme and the persistence to convert the programme into practice. … The characteristic is the entrepreneurial spirit.'[4] Hamish Redd, her former assistant at HREOC, recalled that she approached politicians privately to advance the Commission's agenda. He said:

> [S]he would write letters to the Attorney General, Daryl Williams, and she would ask me to draft letters. I remember her telling me 'I want the tone to be concealed irritation' so yes she was definitely a canny political operator. She maintained connections that she thought she needed to maintain. I think she enjoyed, and why the hell not, a lot of people do, having friends in high places.[5]

Several of Tay's qualities made her suited to the role of academic entrepreneur and maven. She was an attractive woman who stood out and could be extremely charming. Many people found her interesting and felt that she was interested in them.

Tay hosted many functions at her home for students, colleagues, members of the profession and international scholars. By doing so she created a level of intimacy. Her cooking was legend. Redd conjures up an endearing image:

> She was an amazing cook, an absolutely amazing cook. She used to stand on a little wooden block so that she was the right height above the wok. … She was a beautiful cook of Chinese Malay food. She would hand-make dumplings and cook Hainan chicken, all kinds of exotic things.[6]

Wilkins said he learnt from Tay that both cooking and charm helped enormously in handling bureaucracy.[7]

In addition, Tay designed her life in a way that best accommodated her networking. For much of her time in Sydney she chose to live in a place that was central and was attractive to visitors. She lived in a famous apartment in a building in the heart of Sydney

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[3] Wilkins, above n 2 (emphasis added).
[4] Ziegert, above n 44, 8.
[5] Redd, above n 2.
[6] Redd, above n 2.
[7] Wilkins, above n 2.

known as 'The Astor' and held many cocktail parties on the roof, as well as smaller lunches in her dining room during the week. A former student of Tay's, John Atkin, said that 'in the late 1970s it was the only sort of swish apartment block in the city and so to think that your professor had an apartment there and then you were invited there for cocktail parties on the roof of the Astor — it was impressive.'[8]

Tay's strong personal skills and enthusiasm for networking meant that she was different from Stone. While Stone also hosted social events and developed international networks he was less of a social being and his relationships were less personal. Kirby, who had been a student and research assistant of Stone's as well as a friend of Tay's, said that 'they had commonalities of belief but Stone was truly the God professor and a remote figure.'[9] He explained that Stone:

> was very conscious of his status as an important figure in global jurisprudence in the English-speaking world, therefore a mere student, even one who was advancing through the rather suspect ranks of student politics at the University of Sydney like me was a very small player on a field that he dominated. Alice was more democratic in that sense, she knew her status and was also a professor but she was vivacious and voluble, talkative, excitable. Julius Stone was controlled and reserved and formal, conscious of his high status and so they were just different personalities and of course they came from different ethnic backgrounds.
>
> … people admired and respected Julius Stone rather than engaged with him. Alice's personality was more outward going and more engaging.[10]

In addition to differences in personality Stone's greater formality and reserve may have also been a product of the prejudice and exclusion he suffered from being Jewish. In contrast Tay's outsider status gave her an attractive exotic quality. Her outspokenness, charm and stylish dress made her someone that people were drawn to. The fact that she stood out worked for rather than against her. Wilkins said:

> She used her feminine charm. She was a really beautiful woman and she used her charm and she used her rather exotic attributes because it was exotic the way she dressed, the fact that she was this little Asian woman, she used all of that to her great benefit in terms

[8] Interview with John Atkin (by telephone, 29 October 2014).
[9] Kirby, above n 2.
[10] Ibid.

> of getting things done. She was always dressed immaculately. Her hair and makeup was also immaculate.[11]

As a consequence of her charm and networking skills she was able to form strong relationships with Vice-Chancellors of the University of Sydney, senior members of the profession and academics with relative ease. Many of them became allies. At the same time, some visitors to the Department were less impressed by Tay's persona. In correspondence Isaiah Berlin, who spent some time in Kamenka's department, provided the following criticisms of both Tay and Kamenka:

> Kamenka, my boss, is a disarming, affable, know-all, with a rather pedantic ambitious Chinese wife who lacks the higher attributes very conspicuously: she works hard & is not sympathetic: Herbert [Hart] thinks highly of her.[12]

She therefore drew a mixed reception.

### 8.3 Motivating Principles

It may seem surprising that a Professor of Jurisprudence would possess such entrepreneurial qualities and be largely known for them. It might point to a weakness. While there is no doubt that Tay worked extremely hard, by engaging in so many entrepreneurial and networking activities she had less time to devote to scholarship.[13] The nature of her later scholarship and the fact that she spoke of, but never published, a monograph suggests that her scholarship did play a lesser role and was not as developed as it might otherwise have been. She published many articles but even at the end of her career her scholarship did not resemble and had not attracted the same attention as Stone's.

Does the emphasis Tay placed on enterprise therefore point to a deficiency and did it diminish her contribution to the Australian legal academy? Before making a final assessment based on traditional notions of what amounts to a 'great jurisprudential scholar' it is important to recognise both Tay's motivations and what she hoped to achieve through these pursuits. At one level it seems clear that she devoted so much

[11] Wilkins, above n 2. Similar remarks were also made by interviewees in the following interviews: Interview with James Crawford (by telephone, 25 November 2014); Interview with Margaret Allars SC (Law School, University Sydney, 1 August 2014); Sadurski, above n 2; Ziegert, above n 2; Birch, above n 2; Interview with Participant A (11 June 2014); Moens, above n 2; Kirby, above n 2.

[12] Henry Hardy and Mark Pottle (eds), *Affirming — Letters 1975–1997 by Isaiah Berlin* (Chatto and Windus, 2015) 9.

[13] Wilkins, above n 2.

energy to these activities because she enjoyed entertaining and was good at networking. There are, however, other dimensions to these activities that are evident from her larger academic agenda. As one of Tay's former PhD students and research assistants explained, Tay was a woman of principle and in several ways these activities can be viewed as an extension of her scholarly values introduced in the previous chapter:

> What Tay constantly told me, and in a way I suffer in today's environment from what I learned from her, is that if you can't stand for principles you are not a human being. Full stop.[14]

During the early years of her career at Sydney as well as at the very end Tay painted a graphic picture of what was wrong with Australian/Western universities. In 1985 she identified what she described as 'the three great enemies of university achievement.' [15] The first and most worrisome was economic rationalisation: 'using one yardstick to measure everything, discounting that which is not quantifiable.'[16] She said that 'the ideal of economic rationalisation meant that the spirit and interaction of small departments and units was swept away' and that it was 'in the interests of creating an allegedly cost-effective larger whole in which there is no spirit, no sense of involvement and personal responsibility but increased tension and jockeying for position.'[17] Another was 'the belief that the university, culture, education and research are all justified only insofar as they serve some goal that is not their own.' [18] The final enemy of the university she identified was the 'shallow demand that they elevate the community and their students into sacred cows, make them feel good and demand from them neither effort nor self-criticism.' [19]

At the end of her career, and shortly before she died, Tay put the matter more forcefully:

> The scramble of universities to join the corporate world, the commercialisation of so-called education in the last 20 years, has made a mockery of the university. The dishonesty of the corporate world has taken hold of university management and scholarship. …

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[14] Participant A, above n 11.
[15] 'Academics Identify Some of the Problems Facing Universities', *The University of Sydney News* (Sydney) 12 March 1985, 37.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.

> Today, in universities everywhere, not only is there failure of the rules of natural justice, but academic corruption, which flourishes as a result of the former. Academic corruption, like all other forms of corruption, is a highly contagious disease. It is worse, because it does not usually involve money, only false, unearned, inflated CVs and hence it excuses tolerance of inflated standards. Only exposure to the light can curtail the disease. But, alas, there are so many dark holes and corners in universities.[20]

One of the most enduring aspects of Tay's scholarly agenda was to describe and explain the way that different governance models were linked to the freedom and prosperity of citizens. While initially her studies concentrated on the USSR and China, eventually her gaze, along with Kamenka's, turned to the West.[21] The comparative apparatus designed by the pair, consisting of the ideal types described earlier, enabled them to contrast the three. Their studies extended beyond legislatures and judiciaries to political policies, ideas and ideologies. Most obviously the pair were interested in the way that Marxist thinking influenced communist regimes. Their studies therefore included consideration of the independence and influence of intellectuals. They suggested that part of the reason why Stalin's and Mao's tyrannical regimes prospered was because intellectuals — scholars who raised arguments that opposed existing modes of governance — were marginalised and too frequently paid with their lives. In the view of Tay and Kamenka, intellectuals supported by those governments were in the business of propaganda rather than theory. Tay and Kamenka saw parallels in the West and sought to fight against them. In an address at a graduation ceremony Tay said:

> [I]n an egalitarian society with weakly developed cultural traditions and independent institutions in which everyone expects the government to provide for them and in which only money has universal respect, it takes great *courage and institutional self-confidence* to resist whatever goals and procedures are being elevated at the moment, no matter how bad, and to examine critically the cleanliness of the hand that feeds you.[22]

The Department of Jurisprudence at Sydney was therefore designed and preserved by Tay as a protest against these external agendas as well as a bastion of traditional university values. In other exchanges, to signal the point of difference, she described herself as an

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[20] Tay quoted in Paul Sheehan, 'No Credit in Devalued Degree', *Sydney Morning Herald* (online) 8 January 2003 <http://www.smh.com.au/articles/2003/01/07/1041566407260.html>.

[21] The first sign of this change in direction in Tay's scholarship was in the following article: Alice Erh-Soon Tay, '"Smash all Permanent Rules": China as a Model for the Future' (1976) 7 *Sydney Law Review* 400.

[22] 'Academics Identify Some of the Problems Facing Universities', *The University of Sydney News* (Sydney) 12 March 1985, 37 (emphasis added).

'old-fashioned scholar.'[23] By preserving her Department and contrasting it with the Department of Law she sought to prove that a small department organised around a set of scholarly values could provide a far greater service to society than a large faculty organised to achieve economic efficiency and to work *with* government. Although the Department was not entirely independent or autonomous — it relied upon university funding — Tay acted as though it was[24] and projected both confidence and courage. The relationships she established through her networking engendered patronage by those who could discourage or prevent the two departments from being merged. Tay used her networking and management skills to encourage others to contribute to the Department in various ways. The academic elite of the legal theory world always filled the post she left open within the Department for visiting scholars. She also sought to raise money for the Department. At a time when few legal scholars were seeking grants, she attracted several from both the Australian Research Grants Committee (now the Australian Research Council) as well as the Human Rights Commission (now HREOC). She also obtained funding through teaching initiatives, such as teaching in the profession's Law Extension Committee course.[25]

A further strategy Tay deployed was to publicise the Department. Throughout her tenure she was featured, along with other members of the Department, in articles in the local paper, Australia's legal philosophy journal and the university's newsletter *The University of Sydney News*. In comparison relatively few articles in *The University of Sydney News* mentioned achievements of the Department of Law.

These activities were central to the Department's independence and longevity. They are the reason why the Department existed for a further 23 years following Stone's retirement. For Tay this was an important achievement. She took the abolition of the Department very personally and had no lingering affection for the University of Sydney.[26] Recent literature on the corporatisation of universities and the strong move towards 'mega faculties' also give force to the strength of her achievement in maintaining such a small department.[27] As several of the people interviewed for this project attest, in Australia academic departments like Tay's no longer exist.

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[23] See, eg, Graeme Leech, 'Tay a Law unto Herself', *The Australian* (Sydney) 31 July – 1 August 1993, 6. This was also an expression Participant A used to describe Tay: Participant A, above n 11.

[24] Crawford, above n 11.

[25] This is considered further below.

[26] Ziegert, above n 2; Participant A above n 11; Birch, above n 2, Moens, above n 2.

[27] See, eg, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Stuart Macintyre, 'Universities' in Clive Hamilton and Sarah Maddison (eds), *Silencing*

### 8.4 The Heart of the Department

#### 8.4.1 Academic Considerations

Having created an autonomous and independent department Tay then became responsible for its culture and agenda. It fell to her to decide on a vision for the Department that might contribute to the ideals of a university. Under Tay's stewardship the Department distinguished itself from other law schools and resisted external agendas that seemed to her to undermine rather than further the main goals of the university. It was led by academics and academic values. In 1989 in response to a proposal by then Dean Colin Phegan to dissolve the Department she said that the proposal would 'not solve any problems' and that her Department 'always treats academic considerations as more important than administrative ones.'[28] According to Tay, those who did otherwise were acting immorally.[29]

For Tay the central mission of a university was teaching. The Department would therefore give priority to teaching and provide an environment where academics were free to pursue their own agendas provided only that they worked hard and took their teaching seriously. Sadurski described the teaching priority as a 'perfectly noble motivation.'[30] He elaborated:

> I mean she was a university person, she believed in education and she believed in teaching and she believed in putting students first. That was her passion. She was very passionate about students and about her teaching mission. I don't think I even discussed it with her. It may have been something more important to her than her research. This is a perfectly legitimate priority for a person at a university. She was an extremely passionate teacher and a person who would spend a lot of time preparing classes, delivering classes and marking essays.[31]

She attempted to promote academic freedom among its members who were united not by a particular brand of jurisprudence but by the common goal of providing law graduates at the University of Sydney with a strong liberal legal education.

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*Dissent: How the Australian Government Is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, 2007) 41; Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin Bowen and Pearce Reports* (Centre for Legal Education, 1993).

[28] 'Law Meeting on Jurisprudence', *The University of Sydney News* (Sydney), 1 August 1989, 170.

[29] This was made clear in the early parts of her career (as described earlier) and she explicitly drew a connection between academics and morality: Leech, above n 23, 6.

[30] Sadurski, above n 2.

[31] Ibid.

As explained in this section, Tay's different approach did not mean that the Department failed to meet external requirements. Even though it would never subject itself to such measurements, the Department would most probably perform extremely well on any research or teaching assessment exercise. Tay and her colleagues brought to Australia exceptional scholars and built a strong scholarly community that extended beyond the full-time members of the Department.

### 8.4.2 A Community of Scholars

Ziegert, Sadurski and Krygier are all now acknowledged to be strong intellectuals, some of Australia's finest legal academics – certainly among *the* finest in terms of Australian legal theorists. Each would have succeeded irrespective of the Department and Tay. However, all three say that Tay and Kamenka played a significant part in setting up their initial scholarly careers and that were it not for Tay and Kamenka's efforts they would not have taught in an Australian law school. One of Tay and the Department's initial contributions was therefore to recruit these scholars to Australia's discipline of law.

As noted earlier, prior to his meeting with the pair Ziegert was reluctant to come to Australia and considered the idea of teaching law at an Australian law school very unappealing.[32] Sadurski similarly had not contemplated coming to Australia.[33] He met Tay and Kamenka during one of their trips to the University of Warsaw in Poland when he was asked by the Faculty of Law to take charge of their stay.[34] For both Ziegert and Sadurski the decision to move to Australia to work in the Faculty of Law was only made after they had spent a year as visiting lecturers at Sydney.[35] Both of them formed very favourable impressions of the Department and say that Tay and Kamenka provided them with considerable assistance.[36] They found it to be a very friendly and happy place.[37] It was young and vibrant with most of the Department's members in their 20s or 30s.[38] Both thought that the Department stood in contrast with the rest of the Faculty which seemed 'to be fossilised — old-fashioned, conservative and traditional with all sorts of eccentrics.'[39]

[32] Ziergert, above n 2.
[33] Sadurski, above n 2.
[34] Ibid
[35] Ziergert, above n 2; Sadurski, above n 2.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Sadurski, above n 2.

Before he was offered a position in the Department Krygier was hoping to pursue a path in either political science or sociology. Once he had completed his doctorate he intended to apply for a Harkness Fellowship at Harvard so that he could study half of Leon Trotsky's archive, which was then soon to be made available to the public.[40] Tay convinced him to join the Department instead.[41] She explained that writing a reference to support his application for a Harkness Fellowship would be difficult as she hoped that he would join her in the Department.[42] His relationship with and loyalty to Tay, and — more strongly — Kamenka, who had been his PhD supervisor, made the invitation attractive and so rather than Cambridge, he moved to Sydney.[43] His first impressions of the Faculty of Law at Sydney were not as favourable nor as strong as Sadurski's or Ziegert's. Almost as soon as he arrived he became embroiled in the dispute over the Department's existence.[44] Nonetheless it was he, along with Tay, Lauchlan Chipman, Roger Wilkins, Chris Arnold and PhD student Gabriel Moens, who made the Department such a happy and vibrant place.[45]

Tay created a very social and largely collegial environment. She often invited members of the Department to dinner, arranged lunches and sought to get to know her colleagues on both a personal and professional level.[46] The fact that she drew no real distinctions between her personal and professional life meant that she largely expected her colleagues to do the same.[47] Tay's former PhD student and part-time colleague Birch recalls that in many ways it seemed like an ideal academic environment with members of the Department spending much time in the corridor and in each other's offices discussing various ideas and issues.[48] Speaking of his time as a postgraduate student and Tay's research assistant one interviewee said: 'I met a lot of people but the most important thing was the enjoyment. I spent six years in Sydney and it was the best time I have ever had.'[49]

The frequent presence of international visitors meant that members of the Department could speak informally with some of the greatest legal theorists. This proved to be a considerable advantage to PhD students who derived some of their greatest inspiration

[40] Krygier, above n 2.
[41] Ibid.
[42] Krygier, above n 2.
[43] Ibid.
[44] Ibid.
[45] Sadurski, above n 2.
[46] Sadurski, above n 2; Krygier, above n 2; Birch, above n 2.
[47] Sadurski, above n 2.
[48] Birch, above n 2.
[49] Participant A, above n 11.

from these visitors.[50] For Tay it seems that these informal conversations were a very important part of the Department and were part of the reason she kept one post free for visiting appointments and invited scholars who held a variety of interesting opposing views. Tay wanted a broad-minded Department that drew from the very best of legal ideas and strived to match them. By mixing with international visitors as well as judges and barristers, the Department created a kind of intellectual elite within Sydney.

In addition to 'charming' on the one hand and 'fierce' on the other, a word that was often used by interviewees when speaking of Tay was 'energy'.[51] Part of the reason why Tay was able to create such a diverse network of scholars and lawyers was because she appeared to have an abundance of energy that she devoted solely to her career. People were attracted to her energy and it meant that she got things done. One interviewee recalled that when he was her research assistant the pair would sometimes be working from 8.30 am until 9 pm without eating a thing because they were so engaged in their work.[52] He also spoke of professors in China asking after Tay and being very surprised when learning of her death: 'She was so energetic, no one would think she would pass away at 70.'[53] Redd said:

> She continued to work right until the end. Her health was deteriorating because of the cancer, there were secondary cancers on her brain. She was having a lot of radiotherapy and chemotherapy and tumours were popping up all over her but she was a workaholic so I think she needed the work to feel that she was still alive.[54]

She therefore set a strong example for both her postgraduate students and colleagues to follow. She expected her colleagues and assistants to work hard.[55]

One of the Department's central contributions was therefore to create a strong collegial environment where members were encouraged to seek inspiration from a broader world of ideas. Tay was largely loyal to her colleagues and postgraduate students and helped them advance their careers. As a result the University of Sydney had the benefit of several high performing legal scholars — along with a strong international network of scholars — who would not have been associated with the Australian discipline of law were it not for Tay and the Department.

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[50] Birch, above n 2; Participant A, above n 11.
[51] Sadurski, above n 2; Moens, above n 2
[52] Participant A, above n 11
[53] Ibid.
[54] Ibid.
[55] Birch, above n 2.

Some people in the Department did, however, find it oppressive at times. Few wished to integrate their personal and professional lives to the same extent as Tay had done and sometimes resented the amount of personal time they felt obliged to spend with Tay and other members of the Department.[56] While they were devoted to their careers they wished to set limits. The Department was like a family. Sadurski said that Tay 'wanted to be very much like almost a mother of a big family.'[57] And like many families the amount of time and personal intrusions meant that several of the relationships soured over time. Krygier was one of the first to leave the Department, largely due to personal differences.[58] Other formerly very close relationships broke down over time. Tay's frankness in all things — but especially academic matters — caused strain among even her closest colleagues and friends.

### 8.4.3 Tay and Women

The composition of Tay's Department as well as her list of friends suggests that she had a closer affinity with men than with women. Some of her colleagues speculated that she preferred the company of men. A few women joined the department but none lasted for very long. For example, when Tay arrived Lyndel Prott was a member of the department. She had previously been a member of Stone's Department of Jurisprudence and International Law. Some suggest that there was friction between the two. While Prott was a strong scholar her research agenda did not fit neatly with the vision that Tay was advancing for the Department. Her presence in the Department, as the only other senior person, may have suggested that she should have had a greater say in how it was run. This may have irritated Tay. Prott eventually left.

Tay's tendency to favour some colleagues and some PhD students, and bestow on them certain invitations and opportunities, is also said to have caused friction within the Department and Faculty of Law.[59] The fact that much of the favouritism was directed at men may have meant that she appeared sexist and appeared to work against feminist aims. Tay was one of the few women in Australia in a senior position both in terms of the academy and the law. Her leadership position might suggest that she had a responsibility to do more to promote women within both spheres. Tay was clearly aware of the emancipation of women as a social problem in both Western and Soviet societies. She

[56] Sadurski, above n 2; Ziegert, above n 2; Krygier, above n 2.
[57] Sadurski, above n 2.
[58] Krygier, above n 2.
[59] Participant A, above n 11; Allars, above n 11.

had written on this topic.[60] However, she did not generally embrace feminist scholarship.[61] On the one hand, she considered that it was 'morally praiseworthy' to deal 'with the problems of women as specific social problems' as 'a practical, political, legal and social task.'[62] On the other hand, she did not approve of the way that some feminist teaching and scholarship was being advanced. She believed that it was wrong to study feminist issues in isolation and in a way that prioritised the concerns of women over all others.[63] She said:

> The problems of women as women can be the subject of interesting intellectual investigation. Some of the nonsense taught in this area, both by detractors of women and by women's study courses, like some of the nonsense taught in nationalist ideology, in military academics or so-called peace research, cries out for philosophical examination. But this does not provide a basis, in my view, for women gathering together as women to talk some special form of 'female' philosophy or 'female' culture. There is, I believe, no such thing as a 'female' philosophy — analogous, say, to Christian philosophy except for the fact that it does not invite male converts. … We require, on the contrary, a sense of historical development, of interrelation and interaction, a readiness to shuffle backward and forward between principles and consequences, a sense of traditions as being the stuff of which social arrangements and beliefs are constituted, and a recognition that people have not one need or character but many.[64]

She therefore considered that rather than specialist preoccupations the emancipation of women should form part of larger philosophical and sociological questioning about ideas and values in society.[65] Tay believed that what she took to be current approaches, where feminist scholarship is written for and communicated to an audience of like-minded women scholars, and therefore is not subjected to opposing views that might prompt great questioning and self-criticism, 'lowers the standard of intellectual discussion.'[66] These views partially explain why Tay never joined with feminist scholars.

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[60] Alice Erh-Soon Tay, 'The Status of Women in the Soviet Union' (1972) 20 *American Journal of Comparative Law* 662.
[61] Alice Erh-Soon Tay, 'Women, Culture and the Quality of Life' in L Sandell and E E Schmidt (eds), *Women of the Year — A Collection of Speeches by Australia's Most Successful Women* (The Watermark Press, 1987) 23.
[62] Ibid 28.
[63] Ibid 25–26.
[64] Ibid 25.
[65] Ibid 25.
[66] Ibid 26.

Some of Tay's PhD students were women and from the acknowledgment sections of their theses it appears she treated them well.[67] However, the vast majority of her postgraduate students were men. Former female research assistants and female junior academics within the Department declined the invitation to be interviewed for this project, perhaps suggesting that there was no lingering fondness. Tay's own advancement may have also led her to believe that it was not necessary to take special measures to assist women. Perhaps she appointed men on the basis that they represented the established tradition and were typically considered respected authorities.[68] In other words, it played to her conservative inclinations. Another reason might be that she preferred the company of men and that being the only woman meant that she stood out.

Tay's running of the Department therefore had its limitations. Tay was pluralistic and open in her approach to ideas but clearly sought to favour those who she believed had stronger intellects and, presumably, made for better company.

### 8.4.4 Putting Students First

The most obvious benefactors of the community of scholars and networks that Tay created through the Department were students at the University of Sydney. Members of the Department devised a number of teaching initiatives that were firsts for Australia and provided Sydney students with new opportunities. The high-profile international visitors who spent a semester in the Department were typically asked to teach aspects of both undergraduate and postgraduate units. Tay also taught in foreign countries and, along with other colleagues, taught Jurisprudence in the Legal Admission Board course (now the Law Extension Committee) to students who, for reasons of time and/or money, could not qualify as lawyers through traditional university education.[69] Again Tay led the academy into new spaces where law could be studied as a larger global enterprise.

Tay's dedication to students is evident both from the initiatives she devised and the amount of time and energy she devoted to students. Even when she became the President of HREOC she continued to teach part-time at Sydney as well as abroad. She also delivered speeches to various groups on the importance of education.[70] Christopher Birch

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[67] For example, she had an Indian PhD student, Sakuntala Kadirgamar-Rajasingham, who, among other things, went on to become a Senior Advisor to the United Nations. She thanked Tay for 'her unwavering patience, guidance and support' and 'sympathetic ear'.

[68] Ziegert made a similar suggestion: Ziegert, above n 2.

[69] Once a student had completed the course they were eligible for admission as a solicitor.

[70] See, eg, Alice Erh-Soon Tay, 'Graduation Address' (Speech delivered at Brisbane Grammar School, Brisbane, 18 November 1998); Alice Erh-Soon Tay, 'Address' (Speech delivered at the Council for Equal Opportunity Limited, Grace Hotel, Sydney, 26 August 1998).

recalled that during this time she would mark all of the Jurisprudence exam papers for the Law Extension Course:

> So for a number of years I took all the lectures and Alice would mark all of the exam papers. There would be 50–60 students a session and they would each write four or five answers, so you can multiply it all out. It was horrendous. I used to say 'Alice, it must be unbearable having to mark all of those papers' and she said she didn't mind as it helped her keep in touch with what young students were thinking. …
>
> … It always struck me as very unusual that Alice was like this, that she didn't have this view that I've reached this highly elevated position in the profession so teaching in the Diploma of Law course or marking exam papers is beneath me, so I just wish to spend my life in select seminar groups in Oxford or Princeton. She was quite happy to roll up her sleeves and do all this kind of hard academic work.[71]

While President Tay continued to travel to England annually to teach in University of Notre Dame's summer programme in Law in London. Gabriel Moens made the introductions that led to her involvement in the programme. He said that she 'liked it very, very much.'[72] This all provides further evidence for the fact, succinctly expressed by Redd, that 'Alice loved teaching.'[73]

Tay devised a number of teaching initiatives. One of the first was to set up an arrangement whereby students could choose one jurisprudence subject out of four streams. This meant that while jurisprudence was a compulsory part of the law degree at the University of Sydney, students could choose the subject that best suited them. Interestingly, some students chose Tay's stream on the basis of a perception spread by other students that it was the more 'black letter' of the four subjects and therefore sat more comfortably with what they had already learnt.[74] With the help of other members of her Department (particularly Ziegert), Tay also arranged for exchange programmes in China, Vietnam and Germany — mostly at a Master's level. Her second husband, Guenther Doeker-Mach, organised the German exchange programme with Friedrich Schiller Universität Jena that became a first for an Australian law school.[75] Many other exchanges followed. To provide teachers for these programmes she drew from her

[71] Birch, above n 2.
[72] Moens, above n 2.
[73] Redd, above n 2.
[74] Ziegert, above n 2; Interview with Justice Julie Ward (Judges Chambers, Supreme Court of New South Wales, Sydney, 8 December 2014).
[75] Birch, above n 2.

contacts in the profession, including former students, as well as other members of the Faculty.[76]

Tay, initially with Kamenka, made numerous trips to China throughout her career. During her time as Professor of Jurisprudence Tay was part of government delegations to both China and Tibet.[77] She taught in China while President of HREOC, lecturing alongside Chinese professors. In the 1990s the Department, at the instigation of Ziegert, established CAPLUS. One of Tay's central platforms was to make China's laws, legal system and culture accessible to the West. In the 1970s, at the time that she and Kamenka first travelled to China, this was a considerable task as China's laws and legal system were shrouded in secrecy[78] and being a lawyer was a vocation that required a high degree of secrecy.[79] At that stage the rule of both Mao and the Gang of Four had ended and Deng Xiaoping was in power. After a decade of closure during the Cultural Revolution, Chinese universities had reopened and both staff and students were 'hungry for knowledge.'[80] Tay and Kamenka toured throughout China and their speeches were published in newspapers and journals distributed throughout the country.[81] They were considered 'big names' and lectured 'on topics that the Chinese lecturers wouldn't be discussing.'[82] Their understanding of communist, Soviet and Western legal systems meant that they were ideally placed to speak to the Chinese about the trajectory of their legal system and reforms that might prevent some of the atrocities of the past. Of course the new environment did not mean that the Chinese were receptive to a Westernisation of their laws or strong criticisms of their mode of governance but it appears that Tay and Kamenka were able to speak with an openness not permitted either in earlier or later times. As one interviewee explained to me, there was a general attitude that they were foreigners and permitted to have their views.[83] He was not surprised that Tay found that

[76] For example, Chief Justice Allsop, Birch and Allars all taught in the programme. Interview with Chief Justice James Allsop (Federal Court of Australia, Sydney, 29 July 2014); Birch, above n 2; Allars, above n 11.

[77] For example, in 1981 she spent five weeks in China as a guest of the Chinese Academy of Social Sciences: Faculty of Law Minutes, 13 March 1981, 15 (University of Sydney Archives, G3/2). She returned in 1986: 'Fellow of the Academy of Social Sciences', *The University of Sydney News* (Sydney) 4 November 1986, 18; Leech, above n 23, 6. In 1991 they were part of an Australian delegation to both China and Tibet. They attempted a further trip the following year but it was cancelled by the Chinese government: Eugene Kamenka and Alice Erh-Soon Tay, 'International Law, International Justice and the Autonomy of Tibet' (1993) 18 *Bulletin of the Australian Society of Legal Philosophy* 36, 44–50.

[78] This is something that Tay acknowledged: Alice Erh-Soon Tay, 'Law in Communist China – Part 1' (1969) 6 *Sydney Law Review* 153, 154.

[79] Participant A, above n 11

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] Ibid.

Chinese students and academics took to and understood the ideal types far more readily than Westerners.[84] He explained:

> For those who had gone through the 10 years of the 'Cultural Revolution' the whole teaching was Karl Marx or the Chinese version of Marxism. Someone who saw what was going on in the Soviet Union and the Western democratic system providing a sort of conception and notion of justice and equality, those kinds of things, you thought this is someone who knows all this and can give you a precise summary of what all those notions are about and you have all these eager and hungry people trying to understand, then of course your immediate impression is that they understand it much better than Australians. Australians take it for granted — election, equality, justice etc — whereas people over there thought these are the things you need to fight for and sometimes fight for your life and for it to be defined in that precise format (they only had an hour also to talk about this) you can imagine the response from the audience, that they were suddenly so enlightened, 'Oh ok that is what we are trying to fight for.' We didn't have any guidance on what to do, now we have understanding.[85]

It was an important, not to be repeated, time in the history of Chinese universities and gave Tay and Kamenka an ideal opportunity to bring what they had learnt to those who would benefit from it the most. At least in part, it fulfilled one of Tay's primary goals: to bring greater understanding between the East and West. The various teaching programmes Tay established in China and Asia during her tenure at Sydney can therefore be viewed as initiatives also pursued in furtherance of these goals.

It was while Tay was on bereavement leave in 1994 that Ziegert decided to propose CAPLUS. He believed that the Centre would give Tay, who was bereft after Kamenka's death, a new focus and that it would provide some consolation and a refuge if ever the Department was abolished.[86] As Ziegert predicted Tay soon agreed and began devising new initiatives for teaching and research in and about China. Both Ziegert and Redd suggested that her attributes — an older Chinese woman now living in the West — meant that she had a unique vantage point:

> She played this hypocrisy of communism perfectly. She could always criticize them openly for their lack of Rule of Law and legal procedure and was still respected despite kicking ass. That is something only Alice could do because if she had been an American

[84] Alice Erh-Soon Tay and Eugene Kamenka, 'Elevating Law in the People's Republic of China' (1985) 9 *Bulletin of Australian Society of Legal Philosophy* 69, 92.
[85] Participant A, above n 11
[86] Ibid.

> male white law professor and told the Russian law professors that their law was deficient he would not have been invited back and would have been kicked out, but not Alice. She went back to Russia and she made good friends and she also gained strong support in China and Vietnam.[87]

For Tay these teaching opportunities therefore enabled her to attempt to influence present and future lawyers in both China and the USSR/Russia.

The content of Tay's teaching largely replicated her scholarly interests. Her interest in property law flowed through to her teaching, as did her interest in Soviet systems and Marxist ideas. Wilkins, who took tutorials and sat in on Tay's classes, recalled that:

> She was looking at some of the stuff on Reich that was written in the 1930s in Germany on the role of property in a social system. She was interested in Glendon's stuff on welfare and whether it was going to be hypostasised or transformed into some kind of right. This is on the edge of, I suppose, some of the, you might say, more ideological areas of law in terms of property. So she was certainly alive to that sort of Marxist critique. It wasn't Marx so much. So in legal history terms she was sort of interested in E P Thompson and people like that and that sort of analysis of legal systems and laws.[88]

Tay was one of the very first Australian legal scholars to write about human rights and she taught in that subject as well.[89]

Tay's teaching style could be dramatic and she would sometimes attempt to shock her audience. One interviewee said that there was a lot of interaction: 'You discussed the most serious legal issues in the most relaxed way.'[90] She also sought to instil in students an open mind:

> For each of the subjects she taught she would always have guest lecturers either from the judiciary or international scholars so that you got different perspectives and so you could

[87] Ibid. See, also, Redd, above n 2.
[88] Wilkins, above n 2.
[89] Tay's scholarship and teaching in the field of human rights constitutes yet another very important contribution Tay made to the discipline of law in Australia. However, for reasons of space it cannot be fully explored here. While much of her work could be described as working towards the prevention of human rights abuses, as indicated in the appendix that contains Tay's publication list, she began publishing articles, book chapters and papers with 'human rights' in the title in the 1980s and considered specifically how human rights ought to be taught in Australia. In the 1980 she was part of an organising committee for a national seminar on teaching and research on human rights at tertiary and adult education levels sponsored by the Australian National Commission for UNESCO.
[90] Participant A, above n 11.

> see that there was no right or wrong. She always said there was no black or white or right or wrong answers in law. [91]

While she did not inspire all of her students, for some her impact was immense.[92] Atkin believed that she had an aura and said that 'what you did get a sense of was her very strong intellect.'[93] The current Chief Justice of the Federal Court, James Allsop, gave strong praise to Tay's teaching saying that she awakened him to the academic side of law and that it later encouraged him, when as a judge faced with hard cases, to draw inspiration from the writings of great jurisprudential scholars.[94]

As with her colleagues, Tay sought to establish personal connections with students and on occasion she would organise social events for her classes, including at times offering invitations to students to attend events on the rooftop of the Astor.[95] Chief Justice Allsop said that the small classes were personal and that she demanded attention but was never threatening.[96] Instead she would joke and try to encourage students to participate.[97] He believed that she liked people and she liked students.[98] Hamish Redd, who attended a number of Tay's classes, said that she 'formed views very quickly about who the bright students were and who wasn't. She would focus on the bright students.'[99] She kept in touch with some students and also offered kind words of encouragement and advice.[100]

Those who have the fondest memories of Tay and on whom she made the greatest impression were her doctoral students. At times she could be extremely tough and expected a great deal from them. She perceived a certain undesirable 'easy-goingness' in her undergraduate law students[101] that she would not tolerate in her postgraduates. Both Moens and another interviewee recall Tay describing an early draft of their thesis as 'rubbish'.[102] In Moens's case she accentuated the point by throwing his thesis into the bin.[103] Despite the harsh treatment both of them believe that they owed her a great debt

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[91] Ibid.
[92] Chief Justice Allsop attests to this: Allsop, above n 76.
[93] Atkin, above n 8.
[94] Allsop, above n 76.
[95] Atkin, above n 8; Moens, above n 2, Participant A, above n 11.
[96] Allsop, above n 76.
[97] Ibid.
[98] Ibid.
[99] Redd, above n 2.
[100] Allars, above n 11; Allsop, above n 76.
[101] Leech, above n 23, 6.
[102] Moens, above n 2; Participant A, above n 11.
[103] Moens, above n 2.

and that she was a very good supervisor.[104] Tay encouraged her PhD students to become academics and, with her assistance, several of them achieved very high positions early in their career and also took up governance positions in law schools.[105] She hoped to instil in them the scholarly values that drove her career. One interviewee, who later became the Head of School at an Australian university, said that there were moments in his career when he realised that Tay was still 'working on him'.[106] Her legacy therefore extended beyond her scholarship to the set of scholarly values she applied to the management of the Department.

### 8.5 'A Perilous and Fighting Life'

One of the most obvious results of Tay's largely independent and autonomous Department was that it enabled her to act as both fierce critic of and conscience to Australia's legal academy. She moved beyond a larger institutional critique to issuing criticisms that called individual Australian legal academics to account. Rather than despairing at the personal frictions that were created in Stone's time and that she endured throughout her tenure, in several ways she played the tension to her advantage. As her friendships and loyalties largely sat outside the Department of Law she was free to say what she liked about those within it.[107] In fact, there are few signs to suggest that she ever integrated into Australia's legal academy. One of Tay's main contributions was therefore to draw strength from a vantage point that was both within and outside the legal academy and challenge practices and intellectual currents that she believed went against the true spirit of the scholar and what she regarded to be the traditional university values. She blamed both the external pressures being imposed by governments as well as the pervading culture within Australian universities and, more particularly, law schools.

