Free Hands and Minds

Pioneering Australian Legal Scholars

Susan Bartie

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Introduction

This book reveals the distinctive ideas and endeavours which accompanied the birth and early growth of Australia's modern legal academy. Through a series of life histories, it illuminates the serious intellectual and enterprising attempts made to shape the discipline of law and its contribution to Australian society. This is a study of three key – yet largely overlooked – figures: Peter Brett (1918–1975), Professor of Jurisprudence at the University of Melbourne; Alice Erh-Soon Tay (1934–2004), Professor of Jurisprudence at the University of Sydney; and Geoffrey Sawer (1910–1996), Head of the Department of Law in the Research School of Social Sciences (RSSS) at the Australian National University (ANU).

All three professors were part of the first community of legal scholars who established the enduring liberal-progressive foundations of Australia's discipline of law.[1] This book is a vivid, nuanced and contextual account of those foundations. By undertaking this study, I set out to challenge the persistent myth that members of this community are unimportant to understandings of Australian law, legal culture and society, and unremarkable when compared with leading scholars in other common law nations.

Drawing on in-depth interviews with former colleagues, family members and students, extensive archival research, and an appraisal of their contributions to scholarship[2] and teaching, I explore the three professors' international networks and broader social and historical milieux. I also identify some of the central qualities of the first Australian legal theories and explain how Australian scholars engaged with English, American and other foreign ideas. Ranging from local experiences and the concerns of a nascent Australian legal academy, to the complex transnational phenomena of legal scholarship and theory, I make a case for contextualising law and legal culture within society. Further, my exploration of how Australian scholars adopted and adapted US theory also lends weight to recent revisionist accounts of American jurisprudence.

[1] The expression 'first community' is used here to mean the growing number of full-time legal academics employed from the 1950s to replace the part-time practitioner-teachers who had previously taught a large proportion of the law school curriculum. This expression was first used in: S Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Review* 67. See also S Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444, 449–50.

[2] I read and analysed all the published scholarship, as well as unpublished manuscripts, of Brett, Tay and Sawer. A full list is set out at the end of this book.

This is a study of intellectuals rather than abstract ideas. I examine not only the contributions made by Brett, Tay and Sawer to scholarship, but also their contributions to institution building, administration, law making, public debate and advocacy. I explain their efforts to shape the professional identity of lawyers and to counter attempts to treat law as separate from politics. For example, focusing on the Department of Jurisprudence at the University of Sydney and the Department of Law within the RSSS at ANU, allows me to critically examine how Tay and Sawer ran two novel institutions that had the potential to radically change the discipline's identity and culture. I scrutinise their decisions to capitalise on some opportunities while rejecting others, and consider how the discipline might have changed had they managed their departments differently.

This book also counters fatalist accounts of the legal academy by telling the personal stories of three unlikely marginal figures: a Jewish man (Brett); a Chinese woman (Tay); and a war orphan (Sawer). All three rose to prominence within the academy and overcame various obstacles and opposition to create novel roles for themselves and their successors. By choosing one woman and two men as my subjects, I also very consciously explore the role of women within the academy.

In essence, my goal for this study is to make a strong contribution to understandings of a critical phase in the history of the common law and legal education. I hope to provide an important foundation for new lines of inquiry and exploration that will provoke novel ways of thinking about Australia's legal academy and law schools. I therefore dedicate this book to current and future generations of pioneering Australian legal scholars, in the hope that it will be read by those scholars as well as by foreign observers, and also those interested more generally in Australia's intellectual history, the history of Australian universities, jurisprudential movements and legal education.

History and Legal Education

The motivation for this study was my strong curiosity about earlier generations of Australian legal scholars and by my suspicion that existing accounts did not sufficiently examine their activities. In other portrayals, this generation of scholars has either been subsumed under vague labels, such as 'narrow positivists',[3]

[3] See, eg, J Gava, 'Introductory Essay' (1988–89) 5 *Australian Journal of Law and Society* 1, 3; N James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587, 596; M Thornton, 'The Dissolution of the Social in the Legal Academy' (2006) 25 *Australian Feminist Law Journal* 3, 15; F Carrigan, 'They Make a Desert and Call It Peace' (2014) 23 *Legal Education Review* 313, 315–16, citing M Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do about Legal Education' (1991) 34 *Australian Universities' Review* 26, 26; D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra, Australian Government Publishing Service, 1987) [1.20] ('*Pearce Report*'). A similar point is made, and the same authorities cited, in Bartie, 'Towards a History' (n 1).

or swept up within larger social phenomena, such as 'modernisation'.[4] Conventional wisdom holds 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.[5]

Almost from the time of their inception in the 1960s and 1970s, the more radical law schools – those offering alternative visions – came under attack, from both outside and within. The ongoing impact of this 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. To provoke change, it seemed necessary for subsequent generations of legal scholars to condemn or ignore earlier generations.

While we might sympathise with the objectives underpinning these critiques of the old order, we can lament the ways that the history of legal education is being enlisted. Many historians would object to any strategic use of history. However, my objections to the accounts that have been made of Australian legal scholars are of a different kind: I argue that that they create caricatures, straw men (they do not mention many women), that present as slogans or propaganda rather than lessons. As a result, we learn nothing. The purpose of this work is not to glorify this early generation of legal scholars, but to provide a balanced and probing account of their contributions to the legal academy.

Even in the United States, historians continue to provide new explanations for the origins and growth of modern university legal education which challenge conventional wisdom. For example, during the conception of this project David Rabban 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. He notes that biographers of one of his subjects, Henry Adams, have attached little importance to the seven years Adams spent as an academic at Harvard.[6] By contrast, Rabban argues, this period is crucial to 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'.[7] Given the attention that 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

[4] eg, J Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Sydney, Centre for Legal Education, 1993).