Tay's greatest concern was that universities, law schools and legal scholars were being swept up en masse in a new movement, which she labelled 'pseudo-individualism'; 'emotion without competence and without that self-assurance which is grounded in knowledge and capacity and experience; self-importance without the readiness to take responsibility; longing without staying-power; and, intellectual pretension without the

[104] Moens, above n 2; Participant A, above n 11.
[105] For example, both Participant A and Moens became professors quickly and both acted as Heads of School. Another of her PhD students was John Mo who became Dean of the Faculty of International Law at the China University of Political Science and Law and is now Dean of Law at Macao University.
[106] Participant A, above n 11.
[107] Tay acknowledged such freedom during an interview with a journalist. See Leech, above n 23, 6.

habit of sustained planning and sustained work.'[108] This movement had the potential to integrate the university and the discipline of law into the 'general machinery allegedly working for the common good.'[109]

Tay wrote most passionately about the state of Australian legal education and scholarship and with such passion came criticisms that were bound to alienate her in certain academic circles. Her primary attacks were directed at junior scholars who, she believed, had let their emotions such as pity towards the less fortunate dominate at the expense of the careful study required to provide a strong intellectual grounding in the discipline. According to Tay law schools should teach a complement of doctrine and general and informed thinking about law that takes into account its history, social context and the experience of other cultures.[110] She considered that this was not occurring in Australia and that instead doctrinal studies were being replaced by 'half-baked sociology, vociferous compassion, strident protest or the belief that the simple and direct evaluation of policy is an adequate substitute for knowing and understanding the structure and development, the problems and complexities of law and the legal tradition.'[111] She condemned, to the point of personal insult, colleagues who had adopted this approach:

> Because such empty postures come most readily to unintelligent and unimaginative minds, it is striking that university law courses with the most radical titles normally contain the most conventional and traditional material, failing to bring into genuine relation the complexities of the past and the demands for the future.[112]

These new pseudo-individualist trends had not only prospered in areas such as human rights but had also crossed into the heart of Tay and Kamenka's interests, the study of Marxism. Marxism had been commandeered by radical scholars who wished to attack the

> multinational corporations in the world economy, the 'imperialist' and anti-communist role of the United States' 'ruling classes' (implicitly treated as power elites), and the limits that these world protagonists and the unplanned world economy place on the

[108] Alice Erh-Soon Tay, 'Law, the Citizen and the State' in Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay (eds) *Law and Society* (Edward Arnold, 1977) 1, 2–3.
[109] Ibid 5.
[110] Alice Erh-Soon Tay, and Eugene Kamneka, 'New Legal Areas, New Legal Attitudes' in Tay and Kamenka (eds), *Law-Making in Australia* (Edward Arnold, 1980) 247, 259–60.
[111] Ibid 259.
[112] Ibid 259.

> capacity for action by social democratic or socialist national governments anywhere in the world.[113]

Tay and Kamenka did not object to this new reincarnation of Marxism per se but to the way in which this new breed of 'amateur academics'[114] (to use their label) used the parts of Marxism which suited them best and 'were happiest ignoring, or knowing as little as possible about, social ideology, law and legal theory in the communist countries.'[115] They believed that because these radicals were unconcerned with Marxism as a theory, with 'unproblematic science' or with the 'body of general laws', preferring rather to 'choose sides, against the power of capital and the profit motive and to support the cause of peace, community, and "rational" social relations, they were left with themes rather than laws.'[116] They characterised these scholars as irresponsible and self-serving. They considered that they advanced their scholarship in order to promote their own careers and sense of worth rather than to better society.[117]

What concerned Tay and Kamenka most was that these 'emotional' crusades were being advanced in the absence of a careful and balanced appraisal of the *Gesellschaft* — in their view the ideal type of Western law[118] — and that in their ignorance this new band of scholars had sought to erode and dismantle it. Given that through their Soviet studies Tay and Kamenka had concluded that the *Gesellschaft* was best equipped to achieve justice and to fend off tyranny,[119] and given Tay's convictions about the intellectual integrity and coherence of the common law which she had formed during her study of property law,[120] their colleagues' new zeal must have seemed naive and unwise. Much of what Tay and Kamenka wrote in this new chapter of scholarship served to bring forth the strength of the *Gesellschaft* and in particular the common law, which they characterised as the paradigm form of the *Gesellschaft*.

Though they endorsed traditional conceptions of the common law Tay and Kamenka were not narrow formalists. They accepted the realist critique of law, beginning with Rudolf von Ihering, that discounts 'the internal coherence and historical integrity of law,

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[113] Ibid 607–8.
[114] Ibid 613.
[115] Ibid 611.
[116] Ibid 612.
[117] Ibid 613. Alice Erh-Soon Tay and Eugene Kamenka, 'New Marxism for Old: Contemporary Radicalism and Legal Theories' (1988) 1 *University of California Davis Law Review* 605, 636.
[118] Alice Erh-Soon Tay, 'China and Legal Pluralism' (1984) 8 *Bulletin of the Australian Society of Legal Philosophers* 23, 27.
[119] Ibid.
[120] See Chapter 6.

its claim to mould society and to represent specifically legal traditions, procedures and ideals.'[121] In an article they had explicitly endorsed Julius Stone's position on legal reasoning.[122] However, what they did not accept was that law should be 'a neutral, flexible and totally characterless instrument responsive to or serving uncritically elevated goals and ends alleged to have logical priority over that law.'[123] They believed that the common law had always been capable of protecting a diversity of interests, that it 'assumed' a plurality of interests[124] and was inherently flexible. Failings of the common law to protect such interests in the past were due not to 'the rigidity of the common law, but the rigidity of judges' minds.' [125]

Tay clearly believed that the Western desire to elevate the *Gemeinschaft* over the *Gesellschaft* was a product of insularity and ignorance where scholars 'have no eye for a comparison with other countries and political systems.'[126] She said:

> [T]he *Gesellschaft* strain keeps re-emerging and, at the formal level, the Chinese government is moving to increased emphasis on aspects of the *Gesellschaft* conception of law and its role in modern society, even if its practice, like that of the Soviet Union, is more and more bureaucratic-administrative. Those in the West who are excited about other people's legal systems and traditions nearly always elevate the *Gemeinschaft* conception. Those of [us] who are not white and have lived under *Gemeinschaft* conception have long voted the other way — some with guns and some with their feet. [127]

These forthright and sometimes very personal criticisms[128] served to alienate Tay and Kamenka from parts of the legal academy.[129] In one very scathing article she went so far as to say that the strength of Australian law schools came from the fact that students were required to read the judgments of great Australian judges and that the 'legal mind in

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[121] Alice Erh-Soon Tay and Eugene Kamenka, 'Social Traditions, Legal Traditions' in Kamenka and Tay (eds), *Law and Social Control* (Edward Arnold, 1980) 3, 3.
[122] Alice Erh-Soon Tay, 'The Sense of Justice in the Common Law' in Kamenka and Tay (eds), *Justice* (Edward Arnold, 1980) 79, 91.
[123] Tay and Kamenka, above n 121, 3.
[124] Tay, above n 118, 27.
[125] Alice Erh-Soon Tay, 'Law and "Legal Culture"' (1983) 27 *Bulletin of Australian Society of Legal Philosophy* 15, 24.
[126] Alice Erh-Soon Tay, 'Legal Education, Legal Research and Legal Reform in Poland' (1980) 54 *Australian Law Journal* 142, 142.
[127] Tay, above n 118, 34.
[128] See, in particular, Alice Erh-Soon Tay, 'Aimless Perspectives — A Comment on Chapter One of the CTEC "Discipline Assessment" of the Australian Law Schools' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 154, 154.
[129] Some simply did not accept Tay and Kamenka's central thesis that there was a crisis in legal ideals: see David Nelken, 'Is there a Crisis in Law and Legal Ideology?' (1982) 9 *Journal of Law and Society* 177.

Australia is better outside the law schools than within them.'[130] She also indicated that she believed that her education in the Inns of Court in England brought advantages that she could not have received at an Australian law school and said that law schools in Australia ought to not only serve Australian society but also transform it.[131]

These aspects of Tay and Kamenka's scholarship — along with Tay's talk of being an 'old-fashioned scholar'[132] — also earned them reputations as conservatives. Most of those interviewed for this project agreed that Tay had conservative inclinations[133] but some disputed the idea that this went beyond her scholarship to Australian politics. One former student had given this matter some thought and had questioned Tay on her position:

> Alice Tay was highly respected by Labor and was in a good relationship with the Hawke and Keating governments. She chaired the Prime Minister's committee on science under the Hawke/Keating government. … That is a question I directly asked her, whether she was into the Labor or Liberal government. She said 'No, to the contrary, I don't like either of the bastards but they both appoint me which is fine with me but I'm not on either side.[134]

Similarly, Kirby, once he got to know Tay and Kamenka and their work a little better, revised the impression he had initially formed of the pair when they had examined his thesis:

> I think they thought I was a bit of a lefty and I thought they were a bit right-wing. But the truth probably is that we were all fairly conservative in fundamentals. We were quite self-satisfied with the overall structure of our democratic parliamentary system with its independent courts and uncorrupted judges and therefore there wasn't a great deal of difference between us and as Alice and I got to know each other better in the years after our respective appointments in 1975[135] our relationship warmed and my original suspicion of them as both anti-communist ideologues was meted by an appreciation that

[130] Ibid 155.
[131] Ibid 156.
[132] See, above n 23.
[133] Ziegert, above n 2; Sadurski, above n 2; Wilkins, above n 2
[134] Participant A, above n 11. Sadurski speculated: 'I don't think that they could have had a great sense of sympathy for Liberals because of this Liberal snobbishness type of born to rule and here you had two relative outsiders, a Russian Jew who established himself in Australia and a Chinese woman. They didn't fit the old boy network of the Liberal party, especially of that time': Sadurski, above n 2.
[135] Michael Kirby was appointed Deputy President of the Australian Conciliation and Arbitration Commission and a member (later Chairman) of the Law Reform Commission at around the same time Tay was appointed Professor of Jurisprudence. Kirby, above n 2.

> they were simply contributing on the left-right spectrum a perspective that came from their own background, which was entirely legitimate and useful. Including useful to me.[136]

Tay's frank and divisive criticisms demonstrated that if given autonomy and independence academics could act as conscience and critic of the legal academy. She could speak freely because she did not seek approval from the broader legal academy and her promotion within the academy did not depend on it. Rather than placate, compromise or negotiate, Tay's preferred course was to fight for academic ideals and make those who she believed fell below them accountable by calling out their perceived deficiencies. She wanted to make people who she considered either weren't working hard enough or were seeking easy acclaim feel uncomfortable. It is in many ways a noble and courageous objective that points to Tay's strong moral constitution and furthers the case for the existence of a department like Tay's.

On the other hand, Tay's criticisms at times spoke of her own poor judgment and intemperate nature. Unlike Brett, her frank criticisms sometimes moved beyond the professional and academic and became deeply personal and insulting. In both print and in everyday life she was known to be 'capable of a very cutting turn of phrase and a personal attack.'[137] She acknowledged that her frank criticisms of colleagues were likely to offend.[138] Her reasoning often became *ad hominem*, was often repetitive[139] and sometimes 'shrill'.[140] Tay would no doubt argue that she was entitled to form the opinions that she had and express them forcefully. For Tay, this was a personal matter — a true academic lives and breathes their vocation. However, her direct personal criticism of named individuals (in particular) spoke of a lack of balance and made her arguments much easier to dismiss. It also prompts one to question whether her own scholarship met the high standards she subjected others to. While her earlier work speaks of great breadth and industry, in the two decades that she held the Chair at the University of Sydney the repetitious qualities of her scholarship increased and she had less time to spend conducting the large surveys of law and social theory that characterised her earlier work. One also wonders just how far she went to gain a proper understanding of the various

[136] Ibid; Michael Kirby, '*Festschrift* for Professor Alice Erh-Soon Tay — The Future of Human Rights — Does it Have One?' < www.michaelkirby.com.au>.
[137] Redd, above n 2. Others made similar comments: Sadurski, above n 2, Ziegert, above n 2.
[138] Leech, above n 23, 6.
[139] Many of the same passages in Tay's work appear in numerous articles and book chapters. As noted earlier, many of her and Kamenka's articles and chapters on the ideal types contained the same passages and arguments.
[140] Krygier, above n 2.

components of the Critical Legal Studies movement within Australia that she so strongly condemned and read the work of the new generation of legal scholars who she caricatured.

The following chapter explains how Tay's contributions to Australia's legal academy, as presented in the previous three chapters, demonstrate her importance to any understanding of the trajectory of the discipline of law in Australia.

# 9 CONCLUSION: ALICE ERH-SOON TAY

This part has shown that Tay made a distinctive and innovative contribution to the legal academy in two central ways. First, in the face of considerable opposition, she continued Stone's legacy by reincarnating some of the central attributes of the Department of Jurisprudence and International Law. Second, she ensured that the Department would be insulated from external governmental and administrative agendas and would be run almost solely in accordance with academic priorities. Tay pursued both of these goals primarily for the benefit of Sydney law graduates. She hoped to strengthen Australia's system of laws and governance by encouraging students to develop strong intellects and to exercise their intellect both within the academy and in high office. Through the Department Tay made an innovative and distinctive contribution to the discipline of law in Australia.

Tay's career (like Brett's) demonstrates that a person's formative experiences and political environment help explain their scholarly contributions. These served as critical motivating forces and as the impetus for Tay's career. Tay's career (again like Brett's) also demonstrates how politics and personalities can obscure the way that the discipline and particular scholars within it are remembered. While the Department was founded on noble underpinnings and achieved greatness, its mere existence and subsequent history suggested that the Department of Law was narrow and created the impression that those scholars within the Department of Jurisprudence were being privileged over the rest of the Faculty. This meant that its place within the University of Sydney became increasingly untenable. In some ways the Department of Jurisprudence was an exemplar of how academic schools and faculties ought to be managed. However, the success of the Department did not — or at least not entirely — make a sufficient case for its continued existence at the University of Sydney. Ultimately its existence came at too high a price. Regrettably the arguments for its abolition sometimes suggested that its existence contributed little to Sydney or Australia's legal academy. Put succinctly and with Tay's frankness, this is simply wrong.

I have, of course, thought about what Tay would have made of this aspect of my thesis — my finding merit in the arguments of those who both opposed and defended the Department. Were she alive to read this she might say that I have attempted to reconcile the irreconcilable and that I am attempting to please everyone, smoothing over the cracks. That is something I may simply have to accept and leave for others to judge. Throughout this project I have tried to be mindful that biographers often develop a strong bias

towards their subjects. Therefore I have attempted to develop the richest and most informed view of Tay based on a thorough review of all of the evidence that was available to me. This included interviewing a range of Tay's associates who had a variety of opinions about her and the Department and who interacted with her in different ways. Not all people falling within this category were willing to be interviewed. Nonetheless, balance was achieved in other ways. The interviews disclosed that many of Tay's closest colleagues and friends were also well acquainted with her shortcomings and several had argued with her at one time or another. Also, the interviews conducted for this project revealed that even members of the Department could see merit in some of their adversaries' arguments.

The Faculty of Law (now named Sydney Law School) at the University of Sydney of course continues on. It continues to attract more applications from students than there are places and is thought of as one of Australia's most highly regarded law schools. Now that it has moved onto the University's campus and is housed in an iconic architectural structure it has no doubt become even more appealing to academics. It has a small group of jurisprudential scholars with strong reputations (including Sadurski who holds the Chair of Jurisprudence) who identify themselves as primarily jurisprudes. The Julius Stone Institute, created at the instigation of Jeremy Webber in 1998 to help with the task of maintaining and mainstreaming a strong jurisprudential presence at Sydney,[1] provides another forum in which Sydney scholars can advance this area of study. By providing other outlets for jurisprudence and involving a larger number of people from across the faculty in the teaching of theory-based subjects, perhaps these features of the University of Sydney cast doubt on Tay's arguments and motivations and the wisdom of her initiatives, at least into the 1990s.

My suspicion, however, is that many scholars would read these chapters about the Department with a sense of wistfulness and wonder. What would happen if universities abandoned the idea of mega faculties and corporate imperatives and instead used Tay's Department as a model? Would it lead to complacency, inefficiency, nepotism and elitism? Or might it attract and produce more scholars of Krygier, Sadurski and Ziegert's diverse ilk and exceptional ability? Might it provide a solution to the fragmentary nature of disciplines? Could it add strength to universities by yielding power to strong disciplinary leaders? Tay's experience might lead a charge for more academic entrepreneurs and smaller departments.

[1] Interview with Jeremy Webber (By telephone, 22 October 2014).

Irrespective of the model, Tay's career might suggest that the critique, reform and management of the discipline of law are jobs worthy of great jurisprudential scholars and perhaps that legal scholars — scholars who have built careers around the study and advancement of reason and the examination of governance structures — may be ideally placed to lead a change in the culture of universities. The focus of this part should not suggest that Tay was not an intelligent scholar who wrote imaginative and important legal scholarship. Much more could, of course, be said about her scholarship. However, the point of this part has been to bring to the fore the contribution that I believe Tay prioritised and is the most distinctive part of her varied and interesting scholarly endeavour.

At the end of Tay's career it is clear that she was pessimistic about the state of Australian universities and believed them to be beyond repair. She, perhaps unkindly, thought that they were full of mediocre intellectuals lacking in the courage or strength to provide any real opposition to current trends. Some might say that Tay was exceptional — one of a kind — and that no academic today could advance the agenda and wield the same amount of power as she once did. Tay was certainly pessimistic about the future. I suspect, however, that she would not have minded if a few scholars proved her wrong.

This thesis now turns to another scholar who was responsible for a department of law located in a social science school, Geoffrey Sawer. As is revealed in the next part, Sawer took a very different approach to Tay in his role as department head and in several ways his department languished over time. His contribution to Australia's legal academy lies instead in the now seemingly subtle, though at the time provocative, ways that he changed a significant aspect of the culture of Australia's legal profession and legal academy through his scholarship, advocacy and relationships.

## PART 3 GEOFFREY SAWER

**Part 3** is devoted to the last of my subjects, Geoffrey Sawer. As was the case with Tay and Brett, I begin in **Chapter 10** by detailing some of the influences and experiences in Sawer's early life, university education and career that help to explain the contribution he later made to Australia's legal academy. **Chapter 11**, for the first time, attempts to describe Sawer's particular Australian brand of legal theory and also explains how his scholarship fed into a larger agenda to change and broaden attitudes within Australia's legal profession and academy about the relevance of the social sciences to the practice and study of law. **Chapter 12** explores Sawer's efforts as head of the Department of Law at the RSSS and critically examines his decision not to build the Department into a large ambitious enterprise. In **Chapter 13,** the conclusion, I explain the importance of evaluating Sawer on his own terms and in the environment in which he operated and provide a final assessment of his various contributions and the consequences of Sawer's failure to build the Department.

# 10 POLITICS, LAW AND SOCIETY

## 10.1 Introduction

Geoffrey Sawer is the father of modern Australian constitutional law teaching and scholarship. In the second half of the 20th century he pioneered a distinct brand of constitutionalism[1] and advanced significant bodies of scholarship that provided strong foundations for studies in Australian public law and politics. His relevance to this project, however, lies in what he did to incrementally move both the discipline and the legal profession away from the idea of law as an autonomous entity, moving it closer towards the social sciences, and how he undertook this task as a full-time Australian legal scholar in a research school rather than a law school. It is important to recognise that although he did not draw attention to the fact, Sawer was as much a legal theorist as he was a constitutional lawyer.[2] The grouping of Sawer with Brett and Tay can therefore be supported purely on this basis alone. However, there are other attributes that these three scholars have in common. All three advanced ambitious scholarly agendas that responded to their political environment and what they believed was required to strengthen the discipline of law.

Over the course of Sawer's career, both the discipline of law and Australian society changed dramatically. Sawer studied and practised law during the Depression, began his academic career while the Second World War raged, commenced as the first Professor of Law at the newly created RSSS at the ANU on the eve of the creation of a full-time Australian legal academy, built an international reputation within the School while the social sciences grew, and retired during the ferment caused by the critical legal studies movement. He accepted his first academic appointment at the University of Melbourne in 1940[3] when constitutional law had not yet become an organised body of law and ended

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1 Former Chief Justice of the High Court of Australia, Sir Anthony Mason, described Sawer as a 'constitutionalist': see Anthony Mason, 'Geoffrey Sawer: The Priceless Professor', *The Canberra Times* (Canberra), 21 December 1990, 7; Interview with Sir Anthony Mason (Sir Anthony Mason's Chambers in Sydney, 9 December 2014).

2 When Sawer died in August 1996 some of the obituaries referred to his sociological approach but did not describe Sawer as a legal theorist. See 'Obituaries: Geoffrey Sawer 1910—1996', *Sydney Morning Herald* (Sydney), 12 August 1996, 34; Ninian Stephen, 'Constitutional Lawyer and Gardener', *The Canberra Times* (Canberra), 10 August 1996; John Nethercote, 'Lawyer Offered an Authoritative Insight into Federalism', *The Australian* (Sydney) 13, 12 August 1996, 13; Sir Zelman Cowen, 'Academic Shaped Legal Scholarship', *The Australian* (Sydney), 12 August 1996, 13; Justice Rae Else-Mitchell, 'Scholar's Life on Public Record', *The Age* (Melbourne), 30 August 1996, B2.

3 Letter from Geoffrey Sawer to the Registrar of the University of Melbourne, 20 February 1940 (University of Melbourne Archives, *G W Paton Legal Education 1932–1945,* 1984.0033); Outline Biography by Geoffrey Sawer (National Library of Australia Manuscript Collection,

his tenure shortly after the dramatic political and constitutional events of 1975, when Australia's Governor-General, John Kerr, dismissed the Prime Minister, Gough Whitlam.[4] While Sawer spent many sabbaticals overseas, he did not hold the usual Oxbridge qualifications for an Australian legal academic, with his formal studies taking place at the University of Melbourne.[5] Sawer drew his ideas and inspiration largely from the Australian environment and, as with Tay, part of his agenda included bringing Australian law and legal scholarship to the attention of the rest of the world.

Today the notion of a full-time legal scholar in a research institution for social scientists and the idea of studying law in context are largely unexceptional. However, Sawer's position and ideas about law were controversial both at the time of his appointment and throughout his career. As one reviewer remarked, for the time Sawer's work was 'distinctly provocative constitutional writing' that was 'addressed … to open-minded professionals …'.[6] At the beginning of his career some members of Australia's legal profession interpreted Sir Owen Dixon's concept of complete and strict legalism to mean that politics had no place in law and that law's integrity — at least in the judicial sphere — rested on its autonomy.[7] Further, there was no obvious or natural connection between

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*Geoffrey Sawer Papers,* MS 2688, Series 18, Unpublished biographical writings of Geoffrey Sawer) 6.

[4] He retired in December 1975, a month after the dismissal. At the invitation of the Governor-General, Sawer ran two small confidential advisory tutorials with the Governor-General and members of ANU staff on the question of he Governor-General's powers. Realising the potential imminent real-life consequence of the matters discussed Sawer put an end to the tutorials: Jenny Hocking, *Gough Whitlam — His Time* (Miegunyah Press, 2012) vol 2, 304–5. See also Letter from Geoffrey Sawer to Sir John Kerr, 16 May 1975, and string of correspondence around this time (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 7, Papers and Correspondence re Office of the Governor-General 1975-91' Part 1/2). See also Geoffrey Sawer, 'The Governor-General of the Commonwealth of Australia' (1976) 52 *Current Affairs Bulletin* 20; Geoffrey Sawer, 'The Whitlam Revolution in Australian Federalism — Promise Possibilities and Performance' (1976) 10 *Melbourne University Law Review* 315; Geoffrey Sawer, 'Towards a New Federal Structure?' in Gareth Evans (ed), *Labor and the Constitution 1972–75* (Heinemann, 1977) 1; Geoffrey Sawer, *Federation under Strain: Australia 1972-75* (Melbourne University Press, 1977).

[5] Sawer graduated from the Law School of the University of Melbourne in Law in 1933 with an LLB and then in 1934, due to his strong honours performance, was awarded an LLM. He also obtained an Arts Degree while a full-time academic at Melbourne. His full-time teachers of Law at Melbourne, George Paton and Kenneth Bailey, both held degrees from the University of Oxford. See Sawer, *Outline Biography,* above n 3; John Waugh, *First Principles — The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 125–6.

[6] L F Crisp, 'Book Review: Geoffrey Sawer, *Modern Federalism*' (1969) 3 *Federal Law Review* 302, 302.

[7] A leading Australian constitutional law scholar and friend of Sawer's, Geoffrey Lindell, spoke of the various interpretations that have been made of Sir Owen Dixon's complete and strict legalism. He explained that there 'are the narrow Dixons' who 'saw in him high legal techniques' where judges 'avoid reliance on values, policies and societal aims' and the 'wider Dixons', like Sir Anthony Mason, who 'interpreted Dixon as advocating a "more dynamic approach"': Interview with Geoffrey Lindell (Woodbridge Community Centre, Tasmania, 23 March 2015).

good lawyering and university legal studies. Plenty of good lawyers and judges had not studied law at university. Proposals to expand the size of law schools and employ more full-time staff had been met with resistance in some quarters.[8] In the early 1950s all Australian law schools remained small. Given that the concept of university legal education remained controversial and that many lawyers did not believe that the quality of legal practice was improved by university legal education or scholarship, especially that which ventured beyond law, the existence of a research-only Department of Law ('the Department') situated in the RSSS was a strange proposition.[9]

Fittingly, given his field of study, Sawer's elevation to the Chair of Law at the RSSS meant that his career took on a strong political quality. Sawer's task was not merely to pursue scholarship that had recourse to the social sciences but also to demonstrate that it was both valuable and desirable to have a legal academic within a social science research school. This prompted Sawer both to develop a theoretical position on the role of law and legal academics and to engage in exercises of public relations to help the community understand the role of the Department. While he did not entirely succeed in his aim of convincing others of the special nature of the Department, he did provide an important Australian account of law's role within the social sciences and within society that is relevant to both the intellectual underpinnings of the discipline of law and, more generally, the trajectory of law within Australia.

In this first chapter I consider some of Sawer's early formative influences that helped him become a strong legal theorist who balanced the discipline's traditional underpinnings with broader conceptions of studying law. The succeeding chapter then details the nature of Sawer's theoretical scholarship and suggests that he advanced a distinctive brand of Australian jurisprudence and laid the foundations in constitutional law so that future studies would consist of something more than mere doctrinal analysis. In doing so he sought to challenge the notion of law as autonomous from other disciplines. Finally, in the last chapter in this part, Sawer is placed in the context of the RSSS at ANU in order to assess the significance of the Department in the context of Australian legal education. I suggest that his contribution to Australia's legal academy stems primarily from his scholarship and broader activities rather than from the way that he led the Department.

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[8] See discussion of attitudes at the Faculty of Law, University of Sydney in Chapter 7.

[9] Even Sawer 'doubted whether a university properly so called could be established on the basis of pure research' and 'could not see a viable undergraduate institution being established in the remote bush village of Canberra.' He suggested that instead the government build up a 'series of postgraduate research institutions closely linked with existing universities in the six state capitals.' Sawer, *Outline Biography,* above n 3.

### 10.2 University Life and Politics

Reviewing the archival material that relates to Sawer's early life and career alongside his later large body of scholarship one can detect signs of a natural progression. The attitudes he later adopted to jurisprudential schools and theories, the relationship between law and society and how the two ought to be studied can be traced to some of his more significant formative influences. In this section these important aspects of Sawer's early life are explained.

Throughout Sawer's childhood and adolescence there are clear indications that he was a person of obvious intellectual ability. Sawer described himself as always being a 'swot' at school, noting that he preferred reading to sporting and social clubs.[10] He considered that it was his hard work rather than any 'genius' qualities that accounted for his strong performance.[11] The extent of his achievements suggests that Sawer's self-analysis is at least partly a product of his modesty.[12] He graduated in 1928 from an exclusive private secondary school in Melbourne, Scotch College, as equal dux[13] and in 1933 he graduated from university with first class honours in law and won the Supreme Court and Nunn prizes.[14] While he had a strong aptitude for university legal studies, Sawer's greatest interest at university was politics.[15] Although the scholarship he won to attend university prevented him from completing his preferred degree in Arts[16] and thereby deprived him of the opportunity of gaining a broad liberal education,[17] he made up for the deficiency in other ways. Through his membership of student political bodies and by attending lectures on contemporary political issues he became well acquainted with a wide array of

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[10] Mel Pratt, Interview with Geoffrey Sawer (Oral History Interview, Canberra, 16 November 1971) <http://nla.gov.au/nla.oh-vn765219>.

[11] Ibid.

[12] Lindell, above n 7; Ninian Stephen, 'A Recollection of Geoffrey Sawer' (1980) 11 *Federal Law Review* 261, 261; Ninian Stephen, 'War Crimes Trials and the Future' (Speech delivered at the Inaugural Geoffrey Sawer Lecture, Centre for International and Public Law, The Australian National University, 21 May 1998).

[13] Sawer, *Outline Biography,* above n 3, 2.

[14] Ibid; Waugh, above n 5, 25.

[15] Geoffrey Sawer, *Partly Unreliable Memoir* (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers,* MS 2688, Series 18, Unpublished biographical writings of Geoffrey Sawer) part 15, 1.

[16] As Coper explains, Sawer's guardian, Rose Bowman, successfully applied on Sawer's behalf for a McCaughey Scholarship. The terms of the trust limited recipients to studies of a 'technical' nature. Sawer was summoned before the trustees during his first year of his Arts degree and told that he would need to reconsider his studies: Michael Coper, 'Geoffrey Sawer and the Art of Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389, 393–4. Sawer was able to count his first-year arts subjects towards his law degree. He went back and completed his Arts degree in 1947 as he felt 'insufficiently acquainted with culture and things of that sort': Pratt, above n 10.

[17] Sawer, above n 15, part 14, 3.

political issues and processes.[18] He devoted his greatest efforts to the university's Labor Club and engaged in various activities including editing and writing for the club's magazine, *Proletariat,* with the woman who was to later become his wife.[19] Sawer began his university studies on the eve of the Depression.[20] Amid growing poverty and unemployment, the interest of many intellectuals in Australia turned to Marxism and the Soviet Union. Members of left-wing politics were confronted with the question of whether they ought to subscribe to Marxist philosophies. As Sawer explained:

> The University Labor Club suddenly became the focus of intense and continuous debate and social activity. This was partly because of the social and political drama of the Great Depression and the accompanying unemployment, anger and despair, and partly because a link was created between the Labor Club, its members and University activities, and two communist-created and maintained centres in the city — the Workers' Art Club and the Friends of the Soviet Union.[21]

Initially Sawer took an interest in Marxism and attended lectures on the topic by Marxist scholar Guido Baracchi.[22] However, as he learnt more about Marxism and was exposed to the radical elements of the Labor Club, he became disenchanted with both and decided to join the social democratic wing of the Labor Club.[23] Sawer said that he found Baracchi to be a dull lecturer[24] and believed that Marxism was more in the nature of religious dogma than a philosophical movement.[25] He considered that the radical intellectuals who pursued a Marxist agenda showed little regard or understanding for the underprivileged sections of society whom they believed they represented.[26] Reflecting on his experiences at university Sawer described his attitude towards Marxism as follows:

> So far as I could see, Marxism was the creation of middle-class intellectuals — Marx, Engels, Lenin, Stalin, Trotsky and later Mao Tse Tung, Castro and Che Guevera; no sociology or plan of social action could be valid which did not at least admit a leading role for the intelligentsia as well as the proletariat.[27]
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> …

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[18] Ibid part 15.
[19] Sawer, *Outline Biography*, above n 3, 3; Sawer, above n 15, part 15, 3; Pratt, above n 10.
[20] Sawer, *Outline Biography,* above n 3, 2. Sawer believed that there were signs of difficulty as early as 1927 — a year before he began his university studies — even though officially the Depression is said to have begun in Australia in the 1930s: Pratt, above n 10.
[21] Sawer, above n 15, part 15, 1.
[22] Sawer, *Outline Biography*, above n 3, 3.
[23] Pratt, above n 10.
[24] Ibid.
[25] Sawer, above n 15, part 15, 1.
[26] Ibid part 15, 9.
[27] Ibid.

> My private conclusion is this: No one has a right to express opinions on the conduct and opinions of revolutionary parties until he has 1. lived like a worker for some time, 2. taken part in at least one big strike, 3. taken part in some anti-eviction riots. I don't, of course, attribute any mystical significance to such activities. It is simply a matter of common sense — these are typical activities of the worker, and he who would advise the worker, while he must have a first-class education, must also be in the struggle.[28]

Sawer's turbulent and humble beginnings may provide some explanation for why he believed that his contemporaries, along with the founding Marxist thinkers, did not fully understand or relate to the plight of the proletariat. While Sawer's adult life was one of privilege it was obtained not by his family's wealth (of which there was little[29]) but by the scholarships for war orphans he received to study at Scotch College and then the University of Melbourne. Sawer was born in Burma in 1910 and his family moved to Adelaide in 1914 'to assist with the 'Kitchener scheme' for setting up the Australian system of compulsory military training.'[30] The family was told that the change of climate would improve Sawer's poor health.[31] While Sawer's health subsequently improved he nonetheless suffered several tragedies in his early life. His father, Edgar Sawer, who had been a decorated soldier, died in 1917 when Sawer was just seven years old,[32] leaving Sawer's then pregnant mother, Edith (Peg) Langman, as a sole parent.[33] The family was supported by various pensions for spouses of war veterans that she supplemented through a range of enterprises which brought in additional modest amounts.[34] On a more positive note, his father's death also brought with it support from a new entourage of adults.

Sawer's father spent his final days in hospital in Melbourne.[35] In order to visit him Sawer and his mother stayed at a nearby boarding house.[36] It was at the house that they met a group of kindly women who went on to play a crucial role in Sawer's upbringing.[37] The women, whom Sawer referred to as his 'aunts' or members of his 'ongoing committee of

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[28] Ibid part 15, 5–6 quoting letter from Sawer to Professor John Anderson.
[29] Sawer said that when his father and mother died he did not inherit anything: Pratt, above n 10.
[30] Sawer, *Outline Biography*, above n 3, 1.
[31] Ibid.
[32] Sawer's father adopted the assumed name of Edgar Geoffrey Wayne when he enlisted in the army: Ibid 1–2. Coper details Sawer's father's military service and the circumstances that led to his death: Coper, above n 16.
[33] Sawer, above n 15, part 5, 2.
[34] Ibid part 8, 1.
[35] Ibid part 5, 1.
[36] Ibid.
[37] Ibid part 5, 1–2.

management',[38] convinced the young family to move from Adelaide to Melbourne so that they could ease the burden his mother now faced of raising two children on her own.[39] They became part of Sawer's family and in 1924, when Sawer's mother died from cancer, one of the 'aunts', Rose Bowman, took Sawer and his brother, Derek, under her care.[40] Bowman was a daughter of French Huguenot migrants and was married to a house painter.[41] Her brother Fritz ran a vegetable shop in a 'working class area'[42] and Sawer spent much of his weekends helping out in the shop and enjoyed Fritz's company.[43] Although Sawer attended a private secondary school, he had earlier 'picked up a Victorian state-school lingo'.[44] It is perhaps this absence of elitism and privilege in his early life that later fuelled his scepticism about the motives and theories of Marxist intellectuals.

According to Sawer his 'disenchantment with Marxism' as well as his exit from student politics were driven largely by actions taken by his radical colleagues in the Labor Club.[45] When Sawer was editor of the *Proletariat*, the Professor of Philosophy at the University of Sydney, John Anderson (also Eugene Kamenka's mentor[46]), submitted an article that contained criticisms of the Communist Party and some Australian party members.[47] Anderson was a member of the party and had previously written two significant articles about communism that had been published in previous editions of the *Proletariat*.[48] Anderson had addressed his latest submission to Sawer 'as Editor, but … it was intercepted by [a Communist Party member] Silver, and by him returned to Anderson on the specious ground that it was too late to be included.'[49] While Sawer himself had significant intellectual concerns about aspects of the article, he was dismayed by the act of intellectual sabotage and believed that the incident spoke of some of the general dishonesty of his communist colleagues.[50]

The incident is interesting not only for what it tells us about Sawer's motivations and ethics but also about his disposition and ideas. The letters exchanged between Sawer, as

[38] Ibid part 5, 1.
[39] Ibid part 5, 1–2.
[40] Sawer, *Outline Biography*, above n 3, 2.
[41] Sawer, above n 15, part 5, 1; Pratt, above n 10.
[42] Ibid.
[43] Ibid.
[44] Ibid part 3, 2.
[45] Ibid part 15, 4.
[46] See Chapter 6.
[47] Sawer, above n 15, part 15, 4.
[48] Ibid.
[49] Ibid.
[50] Ibid.

editor, and Anderson provide clear evidence that Sawer had thought carefully and read broadly on the subject of Marxism and formed some firm views on the subject. While Sawer said that when he returned to these letters decades later he was 'appalled at their bumptiousness' and said that he 'still regretted … accusing Anderson of lying',[51] they nonetheless also speak of the young Sawer's intellectual confidence and the intensity with which he approached student politics. To provide a better sense of Sawer's character and convictions it is worth quoting a few of the passages from his letters to Anderson at length. In the first letter he criticises members of the Communist Party, and part of Anderson's thesis, in very strong and personal terms:

> I think your remark about 'bourgeois eugenics' is puerile. It is an unfortunate but undoubted truth that the troubles of revolutionary parties and individuals are frequently psychological; I have met several strong 'individualistic' revolutionaries who object strongly to Communist Theories of Art and Communist disciplines generally, and who were obvious victims of incipient paranoia — persecution complex and all complete. Also, I question your ability to criticise the labour theory of value. Alice Stewart, B Com, a brilliant economics graduate of this University, approves of it — indeed, she says that Taylor's classic bourgeois textbook practically proves it.[52]

In a second letter he made a serious accusation against Anderson and complained about the methods and motives of the Communist Party:

> I must congratulate you again on your able pamphlet on the Communist Party. It is a pity that in the introduction to the pamphlet you had to *tell lies* and make *significant omissions*.[53]
>
> It is a source of considerable pain to me that this business should have occurred. A philosophic critic with a respect for accuracy and a contempt for the dialectic methods of Ignatius Loyola is badly needed by revolutionary parties today. I had regarded you as a prophet in this respect, though the preface to your pamphlet gives me doubts. The difficulty is, will they listen to you unless you are in the party? Yet it does seem disturbing that the only revolutionary party not shot through with corruption seems to have a *complete disbelief in the existence of objective fact*. This curious coincidence

[51] Ibid.
[52] Ibid part 15, 5-6, quoting letter from Sawer to Professor John Anderson.
[53] Ibid part 15, 8 quoting from letter from Sawer to Professor John Anderson dated 29 December 1932.

> between the political thought of Communism and the Roman Church is stressed in Thomas Mann's curious book, *Magic Mountain*.[54]

It is startling that a mere 22-year-old would feel so well equipped to criticise a professor of philosophy in such strong terms. The correspondence provides clear evidence that Sawer thought seriously about Marxism and is significant in that it points to where his later studies of law in context began. While Sawer did not subscribe to the views of the radicals he was interested in the issues that their activism raised and remained a progressive. His upbringing and leftist inclinations suggest that he too was concerned with ways to liberate the proletariat and bring about equality. Much later in life he said that he 'continued to think, and still think, that unbridled capitalism is worse than muddling along social democracy, and I voted Labor in every succeeding state election, except one' where there was no Labor candidate.[55]

This interchange and the influence of Marxism on Sawer's career are critical to any understanding of his subsequent studies. It demonstrates that early in his life Sawer became disillusioned with radicalism and with theories that attempted to provide a complete explanation of social phenomena. It also demonstrates that he developed an early interest in the relationship between politics and society and how the two ought to be studied. As explained later in this thesis, these matters became some of the central pillars of Sawer's career and shaped his major contributions to the disciplines of law and politics.

At the University of Melbourne Sawer was surrounded by men (and they were all men) destined to become leaders in Australian law and politics. In various ways they formed an important elite network, bringing significant opportunities that facilitated Sawer's subsequent strong scholarly career. Sawer liked people and made friends easily. Further, people of prominence drew upon and respected his intelligence.[56] Through his student politics he became friends with students who were to become high-profile lawyers and

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[54] Ibid part 15, 8 (emphasis added).

[55] Ibid part 15, 10.

[56] Over the course of Sawer's career numerous politicians and scholars sought Sawer's advice. He gave advice to both the Labor and Liberal governments, to members of the Attorney-General's Department and frequently corresponded with judges and eminent international scholars. In 1962 he was asked to travel to Nigeria to give constitutional advice to the government on whether they had the power to establish a state bank and also to assist with litigation concerning the delegation of executive powers. A political crisis erupted while Sawer was in Nigeria. Sawer provided a summary of his time in Nigeria in a letter he wrote to the Oxford law professor Rupert Cross: Letter from Geoffrey Sawer to Rupert Cross, 14 June 1962 (Australian National University Archives, *Professor G Sawer Correspondence* 7, Box 1, Series 9, Rupert Cross).

politicians. When Sawer graduated from law in 1933 Australia remained in the grips of the Depression and so while he became first a solicitor and then a barrister[57] he also pursued various activities beyond the practice of law to increase his earnings. These activities helped him add more names to his already broad net of associates. For example, he made friends through the tutoring work he performed for articled clerks — men wanting to gain professional qualifications in law but without the means to pursue university education — to assist them to pass the Supreme Court examination.[58] Sawer also taught workers' education courses in Ballarat to various professional men[59] and in the mid-1930s joined the Melbourne branch of the Round Table, an organisation initially established to strengthen colonial ties with Britain but which later, during Sawer's time, simply attempted to preserve 'some special friendship among the countries which had been deeply influenced by British institutions, politics and culture.'[60] It helped Sawer get to know various eminent Australian figures including one of Australia's first constitutional law scholars, Sir Robert Garran, and the future Vice-Chancellor of ANU, Sir Douglas Copland.[61]

A significant relationship was fostered during his university days when he was introduced at a party hosted by Guido Baracchi to a justice of the High Court of Australia, Herbert Evatt (whom Sawer called 'Bert').[62] Evatt invited Sawer to his chambers to converse about the matters of the day and later involved Sawer in both legal and political affairs.[63] When he graduated from law Sawer became a resident tutor at an exclusive university college, Ormond, which brought about further introductions to soon to be prominent men.[64] Again this arrangement came about through Sawer's connections.[65]

Sawer's liberal tendencies are also reflected in his choice of wife. On 6 January 1940 he married Beatrice Mabel Pitcher ('Mamie') who Sawer described as a beautiful and intelligent woman with progressive ideas.[66] By the end of their first year of marriage

[57] In 1934 Sawer took articles with Stewart and Dimelow, a practice that mainly did conveyencing, and the following year he accepted employment with Herman Coltman, a large litigation firm who acted for insurance and hire-purchase companies. He was admitted to the Victorian bar in 1937: Sawer, *Outline Biography,* above n 3, 3. See also Sawer, above n 15, part 22, 1; Pratt, above n 10.
[58] Ibid.
[59] Sawer, above n 15, part 21, 3–4.
[60] Ibid part 19, 2–3.
[61] Ibid part 19, 2.
[62] Ibid part 18, 2–3.
[63] Ibid.
[64] Ibid part 18, 4.
[65] Ibid part 18, 4.
[66] Ibid part 22, 2–3, part 26, 1.

Sawer noted that she had become a 'much more highly decorated scholar than her husband; he was only a Master of Laws whereas she was a Bachelor of Arts, Bachelor of Laws and a Diplomatist of Education.'[67] He knew Mamie from his time in the Labor Club as well as through the Law School where for one semester he lectured her in constitutional law. Both of them were liberal in their political views and the way they conducted their lives. For example, Mamie held a driver's licence and, like Sawer, had had several sexual partners before the pair met.[68] Sawer explained that

> She was interested in but not obsessed by the life of the mind and spirit — like myself somewhat sceptical about ideologies, though also like myself she had at first been attracted to the element of adventure and dedication among the University Communists, and the physical beauty and sexual drive of at least two of them.[69]

Unfortunately for Mamie her sexual liberation had consequences. Before meeting Sawer she had had an abortion that caused ongoing tension in her relationship with her mother.[70] This was not something that would have alarmed Sawer. His first lover, a Russian woman he met at university, educated Sawer about the challenges that young women at that time faced when confronted with unplanned pregnancies. In his unpublished biography he said that after hearing these stories he 'made modest contributions to a fund for enabling girl students to have abortions, though I had no responsibility for their condition, and after acquiring a motor car I once lent it to a student friend as transport for his girlfriend to [an] … abortionist.'[71]

For Sawer marriage brought both companionship and happiness as well as a need to seek further security. Mamie wished to stay home and have children.[72] Their son Michael was born on 24 January 1942 and on 2 March 1946 they had a daughter, Elizabeth. While there are clear signs that before joining the Law School Sawer held academic ambitions — with his part-time teaching and publishing the occasional article — his decision to accept a position as a full-time senior lecturer at the University of Melbourne was partly financial. The job provided him with a secure income.[73] Initially by choice and later by necessity, when she became ill, Mamie did not return to paid work, although she

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[67] Ibid 26, 3.
[68] Ibid part 22, 3, part 26, 1.
[69] Ibid part 22, 3.
[70] 'She and Mamie had never been close, because of Mamie's early love affair and their consequences …': Ibid part 49, 2.
[71] Ibid part 16, 1.
[72] Ibid part 26, 3.
[73] Ibid part 25, 4–5.

sometimes edited Sawer's publications.[74] At least up until Mamie's stroke on 9 April 1957, which devastated Sawer,[75] he believed that he had a very happy marriage and home life.

Sawer's early life was therefore characterised by both privilege and good fortune of various kinds as well as tragedy. His experience made for a well-rounded, down-to-earth intellectual who had a strong drive and took responsibility for the advancement of law and politics and the betterment of society. His early forays into politics made it improbable that he would take a radical stance and firmed up some of his thinking on both matters of politics and society as well as the ethics of the academy.

### 10.3 Traditional Underpinnings

A question that must be addressed in any attempt to understand Sawer's intellectual contribution is how he reconciled his strong progressive political interests with conventional common law teaching and reasoning at that time. As explained here, Sawer took on several roles and advanced scholarship within the mould of a traditional legal scholar. He respected the intellectual tradition embodied in common law reasoning and throughout his career he remained wedded to it. At the same time his learning and interests were much broader than that of a mere doctrinal scholar. This section details the various ways that Sawer's scholarship followed a conventional pattern.

As noted above, while Sawer's scholarly record in law was exemplary, at university it was student politics rather than law that engendered his excitement. Apart from the teachings of the only full-time law teachers, Professors George Paton and Kenneth Bailey, Sawer found the teachers within the Law School largely unremarkable.[76] As full-time legal practitioners employed by the School on a part-time basis taught the bulk of the law curriculum most of Sawer's instruction in law consisted of doctrinal exposition and case analysis. Paton and Bailey taught the jurisprudential and public law subjects. This perhaps points to the reason why Sawer later associated full-time legal academics with these fields and the reason why they became the mainstay of his career. He said that Bailey and Paton gave him 'respect for the intellectual discipline of the law combined with a good deal of scepticism about older professional intellectual habits and impulse to

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[74] See, eg, acknowledgement in Geoffrey Sawer, *Australian Federal Politics and Law 1929–49* (Melbourne University Press, 1963); Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia* (Lawbook Company, 1948).

[75] This is explained further in Chapter 12.

[76] Sawer, above n 15, part 15, 1; Pratt, above n 10.

reform both procedure and content of the law.'[77] Sawer also said that he had learnt from Bailey the 'meaning of rigorous thought' and how to 'pursue something to its conclusion.' He also appears to have adopted Bailey's 'careful measured way of considering a thing.'[78]

Sawer's early scholarship, written both before and after his appointment to Senior Lecturer at Melbourne Law School does not, however, speak of the influence of Bailey or Paton. Rather, it was influenced by the professional work he undertook first as solicitor, then as a barrister and his professional mentors.[79]

In the five years between Sawer's graduation from law and his appointment to the faculty at the University of Melbourne, he published eight articles, with the majority (five) published in the *Australian Law Journal* and the remainder in the Melbourne Law School student journal, *Res Judicatae*. All but one of these articles[80] addressed topics in the field of private law (property, torts, equity, contracts, wills and estates, conflicts of law and bankruptcy) and they were all short and doctrinal in nature, ranging from half a page to four pages in length.[81] His writing style was one of precise economy, with each article written solely to assist the practitioner to think about a doctrinal point rather than engage the reader. They were not literary pieces, lacking introductions or rhetorical flourishes. Sawer began several of these articles abruptly with a proposition of law or case. For example, one article begins 'Section 95 of the Commonwealth Bankruptcy Act, 1924–1933, provides …'. [82] A mere perusal of the prosaic titles ('Accession in English Law', 'Ejectment without Cause from a Place of Entertainment,' 'Non-feasance in Relation to "Artificial Structures" on a Highway', and so on) gives the reader the flavour of what is

[77] Sawer, *Outline Biography,* above n 3, 3.
[78] Pratt, above n 10.
[79] In some of these early articles he thanked practitioners, not scholars, for their assistance.
[80] The exception being Geoffrey Sawer, 'Legal Realism' (1939) 2 *Res Judicatae* 68.
[81] Geoffrey Sawer, 'Accession in English Law' (1935) 9 *Australian Law Journal* 50; Geoffrey Sawer, 'A Trustee May Not Set Off a Gain in One Transaction Against a Loss in Another (1936) 1 *Res Judicatae* 106; Geoffrey Sawer, 'Competitions Involving Chance and Skill (1937) 11 *Australian Law Journal* 114; Geoffrey Sawer, 'Non-feasance in Relation to "Artificial Structures" on a Highway' (1938) 12 *Australian Law Journal* 231; Geoffrey Sawer, 'Proper Law of Contract — Intention of Parties — Moratorium Legislation' (1938) 11 *Australian Law Journal* 332; Geoffrey Sawer, 'Bankruptcy Act, s 95 — Preference to Sureties' (1939) 13 *Australian Law Journal* 13; Geoffrey Sawer, 'Bankruptcy Act, 1924–33 — Relation Back and Protection to Purchasers' (1940) 13 *Australian Law Journal* 438.
[82] Sawer, 'Bankruptcy Act, s 95', above n 81, 13.

to follow. It is the kind of work that Frederick Pollock pioneered[83] and the American legal realist, Fred Rodell, mocked and despaired of.[84]

During Sawer's decade as a full-time legal scholar at Melbourne (1940–50) his scholarship changed so that it became less like the work of a mere technocrat. While many of his articles remained largely doctrinal, they were longer and several were published in the prestigious *Law Quarterly Review*.[85] In a reference written on Sawer's behalf, Professor Kenneth Bailey said that he knew 'from personal discussion how much Goodhart, the Editor of the *Law Quarterly Review*, appreciated the short articles Sawer had sent him and how welcome more work from his pen would be in that quarter.'[86] In the case notes he wrote for Goodhart, Sawer became an ambassador for Australian common law, promoting Australian cases and condemning the English courts for failing to cite relevant Australian precedents.[87] Sawer also wrote and contributed to several books including a collection of constitutional law cases,[88] a short criminal law textbook[89] and a small book on media law for journalists.[90] His constitutional law casebook was the first of its kind and provided an important foundation for shaping constitutional law teaching in Australia. Over the course of Sawer's career he produced three editions of the book and it remained the leading teaching resource for constitutional law. In 1981 responsibility for the book passed to two other leading Australian constitutional law scholars: Leslie Zines and Geoffrey Lindell.[91] Lindell considered that it was an honour to be chosen. Sawer also published a short book on Australian government for the general reader that proved especially popular.[92] In 1977 it went into its twelfth edition with sales

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[83] Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004) 316–22.

[84] Fred Rodell, 'Goodbye to Law Reviews' (1936) 23 *Vanderbilt Law Review* 38.

[85] Geoffrey Sawer, 'Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence' (1944) 60 *Law Quarterly Review* 83; Geoffrey Sawer, 'Contract between the Crown and Its Civil Servants (1946) 62 *Law Quarterly Review* 22; Geoffrey Sawer and George Paton, 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 63 *Law Quarterly Review* 461.

[86] Minutes of Council of the University of Melbourne, 7 July 1947 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series,* UM312, 1947/936, Sawer, Ass Prof G).

[87] Sawer, above n 85.

[88] Sawer, *Cases on the Constitution,* above n 74. The Australian Law Schools Association ('ALSA'), that Sawer and Paton founded, suggested and supported Sawer's compilation of this book. Sawer opted for a casebook anticipating that constitutional law doctrine would undergo significant change over the next decade. Again this is indicative of Sawer's measured approach: Pratt, above n 10.

[89] J V Barry, G W Paton and Geoffrey Sawer, *An Introduction to the Criminal Law in Australia* (Melbourne University Press, 1948).

[90] Geoffrey Sawer, *A Guide to Australian Law for Journalists, Authors, Printers and Publishers* (Melbourne University Press, 1949).

[91] Leslie Zines and G J Lindell, *Sawer's Australian Constitutional Cases* (Lawbook Co, 1982).

[92] Geoffrey Sawer, *Australian Government Today* (Melbourne University Press, 1948).

of over 150,000 and earning Sawer royalties of $25,000.[93] In addition to his publications and teaching duties Sawer spent time gathering material for a doctoral thesis on the topic of accession (the Roman property law concepts of *occupatio, accessio* and *commixtio*). He never completed the doctorate.[94]

This early scholarship illustrates that Sawer was a strong doctrinal scholar and someone with powerful analytical skills. However, on the whole the bulk of this work provides no indication of broader pondering about the role of law in society, nor that he was inclined to draw from learning outside the law.

Sawer maintained a fascination with judges and their judging which meant that he kept up with doctrinal developments. It also prompted him to write to both Australian and foreign judges on many occasions to offer critique of their judgments, to ask for clarification of their reasoning processes and to seek explanations of how they decided cases. Frequent correspondents included Justice Kriewaldt of the Northern Territory Supreme Court, Justice Rae Else-Mitchell of the Supreme Court of New South Wales,[95] Justice Vincent Barry, Justice Fox of the Supreme Court of the Australian Capital Territory, Chief Justice Garfield Barwick of the High Court of Australia and Sir Owen Dixon. Sawer also corresponded with various Canadian justices such as Chief Justice Bora Laskin of the Supreme Court of Canada. Lord Denning, then Master of the Rolls of the Court of Appeal in England, gave Sawer unsolicited praise for his work and issued a personal invitation for Sawer to visit him while in London.[96] To Sawer judges were both phenomena to be understood as well as a part of his professional and intellectual circle. The letters he wrote to judges, while perhaps not as severe as his correspondence with John Anderson, do not suggest an attitude of deference but indicate clearly that Sawer considered himself to be an equal. As his close friend and mentee Professor Geoffrey Lindell said:

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[93] 'Sawer book sales top 150,000', *The Canberra Times* (Canberra), 29 September 1977, 9. In total 13 editions were published.

[94] Waugh, above n 5, 138. In 1982 he was, however, awarded an honorary doctor of letters by the ANU. 'Honorary ANU Degree for Professor Sawer' *The Canberra Times* (Canberra) 2 October 1982, 3.

[95] Sawer described Else-Mitchell as a 'great friend': Ibid.

[96] Letter from Lord Denning to Geoffrey Sawer, 7 March 1972 (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 5, File 2, Correspondence 1951–91); Letter from Lord Denning to Geoffrey Sawer, 20 March 1972 (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 3, File 2, Correspondence 1951–91).

> I don't think he showed [judges] any special reverence or I don't think he showed them any special disrespect either. I think he thought of himself as an equal in a way that was less explicit than I've seen in others in my time.[97]

Sawer believed that legal scholars should have a role in critiquing the judiciary. For example, speaking of the High Court's constitutional jurisprudence up to 1968 Sawer said that the 'present interpretation of s 92 is a fantasy resulting from conservative minds brooding over the words of the section …'.[98] In several articles and speeches Sawer voiced his belief that it was critical for any legal academic to have a connection with the courts and profession.[99] This was not a matter of subordinating one to the other but rather a question of maintaining relevance to society.

For Sawer the most obvious way to demonstrate the relevance and value of a law school to society was by educating future legal practitioners.[100] According to Sawer this connection and relevance diminished the further a legal scholar moved away from teaching towards research because he believed that the practising profession could exist and perform competently without it.[101] In several articles he said that the Department of Law at the RSSS was disadvantaged because it was located in Canberra where the legal profession was very small. He argued that most *Australian* postgraduate students were better off studying at the state law schools where they could gain access to larger legal systems and a greater pool of lawyers.[102] How, exactly, this access would assist students in their doctorates was not made clear by Sawer; however, the fact that he singled out domestic over foreign doctoral students suggests that he was thinking specifically about the future composition of Australia's legal academy. A postgraduate student who was entirely divorced from the practice of law and legal practitioners might present as someone who could not make it in practice. In other words it might play to the argument that legal academics were failed practitioners and therefore of little value and lowly status. This was clearly of concern to Sawer. In an article about his role in a research school of social sciences he said:

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[97] Lindell, above n 7.
[98] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 206.
[99] Geoffrey Sawer, *The Place of a Lawyer in the Social Sciences* (Melbourne University Press, 1953) 14.
[100] Geoffrey Sawer, 'Law at the Australian National University' (1959) 5 *Journal of the Society of Public Teachers of Law* 20, 25.
[101] Ibid.
[102] Geoffrey Sawer, 'An Australian National School of Law' (1951–53) 2 *University of Western Australia Law Review* 483, 487.

> The repute of general jurisprudence has suffered among lawyers from the subject coming to be regarded, particularly in Europe and South America, as the last refuge of a Struldbrug incapable of earning a living in the tough practice of the law. Hence my emphasis on the necessity for the academic lawyer in a research school of social sciences doing the best he can, even in an isolated community like Canberra, to retain a close connection with law in action.[103]

A 'Struldbrug' is a character from Jonathan Swift's book *Gulliver's Travels*.[104] They are immortal creatures that live at the expense of the state, providing nothing in return. This desire to maintain a connection with law in action is perhaps what prompted him to become a part-time magistrate.[105]

### 10.4 Concluding Remarks

The left-leaning moderate stance Sawer took in his early student politics days was clearly reflected in his developing career. Sawer was a competent legal practitioner and doctrinal scholar with an interest in judging and judges. This meant that he never abandoned the traditional concerns of the legal academy. In fact he believed that interacting with the profession was important as it ensured the relevance of the academy to society and improved its standing. However, this was just one aspect of Sawer's scholarly agenda. The following chapter explains how Sawer's early Australian formative influences led him to become one of the first major and distinctively Australian exponents of law's heteronomy.

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[103] Sawer, above n 99, 14.

[104] Jonathan Swift, *Gulliver's Travels into Several Remote Nations of the World* (George Bell and Sons, 1892).

[105] Coper has detailed the circumstances of Sawer's appointment as a special magistrate in Canberra, see Coper, above n 16.

# 11 A CASE AGAINST LAW'S AUTONOMY

## 11. 1 Introduction

This chapter puts an end to at least two myths about the discipline of law in Australia. First, it refutes the claim that until at least the 1980s Australian legal scholars did not develop their own jurisprudential schools of thought.[1] As explained in this chapter, Sawer advanced a distinctively Australian theory that created a foundation for strong contextual constitutional law scholarship. Sawer created his own Australian legal theory that responded to several existing strands of foreign jurisprudence without adopting any one school. He advanced a constructive jurisprudence that urged scholars to begin by seeking a sound understanding of the facts and broader context of constitutional law decision-making. Such facts could then support a range of jurisprudential theorising.

Second, this chapter counters over-generalisations that the first community of Australian legal scholars were short-sighted doctrinal scholars.[2] It suggests that these over-generalisations ought to be abandoned in favour of a more robust exploration of the complex factors and influences that led Australian legal scholars to shape the discipline in various ways. Perhaps Sawer's most important contribution to the discipline and practice of law was to make a case against law's autonomy. He believed that it was time that all Australian lawyers abandoned the fairytale of mechanical jurisprudence. He made this case both by way of example and through explicit advocacy.

By setting his substantial works of scholarship alongside his advocacy I reveal that Sawer delivered a consistent message and did not tailor it to placate dominant schools of thought. Sawer believed that what the discipline needed was incremental liberation from narrow views of law that had been circulating in the 1950s and 1960s and that such liberation should not come at the expense of losing the strengths of the existing body of common law and legal scholarship. He believed that the law should both reflect and lead social change but that stabilising ideas and institutions should not be lost in the process. Here I suggest that Sawer advanced a consistent and well-informed strategy for

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[1] In a general account of Australian legal scholarship in 1987 Chesterman and Weisbrot said that 'it is not yet really possible to identify any distinctively Australian academic jurisprudence, or even to identify local versions of major overseas school of thought: for example, law as science (Langdell at Harvard), economic analysis of law (Posner at Chicago), law as social science (Lasswell and MacDougal at Yale), legal realism (Llewellyn), the now abandoned law and development (Galanter and Trubek), or the recently emerged critical legal studies (Under, Kennedy, Abel)': Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 724.

[2] Ibid 714; Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 968.

advancing Australia's legal profession and legal academy, one that he believed would strengthen Australia's legal system and laws.

### 11.2 A Smorgasbord of Legal Theory

Sawer's early interest in politics and Marxist thought provides the first clear indication that he was attracted to matters of law, politics and governance. During the course of his scholarly career he did many things that moved the discipline away from its traditional orientations. Some of these activities can be explained by his curiosities about Marxism, but the rest was a product of his early jurisprudential study and, in particular, the teachings of George Paton, the Professor of Jurisprudence at the University of Melbourne from 1931 to 1951.

There are clear signs that Paton's teachings in jurisprudence made a firm impression on Sawer and that in his early career he did much to learn about the major theoretical schools. Paton did many things to assist Sawer to build his career including inviting Sawer to co-author an article and contribute to a book.[3] Paton also put Sawer forward for promotion and travel opportunities.[4] Paton, along with Bailey, was willing to appoint Sawer to a permanent full-time position within a law school even though he did not possess the typical qualifications of an Australian legal scholar — a foreign degree. The generosity they showed Sawer meant that he became the first Australian legal scholar to demonstrate that the Australian context and a mere Australian university could provide strong intellectual stimulation and a foundation on which to build an impressive academic legal career.

Sawer's attitude to Marxism suggests that he was sceptical of theories that claimed to hold the answers to law's major problems and to provide a definitive way of studying them. This scepticism extended to all of the major jurisprudential schools. In his formative years Sawer showed interest in American legal realism, but he did not fully subscribe to its tenets, and rejected its more radical components.[5] He respected the

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[3] Geoffrey Sawer and George Paton, 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 63 *Law Quarterly Review* 461; J V Barry, G W Paton and Geoffrey Sawer, *An Introduction to the Criminal Law in Australia* (Melbourne University Press, 1948).

[4] Sawer was the first person to be appointed an associate professor in an Australian law school. Geoffrey Sawer, *Partly Unreliable Memoir* (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers,* MS 2688, Series 18, Unpublished biographical writings of Geoffrey Sawer) part 33, 2.

[5] For example in an early article he provided an account of what teaching law would be like if law teachers followed Jerome Frank's theories. It was clear from the tone of the article that Sawer believed that Frank had gone too far: Geoffrey Sawer, 'Legal Realism' (1939) 2 *Res Judicatae* 68. In his article on Sawer's contribution to the social sciences Ross Cranston also recognised

analytical jurisprudential tradition and the contributions of H L A Hart, but later in his career voiced strong views that suggested that he believed such contributions had fatal limitations[6] and were 'merely' 'abstract' studies.[7] Similarly he thought that sociological jurisprudence and empirical legal studies both held promise but did not consider that either had stronger academic credentials than the analytical school (by which he meant the tradition laid down by scholars such as Austin and revitalised by Hart).[8] Sawer borrowed from both the analytical and sociological schools and at times adopted the sentiment of American legal realism but did not wholly embrace any of them. He believed that the two schools contained valuable ideas and it is clear that aspects of each influenced his scholarship; however, for Sawer a legal scholar's relationship with jurisprudence was not a matter of swearing allegiance to a particular model. Sawer also hoped that others would similarly view the various jurisprudential schools as providing nourishment rather than all-embracing philosophies. As Lindell explained:

> … one thing about Geoff is that he never engaged in labels anyway. He never talked in labels he just plucked things from all these streams of thinking. For example when talking to students he wouldn't say this is natural law and positivism. He didn't talk that way at all. What he would want is for them to be exposed to all those different ways of thinking. He would bring up a problem and you and I would think that is the natural law approach and then he'd bring up another example which you and I would think is the positivist approach.[9]

For Sawer, law was not a narrow autonomous discipline: nor could it be explained through one body of knowledge or theoretical school. Instead it was a rich intellectual discipline that transcended disciplinary boundaries.

### 11.3 Sawer's Sociology of Law

The incremental and constructive nature of Sawer's approach to liberating the study of law from its former narrow confines, drawing from a range of different jurisprudential traditions without firmly joining any of them, is demonstrated in many of his works. Even though Sawer rarely engaged in abstract theorising he was recognised

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Sawer's refusal to accept the radical elements of legal realism: Ross Cranston, 'Lawyer in the Social Sciences' — Geoffrey Sawer' (1980) 11 *Federal Law Review* 263, 264.

[6] Geoffrey Sawer, 'Conscience as Objection in the Law' in T P Grundy (ed), *Conscience in the '70s* (Australian National University Centre for Continuing Education, 1972), 66, 71.

[7] Geoffrey Sawer, 'The Jurisprudence of Ombudsmen' (1971) 30 *Public Administration* 221, 222.

[8] This is the argument Sawer made in the first chapter of his book: Geoffrey Sawer, *Law in Society* (Clarendon Press, 1965).

[9] Interview with Geoffrey Lindell (Woodbridge Community Centre, Tasmania, 23 March 2015).

internationally as a legal theorist. In 1962 Hart, the Professor of Jurisprudence at the University of Oxford, said that he found Sawer's writing on the sociology of law 'more illuminating than anybody else's'[10] and invited Sawer to write a book on the subject for the prestigious Clarendon Law Series. Hart's *The Concept of Law* had earlier been published as part of this series. He referred specifically to Sawer's chapter on the Marxist scholar Karl Renner[11] as a work sitting within the sociology of law, and told Sawer that he believed it to be a 'model of its kind.'[12] Hart's invitation raises further questions about the nature of Sawer's work, in particular how much of it ought to be classified as part of the 'sociology of law', whether he was at heart a jurisprudential scholar or legal theorist and what it was that caught Hart's attention.

It must be remembered that during the first two decades of Sawer's scholarly career substantial Australian textbooks or monographs on public law did not exist. Similarly, there were few works of Australian jurisprudence (Paton's textbook on jurisprudence being an obvious exception). Some of the full-time legal scholars of the pre-war era had been strong liberal scholars but they had done little to advance a uniquely Australian legal theory. Julius Stone was a strong legal theorist but others have suggested that his scholarship was never really an Australian product.[13] His inspiration was forged during his time in America and, perhaps to a lesser extent, England.[14] In this environment Sawer believed that his contribution ought to be careful and cautious. Stone also recognised the need for careful detailed study rather than grand far-reaching work. At a constitutional law symposium where Sawer presented his thoughts on advancing constitutional law scholarship Stone issued caution, stating that he doubted 'whether we have as yet a sufficient foundation of research technique or accumulated findings to justify us in embarking even upon speculation on some of the matters that have been raised in this discussion.'[15] He suggested that it would be a mistake for Australian legal scholars to embark on the type of work the Americans had undertaken until they had first completed detailed studies of particular aspects of Australian constitutional law.[16] Sawer adopted the

[10] Letter from H L A Hart to Geoffrey Sawer, 11 March 1962 (Australian National University Archives, *Professor G Sawer Correspondence* 7, Box 1, Series 18).
[11] Geoffrey Sawer, 'Law as Socially Neutral — Karl Renner' in Geoffrey Sawer (ed) *Studies in the Sociology of Law* (Australian National University, 1961) 137.
[12] Hart, above n 10.
[13] 'Despite Stone's involvement in wartime national planning, in the politics of the Law School, and with his students, it has been said that the focus of his intellectual interests remained in the United States and that he never got to know the "real" Australia': Leonie Starr, *Julius Stone — An Intellectual Life* (Oxford University Press, 1992) 116.
[14] Ibid.
[15] Julius Stone, 'Commentary' to Geoffrey Sawer 'The Record of Judicial Review' in Geoffrey Sawer (ed), *Federalism: An Australian Jubilee Study* (Cheshire, 1952) 211, 250.
[16] Ibid.

same cautious sentiment. Rather than provide dazzling ambitious theories, Sawer's purpose was to set the discipline on the correct path and provide the foundation for future studies.

### 11.3.1 A Response to the Realist Dilemma

In several ways Sawer's legal theory can be construed as a response to the central question posed by the realists, namely, how can law be predictable and certain if judging is largely or in part a product of the personal characteristics of judges?[17] Unlike the legal process scholars who downplayed the importance of the doctrine of precedent in judicial decision-making, Sawer's response was to defend its ongoing relevance. He suggested measures to strengthen the role of precedent and facilitate a deeper analysis of the types of considerations at play in High Court decision-making and its relationship with federal politics. In essence Sawer's legal theory was constructive. He believed in the importance of maintaining the integrity of the courts and his ultimate aim was to encourage Australian legal scholars and students to appreciate the broader context of law and to support wider conceptions of judging without abandoning the discipline's traditional orientations. He wished to carefully build the edifice of Australian constitutional law and legal theory beginning with the essential facts that underpinned both constitutional law and politics. Based on a review of all of Sawer's scholarship this section identifies those aspects of his work that seek to address the realist dilemma and lay the foundation for a contextual approach to constitutional law studies.

What Sawer learnt from Paton was that American legal realism could be divided into a number of distinct camps. Paton had said that while there was a 'nihilist tendency in the writings of certain authors [for example, Jerome Frank] who exaggerate the element of uncertainty and under-estimate the part played by the structure of legal rules' 'some of the work is extremely balanced [for example, the work of Karl Llewellyn].'[18] According to Paton, American legal realism formed the 'left-wing'[19] faction of what he described as the 'functional school' being the school founded by Roscoe Pound.[20] Typically Sawer favoured the left-wing moderate position of the functional school. He rejected the radical elements[21] but accepted the proposition that the personal characteristics and beliefs of

[17] One of Sawer's primary intellectual mentors, George Paton, clearly explained the dilemma in his textbook on jurisprudence: George Whitecross Paton, *A Textbook of Jurisprudence* (Clarendon Press, 1946) 19–21.
[18] Ibid 21.
[19] Ibid 19.
[20] Ibid 18.
[21] Sawer, above n 5; Sawer and Paton, above n 3, 480–1; Geoffrey Sawer, *Law in Society* (Clarendon Press, 1965) 71–2.

judges played some part in judicial decision-making.[22] Sawer's view that judging can sometimes — but not always — be explained as a process of logical deduction and induction and that in many cases there were sufficient elements of consistency to allow for prediction was formed from his early life as a barrister and then later as a magistrate.[23]

Sawer responded to what he had learnt from the realists in a number of ways. When studying case law Sawer looked beyond the way judges explained their application of a body of rules. Like the realists he accepted that 'law is not a body of rules but a collection of facts (ie judicial decisions), and that jurisprudence is not a rational study but an empirical study of events.'[24] While Sawer argued that jurisprudence permitted some objective study he accepted the realists' claims that there were areas of subjectivity and one of his most substantial and significant bodies of work, the very first project that he began at the RSSS, was in essence a historical factual study that provided the materials he believed were needed to understand the first 50 years of Australian constitutional law decision-making and federal politics in Australia.[25]

The impetus for this early and important contribution arose from studies he had conducted while still at the University of Melbourne. Sawer's interest in public law was made plain shortly after he joined Australia's infant legal academy[26] and in the late 1940s he became enthralled in what he believed to be the most important Australian constitutional law case of the time: the *Bank Nationalisation Case*. The case became the vehicle for Sawer's first strong attempt at contextualising constitutional law decision-making to understand better the relationship between judicial decision-making, politics and the personal values of judges.

Sawer also attributed his changing perspective on constitutional science (moving towards viewing the study of constitutional law as part of political science) to the opportunity that was given by an editor of Melbourne University Press to write a general introduction to

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[22] Sawer and Paton, above n 3, 480–1.
[23] See Sawer, *Law in Society,* above n 21, 71–2.
[24] Paton, above n 17, 20–1 quoting Hermann Kantorowicz, 'Some Rationalism about Realism' (1934) 43 *Yale Law Journal* 1240.
[25] Geoffrey Sawer, *Australian Federal Politics and Law 1901–29* (Melbourne University Press, 1956); Geoffrey Sawer, *Australian Federal Politics and Law 1929–49* (Melbourne University Press, 1963).
[26] Geoffrey Sawer, 'Autrefois Acquit and Decision Not "On the Merits"' (1941) 2 *Res Judicatae* 203; Geoffrey Sawer, 'The Blackout Cases and their Relation to Administrative Law' (1941) *Australian Law Journal* 103.

Australian law and political science.[27] Sawer was approached on the strength of a number of lectures he had delivered in political science shortly before the outbreak of war when a politics lecturer took leave[28] and his various experiments with an approach to teaching constitutional law that located doctrine within its political and historical context.[29] The book, *Australian Government Today*, became his best-selling work and was to become a standard textbook in courses of government, constitutional law and in final-year school courses.[30] It led to him acquiring a reputation as both a legal scholar and political scientist that was consolidated in 1951 when he became founding member of the Australian Political Studies Association.[31]

### 11.3.2 Bank Nationalisation

Sawer was employed as an advisor to the Labor government in the *Bank Nationalisation Case* and also studied and wrote about the case for scholarly publication. Evatt, who was Attorney-General of Australia at that time, sought Sawer's advice on the case and arranged for him to travel with the legal team to London (Sawer's first overseas trip) when the case came before the Privy Council.[32] In both Australia and London at the end of each trial day Sawer reviewed the transcript of court proceedings and provided legal advice to assist counsel. He said that he 'became completely absorbed in the litigation — even more so than the barristers.'[33] Sawer's subsequent writing about the case was therefore influenced by his vantage point as an expert adviser, as opposed to mere observer. In a sense his position and the firsthand insights he gained into the government's reasoning and strategies in the matter gave him a degree of sociological insight.

For Sawer the case brought the intersection between law and politics sharply into focus. In his writing about the case he signalled that to study constitutional law it was essential to consider both the political and judicial arms of government. The case involved an attempt by the federal Labor government to further its collectivist — socialist — agenda through the introduction of a regulatory scheme for Australia's banking system. It made

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[27] Mel Pratt, Interview with Geoffrey Sawer (Oral History Interview, Canberra, 16 November 1971) <http://nla.gov.au/nla.oh-vn765219>.

[28] Ibid.

[29] Ninian Stephen, 'A Recollection of Geoffrey Sawer' (1980) 11 *Federal Law Review* 261, 261.

[30] Geoffrey Sawer, *Australian Government Today* (Melbourne University Press, 1948). The success of this book was described in the previous chapter.

[31] *History and Overview*, Australian Political Studies Association <http://www.auspsa.org.au/about/history>

[32] Evatt did so on the strength of Sawer's writing on the government's first attempt to centralise all government banking: Pratt, above n 27.

[33] Sawer, above n 4, part 35, 2.

two such attempts. First, the government took steps to centralise all government banking through the national Commonwealth Bank. State governments and private banks successfully challenged the scheme in the High Court.[34] Second, in response to the High Court decision, the government took the drastic and dramatic move of implementing a scheme that effectively abolished all private banking in Australia. Pursuant to the scheme the Commonwealth Bank was to be given a monopoly over Australian banking. A High Court challenge ensured that the matter made it all the way to the Privy Council.

Sawer argued that the *Bank Nationalisation Case* was one of the most important constitutional law cases to have ever arisen in Australia. He said that 'an honours seminar at the National University's School of Advanced Studies could, without difficulty, spend a year in running down the hares which were started during the argument of the case, either by Counsel or by the Bench, but not pursued …',[35] that the case was 'one of the most celebrated politico-legal disputes in Australia's history'[36] and that 'every major express proposition and unstated assumption of Australian Constitutional structure fell to be debated.'[37] Sawer was interested in the way that the judicial decisions frustrated the government's political agenda as well as the implications of the High Court's reasoning for constitutional law. In particular, he commented on the 'willingness of Justice Owen Dixon and most of his High Court colleagues to modify the pro-Commonwealth power reasoning of the 1920 *Engineers Case*.'[38]

The case provoked the very busy Sawer to write and publish four articles.[39] The most important of the articles was published in an English journal, the *Journal of the Society of Comparative Legislation and International Law*.[40] In the article Sawer moved beyond doctrine to provide an account of the 'complex interaction between political forces, judicial doctrines and the influence of strong personalities.'[41] It is attractively written (with a clear and inviting introduction), contains a short explanation of the implied instrumentality doctrine, describes the Australian political context which gave rise to the

[34] *Melbourne v Commonwealth* (1947) 74 CLR 31 ('*State Banking Case'*); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*').
[35] Geoffrey Sawer, 'Bank of New South Wales and Others v Commonwealth — The Bank Nationalisation Case' (1948) 22 *Australian Law Journal* 213, 213.
[36] Geoffrey Sawer, 'The Case of Bank Nationalisation — a Study in Australian Government' (1950) 32 *Journal of the Society of Comparative Legislation and International Law* 17, 18.
[37] Ibid 18.
[38] Sawer, above n 4, part 35, 1.
[39] Sawer, above n 35; Sawer, above n 36; Geoffrey Sawer, 'Implication and the Constitution — Part I' (1948) 4 *Res Judicatae* 15; Geoffrey Sawer, 'Implication and the Constitution — Part II' (1949) 4 *Res Judicatae* 85.
[40] Sawer, above n 36.
[41] Ibid 18.

challenge (including the socialist agenda of the Labor Party and its interest in strengthening the central regulation of Australia's banking system) and explains the High Court's decision in relation to the first challenge. It then returns to politics and explains the Labor government's response (the attempt to abolish private banks), outlines how this move was received politically and then explains the High Court's decision with respect to the second challenge. It integrates an analysis of judicial decision-making with an account of the political events surrounding that decision-making so as to contextualise the High Court doctrine. It represented a significant change in Sawer's approach to legal scholarship and one that endured throughout the remainder of his career.

### 11.3.3 Australian Federal Politics and Law

Sawer's pieces on the *Bank Nationalisation Case* formed the template for his later much larger two-volume work entitled *Australian Federal Politics and Law*.[42] This latter work is important for several reasons. First, it provided extensive and irrefutable evidence that politics was a part of Australian High Court judging and that constitutional law cases in the first half of the 20th century were often decided on the basis of factors sitting outside the rules themselves and processes of inductive and deductive logic. Sawer's extensive study made it very difficult for an informed practitioner or lawyer to deny that one of the realists' basic tenets — that judging was something more than mechanical jurisprudence — applied to Australian law. As such, the work made a strong case against law's autonomy at a critical stage of the development of the discipline and practice of law in Australia. Second, the work is important in that it demonstrated the importance of studying rules and principles in context and with an appreciation of the complex web of factors that influence High Court decision-making. It remains the only work of its kind on Australian constitutional law and politics.

Both volumes of *Australian Federal Politics and Law* follow the format of an almanac, divided into chapters that represent each term of Australia's federal government from 1901 to 1949. In each chapter Sawer identified all of the factors that bore upon Australian federal legislation, policy and judicial decision-making. He carefully documented the formation and agenda of federal political parties; the legislation proposed and content of federal budgets and their effect on the states; and, the constitutional issues arising in both the courts and the parliament. The decisions of the High Court are explained together with an account of why judges were appointed and a description of

[42] Sawer, above n 25.

their personalities and politics.[43] However, they are not the primary focus of the work but share the spotlight alongside other political actors and events. Very early in the collection Sawer provided clear evidence of the political nature of High Court decision-making. He said that as early as 1906 it was evident that in exercising the 'function of holding a balance between the units of the federation':

> [T]he Court necessarily had to apply some general political theory of the system of governmental relations established by the constitution; the cases reaching [sic] it were almost of necessity incapable of being decided by a literal application of the words of the constitution, since the cases arose precisely because relevant sections of the document were general, vague or ambiguous. It soon became evident, and was hardly surprising, that the Court's political philosophy approximated that of the political centre in the federal parliament — say, between that of conservative Protectionists like Forrest and Quick, and liberal Protectionists like Deakin and Groom.[44]

By contextualising constitutional law decision-making Sawer could assess whether the High Court's decisions helped or hampered a government's attempt to win popularity and thereby influenced elections. He also considered how the federal compact played to the interests of the political parties; for example he spoke of the 'anti-socialist bias of the federal constitution.'[45] The work examines each budget proposed by the federal government and the role of taxes in facilitating the growth of the federal government.[46] It therefore provides a clear indication of the nature of Australia's federal compact and federal balance borne out by 50 years of history.

Sawer's two volumes demonstrated both the relevance of the broader political and social context to any understanding of constitutional law doctrine and also showed that a legal scholar was capable of studying and writing about matters beyond court decision-making. Sawer did not, however, believe that it was a project that sat squarely within the discipline of law. In a letter to one of the founders of the RSSS, Kenneth Wheare, who was based at Oxford, Sawer expressed his belief that the work he was doing sat outside the discipline. He said that he had

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[43] Geoffrey Sawer, *Australian Federal Politics and Law 1929–49* (Melbourne University Press, 1963) 33–4 .
[44] Geoffrey Sawer, *Australian Federal Politics and Law 1901–29* (Melbourne University Press, 1956) 58.
[45] Ibid 329–30.
[46] See, eg, ibid 25–9.

> been delving deep into the federal parliamentary history of 1901–50; strictly speaking it is work for historians and political scientists, but since none of them have embarked upon it, I do not mind combining a bit of political history with my constitutional studies.[47]

Regardless of Sawer's personal views on his own suitability for this project, his efforts proved that a lawyer was capable of a project that moved beyond court doctrine and statutory interpretation and his work provided a critical perspective on the nature of constitutional law and decision-making.

While the volumes have served as valuable reference tools for many legal scholars as well as political scientists,[48] initial reactions were mixed. Some legal scholars gave the books high praise, recognising the weight, usefulness and industry of the books[49] while others seemed puzzled about their purpose.[50] Such confusion is perhaps a reflection of the state of the legal academy. As there were so few legal scholars and no full-time researchers in law, it may have been difficult for some to appreciate who would reap the benefit of these extensive volumes. A Senior Lecturer at the University of Melbourne, Clifford Pannam, observed that 'Sawer often steps out of his guise as cataloguer to thrust a critical dagger through his subjects.'[51] He considered that Sawer provided insufficient reasons to support these types of evaluations.[52] Given the ambitious scale of the project it would seem unreasonable to expect Sawer to attempt anything more than a catalogue; however, Pannam seems correct in his suggestion that where attempts are made to advance criticisms they ought to be fully substantiated. These evaluative aspects of Sawer's work are lively and interesting but have a journalistic rather than strong scholarly style.

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[47] Letter from Geoffrey Sawer to Kenneth Wheare, 6 March 1952 (Australian National University Archives 7 (Australian National University Archives, *Professor G Sawer Correspondence* 7, Box 3, Series 37). See also letter from Geoffrey Sawer to Erwin Griswold, 8 April 1952 (Australian National University Archives 7 (Australian National University Archives, *Professor G Sawer Correspondence* 7, Box 1, Series 17).

[48] Macintyre referred to it as one of several 'fundamental points of reference for national scholarship' produced by the founding members of the RSSS: Stuart Macintyre, *The Poor Relation — A History of Social Sciences in Australia* (Melbourne University, 2010) 104.

[49] Geoffrey Marshall, 'Book Review: *Australian Federal Politics and Law* by Geoffrey Sawer and *The Constitutions of the Australian States* by R D Lumb' (1965) 28 *Modern Law Review* 239, 239.

[50] J Q Ewens, 'Book Review: *Australian Federal Politics and Law 1929-1949* by Geoffrey Sawer' (1964) 165 *Federal Law Review* 165, 166.

[51] Clifford L Pannam, 'Book Review: *Australian Federal Politics and Law 1929–49* by Geoffrey Sawer' (1963) 4 *Melbourne University Law Review* 290, 292.

[52] Ibid.

Despite such criticism it is clear that the volumes were a significant achievement and established Sawer as *the* expert on Australian constitutional law. De Smith commented '[w]hat Professor Geoffrey Sawer does not know about Australian constitutional law (or, for that matter, Australian politics: see his volumes on *Australian Federal Politics and Law*) is probably not worth knowing.'[53] They were and remain monumental works that set a high standard for future constitutional law studies that sought to demonstrate the inadequacies of purely doctrinal studies. Their existence meant that the founding of modern constitutional law scholarship was grounded in an expansive view of law that made a strong case for contextualisation. The two volumes served as foundational works for future studies in law and politics including Sawer's own work. His later popular work *Australian Federalism in the Courts*[54] is in some ways a direct successor to the volumes in that Sawer uses the insights gleaned from his factual study to form theories about Australia's federation from the vantage point of the High Court. While written for the general reader it is designed to instil in a beginner an understanding of the multi-layered nature of federalism that derives as much from the political actors and context as it does from constitutional law itself. Sawer therefore persistently made the case for recognising the relationship between politics and law.[55]

### 11.3.4 Strengthening the Doctrine of Precedent

Treating constitutional law decision-making as a collection of facts to be studied alongside other facts (politics, the economy and so on) was one way that Sawer responded to realist thought. The other was to formulate prescriptions to promote greater certainty and consistency in judicial decision-making. Even though judging was partly the product of a judge's personal characteristics — their values and politics — this did not, according to Sawer, mean that judging was 'entirely whimsical.'[56] In the context of Australian constitutional law, Sawer believed that effort should be concentrated on identifying and setting a limit on the number of permissible values and policies that a court could deploy.[57]

Prior to his appointment to the RSSS Sawer had published an article that explained judicial reasoning in a manner and in terms that signalled his belief in the broader

[53] S A De Smith, 'Book Review: *Australian Federalism in the Courts* by Geoffrey Sawer and *Australian Federal Constitutional Law* and *Australian Federal Constitutional Law* by Colin Howard' (1969) 32 *Modern Law Review* 460, 460.
[54] Geoffrey Sawer, *Australian Federalism and the Courts* (Melbourne University Press, 1967).
[55] N Raeburn, 'Book Review: Geoffrey Sawer, *Australian Federalism in the Courts*' (1968–70) 3 *University of Tasmania Law Review* 232, 234.
[56] Sawer and Paton, above n 3, 481.
[57] This is explained below.

qualities of legal reasoning.[58] His analysis bears a loose resemblance to the types of classification and analysis advanced by Hart and Dworkin. Sawer never wrote a monograph devoted entirely to his concept of legal reasoning but it is clear, as demonstrated in the following passage from an early article, that he had firm views that formed the basis of much of his other scholarship. He said:

> These cases [those considered in the article] therefore, represent the familiar situation of courts driven towards a particular conclusion by considerations of value or policy and endeavouring to reconcile their decisions with an established system of concepts, the concepts themselves being so ill-defined that their re-definition is still possible. It is interesting to notice that in this example, the propositions on which the purely conceptual argument depends do not enter into the statement of the relevant operative rules of law; they are merely explanatory. The only operative rules of law involved were as follows; spouses shall not be permitted to sue each other for personal injury; masters shall pay for the torts of their servants. There is no compelling necessity for any explanation of these rules. They do not need to be derived from any supposedly more general rule of law, nor from any judicially recognised social value dressed up as 'public policy'; it is quite likely that in a codification of English civil law, each would appear as a dogmatic rule and anyone inquiring *why* such a rule exists could be met with the sovereign answer *stet pro ratione voluntas mea*. If the rules are considered in unexplained isolation, there is no propositional relation between them at all, and the problem of the instant cases would be simply solved by pointing out that to allow the spouse to sue the employer involves no disobedience to either rule. …
>
> There is no logical or semantic reason why statements as to the 'rationale' of legal rules should not be a part of the statement of the rules themselves. But it is quite exceptional for any legal system to pursue consistently a course of exposition plus explanation, whether the system be codified or unenacted; the British professional tradition particularly inclines us to treat only the minimum behaviourist expression of a legal obligation as constituting 'the law,' more general explanations or derivations of the rule being treated as a subsidiary logical structure which though within judicial behaviour has a lesser claim to validity. There is an analogy between this situation and that which obtains in the natural sciences, where observed behaviour is often distinguished from a hypothetical explanatory set of concepts. But the scientists tend to treat the explanatory system as *more* 'real' than the observed behaviour, whereas with the lawyers, the explanatory system is usually felt as *less* 'real.' Doubtless this is because the scientific concepts have a high predictive value, while the legal concepts have only a low one.[59]

[58] Geoffrey Sawer, 'Husband-and-Wife versus Master-and-Servant; A Collision of Concepts' (1953) 27 *Australian Law Journal* 323.
[59] Ibid 326.

By drawing attention to the rationale and explanatory system of concepts that underlie rules Sawer clearly expressed his belief that judging involved much more than the formal application of rules and that often the determining factor was the values and policies sitting behind the rule.

For Sawer the task faced by scholars following on from American legal realism was one of increasing the predictive value of the explanatory system by bringing the system into sharper focus. In the case of constitutional law, Sawer considered that when in the early 1900s High Court Justices Higgins and Isaacs introduced a new set of assumptions about the interpretation of the constitution it caused alarm and other justices responded by attempting to proceed in the absence of any general assumptions.[60] Despite their intentions to rid the law of the uncertainty created by political assumptions, in Sawer's view by removing any recourse to enduring values or preferences, the approach of these judges simply created greater idiosyncrasies in constitutional law decision-making.[61] For Sawer the challenge was therefore one of identifying a set of circumscribed fundamental values that should guide the court.[62]

Even though Sawer acknowledged the role of values in decision-making, throughout his career he also remained of the view that logic was an important part of judicial decision-making: 'To give up all reliance on logical principles would be as wise as giving up the use of eyes because occasionally they see what is not there.'[63] In order to increase the predictability of law by strengthening the operation of the doctrine of precedent Sawer, along with Paton, had tentatively suggested that reforms be introduced to mandate appellate courts to deliver unanimous judgments and recommended that each appellate case be heard by an odd number of justices so as to ensure a clear majority. As Duxbury more recently noted, the article stands in contrast with the despair of some American legal realists, including Karl Lewellyn and Herman Oliphant, and constituted a 'constructive' approach to one of the major realist challenges to traditional understandings of law.[64]

Sawer did not follow any one scholar or tradition but drew inspiration from his mentors at Melbourne (principally Paton) and his own extensive assessment of Australian law,

[60] Sawer, above n 44, 329–30.
[61] Ibid.
[62] Ibid; Sawer, above n 54, 197.
[63] Sawer and Paton, above n 3, 481.
[64] Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge, 2008) 79.

politics and practice. He advanced a measured and constructive approach to American legal realism that reflected his individuality.

### 11.3.5 'We're All Socio-Legal Now' (and Always Have Been)[65]

Much has been made of Hart's suggestion at the start of *The Concept of Law* that his work was an exercise in 'descriptive sociology.'[66] Some social scientists argued that the work was really that of an analytical philosopher and that its failure to consider the broader context — 'historical and social facts'[67] — of law meant that it could not be considered either descriptive[68] or a work of sociology.[69] Hart's response was to suggest that he had used the description 'to signal his move away from the more rigidly conceptual theories of John Austin and Hans Kelsen in favour of an approach which helps us to look at the complex social phenomenon of law.'[70]

Given the controversy over Hart's categorisation of his own work, his praise for Sawer's sociological scholarship might be considered a weak endorsement. Sawer's scholarship was, however, different to Hart's. In the *Federal Politics and Law* volumes Sawer attempted to gather together the historical and social facts on which strong sociological studies of Australian law and politics could follow. Sawer did not engage in strong political theorising (hence Pannam's criticisms). Further, he did not follow the two volumes with a work of sociological or analytical theory of a similar kind to either Hart and Dworkin or Talcott Parsons or Max Weber. In one sense the work was empirical. However Sawer was not wholly sold on empirical legal studies, observing that many existing works in the genre were 'flat and obvious'.[71]

While Sawer's work was different from Hart's, his views on the value of sociology to law were similar. Like Hart, Sawer adopted an expansive definition of sociology. He commenced his book for the Clarendon Law Series — *Law in Society* — with a defence of Hart's claim that *The Concept of Law* was a work of descriptive sociology. He argued that jurisprudential scholars have always been sociologically inclined because they have

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[65] The quote is a play on the title of a well-known article on legal education: Richard Collier, '"We're All Socio-Legal Now?" Legal Education, Scholarship and the "Global Knowledge Economy" — Reflections on the UK Experience' (2004) 26 *Sydney Law Review* 504.
[66] H L A Hart, *The Concept of Law* (Clarendon Law Series, 1961) v.
[67] Nicola Lacey, *A Life of H L A Hart — The Nightmare and the Noble Dream* (Oxford University Press, 2004) 229.
[68] Ibid 230.
[69] Ibid 229.
[70] Ibid 229.
[71] Sawer, *Law in Society,* above n 21, 4.

always had awareness that the legal system is part of organised society.[72] To Sawer sociology in law was both a broad church and nothing new. In his inaugural speech as Professor of Law in the RSSS ('The Role of a Lawyer in the Social Sciences') Sawer provided the following as an example of one of his own studies:

> For example, in a recent article in the *Australian Law Journal* (27 *ALJ* 323), I considered some cases dealing with rights of suit between spouses and their respective employers, as affected by the old common law rule that husband and wife, being one, cannot sue each other. Besides giving the detailed rules applicable to this matter, the article considered some sociological factors governing the decisions, and also the logical character of certain types of explanatory concept which lawyers often put forward to support the chain of reasoning by which they arrive at a decision.[73]

Sawer believed that the inclusion of logical legal analysis did not mean that his work was not sociological. He took the expansive position that all judging and legal scholarship that recognised that legal reasoning involves something more than the mechanical application of rules and principles is, at least in part, sociological.[74] Further, he argued that where judges choose to take a strict legalist approach on the grounds that the approach will better serve society than its alternatives then they too are sociological. Controversially, Sawer applied this reasoning to suggest that Sir Owen Dixon's judging had a sociological quality.[75] He argued that Dixon reached his position on how to reason based on a sociological analysis of what society needed.[76] Sawer suggested that the idea of a sociological approach to viewing law was nothing new or threatening.[77]

In *Law in Society* Sawer made it clear that he did not fully embrace any of the sociological schools, nor did he think that their insights for law were any better or worse than the traditional analytical schools. Each had its limitations. Sawer's purpose in writing the book was to introduce the novice to the major ideas on the sociology of law, provide a brief assessment of their merits and relate them to traditional schools of thought. As Lindell noted, for Sawer, the various schools of thought were all 'grist for the mill' and he took nothing with 'special reverence'.[78] One of the central threads of the book is that while there were some radical elements the new sociological thinking largely

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[72] Sawer, *Law in Society,* above n 21, 4–5.
[73] Geoffrey Sawer, *The Place of a Lawyer in the Social Sciences* (Melbourne University Press, 1953) 14.
[74] Ibid 10, 15–16.
[75] Ibid 15–16.
[76] Ibid.
[77] Ibid 3–5, 15–16 and Chapter 1 of Sawer, *Law in Society,* above n 21.
[78] Lindell, above n 9.

did not challenge or better what was already known but, rather, added depth and an incentive for further thought and reflection. As Cedric Jones, a lecturer at the University of Dublin, said in his review of this work, '[i]t is not so ambitious a book but it introduces and reflects faithfully contemporary sociological jurisprudence: so many questions tentatively answered.'[79] He aptly described Sawer as the 'sensible evaluator'.[80]

Several reviewers confirmed what appears to have been the underlying premise of the book, namely that the majority of the profession as well as law teachers were ignorant of the broader theories and that this ignorance impaired their view of law and made them sceptical about thinking and argument challenging law's autonomy.[81] While Sawer's book was shorter and lacked Paton's clarity (Paton wrote beautifully), the format and approach of *Law in Society* — instructing the beginner in the central schools without assuming any knowledge and providing some evaluation — made Sawer's book a companion work to Paton's *A Textbook of Jurisprudence.* Together they provided a strong Australian contribution to strengthening theoretical reflections on law.

Prior to Sawer's book the Clarendon Law Series had been met with a degree of scepticism, with scholars believing that the majority of the works in the series had been 'lawyers' books'[82] liable to promote conservative understandings of law. Sawer's contribution signalled a change in direction that may have addressed these concerns. Sawer's attempt to progressively move the discipline forward, by increments, was appreciated by one reviewer, Lyall, who said that the book 'is not a direct attack on the errors of uninformed positivism but rather weans one away from the linguistic preoccupations of that attitude. Positivism is good only if allied to social consciousness.'[83] Similarly Peter Brett believed that Sawer had helped with efforts to inspire a cultural change, saying that 'lawyers will not be inattentive to the social relations of law or the part which natural science and systematised social knowledge can play in solving legal problems.'[84]

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[79] T Cedric Jones, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966) 17 *Northern Ireland Legal Quarterly* 220, 221.
[80] Ibid 222.
[81] Ronald B Jamieson, 'Book Review: *Law in Society* by Geoffrey Sawer' (1968) 54 *American Bar Association Journal* 67, 67; Peter Brett, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966–67) 2 *Federal Law Review* 139, 140; Ellison Kahn, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966) 83 *South African Law Journal* 236, 237; F H Newark, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966) *The Quarterly Review* 118, 121.
[82] Jones, above n 79, 221.
[83] F Lyall, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966) 9 *Journal of the Society of Public Teachers in Law* 275, 276.
[84] Brett, above n 81, 140.

Generally Sawer avoided grand sociological theorising. He developed arguments that were closely intertwined with his analysis and evaluation of the facts on topics such as federalism and law reform. In the course of his career he did, however, employ some sociological concepts. For example, in his substantial comparative work on federal systems, *Modern Federalism,* he used Weber's concept of 'ideal types' to explain different versions of federalism and the trajectory of countries operating under a federal system.[85] These ideal types helped Sawer to explain why the trajectory of federal systems was not always or necessarily a movement towards centralisation. The book received strong reviews with one reviewer describing it as 'profound'.[86]

In the book chapter that caught Hart's attention, 'Law as Socially Neutral — Karl Renner', Sawer explored the theories of a Marxist philosopher, Karl Renner, and considered how experiences in Australia conformed or contradicted his central philosophies.[87] Sawer argued that some Australian experiences demonstrated that 'law has an instrumental quality', that it is 'capable of expression in such a way as to serve the interests of any social value.'[88] This bore out some of Renner's theories and suggested that they had relevance beyond the Soviet Union. The chapter appeared in a book that contained essays from a range of Sawer's colleagues within the RSSS arising from a seminar series Sawer had arranged on the topic of the sociology of law. In the preface of this work Sawer voiced caution about the sociological theorising covered by the various authors of the book:

> Sometimes these propositions are incorrigible generalisations — either because so general, or because they are so qualified with *exceptions and escape clauses that no observation can invalidate them.* Considered as natural-scientific propositions, they are at best *tentative hypotheses*. Their *predictive power is apt to be small.*[89]

Again this demonstrates that Sawer was measured in his appraisal and promotion of the benefits of sociological theory to law. In Sawer's view scholars ought to be aware of grand theories, but this did not mean wholly embracing them.

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[85] Geoffrey Sawer, *Modern Federalism* (Watts, 1969) 64–73.
[86] L A Sheridan, 'Book Review: G F Sawer, *Modern Federalism*' (1969) 20 *Northern Ireland Legal Quarterly* 225, 225.
[87] Sawer, above n 11.
[88] Ibid 137.
[89] Geoffrey Sawer, 'Introduction' in Geoffrey Sawer, *Studies in the Sociology of Law* (Australian National University Press, 1961) viii (emphasis added).

Sawer's scholarship suggests that one reason why Australian legal scholars did not advance their own brand of foreign jurisprudence was because they believed that the existing and older schools did not do enough to advance the discipline. Sawer believed that the existing schools placed too much emphasis on the courts rather than examining other methods of law reform. In the later years of Sawer's career he became increasingly bold in this assessment. Writing on the ongoing debates between Hart and Devlin and many others over the relationship between law and morality, Sawer bluntly stated that he believed 'that most of this stuff is pretty worthless.'[90] He explained:

> It is dressed up as a dispute about legal and philosophical theory, but the key questions are really ones of social organisation and social psychology, and the better view may vary from society to society and at different stages of development of the same society. When there is general stability and prosperity, or at least contentment, and the system of government is open and flexible enough for legal change to be relatively easy, the better view may well be that existing law is law and ought normally to be obeyed; it may then be said that the path of good conscience is to accept existing law but work vigorously to change it or secure appropriate provisos and exceptions where it works unjustly. If, however, rapid social changes in value systems are under way and if in addition the system of government is resistant to change and frustrates principled efforts at reform, then it may well be that it is better to deny the title 'law' to rules which are felt to be grossly unjust, and to obstruct the operations of the legal system by all means short of imitating the immorality of which the system is accused.[91]

Towards the end of Sawer's career he reached the same conclusion as Brett that efforts were better spent considering the jurisprudence of law reform bodies apart from the courts.[92] His writing on the Ombudsman, the first of its kind, was controversial in that it suggested that there were deficiencies in Australia's political and legal system.[93] Following his proposal other scholars and lawyers wrote on the topic and moves were made to create a Commonwealth merits review tribunal of administrative decisions as

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[90] Sawer, above n 6, 71.
[91] Ibid.
[92] See, eg, Sawer, above n 7; Geoffrey Sawer, 'The Legal Theory of Law Reform' (1970) 20 *University of Toronto Law Journal* 183; Geoffrey Sawer, *Ombudsmen* (Melbourne University Press, 1964). See also Geoffrey Sawer, 'The Ombudsman and Related Institutions in Australia and New Zealand' (1968) (May) *Annals of the American Academy of Political and Social Science* 62; Geoffrey Sawer, 'The Ombudsman Comes to Alberta' (1968) 6 *Alberta Law Review* 95; Geoffrey Sawer, 'The Jurisprudence of Ombudsmen' (1971) 30 *Public Administration* 221.
[93] Lindell, above n 9.

well as an Ombudsman[94] and in July 1977 the first Commonwealth Ombudsman commenced operation.

Like Brett, Sawer believed that the key to a dynamic legal system that is responsive to the needs of society is through the creation of strong law reform bodies. By turning to other components of the legal system as holding the key to progressive reform, and limiting the political and instrumental nature of judicial decision-making, Sawer's scholarship therefore partly reflected legal process sentiment.

Sawer's career has substantial sociological threads that he wove into his scholarship in his own distinctive way. He believed that the sociological jurisprudential scholars had said something important and his scholarship embodies his response to both aspects of the sociological school as well as the realists. He endorsed wide-ranging approaches to studying law, including the existing analytical tradition, while at the same time prompting scholars to look beyond positivism. His efforts worked towards a significant cultural shift in both Australia's legal academy and the profession.

### 11.4 A Middle Ground

From what is set out above it should be clear that during Sawer's time at the ANU he developed his own individual view about the role of law and how it ought to be studied. To better contextualise his position within the larger realm of legal ideas it is important to acknowledge that his career was flanked by two distinct and opposing attitudes towards law's autonomy. During the first two decades of his career Sawer operated in an environment where full-time academics were in the minority at law schools, the were a small group who taught some but not all of the law curriculum. The most influential and prevalent ideas about the law often stemmed from judges and for many the legitimacy of law was tied to its autonomy. Shortly after he moved to ANU Sawer noted 'the unfriendly attitude which some Australian judges can be expected to take towards American-style legal research'[95] and he recalled an incident where a member of the judiciary had objected to an exam question set by Sawer that implied that a judge's personal characteristics affect their decision-making.[96] In an article about his role in the RSSS Sawer acknowledged that:

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[94] This was through the efforts of the Kerr Committee: Sir Anthony Mason, Professor Harry Whitmore and Sir John Kerr.

[95] Sawer, above n 73, 17–18. Lindell concurred with this attitude and said that it was a 'struggle' to get people interested in a contextual approach even in the 1960s': Lindell, above n 9.

[96] Ibid 18.

> The influence of political movements upon the lawyers … is a much more delicate and difficult field of inquiry, and a good many lawyers are disposed to argue that it should never be attempted at all, or else that it would be a useless study because there is no influence of politics on law.[97]

During the course of his career, from the 1930s to the 1970s, Australian judges continued to display suspicion towards probing inquiries into the factors beyond precedent that entered into their decision-making.[98] As a reviewer of one of Sawer's books remarked:

> He is not, of course, a conservative traditionalist in the mould of so much of the Australian legal profession and the verve with which he throws off his contentious ideas makes even some of the abler members of that profession feel somewhat uncomfortable.'[99]

At the end of Sawer's career in the 1970s the size and number of law schools had grown significantly. Some law schools and individual scholars were opposed to traditional conceptions of law and believed that law schools should distance themselves from the interests and traditions of the legal profession. Various attitudes circulated, including the Marxist view that the law was the product of oppressive ideologies that served to subjugate and marginalise various groups including women, the poor and racial minorities.

Throughout his career Sawer's position and interests were therefore at odds with prevailing attitudes. To understand properly Sawer's contributions and motivations it is worth considering how he responded to these opposing attitudes and whether he attempted to pitch his ideas and position in a way that made them more palatable to these very different audiences.

When Sawer moved to the RSSS he was a promising academic with a solid but not yet remarkable scholarly reputation. He moved into a role that was entirely alien to existing notions of the role of a legal scholar. At that time the primary function of a legal scholar

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[97] Sawer, above n 73, 14–15.

[98] Sawer gave the example of a former Australian judge, Sir Alan Taylor, who refused to reveal what school he went to because he believed it was no one's business and of no relevance to his later career: Pratt, above n 27.

[99] L F Crisp, 'Book Review: Geoffrey Sawer, *Modern Federalism*' (1969) 3 *Federal Law Review* 302. Crisp cited the following review of Sawer's work by a judge of the New South Wales Court of Appeal as an example of such discomfort: J D Holmes, 'Book Review: Geoffrey Sawer, *Australian Federalism in the Courts*' (1968) 3 *Federal Law Review* 144, 144–5. Holmes described Sawer's work as 'provocative and worthy of consideration if not always of acceptance.'

— the reason why they were entitled to draw a full-time salary from the government and the reason why the government injected money into the expansion of universities — was to suitably educate legal practitioners. Sawer's job, among other things, was to convince the legal profession and legal academy that a full-time legal scholar in a research school for social sciences, who did not teach undergraduates and therefore did not prepare future lawyers for practice, could perform a useful role. What is important to note here is that the message he conveyed to his Australian audience was consistent with the ideas he advanced in other aspects of his scholarly work.

When Sawer publicly explained his role he presented the idea of a lawyer within the social sciences as a non-threatening prospect. He argued that previous Australian professors, as well as High Court justices, had been sociological in their approach.[100] Sawer's broad definition of the sociology of law described earlier indicates that these characterisations were sincere. Sawer genuinely believed that his placement within the RSSS represented an incremental rather than radical step towards formalising connections between law and the social sciences.[101] He sympathised with the practitioner who believed that the question of law's autonomy was linked to his legitimacy.[102] Sawer too believed that maintaining the legitimacy of courts was paramount. It was therefore important for Sawer to convince both his audience and himself that nothing would be lost in acknowledging that values and politics play a part in judicial reasoning. His goal was to introduce the unacquainted to new ways of thinking about law without condemning their existing beliefs.

Given his location and role it may have been tempting for Sawer to proclaim, or simply accept, that law was part of the social sciences. Not only was Sawer located in a social science school he was also one of the early members of what later became the Academy of Social Sciences in Australia[103] and in 1972 was made chairman.[104] And yet despite his position he never said that law was a social science. He said instead that it was a 'social

[100] Sawer, above n 73, 10, 15–16.
[101] Sir Anthony Mason believed that while Sawer was progressive and innovative he was not a radical: Anthony Mason, 'Geoffrey Sawer: The Priceless Professor', *The Canberra Times* (Canberra), 21 December 1990, 7.
[102] Sawer's commitment to the integrity of the courts was made clear both in the article he wrote with Paton (Sawer and Paton, above n 3) in his inaugural speech as Chair of Law in the Department (Sawer, above n 73, 18–19) and in Chapters 5 and 6 of *Law in Society,* Sawer (*Law in Society*, above n 21).
[103] Stuart Macintyre, *The Poor Relation — A History of Social Sciences in Australia* (Melbourne University, 2010) 82.
[104] Ibid 189.

technology, one of several available for the organisation of human society.'[105] While he did not fully explain what he meant by this expression presumably he was characterising law as a collection of technical and intellectual skills and knowledge that could be put to use in shaping a society. To understand society one needs to have regard to the role of that technology. And to understand the technology one needs to appreciate its role and impact on society. Those engaged in law therefore need recourse to the social sciences. But, according to Sawer, from this relationship it did not follow that law was a social science.

In some of Sawer's scholarship he demarcated the technical skills and knowledge of law by employing Sir Courtenay Ilbert's phrase 'lawyers' law'.[106] Sawer's use of the phrase is controversial, as contrary to his own convictions it could imply that law is autonomous;[107] instead, Sawer used the phrase to suggest merely that there were aspects of law that were solely the province of lawyers. He believed that the phrase served as neat shorthand — like a sociological concept — that could be used to explain when and why lawyers were needed. Again this points to Sawer's belief that embracing sociology did not involve abandoning traditional conceptions of law.

Towards the end of Sawer's career he extended the same thoughtful consideration he had shown to the 1950s legal profession to a new generation of legal academics and students, the 'young Turks' of the 1970s. Of course, Sawer was not in favour of the Marxist sentiment that was again sweeping through universities in the 1970s and did not believe that legal education or the law itself ought to be radicalised in the way that mainly younger scholars and students were suggesting at this time. However, he did not ignore or flatly reject the movement. Unlike Tay, he did not present as an elder statesman dismayed by the impatience and ignorance of youth. When asked to present a paper at a seminar arranged by a number of younger legal academics on the topic of lawyers and social change he accepted and his paper was followed by open discussion and provoked a large amount of criticism. He thoughtfully considered and addressed the criticism in a paper that formed an epilogue to the book that was eventually published from the

[105] Geoffrey Sawer, 'Who Controls the Law in Australia?: Instigators of Change and Obstacles Confronting Them' in A D Hambly and J L Goldring (eds), *Australian Lawyers and Social Change* (Lawbook, 1976) 181–2. Else-Mitchell also drew attention to this aspect of Sawer's characterisation of law's relationship with the social sciences: R Else-Mitchell, 'Introduction' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) xix, xxi.

[106] Sawer, above n 105, 120; Sawer, *Law in Society,* above n 21, 112, 116, 126-136, 172, 175, 183, 186, 190, 202–3, 208; Sawer, above n 73, 11.

[107] See, eg, A F Mason, 'Law Reform in Australia' (1970–71) 4 *Federal Law Review* 187, 215.

seminar. The 'broad aim of the seminar was to assess the responsiveness of Australian law and lawyers to social change, and to consider the extent to which the law and lawyers can, and should, be used as instruments for promoting change.'[108] It is clear from the book that the organisers and most of the contributors held the view that the law and lawyers served as obstacles to rather than facilitators of change. Sawer's paper was at odds with this view. In contrast, he believed that there were a sufficient number of lawyers servicing the poor and disadvantaged and he maintained the view expressed in his previous works that the better instrument for social reform was the parliament not the courts. He said:

> If I thought that the courts did or could play a major role in social reform through legal reform I would go further. As things stand, however, it seems to me that judicial legislation is of such marginal importance so far as any large measures of social reform are concerned, and that judicial integrity is so important to the stabilisation of whatever measures of social reform are otherwise carried into law, that it would be best to interfere very sparingly with the present situation of the judiciary, including the law as to contempt. For believers in continuous revolution, whatever that may mean, the situation is obviously different.[109]

Sawer considered that rather than abandoning traditional approaches to law and lawyering, 'lawyers' law' served a useful function. He believed that it should sit alongside more radical attempts at reform by the legislative and administrative arms of government. He added the caveat that this did not mean that law schools should teach law in a narrow technocratic way, favouring a liberal curriculum in universities and separate schools where the profession took responsibility for imparting 'legal craftsmanship'.[110]

Despite his measured response to the problems posed by the conference organisers, his paper drew little support. Some contributors misconstrued his message, believing that he was advocating for law's insularity while others simply could not accept that lawyers were only bit players in social change. For some the time had come to radicalise the legal profession instead of working around it. The experience sheds further light on Sawer's character and manner. He was a man of strong convictions who believed that ideas were worth listening to and also worth defending. He promoted by example the respectful

[108] A D Hambly and J L Goldring, 'Preface' in A D Hambly and J L Goldring (eds), *Australian Lawyers and Social Change* (Lawbook, 1976) v.
[109] Sawer, above n 105, 136.
[110] Ibid 181–2.

exchange of opposing ideas. These experiences suggest that he did not temper his convictions based on his audience or prevailing trends and attitudes. He was a scholar of integrity and diplomacy.

### 11.5 Concluding Remarks

There are many things that could be said about Sawer's scholarship and its contribution to constitutional law. Here, however, the focus has been on Sawer's theoretical perspectives and what he did to change cultures and attitudes within Australia's legal academy and profession. Perhaps for the first time in the history of writing about Sawer this chapter recognises that Sawer was at heart a legal theorist. His appointment to the RSSS at a time when his ideas and scholarship were moving into a phase of maturity meant that he had time to carefully reflect on where his studies and interests were taking him and to contemplate the needs of the discipline. His decision to provide a solid factual basis for future constitutional studies (including his own) and to provide the necessary guidance for other scholars and lawyers to learn about the major ideas that supported contextual and theoretical approaches to the study of law was both wise and responsible. It represents the two sides of Sawer — a man of high intellect, imagination and ambition tempered with a strong sense of responsibility. Unlike Tay, who devoted much of her energies to creating a particular academic environment within the Department of Law at the University of Sydney, and unlike Brett whose life was cut short, Sawer had the time and opportunity to fully develop his scholarship, publishing a vast amount of books and articles. Once he had laid what he believed to be the appropriate foundations for Australian constitutional law scholarship and Australian legal theory he then used the insights gained to develop more sophisticated work that shone light on new areas of scholarship and contextualised Australia's constitutional law within an international sphere. In the context of the discipline of law in Australia he was important both because of his legal theory and because of the model he created for Australian legal scholars. He was a towering figure.

In the following chapter I move from Sawer's scholarship to his role as head of a Department of Law in a research school of social scientists. I consider why he did not do more to imbed law's status as a member, or close friend of the social sciences into the institutional makeup of the discipline of law in Australia.

# 12 SAWER AND THE RESEARCH SCHOOL OF SOCIAL SCIENCES

## 12.1 Introduction

Sawer's appointment as the first professor of the RSSS and the inclusion of the Department of Law within the School was an initiative of the founders of ANU. None of the founders were members of Australia's legal academy and Sawer had no say in the inclusion of law in the RSSS. In fact, before receiving an invitation to join the Department Sawer held reservations about both the role of ANU and the RSSS, believing it would be better to strengthen existing Australian universities than to create a new national university.[1] As explained in this chapter, the founders of the RSSS had very vague ideas about law's role within the School. The mere inclusion of law in the RSSS was not a result of Sawer's strong academic convictions, nor anyone else's, that law was a social science. Nor did it indicate that either some or the majority of members of Australia's legal academy believed that law should shed its technocratic associations and embrace learning from the social sciences. The mere fact of Sawer's appointment to the first chair in the RSSS constitutes an interesting quirk of history rather than a momentous event in the context of Australian legal education. This chapter details Sawer's leadership of the Department located within the RSSS at the ANU.

What is, however, important about Sawer's position in the RSSS is that it allowed him more time than other Australian legal scholars to lay down strong intellectual foundations for the discipline of law. As explained in the previous chapter, this included a strong basis for the further study of constitutional law and a legal theory that attempted to move both the profession and legal academy away from the view that law was an autonomous discipline. With the benefit of hindsight, through his substantial work and novel contributions Sawer demonstrated that a full-time legal researcher (as opposed to teacher and part-time researcher) was a worthwhile occupation and a wise use of public funds.

Despite his industry and stature there are signs that Sawer held reservations about his role. Comments he made at various times suggest that he was never fully convinced of the utility of his position as a full-time researcher and was uneasy about the fact that he

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[1] *Outline biography* by Geoffrey Sawer (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers,* MS 2688, Series 18, Unpublished biographical writings of Geoffrey Sawer) 14; Mel Pratt, Interview with Geoffrey Sawer (Oral History Interview, Canberra, 16 November 1971) < http://nla.gov.au/nla.oh-vn765219 >.

did not have undergraduate students whom he could prepare for practice.[2] At times he attempted detailed explanations of how his role was different from that of other Australian legal scholars, how the Department of Law had different aims and functions to other law schools and how it was not designed to be a large independent institute devoted to the study of law.[3] However, as explained in this chapter, these messages were not received as well as they might have been and assessments of the Department of Law were often made on the assumption that the Department was destined to either became a large research institution and/or a law school

Of the three scholars who are the focus of this thesis, Sawer was the least divisive and has attracted the greatest admiration and praise. However, even some of his greatest admirers point to one major shortcoming: he did not create a large lively Department of Law within the RSSS.[4] As this could be construed as a very damning criticism of Sawer and one which might weaken the earlier claim that he made a significant contribution to law's disciplinary identity in Australia, it is worth exploring further the way he ran the Department and viewed its role.

The fact that law remained a small subsidiary unit of the RSSS is largely consistent with Sawer's intellectual beliefs as well as his views on what was needed at this stage of the Australian legal academy's development. However, there are also other factors that explain its modest status throughout the subsequent decades, including Sawer's personality, his other professional and personal commitments, his status at the beginning of his appointment and the attitude of the profession to legal research. A careful consideration of Sawer's motivation and activities within the Department suggests that his decision not to build a large vibrant Department of Law was reasonable for the times. An assessment of Sawer and his Department must be made on its own terms and with an appreciation of the broader context. Such an assessment should not be made in the context of an idealised vision of what a large research institute in law should look like today. These were different times that called for different measures. This does not, however, ignore the possibility that had Sawer done more to build the Department of Law in the RSSS Australia's discipline of law may have diversified and embraced interdisciplinary studies more rapidly. In the late 1960s and 1970s the Department might

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[2] Sawer said that while there was enough work for the RSSS to be a pure research institution 'we do not feel content with that role alone, at least not in the social sciences.' See, eg, Geoffrey Sawer, 'Law at the Australian National University' (1959) 5 *Journal of the Society of Public Teachers of Law* 20, 21-2, 25.

[3] Ibid.

[4] Such views are explained further below.

have been a forum for sociologically inclined legal scholars to join forces to create initiatives that widened law's intellectual credentials. My goal has been to ascertain whether he had good reasons for not taking up what now seems to have been a golden opportunity.

### 12.2 Sawer's Appointment to a World-class Australian University

The idea for a national university originated in the 1940s with three Australian intellectuals:Professor of Medicine Douglas (Panzee[5]) Wright and public servants Alfred Conlon and Herbert Cole Coombs.[6] Each was heavily engaged with the war effort and at the same time looked optimistically towards nation-building initiatives that could be implemented at the end of the Second World War.[7] The creation of the ANU was a product of that optimism. Coombs's vision was for a university devoted to research work at a postgraduate level that could engage in joint research projects with government to solve the nation's social problems.[8] The need for more postgraduate work was highlighted when Sir Howard Florey visited Australia and described medical research in Australia as being in a 'parlous state'.[9] At the instigation of these three individuals the federal government supported the establishment of the ANU.

To a modern Australian scholar what is particularly fascinating about ANU's establishment is the extent to which the federal parliament and in particular the then Prime Minister, Joseph Benedict (Ben) Chifley, was involved in its creation. The government and founders placed great stock in gathering together a group of internationally renowned scholars, looking primarily to expatriate Australians living in London, who could head each of the new schools. A pivotal moment in the establishment of the university occurred when Chifley travelled to London and met Mark Oliphant, a leader in experimental research in nuclear physics, then at the University of Birmingham.[10] So strong was the impression Oliphant made on Chifley, with his talk of the possibility of Australia moving to 'the forefront of nuclear research',[11] that the Prime Minister undertook to get Oliphant to Canberra no matter what the cost. This meeting

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[5] A nickname given to Wright as he had long arms that reminded others of a chimpanzee: Geoffrey Sawer, *Partly Unreliable Memoir* (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers,* MS 2688, Series 18, Unpublished biographical writings of Geoffrey Sawer) part 19, 3.

[6] Coombs was commonly referred to as Nugget due to his stocky physique: S G Foster and Margaret M Varghese, *The Making of the Australian National University* (Allen and Unwin, 1996) 3.

[7] Ibid 3.

[8] Ibid 15.

[9] Ibid 12.

[10] Ibid 21.

[11] Ibid 21.

with Oliphant sent ANU along the path of a much grander and ambitious academic enterprise than that initially envisaged by the Australian government. The interim council then placed emphasis on recruiting the very best intellectuals to lay the foundations for each school.

Former Chief Justice of the High Court of Australia, Sir Anthony Mason, described with approval the way that the subsequent Liberal Prime Minister, Sir Robert Menzies, adopted Chifley's ambitions:

> I'm very strong on this …. The Menzies idea was to create one university which in terms of research, teaching and influence at the highest level could compete with the leading American and UK universities and therefore it was important to concentrate your greatest intellectual ability, the people who had the greatest intellectual ability, at a research postgraduate university.[12]

While the medical and science schools duly proceeded along these lines, the founding of the RSSS at ANU did not go as planned. William Keith Hancock, an eminent Australian historian based in England, originally took on the task of establishing the School and went so far as to outline a detailed manifesto.[13] According to Hancock's initial vision, the School would consist of chief researchers in 'economics, statistics, population and health studies, law, political science, social anthropology, psychology, history and philosophy, sociology, geography.'[14] He later revised his vision a number of times until eventually it entailed 'a more coherent grouping of subjects', comprising economics, politics and sociology, each of which would have a professorial head.[15] He also sought a basis for historical research by appointing a 'readership in the sources of Australian history.'[16] The revision made no mention of law. Hancock believed that 'history and philosophy were essential, to ensure that the School did not degenerate into "an aggregate of people myopically focused upon their own tiny segment of place and time and research material".'[17] Despite his enthusiasm and efforts, Hancock initially gave up the opportunity to bring his vision to fruition. He resigned from the advisory committee when the Vice-Chancellor of ANU, Douglas Copland, rejected Hancock's proposal to

[12] Interview with Sir Anthony Mason (Sir Anthony Mason's Chambers, Sydney, 9 December 2014).
[13] Foster and Varghese, above n 6, 39–40.
[14] Ibid 39.
[15] Ibid 39.
[16] Ibid 39.
[17] Ibid 39 quoting Hancock.

integrate the social science and Pacific studies schools.[18] This meant that the School of Social Sciences effectively began both without a director and without a clear vision.

Although Hancock was replaced by another social scientist, Kenneth Wheare, it was clear that Wheare wanted only limited involvement with the RSSS and did not wish to become the full-time director of the School. Wheare held a position at the University of Oxford and intended to remain there.[19] Bringing the School to fruition largely fell to Copland and Sir Frederic Eggleston, a lawyer and graduate of the Law School at the University of Melbourne who was appointed to various public offices (including Attorney-General, Solicitor-General and Minister of Railways in the Allan–Peacock Victorian Government) and wrote a number of political and historical works.[20] Eggleston, then in his 70s (he died in 1954 at the age of 79) was not in a position to become the new director.[21]

The idea behind the ANU was always to attract the best researchers who could compete on a world stage. However, attracting such eminent scholars, particularly to the RSSS, proved difficult. Before abandoning his post, Hancock had made several attempts to recruit eminent social scientists from England.[22] These attempts failed and the founders' ambition to populate the RSSS with expatriate Australians, who had built their careers in England, was largely abandoned.

With Hancock's departure, the RSSS was left without a director and with an appointment committee comprising Copland (the Vice-Chancellor of ANU), Wheare (an 'old school friend' of Sawer's from Scotch and university,[23] then the Gladstone Professor of Government at All Souls, Oxford), Bailey (Sawer's teacher and colleague from Melbourne), Eggleston, Coombs and L F Crisp. All had varying levels of familiarity with Sawer and all liked him. For example, Bailey had written a reference for Sawer for a position at Melbourne where he had said Sawer was the 'best of the applicants for the Chair'[24] and Eggleston, who like Sawer was a graduate from Melbourne Law School, had been in frequent correspondence with Sawer; for example, seeking his views on an essay

[18] Ibid 45–7.
[19] Sawer, above n 5, part 37, 1.
[20] Warren Osmond, 'Eggleston, Sir Frederic William (1875–1954) in *Australian Dictionary of Biography* (Melbourne University Press, 1081) vol 8 <http://adb.anu.edu.au/biography/eggleston-sir-frederic-william-344>
[21] Ibid.
[22] Foster and Varghese, above n 6, 44.
[23] Sawer said that Wheare encouraged Sawer to believe that he could write literature. Sawer said he looked up to Wheare as being like a 'kind uncle or elder brother': Pratt, above n 1.
[24] Letter from Kenneth Bailey to the Vice-Chancellor of the University of Melbourne, 23 May 1947 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series* UM312, 1947.936, Sawer, Ass Prof G).

on the United Nations.[25] The decision fell to Wheare, then living in England, who although a friend of Sawer's from school and university days[26] had less familiarity with Sawer's professional academic life. Copland wrote to him: 'I think in this matter you would be able to give us a more objective view than most of us who are too close to the scene.'[27] He therefore undertook the task of getting to know Sawer a little better. His investigations led to him gaining a favourable impression. He reported back to the committee:

> I have seen more of Sawer since I returned to Melbourne. He took part in a seminar which I held here on Tuesday (16th August). I feel more and more satisfied about him. I think he is very good. Any doubts I had about him get less. I really think that we might put him in as Professor of Law. I think he is of that quality. Probably Eggleston is right when he says that the Chair of Political Science would not be right for him, but I think he is of professorial standing all right.[28]

Despite the ANU founders' initial ambitions of attracting eminent foreign scholars — or Australian scholars with considerable overseas experience — Wheare considered that:

> [I]t would be desirable to have an Australian in the Chair of Law, or at least someone who was well versed in the problems of constitutional law in Australia and their bearing upon economic and social policy. [29]

Although Sawer was a strong and popular candidate among the committee members, he was not, at that time, an eminent Australian scholar and he was not the committee's first choice. The committee had earlier approached one of Sawer's colleagues at the University of Melbourne, Wolfgang Friedmann, who had declined the position and they had also considered Frank Beasley, Professor of Law at the University of Western Australia.[30] A few years earlier Sawer had missed out on gaining Chairs at both the

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[25] See, eg, Letter from Frederic Eggleston to Sawer, 23 June 1947 (National Library of Australia Manuscript Collection, *Frederic Eggleston Papers,* MS 423, Series 1, Folder marked 358-497); Letter from Frederic Eggleston to Sawer, 28 July 1947 (National Library of Australia Manuscript Collection, *Frederic Eggleston Papers,* MS 423, Series 1, Folder marked 358-497).

[26] Sawer, above n 5, part 37, 2.

[27] Letter from Douglas Copland to Kenneth Wheare, 15 August 1949 (Australian National University Archives, 53, Box 436, Series 9.1.1.0 part 1).

[28] Memorandum entitled, 'The Australian National University School of Social Sciences Chair of Law by Douglas Copland', 25 August 1949 (Australian National University Archives, 53, Box 436, Series 9.1.1.0 part 1).

[29] Ibid.

[30] Minutes of the Interim Council — Committee on the Establishment of the Research School of Social Sciences, 8 September 1949 (Australian National University Archives, 53, Box 436, Series 9.1.1.0 part 1).

University of Melbourne and the University of Sydney.[31] Friedmann had beaten him to the Chair at Melbourne.[32] During the Melbourne appointment round, Sawer's mere Australian undergraduate credentials and relatively meagre publication record proved to be no match for several of the applicants who, unlike Sawer, were shortlisted for the position.[33]

Even Sawer recognised that he was not an obvious choice for the Chair of Law at the RSSS.

> I had no expectation of going there myself; I assumed that if they had a law department (which was not at all certain), it would attract Julius Stone or Paton, since they both had a well established reputation as theorists of law, particularly interested in the kind of sociological aspects which would be appropriate to the Research Schools of Social Sciences and Pacific Studies.[34]

According to Foster and Varghese's history of the ANU, Sawer was considered to be a safe bet: 'Wheare thought well of him', Eggleston thought he was 'likely to take interest in the scientific aspects of law', and the council believed that with 'a substantial work on Australian constitutional cases to his credit, as well as a popular paperback on Australian government, he was regarded as a solid investment.'[35]

Recruitment to the RSSS proved difficult in all fields of research. The experimental nature of the ANU and RSSS no doubt deterred some potential recruits, as did the university's location. At that time 'Canberra was little more than a bush town of about 20,000 permanent residents.'[36] While the 'real community spirit'[37] and the potential to

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[31] Resolution of Council of the University of Melbourne, 2 June 1947 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series* UM312, 1947/936, Sawer, Ass Prof G); Letter from Kenneth Bailey to the Vice-Chancellor of the University of Melbourne, 23 May 1947 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series* UM312, 1947/936, Sawer, Ass Prof G).

[32] While it appears that Sawer both liked and respected Friedmann he does not suggest that he was a strong influence. Interestingly Friedmann also sought to promote contextual studies of law: William Twining, 'Wolfgang Friedmann' (1972–73) 12 *Journal of the Society of Public Teachers in Law* 311, 311.

[33] Table entitled 'The University of Melbourne Summary of Applications for the Chair of Public Law', November 1946 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series* UM312, 1947/570, Law, Chair of Public). Sawer knew that he had no serious prospects of getting the position at that time: Pratt, above n 1.

[34] Sawer, above n 1, 15. Sawer also mentioned Frank Beasley, the Dean of the University of Western Australia, as a more likely appointee: Sawer, above n 5, part 33, 3.

[35] Foster and Varghese, above n 6, 54.

[36] Graham Eccles, 'It's a Different Australia', *The Herald* (Melbourne) 26 December 1975, 4. Several of the people interviewed for this project made similar comments.

play various roles in the community enticed Sawer, this was not a widespread attitude.[38] The first recruits to the RSSS were generally young, ranging from 32 to 41, with varying publication records (some had not published anything) and several lacked postgraduate qualifications.[39] Sawer's credentials were among the strongest. He was initially joined by Trevor Swan, an economist; H P (Horrie) Brown, a statistician; W D (Mick) Borrie, a demographer; Laurie Fitzhardinge, a historian; and Leicester Webb, a political scientist. Apart from Webb, who was from New Zealand, they were all Australians. As Stuart Macintrye, in a history of social sciences in Australia, explains, the 'failure to attract any senior scholars from the other Australian universities was striking.'[40] The absence of a director to lead the school meant also that the experience of the RSSS was different from both the medical school that 'benefited from the supervision of Howard Florey' and the school of physics that 'had the immense prestige of Mark Oliphant.'[41] As a result 'the social sciences seemed more makeshift, less distinguished.'[42]

The fact that law was even included at this early stage is attributable largely to Eggleston's thinking. According to Sawer, Eggleston was the member of the interim council who convinced the others of the desirability of law's inclusion but even he only thought that it would be a kind of 'spare part' to deal with the legal issues that might arise in particular projects.[43] He suggested that there be one reader in law.[44] As a lawyer, diplomat and politician it is unsurprising that his vision for the RSSS included studies of political institutions. He envisaged a school of political science that

> should concern itself with the nature and structure of political institutions and their methods of operation. It should cover a wide ambit from constitutions and federations to public administration.[45]

A scholar such as Sawer, with a strong interest in public law, could obviously contribute productively to such studies.

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[37] Ibid.
[38] Ibid. Sir Anthony Mason described Canberra in the 1960s as 'like a base construction camp': Mason, above n 12.
[39] Ibid 54–5.
[40] Stuart Macintyre, *The Poor Relation — A History of Social Sciences in Australia* (Melbourne University, 2010) 62.
[41] Ibid.
[42] Ibid.
[43] Pratt, above n 1.
[44] Pratt, above n 1.
[45] Memorandum entitled 'The Australian National University re the School of Social Sciences' by Sir Frederic Eggleston, undated (Australian National University Archives, 19, Box 436, Series 9.2.1.1).

Like other members of Sawer's appointment committee and Hancock, Eggleston believed that Australia needed scholars who took a constructive rather than 'abstract' approach to their studies. At this time both Australian legal scholars (including Sawer) and social scientists generally frowned upon 'abstract' scholarship.[46] According to many members of this generation what was needed were studies that would more obviously, visibly and, perhaps, immediately contribute to the 'practical' task of nation-building. In one memorandum about the School Eggleston said:

> What usually goes under the name of social or political philosophy is really a history of political ideas. It takes a procession of thinkers, such as Plato, Aquinas, Hobbes, Locke and Rousseau, and traces the evolution of their ideas on political authority and obligation over a long period of time. In most cases, the ideas of these thinkers are abstractions. There is no inherent objection to this, but implied in teaching of this kind is the idea that their ideas were readily translatable into practice. That these ideas had an influence on political events cannot be denied. Most modern ideologies are traceable to them. But I do not think it can be suggested that their ideas were operative or that they played any serious part in ordering the affairs of communities or their members.[47]

Sawer's work for government and his constructive attitude therefore complemented that of Eggleston and fitted with the mood of the time. It was imperative that the School would contribute constructively and obviously to the nation-building effort.

Sawer was therefore appointed to the Chair of Law at the RSSS because of Eggleston's vague idea that the School should conduct studies into Australia's system of government and on the strength of Sawer's public law studies and interest in politics. There are few signs that the committee, following Hancock's departure, engaged in broader in-depth thinking about the nature of law and its potential and contested status as a social science. The decision to appoint Sawer and include law in the RSSS was a constructive decision made by a temporary committee, not a philosophical decision made by scholars who wished to lead the School in accordance with a set of ambitious academic ideals or cohesive mission. It was clear that the founders believed that law would play a minor role in the Department and that Sawer both respected and agreed with this vision and the

[46] See Susan Bartie, 'A Full Day's Work — A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67, 94–5.
[47] Eggleston, above n 45.

founder's eventual belief that political science, economics and history would take centre stage. [48]

### 12.3 The Department of Law

Sawer believed that law could play a useful role in a school for social scientists. He did not, however, believe that law *was* a social science. He therefore had a strong intellectual basis for his position that law should play a subsidiary rather than primary role both within the RSSS and in studies of society.[49] He argued that such projects should be created and run by his social science colleagues.[50] The Department of Law would provide assistance only.[51] In Sawer's vision he and his handful of colleagues in the Department would divide their time between providing information about the law to help the social scientists and advancing their own projects that would resemble the traditional types of doctrinal work and jurisprudential studies that their colleagues at the existing Australian law schools were performing.[52] Of course, as noted above, Sawer did undertake a series of large ambitious projects that launched him into the role of a political scientist and historian. Indeed, he has been acknowledged as one of the early founders of Australian political science. However, he justified these projects on the basis of need.[53] There was no one else at that time — either political scientists or historians — in a position to carry them out. Sawer needed such studies in order to advance his own Australian constitutional law scholarship. The fact that the Department was a bit player in the RSSS therefore appears to be consistent with Sawer's intellectual convictions.

Sawer was not very successful, however, in explaining his humble ambitions. In an article published in the *University of Western Australia Law Review* Dean Erwin Griswold, a friend of Sawer's, spoke critically of Sawer's attitude towards the future of the Department and in particular Sawer's view that the Department would not, at least in the near future, teach undergraduate students.[54] Even if we accept Sawer's reasoning (as I do) for keeping the Department to a modest size and his belief that it should play a subsidiary role, why was it so small and lacking in vibrancy? The answer lies in a number of different causal factors. Some provide sound justification for Sawer's decision

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[48] Pratt, above n 1.
[49] Geoffrey Sawer, *The Place of a Lawyer in the Social Sciences* (Melbourne University Press, 1953) 12–14.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] See, eg, Letter from Geoffrey Sawer to Kenneth Wheare, 6 March 1952 (Australian National University Archives, *Professor G Sawer Correspondence* 7, Box 3, Series 37).
[54] Erwin N Griswold, 'Observations on Legal Education in Australia' (1953) 2 *University of Western Australia Law Review* 197, 198, 201.

to keep the Department small while others suggest that he could and should have done more to strengthen and enliven it. These factors are detailed below.

### 12.3.1 Early Ambitions

What is clear from an investigation of the archives is that shortly after winning the post Sawer was initially very enthusiastic about his position in the RSSS and believed that he and his colleagues could advance large collaborative projects. In 1949, immediately before he commenced his appointment at ANU, he spent a year visiting universities in America (primarily) and England (to a lesser extent). It was his first trip to America and second trip overseas. Paton had nominated Sawer for a Carnegie grant that financed most of Sawer's travel[55] and Copland arranged for further funding to enable Sawer to visit England.[56] Copland considered that the trip would provide Sawer with an opportunity to investigate social science schools in America, seek out potential recruits for the RSSS and visit England to speak with others involved in the establishment of the ANU. Copland and Eggleston drew on their contacts and organised many meetings for Sawer throughout the United States.[57] Sawer was equipped with photographs of the ANU campus and did his best in conversations to put the new venture in the best possible light.[58]

Sawer visited a large number of law schools, political science schools and institutions that aimed to further collaborative work within the social sciences. He also spoke to many eminent scholars in America (for example, Hans Kelsen, Albert Einstein, Roscoe Pound, Learned Hand, Jerome Frank, Ralph Bunche, Max Radin, Felix Frankfurter and Huttington Cairns).[59] Sawer's travels left him sceptical about the potential for the RSSS to engage in large collaborations involving multiple members of the social sciences:

> While filled with admiration for the amount of social science research going on in the USA and for the results of its application in some fields, I was surprised at the relative

[55] Sawer, above n 1, 13.
[56] Letter from Douglas Copland to Kenneth Wheare, 12 October 1949 (Australian National University Archives, 19, Box 436, Series 9.2.1.1); Report entitled 'Tour of USA and Britain' by Geoffrey Sawer, May 1950 (Australian National University Archives, 19, Box 436, Series 9.2.1.1).
[57] See, eg, Letter from Huntington Cairns of the Smithsonian Institute to Frederic Eggleston, 24 October 1949 (National Library of Australia Manuscript Collection, *Frederic Eggleston Papers,* MS 423, Series 1, Folder marked 633 -883); Letter from E F Penrose at John Hopkins University to Douglas Copland, 24 October 1949 (Australian National University Archives, 19, Box 436, Series 9.2.1.1).
[58] Letter from Sawer to Ross Hohnenn, the Registrar of ANU (Australian National University Archives, 19, Box 436, Series 9.2.1.1).
[59] Sawer, above n 56.

> lack of success of the Americans in bringing about large-scale cooperation between social scientists working in different fields. There has been a great deal of effort in this direction; many institutions have been established with the object of putting economists, sociologists, political scientists, psychologists, lawyers etc into teams of one kind or another, in the hope that together they would produce the balanced synthesis, the general theory. I investigated briefly nine such institutions, of which the most ambitious was the Institute of Human Relations at Yale. I also discussed the subject with Dollard of Carnegie, who has had to investigate it because of the amount of money his organisation has been asked to spend on such experiments. It would take too much space to set out in detail the results of this enquiry but I can summarise my conclusions as follows: (a) Limited partnerships between two or at the most three men [sic] from closely related disciplines are possible and often very fruitful; eg the social anthropologist with the social psychologist. (b) It is often better for the man[60] [sic] in one field to undertake a thorough course in the methods and vocabulary of adjacent fields — for the criminal lawyer to study criminal psychology — than to seek a practitioner from those fields.[61]

Sawer therefore abandoned the idea that he would be working with all or most of his colleagues on large collaborative projects.

Sawer's investigations in America nevertheless inspired a vision for an initial research project. He pitched the idea to Copland as follows:

> Commonwealth administration is badly in need of an overhaul. Would it be feasible to launch your social science school with a sort of Australian Hoover commission, investigation being carried out by your political science, economics, sociology etc blokes? The sort of thing I had in mind was to get one of the top American blokes at this sort of thing eg Gulick or a Brookings man, with a short-term chair while doing that job and teaching readers etc of Australian origin the American technique. Should be popular notion with Menzies. If you do discuss this with any politicos keep my name right out; I am suspect to most of them. I would of course be happy to do legal work in such a set up but the less said about that the better for the Nat University. … Ah, well, perhaps it's just a pipe dream, but I would certainly like to see the social science school start off by

[60] Given Sawer's earlier liberal attitudes and fact that his wife held a law degree it is curious that he speaks of 'men' rather than 'people'. It is, however, consistent with the later composition of the Department. While Sawer's Department had a small number of women as doctoral students (for example, Tay) they did not employ women academics and this arguably narrowed the potential breadth and vision of the Department and the RSSS: Glenda Strachan, 'Still Working for the Man? Women's Employment Experiences in Australia since 1950' (2010) 45 *Australian Journal of Social Issues* 1.

[61] Ibid.

> getting its teeth into a real job like these American johnnies instead of considering its collective navel in the Oxford manner …[62]

This proposal demonstrates Sawer's commitment to a constructive project that would assist with the reform of government. Again, it shows signs of preferring the concrete to the abstract.

The note also suggests that Sawer did not feel confident that he could personally convince the government of the merits of such a project or drive negotiations. Sawer's lack of confidence was perhaps the product of one of his central experiences during the Second World War. Sawer began his appointment at the University of Melbourne at the onset of the war and although the tuberculous pleurisy that had interrupted his undergraduate studies[63] prevented him from enlisting in the armed forces[64] much of his activities during that decade were shaped by the events and aftermath of the war. He was also involved in various war efforts. For two years at the end of the war he was made Officer in Charge of the short-wave broadcasts of the Australian Broadcasting Service from Australia to Japan and the Japanese-occupied territories.[65] This was the propaganda unit set up by the political scientist William MacMahon Ball.[66]

Sawer's experience with the propaganda unit is important for various reasons, including that it gave him a direct line into Australian politics and government strategies. But its relevance here lies in the fact that it ultimately served to weaken — rather than strengthen — some of Sawer's key political connections and earned him the reputation of being a loose cannon. Towards the end of his service Evatt convinced Sawer to make a number of broadcasts that emboldened the case for Indonesian self-governance.[67] This was a position that Evatt, but not the rest of the Australian government, supported.[68] Part of

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[62] Letter from Geoffrey Sawer to Douglas Copland, 13 December 1949 (Australian National University Archives, 19, Box 436, Series 9.2.1.1).
[63] Pratt, above n 1.
[64] Later in life he said that he 'never felt any urge to go to war' and that he believed that sending troops out of Australia when there was a Japanese threat was a dangerous strategy: Sawer, above n 1, 6.
[65] 'Geoffrey Sawer 1910 –' (1980) 11 *Federal Law Review* 259, 259; John Farquharson, 'Starke, Joseph Gabriel (Joe) (1911–2006)' in *Obituaries Australia* (Australian National University) http://oa.anu.edu.au/obituary/starke-joseph-gabriel-joe-932/text933. Sawer was also engaged by Evatt to draft a peace treaty with Japan. The Australian draft was not used.
[66] Letter from Vice-Chancellor of the University of Melbourne to Mr Calwell, 29 June 1945 (University of Melbourne Archives, *University of Melbourne Registrar's Correspondence series* UM312, 1947/936, Sawer, Ass Prof G); John Waugh, *First Principles — The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 140–1.
[67] Sawer, above n 5, part 31.
[68] Ibid.

Evatt's argument consisted of criticisms of both the Americans and the Dutch.[69] Sawer incorporated these criticisms into his planned broadcasts; however, not all of them went to air.[70] Sawer believed that a member of the Dutch camp, working in the building where Sawer made his broadcasts, leaked the transcripts he had prepared to a Melbourne newspaper, *The Sun*, who then published them.[71] Embarrassed by the leaked broadcasts and the newspapers headlines that suggested that Sawer, and by implication the Australian government, backed the Japanese leaders in Indonesia the Australian Prime Minister Ben Chifley summoned Sawer to Canberra (his first plane trip) and 'encouraged' Sawer's return to academia.[72]

When Sawer began planning for his position at the RSSS the embarrassment he caused Chifley through his radio broadcasts may have remained central to his thinking. At least in Sawer's mind the experience may have lessened his potential influence with the government and politicians and meant that he could not call on them to support his ambitious project involving the review of government.

Sawer's doubts about his reputation with government coupled with law's status within the RSSS explain why his more ambitious plans to review the operations of government were never fully implemented. While he was the first professor appointed to the RSSS he did not have a mandate to shape the School in any way he wished.[73] Sawer was very much concerned with how the RSSS would operate and through his travels he sought to draw lessons from the United States. However he was not the obvious person to lead the School.

### 12.3.2 Dean of the RSSS

Notwithstanding his subordinate status, for six years Sawer nonetheless took up a new temporary leadership position, being Dean of the RSSS (as opposed to Director).[74] As Sawer explained:

> In early 1951 the five of us on the ground (Swann, Webb, Borrie, Fitzhardinge) foregathered with Copland and they elected me to the interim position of Dean of the School, with the general intention of still trying to get Hancock or some eminent

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Letter from Douglas Copland to Geoffrey Sawer, 22 December 1949 (Australian National University Archives, 19, Box 436, Series 9.2.1.1).
[74] Pratt, above n 1.

> expatriate as Director. In fact, I continued as Dean until 1956 when Hancock finally accepted appointment.[75]

Sawer said that the reason why others expected him to fulfil the interim role was because the Department of Law was expected to be a small enterprise whose work would be less demanding than the other departments. He explained:

> It was moved and carried that a Dean be appointed from those present, to chair Faculty meetings and liaise with Vice-Chancellor and Registrar. Whom to choose? I suddenly found all eyes turned on me. After all*, my appointment was a late afterthought, and I was only a sort of spare part* — there was no question of having a proper Law School. So it was moved and carried nem. con.[76]

Rather than signalling Sawer's and law's credentials to take a lead role in the RSSS, his appointment as Dean reinforced their subordination. The role also meant that Sawer spent more of his time contributing to the general management of the RSSS than concentrating on developing the Department of Law.

Sawer acknowledged that he did not at that time possess the qualities required to be a director of the RSSS. Later he described Hancock as 'a jolly good Director' and wrote that he was 'encouraging, accessible, an excellent chairman, and having something which I necessarily lacked = contacts and a scholarly reputation in England and the USA.'[77] These were qualities Sawer gained over the following two decades. He was appointed Director of the RSSS in 1973.

The circumstances of Sawer's appointment as Dean and conversations with the founders therefore indicate that he had grand ambitions for the RSSS and that he considered himself to be a small player within the School. These factors therefore shed further light on why the Department remained small. What they do not do, however, is explain why Sawer did not at least embed more modest initiatives within the Department.

### 12.3.3 Entrepreneurial Qualities

While each of the five lawyers and scholars interviewed for this project held Sawer in high esteem, they each questioned why he did not do more to build the Department. Four of the five issued the following general criticisms:

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[75] Sawer, above n 1, 16.
[76] Sawer, above n 5, part 42, 3 (emphasis added).
[77] Sawer, above n 5, part 42, 3.

> I guess the downside to Geoff who was, as I say, an absolutely wonderful man is that he didn't really build the Department into anything of great substance. I've never been quite sure why. … He was very encouraging to me, and to one or two other people in the law school who had dealings with him, but he didn't go out, as it were, and sell the place as it happened with other departments.[78] [Emeritus Professor Dennis Pearce]

> I thought that Law was too small an operation. I don't know enough about how it was structured and what policies they were pursuing, but I think that there was too much emphasis on research and not enough emphasis on encouraging PhD students to work with leading figures there.[79] [Sir Anthony Mason]

> I don't think that the Department of Law was fated to be an empire and you have to lay some of that at the feet of Geoff Sawer.[80] [Professor Geoffrey Lindell]

> My impressions of Geoff were that he was highly respected around the school but that he didn't have a strategy or grand vision for the Department and that it was very much a department of individuals.[81] [Justice Ross Cranston]

The interview participants provided a number of different possible explanations. The first was that Sawer was 'not an empire builder'[82] and was not enthusiastic about the prospect of managing a large department. This explanation, while of some merit, requires further consideration.

Both Professor Lindell and Sir Anthony Mason were strong in their views that Sawer did not seem interested in creating and leading a large institution:

> I have an idea that Geoffrey Sawer was not an entrepreneur, not a person who was ambitious to build an empire. I don't think he was that sort of person. I think he saw himself more as a commentator, whether the commentary be a weekly column in a newspaper or in a learned article or a book of some kind and I think that is how he saw himself.[83] [Sir Anthony Mason]

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78 Interview with Dennis Pearce (By telephone, 30 April 2015).
79 Mason, above n 12.
80 Interview with Geoffrey Lindell (Woodbridge Community Centre, Tasmania, 23 March 2015).
81 Interview with Justice Ross Cranston (By telephone, 30 October 2014).
82 Lindell, above n 80; Mason, above n 12.
83 Mason, above n 12.

> He was not an empire builder. Look across the road and there is Jack Richardson building up the law school from practically nothing. He was not the first dean of the Law School when it was created in 1960 but he was in many ways much like Justice Marshall of the US Supreme Court, the first real Chief Justice and an empire builder. He puts it on the map, gets resources, fights for resources, knows quite a lot of people from his days in the public service. All the names you will see on the campus — people like Copeland. These were ex public servants who Jack would have known and made use of. That was not Geoff Sawer and it wasn't Leslie Zines[84] either — they were not empire builders.[85] [Lindell]

These observations might suggest that Sawer lacked some of Alice Erh-Soon Tay's entrepreneurial spirit and maven qualities. And yet in the formative stages of Sawer's career we find that he possessed several of the qualities that made Tay such a successful academic entrepreneur. For example, he developed a rich network of scholars, lawyers and politicians who each held him in very high regard. It was a network that outnumbered Tay's and in Sawer's later life extended around the globe. Like Tay, people sought Sawer's company. Mason said that 'he had great personality'[86] and that

> [h]e was very likeable and he had a great sense of humour. You always enjoyed talking to him. If there were a few people in a room and Geoff was there you would walk over to Geoff and start talking to him.[87]

Similarly Pearce said:

> Oh, he was lovely. He was an absolutely lovely man. He was generous in attitude. I was very young doing this work and he treated me very kindly … He ran meetings in a gentle and kindly sort of fashion. He was just a super guy.[88]

Michael Coper, Professor of Law at ANU and former friend and mentee of Sawer's, described him as the 'kindest of men.'[89] Mason, Lindell and Pearce all said that you could talk to Sawer about almost any topic, that he had a wide range of interests.[90]

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[84] The late Professor Leslie Zines was a close friend of Sawer's and the closest thing to Sawer's successor in the field of constitutional law scholarship.
[85] Lindell, above n 80.
[86] Mason, above n 12.
[87] Ibid.
[88] Pearce, above n 78.
[89] Michael Coper, 'Geoffrey Sawer and the Art of Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389, 412.
[90] Mason, above n 12; Lindell, above n 80; Pearce, above n 78.

Mason added that Sawer 'was interested in people, he enjoyed talking to people'[91] and that he was charming.[92] Cranston described him as outgoing and remembered that at work he would always say 'G'day'.[93] In fact Sawer was perhaps more successful in fostering and maintaining relationships than Tay as he 'wasn't divisive … not at all.'[94]

It is also apparent that Sawer commanded respect and could lead. Lindell described Sawer as 'the great man',[95] Pearce referred to him as 'the big name' and Taylor spoke of his 'remarkable reputation'.[96] At the same time descriptions of Sawer suggest that he was unassuming. He did not brag about or promote his successes.[97] Perhaps unlike today, during Sawer's time self-promotion was generally viewed as a sign of arrogance or insecurity and was frowned upon.[98] Sawer's apparent humility therefore also endeared him to many. Pearce said that 'if someone like the Governor-General wanted to have a chat about something it would be Geoff he would go to. Geoff was very discreet, he would never talk about it.'[99] Taylor said that he was surprised at just how ordinary Sawer, a man of such high reputation, appeared to be:

> He was seen as one of the leading, if not *the* leading academics, in constitutional law in Australia at that time. And indeed I remember when I was awarded the scholarship, the Commonwealth fellowship or whatever it was called when I was in the US, when we were talking about this it was a real honour to be selected and to think that he would be supervising the research project. So I felt extremely privileged. I came to him with a young person's expectations of a giant, if you like, in the field and there is no question that when meeting him his breadth of knowledge and erudition in legal topics was palpable, it was very clear. As an individual he didn't have the sense of presence that I had expected.[100]

While there are signs that Sawer did not wish to be a full-time manager or administrator, there was nothing within his personal makeup that would inhibit his ability to attract

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[91] Mason, above n 12.
[92] Ibid.
[93] Cranston, above n 81.
[94] Mason, above n 12.
[95] Lindell, above n 80.
[96] Interview with John Taylor (By telephone, 26 November 2014).
[97] Lindell, above n 80.
[98] For example, there were reservations about Copland's appointment as Vice-Chancellor at ANU as in 'an academic world where the quality of one's mind was most esteemed when it was self-evident, he was seen as something of a self-promoter': Foster and Varghese, above n 6, 31.
[99] Pearce, above n 78.
[100] Taylor, above n 96. Sir Ninian Stephen also spoke of Sawer's laidback style and self-deprecating nature: Ninian Stephen, 'A Recollection of Geoffrey Sawer' (1980) 11 *Federal Law Review* 261, 261.

support for and visitors to the Department. This suggests that there were other reasons why the Department remained a small and in some ways inconsequential enterprise.

### 12.3.4 Strengthening International Networks

Sawer took several steps to raise his intellectual profile and develop networks around the globe. Compared to other Australian universities the ANU offered a very generous study leave arrangement that meant that every three or four years he could spend between six and 12 months visiting overseas institutions. His first sabbatical was in 1955. He spent the bulk of his time at the Institute of Advanced Legal Studies at the University of London, using the Institute as a base for talks and travel within the United Kingdom and Europe. In 1956 he was invited to speak at a distinguished gathering in Paris organised by the Committee on Science and Freedom.[101] In 1959 he again spent his study leave in London and then in Germany at the Max Planck Institute.[102] In 1964 Sawer spent a whole year in America, devoting most of this time to the Institute of Public Administration, Vanderbilt Law Centre, where he was involved in a systematic and comparative study of court work concentrating on courts in America and England.[103] From 1968 to 1969 he again spent his study leave in the Max Planck Institute and later at All Souls College at the University of Oxford. In Germany he studied German public law and in England he researched matters of law reform and spent time at the Law Reform Commission in London.[104] From mid-1972 to mid-1973 Sawer spent another year in England at All Souls and the University of Cambridge.[105]

This travel was not always easy. On 9 April 1957, shortly before Hancock joined the RSSS and took over the leadership of the school, Sawer's wife, Mamie, suffered a stroke.[106] She survived the ordeal but part of her body was paralysed and she required significant medical and other care. This took a considerable toll on Sawer. In his personal diary he described the event as the 'most terrible experience since Mum came home dying of cancer' and noted his severe bouts of depression in the subsequent

[101] Letter from Geoffrey Sawer to the Vice-Chancellor of ANU, 15 May 1956 (Australian National University Archives, 19, Box 436, Series 9.2.1.1 (part 2)).
[102] Report on Study Leave by Geoffrey Sawer, 1960 (Australian National University Archives, 19, Box 436, Series 9.2.1.1 (part 2)).
[103] Report on Study Leave by Geoffrey Sawer, 5 February 1965 (Australian National University Archives, 19, Box 436, Series 9.2.1.1 (part 3)). The results were published as a book: D Karlen, E M Wise and G Sawer, *Anglo-American Criminal Justice* (Clarendon Press, 1967).
[104] Report on Study Leave by Geoffrey Sawer, July 1969 (Australian National University Archives, 19, Box 436, Series 9.2.1.1 (part 3)).
[105] Report on Study Leave by Geoffrey Sawer, 17 July 1973 (Australian National University Archives, 19, Box 436, Series 9.2.1.1 (part 3)).
[106] Diary entry dated 9 April 1957 (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 1, File 5, Diary).

years.[107] Shortly after her stroke he said that he contemplated 'mutual suicide'.[108] Despite her delicate condition, Mamie accompanied Sawer on his trips and on one occasion was able to seek treatment from specialist doctors in Germany.[109] Sadly, however, she died 12 years later during his 1968–69 sabbatical while the pair were at All Souls in Oxford.[110] While it appears that Sawer soldiered on despite his grief and his new responsibilities, one imagines that it may have dampened some of the enthusiasm he might otherwise have had to build the Department of Law. His wife's illness also meant that he sought other opportunities to improve their finances in order to provide Mamie with the care she needed. For example, he took on journalism work to supplement his income.[111] On 2 July 1971 Sawer married Nancy Parker, an artist, illustrator and teacher.[112]

In total Sawer spent one-fifth of his tenure at the ANU (five out of 25 years) on sabbatical undertaking activities at foreign institutions and universities that contributed vitally to his growing international reputation and comparative law studies. While this time away resulted in a strong network of scholarly contacts it also meant that he had less time to spend at the RSSS building the Department of Law. This provides another reason that, taken together with his wife's illness, Sawer did not build a large and lively Department of Law.

### 12.3.5 Recruitment

The Department never comprised more than a small number of legal scholars. This was due to a number of factors. First, it appears that Sawer set very high standards and was often dissatisfied with the candidates who applied for various advertised positions. For example, in September 1953 Sawer drafted the first advertisement for a senior fellow in the Department.[113] Following the advertisement he received only three applications.[114] Of the three he deemed only one candidate to be of the requisite standard and even then

[107] Ibid.
[108] Ibid.
[109] Sawer, above n 102.
[110] Sawer, above n 104. She was buried in Oxford.
[111] Sawer's journalistic work drew criticism from a politician, Eddie Ward, who thought that it suggested that Sawer had too much time on his hands. When Sawer explained his predicament to Ward the politician sent a note of apology. Letter from E J Ward to Geoffrey Sawer, 9 October 1958, Diary entry dated 9 April 1957 (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 1, File 5, Diary) (letter contained within the diary).
[112] 'Quiet Office Marriage', *The Canberra Times* (Canberra) 3 July 1971, 1.
[113] Letter from Sawer to the Registrar of ANU, 21 September 1953 (Australian National University Archives 53, Box 1181, Series 9.6.3.0).
[114] Letter from Sawer to the Registrar of ANU, 12 January 1954 (Australian National University Archives 53, Box 1181, Series 9.6.3.0).

still had reservations.[115] The candidate was, in fact, Peter Brett.[116] Sawer ultimately considered that Brett was unsuitable as his interests were in criminology which in Sawer's view 'should be carried on only at the state universities in close proximity to the major collections of criminals, gaols, etc.' [117]

This comment points to a further reason why the Department remained small. Sawer did not seek to compete with the state universities and believed that they were better placed to conduct both research and postgraduate teaching in many areas. The following year Sawer recruited a permanent research fellow, Sam Stoljar, who held the attributes sought in his advertisement.[118] Stoljar became one of the early proponents of quasi-contract and unjust enrichment and published several works that earned him an international reputation.[119] His work, however, sat uncomfortably with the social sciences, being more in the nature of analytical jurisprudence.

In 1961 Joe Starke, a Rhodes Scholar from Western Australia and later a member of the League of Nations secretariat, was appointed a Research Fellow in the Department. [120] He remained there until 1976.[121] Sawer said that he 'proved an awkward colleague, unwilling to discuss his own subject and participate in our weekly discussions about the draft papers of scholars and staff; he seemed to fear that students in particular would pinch ideas from him.'[122] In 1971 one of Sawer's PhD students, Peter Sack from Germany, was made a Research Fellow in the Department.[123] His thesis was devoted to German law in New Guinea. In the 1960s and 1970s Sawer invited scholars to spend six months as visiting fellows in the Department (for example, DJ Whalen from the University of Auckland and EI Sykes and Colin Howard from the University of Melbourne). However overall the number of visiting scholars was small.

When the Faculty of Law was established at ANU in 1960 (now the ANU College of Law), which occurred when Canberra University College (previously a part of the University of Melbourne) was integrated into the ANU, it remained separate from

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[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ross Cranston, 'Samuel Jacob Stoljar' (1991) 4 *Journal of Contract Law* 146, 146.
[119] Ibid 148–49.
[120] Farquharson, above n 65.
[121] Ibid.
[122] Sawer, above n 5, Part 53, 1.
[123] Minutes of the Faculty Board of the RSS, 26 March 1971 (Australian National University Archives 206, Box 1, Research School of Social Sciences, Faculty and Faculty Board Minutes 17 Feb 1971 to 10 December 1975).

Sawer's Department.[124] Members of the Faculty of Law and Sawer's Department did not collaborate. Both Lindell and Pearce said that the Faculty of Law and the Department within the RSSS were kept entirely separate and that it was rare for scholars from the Faculty to even visit the Department to attend seminars.[125] Similarly Taylor said that when he was a PhD student neither Sawer, nor anyone else from the Department, encouraged him to visit the Faculty or suggest that he should do some part-time teaching there.[126] Rather than facilitate an expansion of the activities of the Department, according to Sawer, the existence of the Faculty of Law made the Department even less tenable.[127] Reflecting on the small stature of the Department in 1982 Sawer said:

> … I was always a bit reluctant to build up the Department of Law in the Research School of Social Sciences to any great extent, because I soon became aware of the fact that you either had to have a very large number of lawyers in one place, or you had to have the lawyers in some sense scattered among other disciplines. It was out of the question to spend the enormous amount of money that would have been required to have a research department of law, consisting say, of 20 or 25 people. But that's probably the minimum number that can successfully carry on a totally integrated complete, across the board, legal enterprise and that's plus the library facilities that that requires, which are present in the National Library for example, but certainly not present in the Australian National University library.[128]

He went so far as to indicate that he fully supported the moves to close the Department in the late 1970s and early 1980s.[129] He therefore never wavered from his early view that the Department was only ever intended to be a 'spare part' within the RSSS.

### 12.3.6 Doctoral Students

Although the RSSS awarded very generous scholarships there were very few postgraduate students in the Department. Up until 1957 Sawer had no PhD students in law. Part of Sawer's initial reservations about the creation of ANU and the RSSS was that at that time law schools in Australia simply did not offer PhDs.[130] Therefore the idea of a law department consisting purely of research and the teaching of postgraduate students was indeed an odd notion.[131] Before 1957 Sawer had been involved as a

[124] Sawer, above n 5, Part 56, 3.
[125] Pearce, above n 78; Lindell, above n 80.
[126] Taylor, above n 96.
[127] Ian Hamilton, Interview with Geoffrey Sawer (Oral History Interview, Canberra, 16 July 1982).
[128] Ibid
[129] Ibid.
[130] Pratt, above n 1.
[131] Ibid.

secondary supervisor to several students located in other departments whose theses touched on legal matters. His first PhD student who concentrated entirely on law was the Rhodes Scholar and future Prime Minister Bob Hawke. Hawke, however, never completed his thesis. His heavy involvement in trade union activities delayed progress of his thesis and he sought extensions, the last of which Sawer refused. Another notable PhD candidate of the Department was Israeli student Abraham Harari. Stoljar supervised Harari's thesis in the area of negligence. One of Harari's initial examiners was H L A Hart. The examiners said that it would require substantial revision before it could be accepted as a doctoral thesis. Harari at first refused to carry out the revisions, suggesting that Hart had been unfair in his examination as the thesis criticised some of his and Tony Honoré's work on causation.[132] While Harari eventually resubmitted, the new examiners, Glanville Williams and Professor W Pedrick of Northwestern University, reached the same conclusion.[133] Nicola Lacey has detailed Harari's lingering bitterness towards Hart and the various ways that Harari then ran his own personal campaign against him, writing letters to Hart containing strong personal attacks as well as a larger 'Open Letter' (96 pages) that contained heightened criticisms of Hart's work and integrity.[134] It was a saga filled with tragedy. Lacey notes that Harari's attacks caused Hart considerable anguish and that Harari died of a brain tumour shortly after writing the 'Open Letter'.[135] The fact that students failed to complete their theses, and that in the case of Harari at least this was widely known, would not have encouraged others to take up a scholarship at ANU.

While it is difficult to ascertain an exact number, it appears from a review of the minutes of governance boards of RSSS that within the Department Sawer supervised fewer than 20 pure law PhD students during his tenure. Several of the students were from overseas. The absence of a lively student culture and lack of visitors led some students to abandon their studies.[136] Sawer provided the following explanation for the small number of doctoral students:

> Reverting to the matter of student-teaching at the ANU in my time, there was a substantial reason why my Law Department should have relatively few students reading

[132] Letter from Geoffrey Sawer to Sir Owen Dixon, 5 October 1961 (National Library of Australia Manuscript Collection, *Geoffrey Sawer Papers*, MS 2688, Box 3, File 2, Correspondence 1951–91).
[133] Minutes of the Meeting of Faculty of the RSSS, 21 September 1962 (Australian National University Archives 206, Box 1, Research School of Social Sciences, Faculty and Faculty Board Minutes 15 Feb 1961 to 10 December 1964).
[134] Nicola Lacey, *A Life of H L A Hart — The Nightmare and the Noble Dream* (Oxford University Press, 2004) 274–7.
[135] Ibid 276–7.
[136] Taylor, above n 96; Mason, above n 12.

> for a law doctorate. This was the absence from the ACT in those days of any substantial body of important courts and of legal practitioners. The High Court didn't as yet sit in Canberra, and the greatest number and eminence of both barristers and solicitors was (and indeed still is) in the state capitals, in particular Sydney and Melbourne … and I fairly frequently had cause to advise budding law students to seek a place in state law schools.[137]

In 1970 John Taylor commenced a PhD in law within the Department under Sawer's supervision. He had previously studied at the University of Adelaide, achieving first class honours in an illustrious class of students, and had then won a scholarship to study at Harvard Law School. Both experiences had drawn him towards a career within the legal academy. He enjoyed the vibrant activity of both Adelaide and Harvard and was inspired by dynamic teachers such as the international law scholar Daniel O'Connell. However, his experience at the RSSS prompted him to abandon such ambitions. He said:

> Harvard Law School blew my mind, it was totally exceptional. I had never experienced anything like it before and so I thought 'oh gosh this is what academia is about.' When I came back to Australia and ANU, it was a fantastic environment if you wanted to shut yourself out from the real world and get down and do a thesis, do pure research. It couldn't have been better. The facilities that the Research School provided were as good as anywhere if not better than anywhere in the world, but it was like going from, I don't know, I guess it was like going from a major railway station, you know like Grand Central Station in New York or Paddington Station here in London, so busy so active so dynamic, to a little country railway station. You know, one train a day coming in.[138]

Taylor said that apart from weekly or fortnightly meetings with Sawer there was very little to do within the Department and Sawer did not encourage him to get involved with the law school.[139] While he was committed to the topic of his thesis — a comparative constitutional law thesis on s 92 of the Australian Constitution — and believed that it would have made for a solid doctorate, after eight and a half months he decided to abandon his studies, as he simply wasn't enjoying the environment.[140] He went on to pursue a very successful professional career in international law and finance. For example, he devised initiatives for the World Bank and playing a leading role in negotiations and as General Counsel in leading international financial institutions in four continents.

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[137] Sawer, above n 5, part 56, 1–3.
[138] Taylor, above n 96.
[139] Ibid.
[140] Ibid.

In interviews conducted for this thesis both Professor Pearce and Sir Anthony Mason suggested that attitudes within Australia's legal profession may have discouraged Sawer from building a large ambitious department with a lively postgraduate research culture.[141] Many members in the legal profession simply believed that it was unnecessary.

PhD students provided a teaching outlet that might have further demonstrated the utility of the Department. However reservations about the role of pure research in law, Sawer's view that Australian law schools were better equipped to supervise doctorates and a general lack of interest in doctoral studies led to a small postgraduate culture in law.

### 12.4 Concluding Remarks

After Sawer retired from the RSSS the ANU advertised a new Chair of Law. It is clear from the advertisement that what they wanted was another Sawer. They weren't able to find one. Sawer had done much to demonstrate that placing a full-time legal scholar within a social science school could prove very valuable. However, his failure to recruit and nurture similarly equipped legal scholars and students engendered the belief that Sawer was an individualistic legal scholar. Sawer's experience had caused others to believe that productive collaborations between the social sciences and law were made possible because Sawer was exceptional. Sawer did not build a case for making law a social science and it always remained a bit player within the RSSS. The primary reason for this was Sawer's intellectual belief that the role of his Department was to assist the other departments that *were* social sciences. As such he believed it should not take up too many resources.

The novelty of the Department's position in the eyes of the legal profession was a consideration for Sawer. So too was his perception that it would take valuable resources and opportunities away from the state law schools. He also did not believe that PhD students and early career scholars should spend time in an institution so far removed from the practice of law and a large legal profession. Further he did not believe that there were many legal scholars sufficiently qualified and suited to a role in the Department. It seems that while he was very encouraging to young Australian law students and scholars[142] he did not attempt to cultivate a strong community of legal scholars in Canberra. He simply

[141] Pearce, above n 78; Mason, above n 12.

[142] Former Dean of Law at the University of Sydney, Emeritus Professor Ron McCallum, recalls the classes Sawer took at Monash fondly and said that Sawer encouraged him to pursue a doctorate within the RSSS: Interview with Ron McCallum (by telephone, 4 November 2014).

did not think that this was either desirable or the point of the RSSS. While his decision speaks of integrity it does not entirely explain why there was so little vibrancy within the Department and so few initiatives — such as conferences and seminars — that may have brought others to the School. Although Sawer had good reasons for choosing not to build an empire at the end of these investigations I nonetheless have a sense that Sawer should have done a little more to institutionally secure law's interdisciplinary identity. In the following chapter I further consider the significance of Sawer's leadership of the Department in the context of summarising his overall contributions to the discipline of law in Australia.

# 13 CONCLUSION: GEOFFREY SAWER

Sawer is important to this study for the following reasons. First, as with Brett and Tay, there is a clear connection between Sawer's life and his career. His experiences suggest that the beginnings of Australia's first uniquely Australian legal theory can be traced to Sawer's early reaction to Marxism. His humble childhood followed by a life of privilege prompted an interest in Marxist concerns followed by scepticism about their prescriptions and motivations. His career should dispel any lingering notions that it was only from the 1970s that Australian legal scholars sought to examine and respond to Marxist thinking.

Second, Sawer's experiences speak to one of the central issues of this thesis: how important is context to assessments of the discipline and to judgments of particular scholars? If we remove the context and ignore Sawer's views on the nature of the discipline, then the small nature of the Department of Law in the RSSS appears both puzzling and frustrating. Scholars who are keen for the discipline to teach and study law as a social phenomenon, rather than a bounded craft, might see this as a missed opportunity. In theory the establishment of a law department in a social science school staffed by full-time legal research scholars presented the perfect opportunity for securing the social science identity of law. The Department could have provided a forum for free and frank debate about the nature of the discipline and its relationship with the social sciences. Had Sawer taken a more active role in building the Department how different might the discipline look today?

Sawer's response to such expectations would, I assume, be that both the time and the place dictated a different approach. There were cogent practical reasons for maintaining a small department. To take Sawer on his own terms and understand his decision you must contextualise a contextualist. Imagine if after having spent 10 years in a law school where most of your time was fully occupied with teaching not research, you were thrust into a research-only role in a school of social sciences. The promotion comes at a time where Australian law schools around the country are tiny affairs; many have just two or three full-time members of staff, with the majority of teaching carried out by practising legal practitioners. Some of the full-time members wish to build larger schools where students study full-time, while others do not. There are almost no Australian textbooks that explain the body of doctrine that has emerged from Australia's courts and statute books. Australian contributions to legal scholarship are modest. Much of the profession revere a judge of the High Court of Australia, Sir Owen Dixon, who advances views that are interpreted to mean that the practice of law is craft based and can be advanced by

practitioners whose expertise lies primarily in deductive and inductive reasoning and the ability to assimilate a mass of cases. You, on the other hand, believe that history, economics and politics can throw strong light on the understanding of the discipline and enrich the practice of law. However, you also believe that there is a small sphere of knowledge and skills that is the province of lawyers. The challenge, in your view, lies in expanding not abandoning the existing terrain.

Imagine further that you have been a barrister and so know that lawyers can get by without deeper learning, but believe that their practice and Australian society would be so much richer if their thinking extended to other conceptions of law and to the investigation of other bodies of knowledge. You also know that members of the Australian legal profession — including its most senior judges — are suspicious of claims concerning the interdisciplinary and value-laden dimensions of law as this brings with it the potential to undermine the status of the profession. Such claims might imply that existing lawyers, who see and study the law differently, are inferior practitioners. They might also suggest that judging is entirely whimsical. You too believe that certainty and predictability is an important function of the courts and believe that it is possible to reason in a way that permits the making of some value judgments. However, you also believe that judges are restricted in the scope of those value judgments. Your colleagues in the RSSS, especially the political scientists, view you as a useful resource but do not consider that the Department of Law sits at the heart of the School. The founders also took this view. What would you do?

One response (which was my initial response) to this hypothetical is to say that a person holding such views should not have been appointed to lead such a department. Instead of Sawer, a person believing that the discipline of law *was* a member of the social sciences rather than an entity that should work in close collaboration with the social sciences ought to have held Sawer's position. A person possessing such beliefs might be driven to change the course of the discipline through advocacy and by building and cementing into the institutional architecture a new identity for law.

The problem with this response is that it does not take Sawer on his own terms and suggests that Sawer was not entitled to his beliefs on the identity of the discipline. While there are many arguments that can be levelled against Sawer's position it is clear it was carefully considered and well reasoned.

Further, even if a scholar with a grander vision for law and social sciences had been appointed, I doubt that they would have succeeded to do more to move the discipline towards the social sciences. Both the academic and legal community were hostile to the notion of a research-only scholar. Had that scholar advanced notions entirely alien to conventional norms they would have been strongly condemned. Julius Stone, of course, argued for broader conceptions of law. However he was not in Sawer's position. By teaching jurisprudence and international law to undergraduates Stone had something in common with all other Australian law teachers. He certainly did not embark on a new role. As Sawer did not teach undergraduates his position was subject to greater controversy.

In the context of the discipline of law in Australia Sawer's importance springs from two central contributions. The first is the considerable start he gave to contextual studies of Australian public law and politics. He produced first-class public law scholarship that suggested that future scholars and lawyers would be unwise to ignore politics, economics and history. Unfortunately, future interdisciplinary collaborations did not reach their full potential. Mason, Lindell and Coper point to factors that frustrated Sawer's legacy (factors that Sawer himself anticipated[1]); namely, that increased specialisation both in law and other disciplines would make it very difficult for future legal scholars to carry out Sawer's contextual studies.[2] Lindell recalled that at an interdisciplinary seminar in the 1980s Sawer displayed considerable anguish over his perception that members of the various disciplines 'simply can't talk to each other anymore.'[3] Sawer arguably went further than most Australian legal scholars of the 20th century in attempting to build bridges between law and other disciplines.

Sawer's second significant contribution was to help bring about a small yet significant cultural change within the legal profession. He wrote textbooks on public law, legal theory and political commentary for the novice. Rather than attacking existing conceptions, he attempted to persuade through education. This is why he assumed the role of a public commentator. The object of this project has not been to measure the extent to which Sawer's efforts contributed to the cultural change that led Australian judges and lawyers, including certain members of the High Court during the Mason era,

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1 Geoffrey Sawer, *Law in Society* (Clarendon Press, 1965) 209.

2 Interview with Sir Anthony Mason (Sir Anthony Mason's Chambers, Sydney, 9 December 2014); Interview with Geoffrey Lindell (Woodbridge Community Centre, Tasmania, 23 March 2015); and Michael Coper, 'Geoffrey Sawer and the Art of Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389, 418.

3 Lindell, above n 2.

to embrace broader conceptions of law and legal reasoning. However, it is significant that when asked about the similarities between Sawer's position on judging and his own Sir Anthony acknowledged that they held similar views.[4] Of course, Sawer did not teach Sir Anthony nor, from the 1950s onwards, any other law graduate. However, his books — both the monographs and the textbooks for the beginner — were in wide circulation. Coper also speaks of the influence that Sawer had on High Court justice Ninian Stephen and argues, with considerable force, that Sawer ought to be recognised, alongside Stone, as an early Australian scholar who helped bring about a significant change in High Court decision-making.[5]

The acknowledgement sections of Sawer's books demonstrate his role in building a community of Australian legal scholars through inviting different members of the academy to contribute feedback and advice on his work.[6] His acknowledgements also demonstrate that Sawer was seeking the opinions of from a range of Australian political actors, including judges, politicians and parliamentary draftsmen.[7] He was attempting to understand the nuances of Australian political and legal life and that he drew inspiration from Australia's unique environment.

There are many other things that could be said about Sawer. Fortunately, several other studies exist that, while not as lengthy or comprehensive as this work, thoughtfully detail other aspects of Sawer's life and career such as his work as a magistrate, his journalism[8] and advisory work, his early life, his part in and commentary on the Whitlam dismissal, his poetry and his broader legacy.[9] None of what has been set out in the previous three

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[4] Mason, above n 2.

[5] Coper, above n 2, 416 –17.

[6] See, eg, the acknowledgement sections to the following works: Geoffrey Sawer, *Australian Government Today* (Melbourne University Press, 1948); Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia* (Lawbook Company, 1948); Geoffrey Sawer 'The Record of Judicial Review' in Geoffrey Sawer (ed), *Federalism: An Australian Jubilee Study* (Cheshire, 1952) 211.

[7] See, eg, the acknowledgement sections of the following works: Geoffrey Sawer, *Australian Government Today* (Melbourne University Press, 1948); Geoffrey Sawer, *Australian Federal Politics and Law 1901–29* (Melbourne University Press, 1956); Geoffrey Sawer, *Australian Federal Politics and Law 1929–49* (Melbourne University Press, 1963); Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177.

[8] As noted in the introduction to this PhD a whole thesis could be devoted to Sawer's journalistic work, most notably the regular column he prepared for the *Canberra Times* as well as other work for various television and news outlets. Throughout his life he was friends with various journalists and he established the first media law course for journalists, preparing materials for that course that were turned into a book: Geoffrey Sawer, *A Guide to Australian Law for Journalists, Authors, Printers and Publishers* (Melbourne University Press, 1949). From 1982 to 1984 he was the Chairman of the Press Council of Australia.

[9] The most detailed work of this kind is that conducted by Professor Michael Coper: Coper, above n 2. Judge Ross Cranston's work on Sawer and the social sciences is the second most detailed

chapters contradicts these other works. However, this study is different in that it attempts to examine comprehensively and in depth, based on a close reading of all archival material relating to Sawer and all of his scholarship, what it was that Sawer did for Australian legal theory, how his contribution sits among other schools of thought and what the minor status of the Department within the RSSS says about Sawer's approach and legacy.

While many more lines of investigation could and no doubt will flow from Sawer's rich life and career, this study has sought to demonstrate Sawer's primary significance for Australia's legal academy.

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work on Sawer: Ross Cranston, 'Lawyer in the Social Sciences — Geoffrey Sawer' (1980) 11 *Federal Law Review* 263. The remaining works consist of the obituaries and personal tributes that have been referenced throughout the previous three chapters.

# 14 CONCLUSION

## 14.1 Learning Lessons

> It is an important thing for any culture to know where the ideas in its past and present came from. It is an important thing for any culture to understand what those ideas meant in their time and place and how that meaning has changed, if it has, over time. It is important for any culture to have intellectual heroes (and goats), individuals who exemplify what it is to be a serious (or frivolous) intellectual.[1]

Quite a few years before I began this project I read several books and articles by John Henry Schlegel and Neil Duxbury.[2] The power of their writing led me to other authors who have similarly sought to contextualise legal scholars in strong socio-legal and biographical works: William Twining, David Sugarman, Nicola Lacey, Laura Kalman, Fiona Cownie, David Rabban and so on. The more I read such works, the more I began to study and think about the academy differently. There seemed to be so much that I did not know about the discipline that had launched first my professional and then my academic career. Wanting to understand my own environment a little better, I looked for Australian works within the genre but, of those, I found none took quite the same approach or asked the same kinds of questions as the American and English scholars who had made such an impression on me. This pointed to an obvious gap in the literature and I wondered whether it would be possible to ask similar questions and adopt similar methods to investigate Australian scholars. This project — an intellectual experiment — is perhaps the natural conclusion of those musings. I hope that it too helps others think about the discipline differently and goes some way towards achieving the important objectives that Schlegel identified in the quote above. Returning to Schlegel's work today I realise that he provided the internal mantra that drove this project.

While I expected that the context of each scholar would provide some richer and deeper insights, I have been surprised by how, over the last three years, chapters that were once overflowing with citations to their scholarly work have developed so that they now give equal billing to archival material and interviews that speak to each of my subjects' environment, opinions about universities and law schools, relationships with colleagues and significant work performed outside of their university. While debate among

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[1] John Henry Schlegel, *American Legal Realism and Empirical Social Science* (The University of North Carolina Press, 1995) 259.

[2] Most notably Schlegel's work on American legal realism referenced in the prior paragraph and Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004); Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995).

historians and jurisprudential scholars continues about the value of history to understanding legal ideas,[3] I stand convinced that at least in Australia the shape of legal theory, education and the discipline has been contingent on circumstance and that politics have played a significant part in their trajectory. I am also convinced that this is an important history and that the scholars studied here are in their different ways admirable and worth remembering.

From Duxbury's work on Pollock I learnt that transposing labels and experiences within the discipline of law from one country to another was ill-advised and that it was important to look beyond the scholars whose major monographs had been eulogised to find other scholars and other contributions that might be just as important to the shape of a discipline.[4] As my investigations were made on behalf of the whole of the discipline, rather than for the benefit only of those who claim to be legal philosophers or jurisprudential scholars, it was important to set aside any assumptions I may have had about what might amount to an important or jurisprudential contribution to the discipline. While the boundaries of jurisprudence have never been precisely defined, perhaps like Duxbury's Pollock my scholars belong to a 'juristic as opposed to' a 'jurisprudential tradition'.[5] To avoid unnecessary controversy, I have used the wider label of 'legal theory'.

One of the central claims of this project is that the terrain of Australian legal theory is diverse and a product of its context. In Australia, at least since the 1950s, it has not been synonymous with legal philosophy. The social sciences had a considerable influence on each of the scholars studied here. Of the three, Brett perhaps took the greatest interest in legal philosophy and yet his investigations into the philosophy and sociology of science led him to advocate for greater collaborations with the social sciences. Tay also read broadly but adopted sociological methods. Sawer was fascinated by politics and was convinced that public law ought to be informed by political science along with economics and history. All three sought to integrate learning and methods from the social sciences into law. None were positivists or subscribed to narrow views on Dixonian strict legalism. Their experiences suggest that the conventional portrayals and generalisations

[3] For two recent manifestations of debate on this topic see: Symposium, 'Jurisprudence and (Its) History' (2015) 101 (4) *Virginia Law Review* 849; Symposium, 'Legal Life Writing and Marginalised Subjects and Sources' (2015) 42 (1) *Journal of Law and Society* 1. See also Maksymillian Del Mar and Michael Lobban (eds), *Legal Theory and Legal History* (Ashgate, 2014) vol 4.

[4] Duxbury, *Pollock*, above n 2, 326.

[5] Ibid 327.

about this generation overlook a great deal. Julius Stone was not the only early legal scholar in Australia who was adventurous and sought to draw from the social sciences.

It is intriguing that in the 1960s and 1970s at least two of the discipline's most prominent legal scholars (Brett and Sawer), who at the time were elder statesmen, reached the same conclusion that traditional jurisprudential enquiries — those that occupied the minds of the leading English and American scholars — had run aground and that more efforts ought to be devoted to a new jurisprudence of law reform. This suggests that a progressive and reformist sentiment was an important part of the discipline before the critical legal studies movement and that Australian legal theory has had distinctive features. Tay too wanted to reform Australia's legal academy, while at the same time believing, as a result of her Soviet studies, that stability was extremely important in any legal system.

Given there was little secondary literature about my subjects, most of my efforts have gone into working out what their various contributions were rather than providing a strong critique of those contributions. I have, however, examined and commented on several of their shortcomings. To understand my subjects' roles in the discipline it was important to take each of them on their own terms and view them in a detached and impersonal way. Like Schlegel

> I have attempted to identify … where their ideas came from. I have tried to show how those ideas changed over time. I have even attempted … to explain why those ideas took the shape that they did and how they worked out in the practices that these thinkers believed that their ideas implied.[6]

I believe that by doing so I have deepened our understanding of the shape of the discipline of law in Australia. I have demonstrated that the reductionist tendencies of commentators when speaking about the discipline have meant that they have missed much that matters and I have made a case to move beyond them. At a time when many speak as though the future of the discipline simply involves fulfilling externally imposed expectations without any room for pioneers, life histories can serve as an important motivating force for scholars who wish to reclaim the discipline.[7]

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[6] Schlegel, above n 1, 259.

[7] I have made various arguments about the purpose of such works in the following article: Susan Bartie, 'Histories of Legal Scholars — The Power of Possibility' (2014) 34 *Legal Studies* 305.

## 14.2 A Distinctive History

As this thesis is put forward for a qualification it is important that I state clearly what I believe I have shown and why I consider that by revealing the contributions of Brett, Tay and Sawer, I too make a contribution to the discipline. Like a typical biography, this study has a strong parasitical element.

Put simply this thesis has explained how leading Australian legal scholars responded to surrounding political conditions by both challenging and advancing a range of views about the nature of law and the enterprise of the discipline.[8] First, I have argued that ideas about law and legal education in Australia have been contingent on the political environment. Second, I have pointed to ways that the ideas of leading Australian legal scholars have been shaped by their life and context.[9] Because of the contingent and contextual nature of their ideas, their contributions as legal theorists, teachers, managers, moral authorities and public intellectuals have been distinctively Australian. To understand the discipline of law it is necessary to investigate the political and intellectual strategies that have been deployed by its members in response to their environment. By combining life histories of three legal scholars with broader contemplation of the discipline of law within Australia, it makes a new and novel contribution to the understanding of the founding of modern university legal education and scholarship within Australia.

In the case of each of my subjects, by reading all of their scholarship, reviewing all available Australian[10] archival material and conducting interviews, I was able to trace in some detail some of the central aspects of their scholarly careers and demonstrate that each of them were, in their own ways and endeavours, trailblazing scholars. This is the first time this exercise has been performed. Here I will briefly explain how exploring a range of sources produced new insights.

Part 1 of this thesis introduced Professor Peter Brett. Interviews with close friends and members of Brett's family provided an insight into Brett's personality, early life, and motivations. They helped explain how his experience as a Jewish man who fought in the

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[8] Like Cotterell I believe that legal theory 'can usefully be understood, to a large extent, as responses to particular political conditions': Roger Cotterell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1989) v.

[9] Sugarman recently argued that Nicola Lacey's work on H L A Hart achieved this objective: David Sugarman, 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship' (2015) 42 *Journal of Law and Society* 7, 20.

[10] Some attempt was made to locate international material. Documents were sourced from Harvard University for Brett and from the UK for Alice Erh-Soon Tay.

Second World War led to an enduring fascination with the interplay between law and morality. Archives at the University of Melbourne, along with interviews, explained the circumstances that led to his appointment and how the conditions at the University of Melbourne played to his strengths and interests and enabled him to make trailblazing contributions to the discipline, such as publishing a theoretical monograph on criminal guilt. His written correspondence to friends and Harvard professors explained the influence of the Legal Process School. A careful reading of his scholarship revealed how Harvard marked a new direction in his approach to both scholarship and teaching and meant that he was the only Australian scholar to attempt to bring the leading contemporary American jurisprudential school of the time to Australia. It provided him with the confidence to do more than merely keeping up with doctrine, something he had previously felt obliged to do.

In the first part I also detailed the teaching innovations Brett devised with Louis Waller. The innovations were unique as they were based on a theory that was designed to rebut positivism and change the culture of Australia's legal profession. Two interviews with Louis Waller helped me better understand the nature of their collaboration and interviews with former students and other colleagues pointed to the novelty of their initiative and why it did not receive the ongoing recognition it deserved. The archives also provided material that helped explain how scholars, judges and practitioners responded to the work, how students received Brett's teaching and pointed to ongoing friction between Brett and another professor of criminal law at Melbourne (Colin Howard). A close reading of each edition of his textbooks along with the reviews and the book on which it was based — *The Legal Process*[11] — brought to light the central theory and objectives of Brett's teaching. I concluded this part on Brett by introducing what he hoped to be his most important contribution to the academy — a monograph that promised a new path for legal theory. The archives also helped me to understand how Brett conceptualised his role as Professor of Jurisprudence in a different way from that of his colleagues and how these differences help explain why the trajectory of legal theory in Australia has taken a different path to that of America.

Reading all of Brett's scholarship, along with the interviews and archives, revealed the importance that he placed on science and his keen interest in the philosophy and sociology of science. The volume of letters and appeals he made to politicians, lawyers

[11] Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Tentative Edition, 1958).

and family members of two accused men showed his relentless dedication to various causes encouraging the just operation of law and the improved functioning of universities. In sum, these materials pointed to the richness of his endeavour and suggested that he was someone who ought to be remembered by the discipline.

Part 2 of this thesis was devoted to Alice Erh-Soon Tay. Reading an oral history completed by Julia Horne, newspaper articles and archival records alongside her early scholarship revealed the effects of her early life on her subsequent career and the importance of her collaboration with her first husband, Eugene Kamenka. Interviewees provided some insight into how others perceived Tay as an outsider in the 1960s and 1970s. Histories of the University of Sydney and of Julius Stone, and archival documents (particularly minutes of meetings) provided valuable insights into the nature of the dispute she inherited when appointed to the Chair of Jurisprudence. Interviews helped explain Tay's position in sustaining the Department of Jurisprudence in the face of considerable opposition. Speaking with former deans of the Faculty of Law at the University of Sydney along with members of the Department of Jurisprudence provided strong insights into why the Department was abolished in spite of its success. Interviews were essential for gaining an understanding of Tay's interpersonal qualities and the role that she assumed outside teaching and scholarship — that of 'academic entrepreneur'. A careful and open investigation of Tay from a range of different perspectives therefore revealed that she made a distinctive theoretical contribution to the academy in the form of a management role that was different to the one ordinarily associated with a jurisprudential scholar.

Part 3 of this thesis concentrated on Geoffrey Sawer. The extensive collection of Sawer's personal papers revealed how his early university days and upbringing shaped his progressive interests as well as his scepticism towards radical agendas. Reading his early scholarship alongside his personal papers demonstrated that he was in part following within a Melbourne tradition while pursuing his own inquiries in response to one of the central dilemmas posed by the American legal realists. Reading all of his scholarship brought to light some of the central initiatives he devised to be used as building blocks for investigations into public law in Australia. From such readings I was also able to identify the theoretical foundations and convictions that supported his work. I learnt that there was a clear correlation between the advocacy work he conducted to garner support for his role at the RSSS and his intellectual beliefs. I noted Sawer's own distinct style and his strategy for promoting cultural change within Australia's academy and legal profession. Interviews and archives pointed to an explanation of why his

Department remained so small. Collectively, such investigations make a case for studying a scholar in context.

While there remain grounds for arguing that Sawer ought to have done at least a little more to build the department, the archives suggest that he had sound reasons for his decision to direct his energies elsewhere and that this decision corresponded with some of his intellectual beliefs. My investigations reveal that he was faced with a number of choices about how to best build the discipline from his particular vantage point. Necessarily there were opportunity costs. Choosing to pursue one avenue — laying the foundations of public law scholarship — meant that he could not fully pursue another — creating strong institutional foundations for socio-legal studies.

The purpose of this conclusion is to bring to the fore, and provide some further analysis of, the central themes that have emerged from this project. I do not propose to make any sweeping generalisations or develop unifying theories about the collective experiences of the three subjects as one of the central goals of this project has been to counter the reductionist tendencies of the discipline. In the remainder of this conclusion I provide some final analysis of the central themes raised in this project. First, I comment on how the lives of my subjects shaped their careers and consider how being in Australia brought with it certain opportunities. Second, I consider how each of them responded to their environment to devise initiatives that they believed would improve the standing and intellectual credentials of the discipline. Their context was critical to the ideas they advanced and contributions they made. Finally, I consider how this project might assist current thinking about the discipline.

### 14.3 Lives and Careers

This project is based on three life histories. While it does not (and could not for reasons of space) provide an extensive biography of each of the three subjects I have attempted to explain some of the connections between their education and life experience and the scholarly agendas they developed once part of Australia's legal academy. Brett, Tay and Sawer were canny political operators whose backgrounds made them tough and resilient, which in turn fostered strong independent agendas. When their early lives, attributes and formative beliefs are considered it is little wonder that they devised innovative strategies that departed from the orthodoxy in England and did not fully embrace any one tradition. They each had the capacity to survey the state of the discipline and law in Australia and respond in ways that they believed would make a difference. Their remarkable rises to

the top of Australia's scholarly hierarchy no doubt helped them to believe that they could make real changes.

None of these scholars were obvious candidates for professorships in legal theory. Brett was a Jewish man from a lower middle-class family who could not afford to study law — or any other subject — at university on a full-time basis. Before joining the legal academy, Tay spent very few years in formal education. As a child she had to work to support her family. Sawer was an orphan who did not have the means to study at an elite foreign institution. He was brought up in a working-class family. Each of them became members of Australia's legal elite thanks to the opportunities afforded to them within Australia. It is doubtful that such opportunities would be extended to their kind in places where class distinctions were more pronounced. Their intellects and potential were acknowledged and rewarded, rather than their pedigrees. In this way the Australian environment helped them to prosper.

Each of the three scholars held ambitions that extended beyond merely securing an income and engaging in the type of work that suited them best. Their early experiences motivated them to act in ways that they believed might lead to real social change. Brett wanted to create a society where the culture and attitudes inherent in Nazi Germany could not prosper. He wished to create practitioners who appreciated that law was more than a blunt instrument of the state and who believed that they could play a role in interpreting the law and ensuring that it embodied principles that reflected morality. Tay wanted to put in place institutions that could counter the type of tyrannical regimes that plagued her childhood and discriminated against her family. Her comparative law and human rights scholarship, as well as her move from the Department of Jurisprudence to HREOC, are obvious extensions of this early goal. Sawer wanted to ensure that the discipline and Australian law more generally were based on strong intellectual foundations, through careful study of law and its relationship with politics. He did so to bring about measured incremental cultural and legal change that ensured that the courts updated principle to reflect societal attitudes while also acting as a safeguard against government. He looked to other mechanisms to effect radical change. He wanted law and political systems to bring about much needed social reform leading to greater equality.

Collectively their careers make a case for the outsider and for the deeper insights that viewing the discipline and Australia's laws from an outsider's perspective can bring. Tay was, of course, the ultimate outsider. She was so different that she could not be placed in any one box and this worked to her advantage. Leading legal and political figures

regarded her as both exotic and interesting. Tay, along with Brett and Sawer, support the notion that diversity can make for very different perspectives and act as a force for change within the discipline. Irrespective of whether one supports the various agendas and contributions each of them made, it cannot be denied that each sought to do something very different and to shape the discipline in ways that would break down some of its insularity. Because they were not typical members of the elite, they took responsibility for the discipline and sought to inject ideas and initiatives that reflected their lives and interests. It is for this reason that the experience of academic law in Australia has been distinctive.

### 14.4 Australian Universities

Had Brett, Tay and Sawer commenced their careers in universities in countries other than Australia they may not have been seriously considered as candidates for, or given, such esteemed posts. The Australian environment also provided each of them with incentives and inspiration to shape their careers in particular ways. The law school at Melbourne and the leadership of Zelman Cowan gave Brett the opportunities and confidence to pursue an ambitious (at least for the time) theoretical path. It gave him the courage to assume a role akin to an acclaimed American law professor. He acted as moral authority, elder statesman, expert advisor and intellectual leader. He demonstrated that a legal scholar could perform a strong public role. His friends, Justice Barry and Norval Morris, gave him the support and encouragement he needed to relentlessly pursue his objective of ensuring the rights of the accused and criminals. He was a compassionate, focused and strategic intellectual leader. He had a strong dislike for elitism and snobbishness and his move from England to a smaller and more egalitarian society in Australia encouraged him to call out and condemn such practices within his adopted country. He was a persistent and forceful advocate for change to rid Australia of nepotism and complacent practices.

Tay, on the other hand, never bathed in a warm congenial atmosphere. At the law school at ANU she felt that she had little in common with her colleagues, and at Sydney some strongly opposed the position she took in maintaining the Department of Jurisprudence. Kamenka drew her attention to certain notable scholars, including the fathers of the social sciences. He also introduced her to scholars who had risked much to maintain their independence in order to oppose oppressive dictatorships. In Australia she found a strong legal system but (to her mind) lazy and complacent academics who did not fully appreciate their important social role. Rather than deterring her, this predicament played to what seemed to be Tay's natural inclination to fight. While there are signs that the

friction between the two departments at Sydney took a personal toll, it is also clear that many of her arguments worked best when there was an enemy to condemn and overthrow. Tay believed that it was necessary to create an environment where exceptional scholars were insulated both from the broader fray and external agendas. Her position at the University of Sydney gave her the opportunity to do this. The politics of her environment were central to what she did.

Sawer, by way of contrast, was presented with a blank canvas. He was the first Australian full-time legal scholar with no undergraduate teaching responsibilities and the first Australian legal scholar situated within a school of social sciences. Freed of teaching, Sawer was able to advance scholarship of an unprecedented depth and scale. He was also able to carefully assess the intellectual terrain and consider ways that he could move the legal profession and academy towards a stronger interdisciplinary path. He believed that the best prospects rested with advancing scholarship that educated the profession and students about a range of views on law and that opened up debate and knowledge without threatening prior learning. Unlike Tay, he educated rather than criticised. He devoted his energies to producing scholarly tomes rather than a strong Department. His goal was to maintain and improve the standing of the discipline within the eyes of the profession and university while moving it to a broader terrain. This influenced the way that he conceptualised his role and the work that he did. He made a case against the autonomy of law and one in favour of legal academics addressing subjects and adopting methods from other disciplines. He was inspired by the American legal realist view that the law ought to be treated as a bundle of facts, to sit alongside other social facts, rather than as a body of rules. And in the course of his studies of Australia's legal and political system he appears to have proven this thesis. He took a middle road between the conservative attitudes of the profession and the radical ideas that fascinated him as a university student. His environment shaped his position.

Had Brett, Tay and Sawer been born in different times I doubt that they would have adopted the same agendas. Their work was very much inspired by their lives and their political context. In each case they were on the brink of the development of the establishment of a large professionalised legal academy and wanted it to be central to society (both locally and globally) rather than a minor player. This thesis shows that this context has been critical to the discipline's trajectory in Australia and many of the ideas that were advanced. It also shows that some of Australia's leading legal scholars were astute political operators and that their political and intellectual agendas combined to produce certain contributions intended to shape both the concept of law and the

discipline. Tay was an academic maven, Brett sought out political roles within universities and engaged in political advocacy and Sawer spent his life with and was fascinated by politicians. Each of them advanced academic agendas that were designed to both contribute to legal thought and provide both intellectual and political foundations for the discipline.

### 14.5 The Road Ahead

Brett, Tay and Sawer did not hold a rulebook on how to be a legal scholar. And even if they were provided with a guide, one suspects that they would not have followed it. They were driven by their own ambitions and their own appraisals of what the discipline and Australian society needed. They drew a clear connection between the two. Each believed that strengthening the intellectual credentials, diversity and status of the academy was of significant benefit to society. They did not need additional reasons to do what they did. Being a serious academic was enough. Their endeavours often did not conform to prevalent attitudes within the legal profession or even the universities in which they worked. Brett and Tay made significant enemies and Sawer often voiced views that were unpopular. All three held doubts about whether they ought to have done what they did — Brett was hesitant about moving away from doctrinal study at a time when so little Australian law had been catalogued, for Tay continuing the Department of Jurisprudence took a strong personal toll and for Sawer the idea of being a research-only scholar in circumstances where the academy was at an infant stage brought a feeling of unease. And yet all three pursued agendas that meant that they had to proceed despite such doubts.

This thesis raises many questions about the current discipline of law in Australia. These three scholars may serve as useful reference points for further study and debate. Even though times have indeed changed we can still identify with some of their central motivations and endeavours. For example, their experiences invite questions about what it is about a legal scholar that makes them feel equipped to step into high offices, such as HREOC, to act as public commentators or to serve as a moral conscience to law, lawyers and society. Do current generations of legal scholars feel similarly equipped? What might have happened had Brett lived a longer life and appointed a successor with a similar fascination with science and legal knowledge or had Sawer done more to create a strong institutional setting where law was treated as a social science? What else might these individuals have done to place the discipline on a different path? Are we engaging in such activities today? All three scholars had progressive and reformist tendencies as well as conservative elements such as their faith in maintaining the common law and

integrity of the judiciary.[12] While neither wanted law to be studied in isolation from other disciplines or to give undue power to lawyers or law firms, Brett and Sawer nonetheless had a vision of legal education that was 'modernised' and 'pluralistic'[13] rather than truly liberal and in this sense would seem to be subscribing to one of the conservative elements of Langdell's conception of modern legal education. Tay and Sawer seemed moderate, or at least not radical, in that they both reacted against core Marxist sentiment. At the same time, none of the scholars studied here sought to advance legal education in a way that would merely reinforce or legitimise the status of Australia's legal profession. Nor did they attempt to create a 'narrow ledge'[14] of legal expertise that would distinguish the discipline from others and from legal practice. They moved freely between the world of ideas and the world of legal practice. To what extent are such progressive and conservative strands reflected in the discipline today?

In addition to the other contributions I claim for this thesis, I believe that it makes an argument for fashioning an academic agenda around a set of beliefs about the discipline and its relationship to society. This raises the question of whether current legal scholars advance their careers in light of appraisals of the health of the discipline and a similar set of convictions. My sense is that the rapid increase in the size of the legal academy and its seemingly fixed place within the university landscape discourages this type of questioning, as does the extent of external direction. While today legal scholars may seek to advance work and teach in a way that has the potential to assist with the reform of the law and legal systems, they may not perceive, at least in the way that Sawer, Tay and Brett did, that their activities have the potential to fundamentally alter the future of the discipline. Of course any appraisal of the legal academy and discipline should include larger questioning that transcends local concerns. One of the central objectives of the three scholars studied here was to link Australia's legal academy with leading thought and scholars around the world. However, their experiences suggest that the environment within Australia is nonetheless important to fostering strong scholarly contributions. As

[12] On features of the conservative tradition in legal writing see Morton J Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History* 275.

[13] Robert Stevens, *Law School — Legal Education in America from the 1850s to the 1980s* (University of North Carolina, 1983) 50.

[14] David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26, 33–36.

Tay explained '[o]ur Australian reality is one we live in. But law schools need not only to serve it, but to help transform it.'[15]

I conclude with the words of Robert Stevens who said that his history of American law schools was important because law schools are 'a significant force in the American establishment', they play an important 'function in the social evolution of law, lawyers and higher education' and because 'the very concept of law' 'has shaped and been shaped by legal education.'[16] The more I learnt about the three scholars studied here and thought about the history of Australia's legal academy, the more I came to believe that Australian law schools have, although not to the same extent, also performed an important function and exerted considerable influence. They hold power. Even if Australian law schools have not reached the American heights, it is clear from this study that over the generations some leading legal scholars have wanted Australian law schools to play the very same role as their American counterparts. Whether this is a desirable goal and, if so, how it is best fulfilled obviously warrants further contemplation. Such contemplation ought to be based on strong intellectual foundations, including a more careful examination of the leading thought and activities of those who took responsibility for the development of Australia's legal academy. This project is one attempt to achieve this aim.

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15 Alice Erh-Soon Tay, 'Aimless Perspectives — A Comment on Chapter One of the CTEC "Discipline Assessment" of the Australian Law Schools' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 154, 156.

16 Stevens, above n 13, xiii.

# APPENDIX A RESEARCH DESIGN AND METHOD

## A.1 Introduction

The challenge presented by this project was to devise and adopt an epistemological position that would yield the best evidence of how three theoretically inclined Australian legal scholars attempted to improve the standing and intellectual credentials of Australia's discipline of law. My purpose was to reveal both the opportunities presented to these scholars and the obstacles they faced and to identify aspects of their political environment that influenced, facilitated and curtailed their agendas for the discipline. My interest in each scholar arose from their novelty rather than what they might represent to the broader legal academy. I sought to learn how they developed distinctively Australian conceptions of legal scholarship, legal teaching and law and how important their environments were to these conceptions. The theoretical basis and method of this project therefore needed to match these aims.

As this project revolves around the motivations, inspiration and ideas of my three subjects my early investigations led me to the complex contemporary debates on the writing of intellectual history, noting the relatively recent shifts towards 'the cultural production of meaning and how meaning is constituted in and through language'.[1] In the end I took my lead from another legal scholar, John Henry Schlegel who, in the context of writing about the ideas of American legal scholars, argued that in order to understand an intellectual's contribution to a discipline it is necessary to move beyond their scholarship and consider all aspects of their career and the broader institutional and social context. Schlegel considered that these broader factors may provide the best evidence of what the scholar was hoping to do and achieve.[2] As this project progressed and I learnt more about each scholar, one of the central tenets of my thesis became that this broader

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[1] William W Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1997) 49 *Stanford Law Review* 1065, 1067. The following literature provides a useful introduction to the field and debates: Donald Kelley, *The Descent of Ideas: The History of Intellectual History* (Aldershot, 2002); Stefan Collini, 'What is Intellectual History?' (1985) 35 *History Today* 46; Felix Gilbert, 'Intellectual History: Its Aims and Methods' (1971) 100 *Daedalus* 80; Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3.

[2] John Henry Schlegel, *American Legal Realism and Empirical Social Sciences* (University of North Carolina Press, 1995) 259 – 261. John Henry Schlegel, 'Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals' (1997) 45 *Buffalo Law Review* 277; John Henry Schlegel, 'Talkin' Dirty: Twining's Tower and Kalman's Strange Career' (1997) *Law and Social Inquiry* 981; John Henry Schlegel, 'The Ten Thousand Dollar Question' (1989) 41 *Stanford Law Review* 435; John Henry Schlegel, 'Langdell's Legacy Or, The Case of the Empty Envelope' (1984) 36 *Stanford Law Review* 1518.

context is critical to gaining a good understanding of their contribution to the discipline. In other words, as explained in the conclusion, I became convinced of Schlegel's thesis.

Schlegel went so far as to argue that intellectual histories should really be treated as histories of intellectuals and therefore should take a largely biographical form. He held out Nicola Lacey's personal and professional biography of HLA Hart as an ideal form of an intellectual history.[3] While I am inclined to agree with Schlegel's argument as it generally applies to works of intellectual history, I do not need to adopt this broader claim for the purpose of justifying the approach in this thesis. I believe that the method and perspective he prescribes is well suited to this project as my aim is not merely to give meaning to the central ideas of my subjects and how they developed over time but to try to understand how my subjects, consciously or not, endeavoured to give shape to the discipline and raise its profile and how they responded to their environment. In other words, my aim is not simply to provide the best interpretation of their scholarly ideas as found in their publications but instead to understand all dimensions of their careers. Although I have not attempted to provide a full biography of my subjects, I have sought out as much evidence as possible that may explain their careers and aspirations. I have looked for evidence of how my subjects expressly articulated problems and gave their solutions as well as how their actions both in scholarship, in administration, in public advocacy and in the classroom provide insight into their views concerning the role of the Australian legal academy and the shape of the discipline.

I have therefore used their contributions — their central activities and endeavours during the course of their scholarly career — as a form of evidence. I believe that from this it can be deduced that my subjects endeavoured to engage in work that they believed was both important and necessary for the new age. Their endeavours can therefore be treated as evidence of what they believed a legal scholar should do and achieve. It speaks of the professional identity they preferred both for themselves and perhaps for their colleagues. Of course their careers may not have embodied all of their aspirations. Their ability to model the professional identity they favoured may have been limited by a range of factors. For example, they may not have been able to realise their ambitions due to the fiscal, political and practical constraints of their universities and law schools, a lack of cooperation from colleagues and others or due to deficiencies in their own personality and drive. Any explanation of their contribution therefore must acknowledge these potential limitations and attempt to explain both their aspirations and how their career

[3] John Henry Schlegel, 'A Life of HLA Hart' (2006) 24 *Law and History Review* 679.

may have fallen short of this ideal. In fact as I learnt more about their environment and the various limitations I became more convinced that their contributions, ideas and endeavours were intimately linked to their contexts.

Studying three legal scholars, as opposed to merely one, brought both opportunities and challenges. It meant that throughout the project I could draw comparisons that pointed to new lines of inquiry. If I discovered something interesting about a subject by looking at a particular source I wondered whether I could look in similar places to make similar discoveries about the others. This helped me generate a larger and richer set of questions and pool of evidence for the collective. Studying three accomplished Australian scholars also helped me to think more carefully about the type of generalisations I could draw and also helped me determine how each scholar was exceptional. On a less heartening note, it also meant that I had a much larger task before me in terms of collecting and synthesising evidence. While others have written monographs encompassing a larger number of scholars and groups of scholars, this was not a realistic option for me given my aspirations and given the state of existing literature on the Australian legal academy and each of my subjects. My aim was to conduct a thorough and detailed examination of each of their careers to discern their primary contributions to discipline. This had not been done before and existing accounts did not provide adequate clues and had not adopted the same methods or considered the same pool of evidence. The literature therefore did not offer many shortcuts. The bulk of this project and the most important findings are based on my own review of archives, interviews and my own reading of the complete body of each scholars work. It is not based on secondary accounts. For these reasons, while I had initially contemplated studying five scholars I limited the study to three.

I had originally included in this project Tay and Brett's predecessors, the Professor of Jurisprudence and International Law at the University of Sydney, Julius Stone and the Professor of Jurisprudence at Melbourne, David Derham. However, both were subsequently omitted. As a biography, along with various tributes, has already been published on Stone I decided to consider his contributions within the context of Tay's career, relying largely on secondary literature. From further investigation it appeared that Derham, while a highly regarded law teacher and founding Dean of the Law School at Monash University, made his greatest contribution as a Vice Chancellor of the University of Melbourne. Studying his career would therefore take me into a field that did not sit neatly alongside Tay, Brett or Sawer or speak to the issues at the heart of this project.

In the early stages I also read as much as I could about the legal academy in Australia and equivalents elsewhere. I had begun researching in this area several years before I began this project and so returned to what I had learnt during some of my earlier investigations[4] and also wrote two new articles that helped me to reflect on the point of a study like this and how it ought best be pursued.[5] While written from a British perspective, Guy Holborn's reference work entitled *Sources of Biographical Information on Past Lawyers* provided a useful list of further places to look for material about my subjects and their colleagues.[6]

There are three main sources of evidence that have formed the basis of this project. First, each subject's scholarship, second archival material that evidences my subjects' activities, thoughts and how they were received and third, the accounts of people who knew my subjects and were involved in various facets of their careers. Drawing from these three different sources meant that I had to adopt a variety of methods. To facilitate transparency, I have described each of these methods below. In the other appendices to this thesis I have provided detailed lists of all of the material I reviewed for this project as well as a list of all interview participants.

In some instances I have used the three methods to corroborate one another — to enhance the reliability of the data — and in this sense it can be said that I am using a triangulation of methods.[7] However the main reason I based this thesis on three different sources was to answer the same research question from different angles and to analyse it in greater depth and breadth.[8] It is now well recognised that

> historical research is not a matter of identifying *the* authoritative source and then exploiting it for all it is worth, for the majority of sources are in some way inaccurate,

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[4] See, eg, Susan Bartie, 'A Full Day's Work - A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67; Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30 *Legal Studies* 345; Susan Bartie, 'The Social Sciences in Australia and the Experience of Law' (2012) 34 *Sydney Law Review* 371.

[5] Susan Bartie, 'Histories of Legal Scholars — The Power of Possibility' (2014) 34 *Legal Studies* 305; Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444.

[6] Guy Holborn, *Sources of Biographical Information on Past Lawyers* (British and Irish Association of Law Librarians, 1999).

[7] 'Triangulation has been generally considered a process of using multiple perceptions to clarify meaning, verifying the repeatability of an observation or interpretation. But, acknowledging that no observations or interpretations are perfectly repeatable, triangulation serves also to clarify meaning by identifying different ways the phenomenon is being seen.' Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (2nd ed, Sage Publications, 2000) 443. Also Jennifer Mason, *Qualitative Researching* (2nd ed, Sage Publications, 2010) 33.

[8] Mason, above n 7, 34.

> incomplete or tainted by prejudice and self-interest. The procedure is rather to amass as many pieces of evidence as possible from a wide range of sources — preferably from *all* the sources that have a bearing on the problem in hand. In this way the inaccuracies and distortions of particular sources are more likely to be revealed, and the inferences drawn by the historian can be corroborated. Each type of source possesses certain strengths and weaknesses; considered together, and compared one against the other, there is at least a chance that they will reveal the true facts — or something very close to them.[9]

While each source has its limitations I hope that this appendix will help the reader assess the veracity of the findings as well as some of their limitations. In other words, I hope that it will help the reader see the project for what it is — nothing more and nothing less.

As some of the sources provided a greater volume of evidence for one subject than they did for another the three parts present different types of accounts. For Brett and Sawer correspondence and personal notes and, in Sawer's case, a diary provided some insight into their personal worlds and vivid accounts of their personalities — the way they expressed themselves when interacting with close colleagues, friends and students. Such sources provided some insight into how they played a variety of roles. For Tay, however, there were few personal documents available to me which meant that my impression of her manner and personality was gleaned from the work she published — what she was willing to make public — and the perceptions formed by others and recalled many years later. In this sense, my presentation of Tay centres largely on her public persona. This is one of the critical differences between the three parts that occurred simply because of differences in source material.

### A.2 Biography

By following in what Barbara Caine describes as the recent 'biographical turn'[10] I hope that this work provokes interest and a level of insight into a larger topic: the growth and shape of the modern legal academy and the discipline of law in Australia. It brings forth the 'contingency of historical contingency': the disciplinary environment shaped each subject whose contributions then reshaped the discipline.[11] By taking a partly biographical form my hope is that this study will entice a reader's excitement and interest in this larger topic and, by situating it within a specific human context, improve the

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[9] John Tosh with Seán Lang, *The Pursuit of History* (4th ed, Pearson Education, 2006) 104.

[10] Barbara Caine, *Biography and History* (Palgrave MacMillan, 2010) 1. Parry has also spoken of a recent growth in interest in legal biography: R Gwynedd Parry, 'Is Legal Biography Really Legal Scholarship?' (2010) 30 *Legal Studies* 208.

[11] Laura Kalman, 'The Power of Biography' (1998) 23 *Law and Social Inquiry* 479, 481.

prospects that a reader will grasp some of the major themes and issues. I agree with Laura Kalman that these constitute 'the two best reasons for undertaking a biography'[12] and like Fiona Cownie I want this project to be something more than 'merely the minute details of the professional lives of a few … legal academics.'[13]

The generalisations and assessments I made about the history of the discipline and legal academy are tentative in places and no doubt with the passage of time I will think of others that I should have made. Drawing correlations between a person's career and personality, environment and personal life is an exercise fraught with danger. I am not a psychologist and thus have only sought to comment on what I believe are obvious connections that a legal scholar could reasonably draw between each scholar's life experience and scholarly and teaching interests that simply could not be coincidental. Thus I feel confident to argue that had Brett not been born Jewish and fought in the Second war, had Tay not grown up in Singapore under Japanese occupation and had Sawer not been an orphan and seen two sides of Australian society, their scholarship and teaching would have been different.

I am of course a part of this project and it is important to disclose some parts of my own background and some of the ways I wrestled with topics that arose during the course of this project. As I am a legal scholar who also practiced law for a number of years I had much in common with my interview participants and subjects and shared the same vocabulary when it came to knowledge about the law and discipline. I did not, however, study at any of the institutions I was investigating and am not known to be someone who has pursued a scholarly agenda in Constitutional Law, Criminal Law or Comparative Law or adopted the approach of either an analytical or sociological legal theorist. Further I had never met or studied under any of the scholars that I was studying. I was never on the receiving end of Brett and Tay's frank criticisms and, rightly or wrongly, did not construe their criticisms of certain parts of the legal academy or certain types of legal scholarship, as applying to my scholarship or career. I had only met two of the interview participants before — Geoffrey Lindell and Ian Leader-Elliot were both colleagues of mine at the University of Adelaide — but neither had taught me any law, at least outside of this project.

As far as my personal makeup is concerned there is one matter that may have deterred frankness from interview participants and may have also affected the way that I presented

[12] Ibid 480.
[13] Fiona Cownie, *Legal Academics — Culture and Identities* (Hart Publishing, 2004) 14.

each subject. Most of the people interviewed were men. I, on the other hand, am a woman in my 30s. Part of this project considered the way that my subjects treated women. While I felt that the responses of each interview participant to this line of questioning was frank I cannot be sure that this was the case or whether different responses may have been elicited had I been a man. I therefore 'must accept responsibility for [my] share in creating new evidence.'[14] As a feminist I was concerned that Sawer and Brett showed so little regard for the interests of women and proceeded throughout the academy assuming that it would be dominated by men. Given that much of their careers were devoted to exploring issues of social justice and equality this struck me as odd. I was not wholly placated by the fact that few other men in Australian society had taken up the cause. The fact that both Brett and Sawer seemed to do little to smooth the road for the few women in their classes also bothered me. However, I did not want these matters to overwhelm my project, as my object was to survey the whole of their contributions. It is nonetheless fair to say that while I hold each of them in high regard their position on women in the law lowered them in my estimation.

Tay's position on the plight on women within law and legal academy seemed more complex. She was one of the first Australian legal scholars to write on the topic of inequality in law as it relates to women and therefore was more enlightened than either Brett or Sawer. On the other hand, the fact that she appeared to do relatively little to mentor or advance the careers of women law graduates is disappointing. Unlike Brett and Sawer, Tay's rise to prominence coincided with a larger number of women entering law schools as students and it is clear that she taught some very bright women law graduates. While I would have liked Tay to be a strong ambassador for women's rights and to help other women prosper in the legal academy, I am also conscious of the tendency of some feminist writers to create life histories of women that construct the 'lady-teacher as hero.'[15] In the body of this thesis I have attempted to explain the conflicting strands and noted her views on the law's treatment of women and feminist legal scholarship.

There is a further way that gender complicated my assessment of Tay. Many scholars disliked Tay and some voiced views that while she was an obviously intelligent woman, her scholarship was unremarkable. Whether these assessments were made based purely

[14] Tosh, above n 9, 318.

[15] Marjorie Theobald, 'Teachers, Memory and Oral History' in Kathleen Weiler and Sue Middleton, *Telling Women's Lives — Narrative Inquiries in the History of Women's Education* (Open University Press, 1999) 9, 17.

on the merits of her work or were influenced by prejudice or were made in retaliation to her harsh judgments and treatment of my interview participants and others is difficult to tell. The fact that people who were fond of Tay noted similar shortcomings suggests that the criticisms were not simply due to personal hurt. This did not, however, stop me at various junctures from wondering whether the same judgments and reflections of Tay would have been different had she been a man. Would, for example, she have been considered quite so ferocious? On the one hand it seemed that her outsider status, her novelty, meant that people permitted her greater liberties. In Australia people put some of her frank appraisals down to cultural differences. In Asia people believed that she had a duality of insight, that she could see matters from both a Western and Eastern perspective, and therefore was permitted to make criticisms that others, lacking such background and insights, would be condemned for making. However, one also suspects that her small, delicate stature sometimes created false expectations in others and meant that her sarcastic quips and strong condemnation were particularly jarring.

I also wondered whether Tay's peculiar brand of scholarship have gained greater traction had she been a man. And if Kamenka had been the woman in their intellectual partnership would Tay have been given greater credit for their work? As Julia Horne has pointed out, in tributes to Kamenka few references are made to Tay despite the fact that they co-authored a great deal of work together.[16] Perhaps these impressions influenced me and made me more sympathetic to the assessment that in the final decades of her life Tay's scholarship did not constitute her most important contribution to the academy. While I endeavoured to combat this potential bias the subjectivity associated with any assessment of scholarship meant that it has remained a risk and my judgment may well be flawed.

Throughout the project my views about each of my subjects changed dramatically; backwards and forwards between strong admiration and frustration. In some ways I found each subject inspiring but there were moments when they fell short of my ideal of a leading legal scholar. I made an effort to ensure that the views I was developing about them were not revealed to the interview participants. There was no basis for my interview participants to believe that I held a particular view about my subjects or legal education and I made sure that they realised that my project was not intended to be a celebration of my subjects' lives but instead a robust critical inquiry.

[16] Julia Horne, 'The Cosmopolitan Life of Alice Erh-Soon Tay' (2010) 21 *Journal of World History* 419, 426.

During the early stages of this project I read a range of literary and intellectual biographies about legal scholars, lawyers and other intellectuals as well as books that provided rich descriptions of historical events that concerned social, political and legal upheaval. For example, I read Ray Monk's biography of Wittgenstein[17] and several of E P Thompson's works including, of course, *The Making of the English Working Class,*[18] as well as *Whigs and Hunters*.[19] These works provided models of how to distil complex ideas into short paragraphs designed for a general reader. They also acted as guides on how to integrate explanations of events with narrative and argument in an inviting and thought-provoking manner that serves to open up, rather than shut down, lines of inquiry. I do not profess having the writing or intellectual talents of either of these writers but their books provided a benchmark to work towards. As the project progressed I also read (or reread) some of the work of the scholars who had inspired or at least influenced my three subjects: Webber, Tönnies, Marx, Henry Hart, Lon Fuller, Michael Polanyi, George Paton. This helped me to better understand the perspectives of each of my subjects.

### A.3 Brett, Tay and Sawer's Scholarship

Although I did not wish to privilege my subjects' scholarship over their other contributions or suggest that their published views are the most reliable indicators of their central intellectual intentions,[20] actions and experiences, I began this project by reading all of my subjects' scholarship in chronological order. I then drafted each part of this thesis based solely on their scholarship. This exercise was performed in order to test and improve my understanding of their work and to identify key lines of initial inquiry. It was never my intention to simply supplement these chapters with material from the archives and interviews and the chapters presented here bear very little resemblance to these early drafts. While the scholarship raised some hypothesis on the motivations and perspectives of my subjects, I did not take them as presenting the conclusive version of this and the questions I noted for further exploration vastly outnumbered the conclusions I had reached. When it came to writing the chapters now presented for examination I revisited all of the notes I had made on my subjects' scholarship from the perspective of the broader understanding gained from interviews and other sources.

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[17] Ray Monk, *Ludwig Wittgenstein — The Duty of Genius* (Penguin Books, 1991).
[18] EP Thompson, *The Making of the English Working Class* (Penguin Books, 1991).
[19] EP Thompson, *Whigs and Hunters — The Origins of the Black Act* (Pantheon Books, 1975).
[20] Like most social scientists I have attempted to explain my subjects reasons and thinking through their behavior and actions. Victor Minichiello, Rosalie Aroni, Eric Timewell, Loris Alexander, *In-Depth Interviewing — Principles, Techniques, Analysis* (2nd ed, Longman1995) 22–23.

When reading my subject's scholarship for the first time I sought to learn who they were writing for, why they were writing and what ambitions they held for themselves and the Australian legal academy. In several instances my subjects expressly addressed the question of what a legal scholar should write and teach and what they hoped and expected from the Australian legal academy. The scholarship also reported on activities they engaged in outside of scholarship and teaching, such as their role in legal proceedings, law reform commission work and other government appointments. It therefore spoke of some of my subjects' intellectual and political endeavours outside the realm of writing works of legal scholarship.

As very little has been written about their body of work that might provide clues to my subjects' most important works, I read all of their articles, textbooks, speeches, monographs and book reviews to form my own assessment of which works were most important. Given that relatively more has been written about Sawer's scholarship than Brett or Tay's, I had the option of relying on the assessments formed in this secondary literature. However, as noted in the introduction, I decided to adopt the same approach to Sawer as I did for the other two scholars, as the questions I sought to answer with respect to him were in some ways different to those that others had asked. I approached this task chronologically so that I could detect how their intellectual interests and agenda changed over time.

During the initial review of their scholarship I did not engage in a critical examination of my subjects' work as I wanted to focus on their aspirations and to gain a sense of what they believed was important. It was important not to apply my own or traditional judgments about what amounts to a strong contribution to the discipline at this stage. Having conducted the review I then searched for book reviews and other articles that commented on my subjects' work and sought to place it in a global context by asking what other legal scholars in the common law world were writing about at that time. This provided me with an opportunity to form some assessment of whether each scholar was following within a particular intellectual tradition and what it was that they sought to add. I could also gauge some of the reactions to their work. I also sought to identify their prominent lines of thought and any intellectual mentors so that I could then read more on these topics. In addition I identified some of the central criticism that had been made of their works.

There are several limitations to looking to my subjects' scholarship as evidence of how they faced and addressed the problem of large-scale professionalised Australian legal

education. First their published work only provides evidence of the views that my subjects wished to make public. They each presumably held a broader range of views that are not captured by the pubic record as well as potentially views that they may not have wished to broadcast publicly. Second, much of their scholarly work was written for purposes other than to communicate answers to the problem that sits at the heart of this thesis. Using such work as evidence of the model of legal education that my subjects preferred involves making a number of inferences which ought to be tested in other ways before being adopted as reliable. As noted above, for a number of reasons they may not have felt able to engage in all of the activities that they personally believed would best serve the legal academy. The other sources considered in this study should, among other things, test those views. Finally my subjects may have acted in ways that were inconsistent with the statements they made and impressions they gave on how legal education should be advanced by legal scholars. It was therefore desirable to both corroborate and expand on the explanations provided through an analysis of their scholarship.

### A.4 Archival Research

My subjects' employers — the University of Melbourne, the University of Sydney and the Australian National University — each hold large quantities of archival material relating to them and their environment. With the help of archivists I obtained all archives that had been identified as relating to my subjects as well as documents authored by the law schools or research institutions where they worked that potentially contained references to events and activities that concerned my subject. Where possible, I also reviewed files relating to the Deans of law schools and close associates of my subjects as well as their personnel files. The material in the archives included correspondence between my subjects and other colleagues, evidence of their role on faculty and university boards, applications for professional posts and references written about my subject. They also included faculty handbooks and teaching materials as well as records of decisions and comments made by my subjects on the law school curriculum and law school governance. They provide information about a range of administrative and professional tasks undertaken by my subject and also their involvement in various teaching initiatives within their law school or research institution. The applications and references provide biographical information and also provide some insight into how my subjects were regarded by their colleagues.

The archives contained oral history interviews of one of my subjects, Geoffrey Sawer, that were useful insofar as they provided some indication of his views on Australian legal

education and his role in the RSSS. The archives also contained oral histories of some of Brett's colleagues that shed further light on how he was perceived. These interviews have been cited in the body of this thesis. The archival material also pointed to obstacles that prevented my subjects from realising some of their ambitions. They revealed funding difficulties and clashes with other staff and managerial agendas. Existing institutional histories of the University of Melbourne and the Research School of Social Sciences that also drew from this archival material, helped me to tie these threads together.

Further archives were sourced from the National Library of Australia, where both Sawer and Brett had deposited their personal papers. Brett's personal papers contained draft manuscripts of articles and presentations, correspondence and a large amount of material relating to the Beamish and Ratten cases. Sawer's papers included an unpublished biography and diary that I was given permission to access. Both documents were useful but had to be treated with some caution. The biography was intended to be published at some stage and therefore may not have been as candid as Sawer's other personal papers. For this reason his correspondence often provided a better insight into Sawer's thinking and personality. His diary contained short scribbled notes of daily activities (including a large number of notes on what he intended to do with his garden) rather than long accounts and reflections on his life. Apart from a few exceptional entries, this provided only limited insight into Sawer's personality.

I also wrote to eminent international scholars who knew my subjects and sourced documents from the archives of Harvard University Law School and from Maksamillian Del Mar of Queens College, University of London, who is conducting archival research for a project on a close friend and associate of Tay's, Neil MacCormack.

When reviewing the archives I thought carefully about why each document was brought into existence and how the motivations of the author might assist with its interpretation.[21] Further details about the collections that I reviewed are contained in **Appendix C.**

### A.5 Interviews

In the course of this project I undertook 33 interviews with former students, colleagues, friends or family members of each of my subjects. I also interviewed former Deans of the Law School at the University of Sydney and lawyers and scholars who had worked in or

[21] Paul Thompson, *The Voice of the Past — Oral History* (3rd ed, Oxford University Press, 2000) 83.

collaborated with the Research School of Social Sciences at the Australian National University. In the vast majority of cases the interviews concentrated on one of my subjects but in some cases, where the interview participant ('the participant') had some familiarity with another of my subjects the interview addressed aspects of both. Like most current day historians my project is therefore based on the assumption that 'personal reminiscence' is 'an effective instrument for *re-creating* the past.'[22]

The purpose of the interviews was threefold. First they were exploratory in the sense that I asked the participants to tell me more about my subjects' careers and the activities they engaged in while at the law school. This information supplemented the knowledge I had gained from my subjects' scholarship and gave rise to further lines of inquiry that I followed up through archival and other historical searches. I was particularly interested in learning more about my subjects' teaching — what they taught, how they taught and what impression their teaching made on students and colleagues — and how they contributed to their various institutions through their participation on boards and committees and general management responsibilities. The archives and scholarship provide little evidence of my subjects' experiences in the classroom. I also attempted to learn more about my subjects' relationship with colleagues and any obstacles they faced. I presumed that some of their colleagues faced some of the same obstacles. One reason I conducted the interviews was therefore simply to obtain evidence and information that could not be accessed through other sources.

Second, I sought out specific examples of how my subjects interacted with colleagues and students and sought participants' views on the impression that my subjects had made on them. This helped me to understand how my subjects were perceived in the course of their work and how they treated their colleagues and students. It provided evidence to suggest that my subjects' behaviour either facilitated or compromised the role they conceptualised for themselves and others. For example, students' experiences may have been very different to the experiences that my subjects intended them to have. Where the participant co-authored scholarship with my subject I was able to ascertain what the pair sought to achieve in the process and who influenced what aspects of that scholarship. In other words, the interviews helped me understand how my subjects were perceived and how relationships helped or hampered their careers.

[22] Tosh, above n 9, 316 – 317.

Third, I sought each participant's opinions on what they believed my subjects were attempting to achieve and asked them to explain the basis for such opinions. While, with the exception of those who co-authored work with my subjects, the participants could not speak authoritatively on this question, their views and the evidence they provide helped clarify and strengthen views that I had formed from reading scholarship and reviewing the archives. Sometimes my subjects spoke to participants about such matters, in which case the participant could report directly on how my subjects voiced some of their thoughts and motivations.

### A.5.1 Selection and Recruitment

It was impossible to begin this project with a set list of potential participants who would be in a position to speak to the central issues in my work. The point of the project was to discover what were the significant events, achievements, motivations, influences and experiences in my subjects' lives. If I knew what I was going to find then there would have been little point in pursuing this project. For example, at the outset I could not have known who benefitted from my subjects' contributions or challenged their position or ideas and therefore I could not identify such people as potential participants. To discover this I needed to read my scholars work, review the archives and commence interviews with participants who, it was obvious, knew my subjects well and could provide further leads. As such, I continued to identify people to interview throughout the project and this only ceased once I had completed my investigations and research.

The bulk of participants fell into the categories of students or colleagues of my subjects or other notable scholars or lawyers who were acquaintances of or had dealings with my subjects. In other words, they were people who shared the discipline in common (either as students or academics) and observed aspects of my subjects' careers. Given that all three of my subjects had an interest in other disciplines and believed that legal scholars ought to be acquainted with the social sciences and, in Brett's case, the natural sciences, an attempt was made to interview colleagues of my subjects from other disciplines. However I discovered that the people I had hoped to contact had passed away. Two of Brett's children, both lawyers, were interviewed. They were the only family members I interviewed and I was mindful of the danger that their involvement might make me feel reluctant to frankly express Brett's shortcomings in fear of tainting the memory that they have of their father. I therefore scrutinised my presentation of Brett's pitfalls and strived to achieve balance rather than undue sympathy. While it was important not to waste time interviewing people who only had a passing acquaintance with my subjects it was also the case that given the passage of time I could not be too selective as many of my

subjects' contemporaries and, at least in the case of Sawer, even many of their students had passed away. If someone claimed to know my subject or were recommended to me then I generally interviewed them.

It was only necessary to be a little more selective in the case of Tay, whose retirement date was the most recent of the three (Sawer retired in 1975, Brett died suddenly in 1975 whereas Tay retired in 2002[23]). There was a far greater pool of students, colleagues and acquaintances to draw upon and I conducted the largest number of interviews for Tay — 18 interviews in total. As I have argued that one of Tay's greatest contributions to the discipline consisted of the way she built and managed her department and mentored postgraduate students, the interviews proved a very necessary and valuable component of the research conducted. As fewer archives had been retained for Tay the interviews were the best way of discovering the contributions that centred upon her relationship with others.

As the problem I confronted was the potential of too few participants, rather than too many, my efforts were devoted to making sure that I pursued all lines of inquiry to identify as many people as I could who could speak about my subjects. This included contacting the alumni offices at the universities where each of my subjects worked to find former students and colleagues and reviewing all of the Masters and PhD theses that my subjects supervised. It also involved advertising in the law society bulletins of the relevant Australian states to request that formers students come forward. This generated some further correspondence and leads.

For the first round of interviews I identified people who, from reading tributes and obituaries and my subjects' scholarship, obviously had considerable dealings with each subject. For Brett it was clear that Louis Waller would be able to provide insights into Brett's career. He was Brett's principle collaborator and had already written an obituary and tribute to Brett and had brought Brett's final monograph to completion. For Tay I began with full-time members of her department – Alex Ziegert, Martin Krygier and Wojciech Sadurski. Finding people to interview for Sawer proved to be more difficult. At the time of writing his direct contemporaries would have been around 105 years of age. As noted in the introduction, a number of his close friends, collaborators and students had recently died or were seriously ill. Justice Ross Cranston had written an article about Sawer and so an interview was arranged with him. Of the list of Sawer's

[23] From 1998 Tay maintained a part-time position at the University of Sydney as her primary role was as the Human Rights and Equal Opportunities Commissioner.

PhD students, John Taylor was the only person available for an interview. Before commencing this thesis I had been an academic at the University of Adelaide and knew Geoffrey Lindell to be an Australian constitutional law scholar of considerable repute. One of my supervisors suggested that I contact him and from there I learnt that Sawer had a significant formative and ongoing influence on his career. Sir Anthony Mason was also a strong admirer and between his account of Sawer and Lindell's I was presented with a very vivid picture of the man.

In my introductory letter to each participant I asked whether they knew of others who were well acquainted with my subjects and this provided me with further names. As I read more material from the archives as well as my subjects' scholarship important events in the life of each became apparent. For example, Tay's maintenance of the Department of Jurisprudence in the face of opposition was an important line of investigation as was her relationship with postgraduate students. I therefore sought to find members of the faculty of law at the University of Sydney who held a variety of views on the Department of Jurisprudence. Her ability to identify students of immense potential and to network with the who's who of the legal world also seemed to be a major part of her career. This led me to former High Court justice, Michael Kirby, and Chief Justice of the Federal Court of Australia, James Allsop.

During the course of reviewing archives more names came to hand particularly through correspondence my subject had written and in minutes of meetings. I was keen to present a range of views on my subjects' careers and so made sure to note instances when either participants or the archives pointed to my subjects' adversaries or hostilities that had arisen with others. There was a risk that those who would be most willing to speak to me would be loyal to my subjects. However, that was not the reality. Some of the participants who seemed most keen to speak to me had, in various ways, been poorly treated by my subjects and wanted to ensure that I provided a balanced account that did not overlook some of the ways that my subjects fell short in matters of scholarship and in the treatment of colleagues and students. Both Brett and Tay were divisive figures, they frequently set out to be provocative and often caused offence to others. It was important to reflect the different impressions that they made and consider how successful they were in communicating their central messages and being understood. My aim was not to settle on a definitive truth about who my subjects were but to instead reflect the various perceptions others had of them and consider how this might have affected their influence and effectiveness.

In accordance with the ethics approval I had received all participants were contacted using publicly available information or alternatively someone who had their personal details contacted them on my behalf and provided my contact information. In my opening letter I provided each person with a description of my project and its purpose, explained how the interview might proceed, gave them a list of interview topics and also provided them with the relevant complaints procedure. The majority of people I approached agreed to be interviewed. Those who did not wish to be interviewed generally said that they had little knowledge of my subject or were of ill health. A few did not provide a reason. In each case the person contacted often suggested another person who they believed would be in a better position to speak about my subject.

### A.5.2 The Interview

When planning my approach to the interviews I took my lead primarily form oral history interviewing guides and literature.[24] As one of my primary goals was to consider how the lives of the participants interacted with that of my subjects I found that the techniques described in these materials best suited my aims. Before each interview I conducted research to ascertain the major events in my participants' lives, significant appointments and their relationship to my subject. Many participants also provide such information before each interview. As my participants occupied public and senior roles it was relatively easy, through Internet and library searches, to find biographical details about the major events in their careers. If they were scholars I also sought to ascertain the type of scholarship they advanced and in some instances, where I believed that there might be some overlap with my subjects' agendas, I read some of their work. I wanted to imagine what they were like at the time they met my subject.[25] All, of course, would have been much younger and it seemed important to consider whether my subject was in a position of seniority and the level of exposure the participant had to both law schools, legal academics and the law at the time that they dealt with my subject. Further, where they knew my subject over a number of years it was important to consider how their relationship may have changed.

I used this information to tailor an outline of questions to ask during each interview. For each participant I had a list of standard questions that I would ask all participants on

[24] The Oral History Association of Australia's handbook was particularly useful in providing practical guidance on how to conduct interviews and a member of the Association provided further useful guidance by email: Beth Robertson, *Oral History Handbook* (5th ed, Oral History Association South Australian Branch, 2006).

[25] On the importance of the interviewer placing themselves in the participant's shoes see Charles T Morrissey, 'On Oral History Interviewing' in R Perks and A Thomson, *The Oral History Reader* (Routledge, 1998) 112.

matters such as my subjects' personality, greatest accomplishments, weaknesses and so on as well as some standard questions on teaching that I would ask if the participant was a student of one of my subject's and some standard questions on scholarship if the participant was a legal scholar or a lawyer who most probably read my subject's work. As the number of interviews accumulated I made sure that I had a good understanding of what others had said about my subject so that I could ask more probing questions where the matters raised by a participant deviated or contradicted matters advanced in prior interviews. In this way the interviews were semi-structured. In each case I commenced with a plan and list of matters that I intended to raise. However, during the interview it would have appeared that I was taking an unstructured approach. I guided the participant through a chronological account of their relationship with my subject during which I asked them to elaborate on matters that I believed were relevant to my project and did not refer to my notes until the end of the interview as a final way of checking that the interview had covered all of the issues that I believed were important. This allowed me to follow my own intuition and then bring in a structure where I felt it was failing.[26] In order to develop rapport at the beginning of the interview I spent around five to 15 minutes explaining my project and inviting any questions.[27]

The participants were highly educated people with strong vocabularies and often eloquent turns of phrase. It was tempting to include many more quotations from them but for reasons of space I refrained from doing so. Often they would provide elaboration and detail without the need for me to ask further questions and where they felt comfortable speaking at length I generally allowed them to do so, only interrupting when it seemed obvious that the matters being discussed would be of little use to my project.[28] Where detail was not forthcoming I asked them to provide illustrations to clarify the answers they had provided. I kept Charles Morrisey's advice firmly in my that 'a good interview should pursue *in detail*, constantly asking for examples, constantly asking people to illustrate the points they are making.'[29]

Throughout the course of conducting interviews I periodically evaluated and revised the way that I was phrasing my questions by reviewing transcripts of interview.[30] Some of the rules for asking questions set down by oral historians were relatively simple to follow.

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[26] Ibid 108.
[27] Robertson, above n 24, 64.
[28] Morrissey, above n 25, 108.
[29] Ibid 109.
[30] I found the instructions provided by Maggie Walter on evaluating interviews useful for this purpose: Maggie Walter, Social Research Methods (2nd ed Oxford University Press, 2010) 306.

For example if there were any sensitive topics I left these until the end of the interview, unless the participant had earlier raised the issue.[31] Having, in an earlier life, practiced as a litigator I also generally managed to avoid leading questions.[32] What I had to work at throughout the interviews was advancing questions that were as 'simple and as straightforward as possible,' were open rather than closed[33] and were not 'complex [or] double barrelled.'[34]

The length of the interviews ranged from 40 minutes to six hours (two interviews of around 3 hours in length were arranged with Louis Waller given his substantial involvement with Brett). Participants were only asked to commit to an interview of 1 hour in duration but several were happy for the interview to continue beyond this time. Most of the interviews were conducted face to face but due to a limited budget some of the interviews that either occurred towards the end of the project when my funding had run out or were with participants located either overseas or in Western Australia were conducted over the telephone. During the phone interviews I did not have the same opportunity to develop rapport as in the case of a face-to-face interview but I nonetheless adopted the same protocol, spending time at the beginning of the interview speaking about my project and getting to know the person a little better. I recorded, with permission, all but one of the interviews. As the participants were all accomplished speakers at no time did I sense that they were deterred by the presence of a small recording device. When participants wished to raise matters that they did not want recorded or included in the thesis they let me know and either proceeded with their accounts or asked me to pause the recording. I explained to participants at the beginning of the interview that they had merely consented to the giving of the interview and had not yet provided me with permission to use the material in my thesis. Following each interview I transcribed the recording and sent the transcript to the participant for their review. I took on board Cownie's experience. She said that:

> Having experimented with transcription done by others, I would agree with Buchanan et al (1988) that transcription by the researcher is preferable, since it provides a much greater degree of accuracy than is generally possible otherwise, and also enables the researcher to begin the process of identifying the themes and topics which will eventually form the basis of the analysis.[35]

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[31] Morrissey, above n 25, 110.
[32] Thompson, above n 21, 152.
[33] Morrissey, above n 25, 109.
[34] Thompson, above n 21, 152. Robertson, above n 24, 65–68.
[35] Cownie, above n 13, 16–17.

Transcribing each interview helped me to recall the interview and consider the significance of the participant's tone of voice and inflections and add annotations that helped me better understand the points that they were attempting to make. Upon receipt of an initial interview transcript each participant had the option of either providing me with full consent to use the material in the transcript in any subsequent thesis publication or to withhold their consent until they had the opportunity to see how I intended to use their comments. Around half provided their consent following a review of the transcript and the other half did so having reviewed the draft chapters containing references to their interview.

Irrespective of the consent provided, I sent all participants a draft of the relevant chapters and invited them to provide any final comments. For this exercise I assigned those participants who had not provided their final consent a letter (eg IPA = 'interview participant A') and removed any identifying comments. This provided me with a further opportunity to ask further questions and for the participant to clarify some matters and therefore helped remedy any defects I had identified in the way that I had asked questions.

### A.5.3 Analysis

The interview data was analysed in a number of ways. First it was analysed to determine whether it revealed information about events or contributions that my subjects had made and these were added into the chronology I had initially compiled based on scholarship and archives. This material either supplemented something I already knew or raised a new line of inquiry that often prompted me to pursue further lines of research.

Second as the interviews progressed and I had five or more transcripts relating to a subject I compared the interview data to ascertain whether themes were emerging. The themes either reinforced points that had occurred to me while reading the scholarship and archive material or else were entirely new ideas. I gave each theme a code and as I accumulated more transcripts I revised and added to the codes until I felt satisfied that I had identified all major themes. While I undertook NVivo software training and entered transcripts into a database, in the end I found that coding through this system was creating undue rigidity and acting as a deterrent to my revising the codes and so simply used the database for its searching capacity. I found that writing memos that captured my thinking after each interview and memos that detailed my impressions drawn from a series of transcripts led to a greater familiarity with the data and more creative and

interesting lines of thought. It was important not to lose the rich detail provided by the participants or to take aspects of the transcript out of context. Over zealous coding brought with it the risk of overlooking some of the most interesting aspects of the interviews. Nonetheless it was useful to place some of the major themes into tables and match them with significant quotes from the interviews. I felt that it was important to preserve some of the vivid expressions and anecdotes the participants had provided. In the case of the interviews relating to all of the subjects, consistencies emerged from the interview data that prompted me to advance certain arguments.

Third, I analysed the transcripts to gain a greater understanding of how my subjects were perceived. I carefully considered the perspectives of each of my participants and the opinions they had formed. In some instances I amalgamated these views while in others I kept them separate to help explain the variety of reactions each of my subjects provoked. This became an important component of my thesis.

Sometimes the information provided by participants could be corroborated through documentary evidence and, more often, through other interviews. At other times it presented simply as a particular person's view. Providing draft chapters to participants was useful as it gave them the opportunity to clarify their earlier views and comment on my general portrayal of my subjects. I made some minor changes following this process. Participants expressed their interest in and approval of the draft chapters, providing comments suggesting that my thesis reflected their understanding of the subject, that it helped them understand aspects of my subjects that had previously confused them and that through reading the chapters they had gained a stronger admiration and appreciation of my subject. With one exception ('Interview Participant A') the participants were happy to be identified in this thesis and in any subsequent publications.

The interviews were an important part of my investigations but they were only a part. As Tosh explains 'historical reality comprises more than the sum of individual experiences'[36] and people's perception of reality never correspond precisely with that reality.[37] The accounts that the participants provided were 'filtered through subsequent experience' and 'may be contaminated by what has been absorbed from other sources' or 'they may be overlaid by nostalgia.'[38] In the changing and political environment of university legal

[36] Tosh, above n 9, 320
[37] Ibid, 320.
[38] Ibid 319. See also Thompson, above n 21, 91.

education one ought to expect that confronting and challenging experiences in the lives of legal scholars will shape their recollections of earlier times.

### A.6 Concluding Remarks

Throughout this project I brought to mind E P Thompson's advice that the record ought to 'be interrogated by minds trained in a discipline of attentive disbelief.'[39] It is not just an intellectual matter but calls into question the researcher's ethics and must, unfortunately, lead to a state of constant unease. Throughout the project I asked myself whether I was 'aiding and abetting a misrepresentation', 'basing theories on false or untrue data' or 'making invalid claims.'[40] None of the sources provided me with a perfect record and I hope that I never treated any of them as such. I sought to be as exhaustive and rigorous as my budget and timeframe would allow and so far as possible adopted the standpoint of a systematic and sceptical onlooker.

The result is of course that this thesis recreates just one version of the academic careers and agendas of Brett, Tay and Sawer. I nonetheless hope that it is an intellectually robust version that has presented lines of inquiry and interest that will assist and provoke further investigations.

[39] E P Thompson, *The Poverty of Theory and Other Essays* (Monthly Review, 1978) 28.
[40] Lynda Measor and Patricia Sikes, 'Visiting Lives — Ethics and Methodology in Life History' in Igor F Goodson (ed), *Studying Teachers' Lives* (Routledge, 1992) 209, 223.

# APPENDIX B INTERVIEW PARTICIPANTS

## B.1 Introduction

The table below lists all of the people who were interviewed for this project to find out more about my subjects. Many of the interviewees had a variety of different interactions with the subject about whom I interviewed them. These interactions were as colleagues, students, friends or family. Appendix A provides an explanation of how each interviewee was identified and selected for this project.

## B.2 Peter Brett

| Participant | Relationship to Peter Brett | Venue | Dates |
|---|---|---|---|
| **Jonathan Brett Barrister** | Son, student | RACV Club, Melbourne | 11 June 2014 |
| **Robin Brett QC Barrister** | Son, student | RACV Club, Melbourne | 11 June 2014 |
| **Gareth Evans Chancellor of ANU** | Student, colleague | ANU House, Melbourne | 13 June 2014 |
| **Richard Fox Emeritus Professor Monash University** | Student (both undergraduate and postgraduate), colleague | Law School Monash University, Victoria | 23 October 2013 |
| **David Henshall Barrister (retired)** | Student | By telephone | 9 January 2014 |
| **Mary Hiscock Emeritus Professor Bond University** | Colleague, friend | Law School, Bond University, Queensland | 8 October 2014 |
| **Ian Leader-Elliot Adjunct Professor University of South Australia** | Student, colleague, friend | Law School, University of South Australia | 10 February 2014 |
| **Allan Myers AO, QC Barrister** | Student, colleague, friend | Dunkeld Pastoral Co Pty Ltd, Melbourne | 10 June 2014 |
| **Pat Urban Solicitor (retired)** | Student (Honours) | By telephone | 17 June 2014 |
| **Louis Waller Emeritus Professor, Monash University** | Student, colleague, joint author and closest friend | Law School, Monash University, Victoria | 23 October 2013<br>25 November 2013 |

**B.3 Alice Tay**

| Participant | Relationship to Alice Tay | Venue | Dates |
|---|---|---|---|
| **Margaret Allars SC**<br>**Barrister**<br>**Professor**<br>**University of Sydney** | Student and colleague | Law School, University of Sydney | 1 August 2014 |
| **James Allsop**<br>**Chief Justice of the Federal Court of Australia** | Student | Judges Chambers, Federal Court of Australia, NSW | 29 July 2014 |
| **John Atkin**<br>**Director, Aurizon** | Student | By telephone | 29 October 2014 |
| **Dr Christopher Birch SC Barrister** | Postgraduate student | Garfield Barwick Chambers, Sydney | 28 July 2014 |
| **Lauchlan Chipman**<br>**Emeritus Professor**<br>**Bond University** | Colleague | Bond University, Queensland | 8 October 2014 |
| **James Crawford**<br>**Professor at the University of Cambridge and Judge of the International Court of Justice** | Colleague, Dean | By telephone | 25 November 2014 |
| **Michael Kirby AC, CMG**<br>**Former Justice of the High Court of Australia** | Friend | By telephone | 14 March 2015 |
| **Martin Krygier**<br>**Gordon Samuels Professor of Law and Social Theory**<br>**University of New South Wales** | Colleague | Law School, University of New South Wales | 7 February 2014 |
| **Dennis Mahoney AO, QC**<br>**Former President of the New South Wales Court of Appeal** | Friend | By telephone | 13 May 2015 |
| **Ron McCallum AO**<br>**Emeritus Professor**<br>**University of Sydney** | Colleague, Dean | By telephone | 4 November 2014 |

| | | | |
|---|---|---|---|
| **Gabriel Moens**<br>**Professor**<br>**Curtin University** | Postgraduate student | By telephone | 30 September 2014 |
| **Participant A** | Postgraduate student, Friend | Withheld | Withheld |
| **Hamish Redd**<br>**Barrister** | Executive Assistant to Tay at the Human Rights and Equal Opportunities Commission | By telephone | 5 August 2014 |
| **Wojciech Sadurski**<br>**Challis Professor of Jurisprudence at the University of Sydney** | Colleague | Law School, University of Sydney | 31 July 2014 |
| **Julie Ward**<br>**Justice of the Court of Appeal of New South Wales** | Student | Judges Chambers, Supreme Court of New South Wales | 8 December 2014 |
| **Jeremy Webber**<br>**Dean of Law**<br>**Professor**<br>**University of Victoria** | Dean | By telephone | 22 October 2014 |
| **Roger Wilkins, AO**<br>**Secretary, Attorney-General's Department** | Student, assistant, friend | Attorney-General's Department, Canberra | 19 August 2014 |
| **Klaus Ziegert**<br>**Associate Professor**<br>**University of Sydney** | Colleague, friend | Law School, University of Sydney | 5 February 2014 |

### B.4 Geoffrey Sawer

| Participant | Relationship to Geoffrey Sawer | Venue | Dates |
|---|---|---|---|
| **Sir Ross Cranston Judge High Court, Queens Bench Division** | Visiting Scholar then Research Fellow at the Research School of Social Sciences | By telephone | 30 October 2014 |
| **Geoffrey Lindell Professorial Fellow University of Melbourne Adjunct Professor University of Adelaide** | Friend and Australian constitutional law scholar | Woodbridge Community Centre, Tasmania | 23 March 2015 |
| **Sir Anthony Mason Judge of the Hong Kong Court of Final Appeal and former Chief Justice of the High Court of Australia** | Friend and National Fellow at the Research School of Social Sciences and Pro Chancellor of ANU | Sir Anthony Mason's Chambers, Sydney | 9 December 2014 |
| **Dennis Pearce Emeritus Professor Australian National University** | Public law scholar at ANU | By telephone | 30 April 2015 |
| **John Taylor Independent Consultant to International Financial Institutions and International Advisor to Centre of Commercial Law Studies, Queen Mary University of London** | Student | By telephone | 26 November 2014 |

# APPENDIX C ARCHIVAL RESEARCH

## C.1 Peter Brett

Archival material relating to Peter Brett was sourced from collections held at the following locations:

- University of Melbourne Archives
- Law School, University of Melbourne
- National Library of Australia
- Harvard Law School Library, Historical and Special Collections.

In 2013 and 2014, I visited on two or more occasions each of the libraries listed above to review the archives (with the exception of Harvard as the budget for this thesis did not extend to international travel).

Attempts were also made to locate and review all honours, Master's and PhD theses supervised by Peter Brett. These were located both at the University of Melbourne Archives as well as at the Law School at the University of Melbourne.

In the course of my research the archivists provided very useful assistance, particularly Katie Wood of the University of Melbourne Archives and Carole Hinchcliff, Law Librarian at the University of Melbourne. Professor John Waugh who, in the course of writing a history of Melbourne Law School, organised the collection of law school documents within the University of Melbourne's archives also provided guidance.

Further material was sourced from Harvard Law School Library, Historical and Special Collection. Copies of relevant documents were scanned and sent to me by Lesley Schoenfeld, the Public Services and Visual Collections Coordinator at Harvard. Further information about the SJD at Harvard Law School and his supervision arrangements was sought from Gail Hupper, former Assistant Dean of the Graduate Programme at Harvard Law School. She had recently completed an extensive study of the history of the SJD degree at Harvard.[1]

**University of Melbourne Archives**
Peter Brett Papers (two boxes)
Orr Case Papers (41 boxes)
University of Melbourne Faculty of Law 1920–85 (files)
University of Melbourne Faculty of Law 1932–77 (10 boxes)
University of Melbourne Faculty of Law 1952–58 (one folder)
University of Melbourne, Faculty of Law 1970–73 (five volumes)
University of Melbourne, Faculty of Law 1971-79 (five volumes)

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[1] Email correspondence from Gail Hupper to Susan Bartie, 31 January 2015. See Gail Hupper, 'The Academic Doctorate in Law: A Vehicle for Legal Transplants?' (2008) 58 *Journal of Legal Education* 413; Gail Hupper, 'The Rise of an Academic Doctorate in Law: Origins Through World War II' (2007) *American Journal of Law and History* 1; Gail Hupper, 'Educational Ambivalence: The Rise of a Foreign Student Doctorate in Law' (2015) 49 *New England Law Review* 319.

Law AULSA
Papers of Harold Arthur Ford (three boxes)
University of Melbourne Registrar's Correspondence Series UM 312

**National Library of Australia**
Papers of Peter Brett 1950–75 (10 boxes and a folio)
Papers of Sir John Vincent Barry 1917–69, Series 1 (10 boxes)
Biographical Cuttings relating to Peter Brett

**Harvard Law School Library, Historical and Special Collections***
Lon L Fuller Papers, 1926–77
Henry Melvin Hart Papers, 1927–69
Sheldon Glueck Papers 1916–72

***** Not all documents in the collections listed were reviewed. Selected documents were sourced from a review of an online database.

**Citations**

In the course of writing this thesis an effort was made to cite archives in accordance with the preferred conventions of each archives. This was done so as to make it possible to relocate each document with relative ease. In this respect this thesis has therefore departed from the relatively meagre guidance provided in the *Australian Guide to Legal Citation* on citing archives.

With respect to the University of Melbourne archives, wherever possible the following details have been placed in brackets following the document name and date: 'Name of University of Melbourne Archives in full, full collection name, collection reference number, box number (where appropriate), File [number/]title (where available).'[2]

Archival material from the National Library of Australia manuscript collection has been cited in brackets as follows: National Library of Australia Manuscript Collection, full collection name, collection reference number, box number, file number and/or file title.

### C.2 Alice Erh-Soon Tay

Archival material relating to Alice Erh-Soon Tay was sourced from collections held at the following locations:

- University of Sydney Archives
- Rare Books and Special Collections Library, University of Sydney
- Noel Butlin Archive Centre, Australian National University
- National Library of Australia, Manuscripts Collection.

In 2014 and 2015 I visited on two or more occasions each of the libraries listed above to review the archival material.

Attempts were also made to locate and review all honours, Master's and PhD theses supervised by Tay. These were located within the Rare Books and Special Collections

[2] The University of Melbourne, 'Cultural Collection Reading Room Information Sheet No. 2 — Citation of Archival and Unpublished Material' (University of Melbourne, 4 July 2012).

Library at the University of Sydney. Material held at the Noel Butlin Archive Centre was primarily useful as it helped explain Eugene Kamenka's early career trajectory and provide some small insights into Tay's time at the law school at the Australian National University and time as a PhD student in the Research School of Social Sciences. The National Library of Australia Manuscripts Collection was primarily of interest as they hold a collection of newspaper clippings relating to Tay and Kamenka.

In the course of my research the archivists provided very useful assistance, particularly Jane Beattie, Margaret Avard and Greg Bell of the Noel Butlin Archive Centre. I would also like to thank the University of Sydney's historian, Julia Horne, who met with me and discussed her experience of interviewing Tay.

I am also in debt to Tim Robinson, the Manager of the University of Sydney Archives, and archivist Nyee Morrison. Both provided me with considerable assistance in searching the archive and accessing documents.

I was restricted in the documents I could access at the University of Sydney archives. Pursuant to a 30-year rule under the *State Records Act* 1998 (NSW) files that were created post 1985 were closed to me. Further Tay's staff files were subject to a Closed Public Access direction for a period of 50 years. Nonetheless Mr Robinson searched a number of the closed files for matters that could be relevant to my project and after receiving the consent of Professor Ron McCallum, who also deserves my thanks, requested early access to critical documents. Through this process I was able to access the Dean's Report to Faculty in relation to the merger of the Department of Jurisprudence with the Department of Law along with McCallum's recommendation for awarding Tay the title of Emeritus Professor. Pursuant to s 57 of the *State Records Act* 1998 (NSW) the University of Sydney's General Counsel provided the necessary consents.

Further correspondence was sourced from Dr Maksymillian Del Mar at Queen Mary, University of London. He was at the time advancing an intellectual biography of one of the distinguished international visitors who spent time in the Department of Jurisprudence at the University of Sydney, the late Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh.

I also searched in vain for further personal papers. I searched the collections of Australian libraries and two of the people I interviewed for this project contacted Tay's second husband, Günther Doeker-Mach, on my behalf. They did not receive a response. His details are not publicly listed and I believe that he is currently living overseas. I also contacted Tay's nephew, Professor Peter Kwan, who informed me that Tay's estate including her papers were left to her second husband and that he had not been in touch with him since Tay's passing.[3] He believed that Professor Doeker-Mach was at the time living in France.

[3] Email from Peter Kwan to Susan Bartie, 8 September 2014 (copy on file).

Below is a list of collections I searched, within the time restrictions, to ascertain documents relating to Tay:

**University of Sydney Archives**
Professorial Board Minutes/ Academic Board Minutes[4] (open)
Academic Board Minutes (open)
Faculty of Law Minutes – 1984
University of Sydney News

**Noel Butlin Archive**
Law School Minutes
Eugene Kamenka Staff Files
Minutes of the Research School of Social Sciences

**National Library of Australia**
Biographical Cuttings relating to Alice Tay and/or Eugene Kamenka

**Citations**

In the course of writing this thesis an effort was made to cite archives in accordance with the preferred conventions of each archives. This was done so as to make it possible to relocate each document with relative ease. In this respect this thesis has therefore departed from the relatively meagre guidance provided in the *Australian Guide to Legal Citation* on citing archives.

Nyree Morrison provided the following example of how specific materials from the archive ought to be referenced:

> "Professorial Board Minutes, 1974, p.103 (University of Sydney Archives, G2/1)"
> "Academic Board Minutes, 1981, p.658 (University of Sydney Archives, G51/1)"
> "Faculty of Law Minutes, Year and page (University of Sydney Archives, G3/2)"

Archival material from the National Library of Australia manuscript collection has been cited as follows: National Library of Australia Manuscript Collection, full collection name, collection reference number, box number, file number and/or file title.

Archival material from the Noel Butlin Archive Centre has been cited as follows: Australian National University Archives, Collection reference number, box number, file/folio number.

Newspaper articles sourced from the National Library of Australia were cited in accordance with the convention set down in the *Australian Guide to Legal Citation*.

### C.3 Geoffrey Sawer

Archival material relating to Geoffrey Sawer was sourced from collections held at the following locations:

- University of Melbourne Archives
- National Library of Australia, Manuscripts Collection
- Noel Butlin Archive Centre, Australian National University

[4] In 1975 the Professorial Board was replaced by the Academic Board.

- Australian National University College of Law
- Menzies Library, Australian National University.

In 2013 and 2014 I visited on two or more occasions each of the libraries listed above to review the archival material.

Attempts were also made to locate and review all Master's and PhD theses supervised by Sawer. I did this by reviewing the minutes of the Research School of Social Sciences as they noted when new PhD candidates were awarded scholarships or joined the school. I also reviewed any theses held at the Australian National University from 1958 to 1975 that were in the field of legal theory or public law. The theses were held at the Menzies Library and I also searched the collection at the Australian National University College of Law. I was prohibited from accessing some theses as at the time of submission their authors had elected not to make them publicly available.

I am grateful to Sawer's family for granting me access to Sawer's unpublished biography and diaries held at the National Library of Australia. As noted in relation to Brett and Tay, I am also grateful to the archivists at the University of Melbourne and Noel Butlin Archive and to Professor John Waugh for speaking with me and helping me to navigate the archives at Melbourne.

**University of Melbourne Archives**
University of Melbourne Faculty of Law 1920–85 (files)
University of Melbourne Faculty of Law 1932–77 (10 boxes)
Law AULSA
University of Melbourne Registrar's Correspondence Series UM 312

**National Library of Australia**
Papers of Geoffrey Sawer 1937–95 (21 boxes)
Papers of Sir Frederic William Eggleston 1911–45, series 1
Papers of Sir John Vincent Barry 1917–69, Series 1 (10 boxes)
Biographical Cuttings relating to Geoffrey Sawer

**Australian National Library**
Collection of Sawer's Correspondence, Writing and Diaries (4 boxes)
Sawer's Staff Files (2 boxes)
The Research School of Social Sciences — General 9.1.1.0 (1–12) (3 boxes)
Publications of the Research School of Social Sciences
Sam Stoljar's Staff Files

**Citations**

The conventions that I adopted when citing material from the above archives are the same as those I adopted for Peter Brett and Alice Erh-Soon Tay.

# APPENDIX D BRETT PUBLICATION LIST

## D.1 Introduction

The following list was compiled from database searches as well as drawn from one of Professor Peter Brett's resumes found in his personal papers held at the Australian National University Archives, Manuscript Collection (MS 5603 Box 7). Some of Brett's conference papers were located; however, as they constitute an incomplete record, they have not been included in this list. Peter Brett's Master's thesis was sourced from the archives at the University of Western Australia.

## D.2 List of Publications

A *Articles/Book Chapters*

Brett, Peter, 'The Right to Take Flowing Water' (1950) 14 *The Conveyancer and Property Lawyer* 154–159

Brett, Peter, 'The Dominant Lease' (1950) 14 *The Conveyancer and Property Lawyer* 264

Brett, Peter, 'The Retrospective Lease' (1950) 14 *The Conveyancer and Property Lawyer* 367

Brett, Peter, 'Compulsory Purchase and Covenants Affecting Land' (1951) 15 *The Conveyancer and Property Lawyer* 8

Brett, Peter, 'Civil and Criminal Defamation in Western Australia' (1951–53) 2 *University of Western Australia Annual Law Review* 43

Brett, Peter, 'The Theory of Interpreting Statutes' (1952–55) 2 *University of Queensland Law Journal* 99

Brett, Peter, 'Abnormal Propensity or Plain Bad Character' (1953) 6 *Res Judicatae* 471

Brett, Peter, 'Manslaughter and the Motorist Part I' (1953) 27 *Australian Law Journal* 6

Brett, Peter, 'Manslaughter and the Motorist Part II' (1953) 27 *Australian Law Journal* 89

Brett, Peter, 'Consortium and Servitium: A History and Some Proposals Part 1' (1955) 29 *Australian Law Journal* 321

Brett, Peter, 'Consortium and Servitium: A History and Some Proposals Part II' (1955) 29 *Australian Law Journal* 389

Brett, Peter, 'Consortium and Servitium: A History and Some Proposals Part III' (1955) 29 *Australian Law Journal* 428

Brett, Peter, 'The Case of the Statutory Petard' (1956) 29 *Australian Law Journal* 635

Brett, Peter, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20 *Modern Law Review* 131

Brett, Peter, 'North Borneo: Redrafting the Land Legislation of Brunei' (1957) 6 *The American Journal of Comparative Law* 565

Brett, Peter, 'A Limitation on Executive Power' (1960) 23 *Modern Law Review* 310

Brett, Peter, 'Irresistible Impulse and the M'Naughten Rules' (1960) 23 *Modern Law Review* 545

Brett, Peter, 'Overseas Influence on English Law: Australia' (1961) 105 *The Solicitors' Journal and Weekly Reporter* 754

Brett, Peter, 'Compensation for the Victims of Crime: New Zealand's Pioneer Statute' (1964) 5 *The Australian Lawyer* 21

Brett, Peter, 'The Rebirth of Natural Justice' (1964) 6 *Malaya Law Review* 100

Brett, Peter, 'Mistake of Law as a Criminal Defence' (1965–67) 5 *Melbourne University Law Review* 179

Brett, Peter, 'Free Speech, Supreme-Court Style: A View from Overseas' (1967–68) *Texas Law Review* 668

Brett, Peter, 'The Beamish Case: A Rejoinder' (1967–68) 8 *University of Western Australia Annual Law Review* 115

Brett, Peter 'Reflections on the Canadian Bill of Rights' (1969) 7 *Alberta Law Review* 294

Brett, Peter, 'The Physiology of Provocation' (1970) *Criminal Law Review* 634

Brett, Peter, 'The Law and the Changing View of Man' (1971) 5 *Australian and New Zealand Journal of Psychiatry* 78

Brett, Peter, 'Law in a Scientific Age' in Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (Gordon and Breach, 1972) 80

Brett, Peter, 'The Implications of Science for the Law' (1972) 18 *McGill Law Journal* 170

Brett, Peter, 'Legal Decision-making and Bias: A Critique of an "Experiment"' (1973) 45 *University of Colorado Law Review* 1

Brett, Peter, 'A Rejoinder to the Researchers' (1973–74) 45 *University of Colorado Law Review* 24

Brett, Peter, 'Strict Responsibility: Possible Solutions' (1974) 37 *Modern Law Review* 417

Brett, Peter, 'The Blessings of Liberty' (1974) *Summons* 5

B *Books*

Brett, Peter and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 1962)

Brett, Peter, *Cases and Materials in Constitutional and Administrative Law* (Butterworths, 1962)

Brett, Peter, *An Inquiry into Criminal Guilt* (Lawbook, 1963)

Brett, Peter and Peter L Waller, *Cases and Materials in Criminal Law* (Butterworths, 2nd ed, 1965)

Brett, Peter, *The Beamish Case* (Melbourne University Press, 1966)

Brett, Peter and Peter W Hogg, *Cases and Materials on Administrative Law* (Butterworths, 1967)

Brett, Peter and Peter L Waller, *Criminal Law — Cases and Text* (Butterworths, 3rd ed, 1971)

Brett, Peter, *An Essay on a Contemporary Jurisprudence* (Butterworths, 1975)

Brett, Peter and Peter L Waller, *Criminal Law — Text and Cases* (Butterworths, 4th ed, 1978)

C *Book Reviews/Review Essays*

Brett, Peter, 'Book Review: *An Introduction to Criminal Law* by Rupert Cross and Asterley Jones and *Cases on Criminal Law* by Rupert Cross and Asterley Jones' (1951–53) 2 *University of Western Australia Law Review* 665

Brett, Peter, 'Book Review: *An Introduction to Evidence* by G D Nokes' (1951–53) 2 *University of Western Australia Law Review* 459

Brett, Peter, 'Book Review: *International Review of Criminal Policy* by the United Nations Department of Social Affairs' (1951–53) 2 *University of Western Australia Law Review* 458

Brett, Peter, 'Book Review: *Joint Torts and Contributory Negligence* by Glanville L Williams' (1951–53) 2 *University of Western Australia Law Review* 174

Brett, Peter, 'Book Review: *Justice and Administrative Law* by William A Robson' (1951–53) 2 *University of Western Australia Law Review* 462

Brett, Peter, 'Book Review: *Justice in Magistrates' Courts* by Frank J Powell' (1951–53) 2 *University of Western Australia Law Review* 668

Brett, Peter, 'Book Review: *Police Offences of Queensland* by W K A Allen' (1951–53) 2 *University of Western Australia Law Review* 177

Brett, Peter, 'Book Review: *The Construction of Deeds and Statutes* by Charles E Odgers' (1951–53) 2 *University of Western Australia Law Review* 667

Brett, Peter, 'Book Review: *The Habitual Criminal* by Norval Morris' (1951–53) 2 *University of Western Australia Law Review* 465

Brett, Peter, 'Book Review: *The Technique of Advocacy* by John H Munkman' (1951–1953) 2 *University of Western Australia Law Review* 460

Brett, Peter, 'Book Review: *The Contracts of Public Authorities: A Comparative Study* by J D B Mitchell*'* (1954–56) 3 *University of Western Australia Law Review* 183

Brett, Peter, 'Book Review: *The Law of Homicide* by Roy Moreland' (1954–56) 3 *University of Western Australia Law Review* 181

Brett, Peter, 'Book Review: *Theft, Law and Society* by Jerome Hall' (1954–56) 3 *University of Western Australia Law Review* 179

Brett, Peter, 'Book Review: *Sexual Offences, A Report of the Cambridge Department of Criminal Science*' (1956) 2 *Sydney Law Review* 618

Brett, Peter, 'Book Review: *Criminal Law: The General Part* by Glanville Williams' (1956–58) 2 *Sydney Law Review* 199

Brett, Peter, 'Book Review: First United Nations Congress of the Prevention of Crime and the Treatment of Offenders' (1957) 1 *Melbourne University Law Review* 282

Brett, Peter, 'Book Review: *Law and Orders* by Sir Carleton Kemp Allen' (1957) 1 *Melbourne University Law Review* 279

Brett, Peter, 'Book Review: *The Sanctity of Life and the Criminal Law* by Glanville Williams' (1958) 1 *Melbourne University Law Review* 556

Brett, Peter, 'Book Review: *Administrative Law Treatise* by Kenneth Culp Davis' (1960) 38 *Texas Law Review* 349

Brett, Peter, 'Book Review: *Legal Education and Public Responsibility* by Julius Stone' (1960) 2 *Melbourne University Law Review* 568

Brett, Peter, 'Book Review: *Causation in the Law* by H L A Hart' (1961) 4 *Melbourne University Law Review* 93

Brett, Peter, 'Book Review: *Oxford Essays in Jurisprudence* by A G Guest (editor)' (1962) 3 *Melbourne University Law Review* 402

Brett, Peter, 'Book Review: *The Citizen and the Administration: The Redress of Grievances,* a report by JUSTICE' (1962) 3 *Melbourne University Law Review* 555

Brett, Peter, 'Book Review: *Appellate Courts in the United States and England* by Delmar Karlen' (1963) 4 *Melbourne University Law Review* 299

Brett, Peter, 'Book Review: *Criminal Law: Problems for Decision in the Promulgation, Invocation and Administation of a Law of Crimes* by Richard C Donnelly, Joseph Goldstein and Richard D Schwartz' (1963) 4 *Melbourne University Law Review* 162

Brett, Peter, 'Book Review: *The Constitutions of the Australian States* by R D Lumb' (1964) 4 *Melbourne University Law Review* 423

Brett, Peter, 'Book Review: *Studies in Criminal Law* by Norval Morris and Colin Howard, *Strict Responsibility* by Colin Howard and *A Casebook on Criminal Law* by D W Elliott and J C Wood' (1965) 5 *Melbourne University Law Review* 106

Brett, Peter, 'Book Review: *Law in Society* by Geoffrey Sawer' (1966–67) 2 *Federal Law Review* 139

Brett, Peter, 'Book Review: *Human Law and Human Justice* by Julius Stone' (1967) 5 *Melbourne University Law Review* 510

Brett, Peter, 'Book Review: *The Courts and Criminal Punishments* by Sir John Vincent William Barry' (1969–70) 7 *Melbourne University Law Review* 585

D *Theses*

Brett, Peter, *The Penal System of Western Australia, A Critical Study* (Master's Thesis, University of Western Australia, 1953)

Brett, Peter, *An Inquiry into Criminal Guilt* (PhD, Harvard University, 1960)

# APPENDIX E TAY PUBLICATION LIST

## E.1 Introduction

The following list was compiled from the list appended to Guenther Doeker-Mach and Klaus A Ziegert (eds), *Alice Erh-Soon Tay – Lawyer, Scholar, Civil Servant* (Franz Steiner Verlag, 2004) as well as Alice Erh-Soon Tay's resume that was appended to Professor Ron McCallum's recommendation that she be made an Emeritus Professor. The list does not include minor publications (such as short entries in encyclopaedias) or the speeches Tay delivered or the Government Reports she contributed to. Due to insufficient record keeping any attempt to list such publications would be incomplete. Where an article or chapter was published in more than one location, I have noted the source that was most readily available.

## E.2 List of Publications

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D *Theses*

Tay, Alice Erh-Soon, *The Concept of Possession in the Common Law* (PhD Thesis, Australian National University, 1964)

# APPENDIX F SAWER PUBLICATION LIST

## F.1 Introduction

This list was compiled from various database searches and drew heavily on Anne Schick, 'Bibliography of Works by Geoffrey Sawer 1935–80' (1980) 11 *Federal Law Review* 271. As with appendices D and E I have not included minor publications and speeches.

## F.2 List of Publications

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