[5] M Chesterman and D Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 724.

[6] DM Rabban, *Law's History* (Cambridge, Cambridge University Press, 2013) 153.

[7] ibid.

than by the way their work was subsequently remembered and incorporated into works of legal scholarship. Rabban's work makes a compelling case for testing conventional wisdom about the history of law schools and the discipline of law through open-minded exploration.

Several fundamental lessons emerge from histories of university legal education which are crucial to the health of the discipline. Most obviously, they demonstrate that in the past universities, law professors and law schools have fulfilled roles and engaged in activities that are very different from those pursued today.[8] Acknowledging these alternatives may prompt current legal scholars to question whether their priorities and activities are in fact central to universities, and to reject the sense that the current arrangements accord with a natural order. Sometimes, histories of both law schools and universities are presented in a linear fashion to suggest that both grew in maturity over the course of the twentieth century. As Hannah Forsyth explains in her history of the modern university, for Australian universities this maturity is demonstrated by the post-1950s emphasis on, and eventual commodification of, research.[9] This research emphasis initially did not gain much traction in the field of law. Yet, by the end of the twentieth century, the rise in the number of PhDs in law, increased pressures for legal scholars to seek research funding, and a growing emphasis on publication of monographs and articles rather than textbooks, confirm the penetration of these broader university trends. In linear histories, these changes are presented as evidence of the growing sophistication of the discipline. The earlier central emphasis on teaching is treated as misguided and a product of narrow thinking that reflected the supposed early doctrinal and positivist emphasis. In other words, it is symptomatic of an outmoded belief that law ought to be studied as an autonomous discipline. This linear history approach reinforces the idea that law schools should reject earlier traditions and practices on the basis that they are misguided (and therefore irrelevant), and instead place primary emphasis on research over scholarship and teaching. Standing in opposition to these ideas, this study suggests that earlier debates and thinking about the role of universities, law schools and law professors remain relevant to the current – and ostensibly more mature – age.

Many criticisms could be levelled at previous (and present) generations of Australian legal scholars, but the use of linear histories to dismiss the efforts of their predecessors limits the range of alternatives that might be considered by current professors and managers. In the process, it provides greater force to the status quo. Better understandings of the efforts and endeavours of our predecessors – examining their ambitions and priorities – provides material which may be used to challenge dominant narratives and values, and encourages legal academics to develop an appreciation of a broader range of activities, perhaps with

[8] For a similar argument on the value of history, see M MacMillan, *History's People* (London, Profile Books Ltd, 2017) xv–xvi.

[9] H Forsyth, *A History of the Modern Australian University* (Sydney, NewSouth, 2014).

the ultimate goal of liberating law schools and universities from current ways of thinking about their role in society. As the father of English legal history opined over a century ago, this approach has the potential to 'free [current and future legal scholars] from superstitions and teach them that they have free hands'.[10] As I have argued elsewhere, the underlying assumption behind writing the life history of a legal scholar

> is that how a scholar balanced their personal desire to succeed, along with their learning and their own altruistic notions of the discipline's best interests, mattered to the future of law schools. This in turn suggests that a current legal scholar's current daily musing on such things also matters to the future of law school.[11]

Histories of Christopher Columbus Langdell, for example, not only bring to light the strategic motivations behind his appeals to 'science', but also the absence of any empirical basis for his claims that his approach to legal education would reform the profession.[12] They demonstrate how a very intelligent lawyer may advance fundamentally flawed ideas that have an enormous impact on the nature and advancement of law. They also illustrate the importance of caution and humility in the running of law schools and in the exercise of academic leadership. In a similar vein, institutional accounts of law schools, such as those led by Robert Stevens and Brian Tamanaha, show that law professors are mere mortals: they can be seduced by the prospect of elevated status and financial gain to lead law schools in ways that are largely self-serving.[13] Rather than reach for a utopia, history encourages a frank appraisal of circumstances and possibilities, and an awareness that bright legal academics may advance both worthwhile and fundamentally flawed agendas, sometimes simultaneously.

This book, therefore, is a call to develop greater curiosity and to better understand the past decades of Australian university legal education in order to think with greater ingenuity, optimism and depth about the opportunities and problems of the present.

The university's prioritisation of attracting research funding over other pursuits, and the growth in size of the student body, as well as the number of law schools,

[10] FW Maitland to AV Dicey (c July 1896), in CHS Fifoot and PNR Zutshi (eds), *The Letters of Frederic William Maitland*, 2 vols (Cambridge and London, Seldon Society, 1995) 11. In more recent times, Robert Gordon, citing Maitland, has approved of this use of history: see RW Gordon, 'The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument' in TJ McDonald (ed), *The Historic Turn in the Human Sciences* (University of Michigan Press, 1996) 359; David Sugarman, 'Robert W Gordon in Conversation with David Sugarman' (October 2018) 1(3) *Law and History Review: The Docket*, www.lawandhistoryreview.org/article/robert-w-gordon-in-conversation-with-david-sugarman/.

[11] S Bartie, 'Histories of Legal Scholars – The Power of Possibility' (2014) 34 *Legal Studies* 305, 319.

[12] The best account of Langdell's methods is BA Kimball, *The Inception of Modern Professional Education – CC Langdell, 1826–1906* (Chapel Hill, University of North Carolina Press, 2009).

[13] R Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill, University of North Carolina Press, 1983); B Tamanaha, *Failing Law Schools* (Chicago, University of Chicago Press, 2012). See also Bartie (n 11) 309.

raises critical questions about the role of law schools and legal academics that ought to attract the attention of the discipline's brightest minds. Each year thousands of young, and not so young, Australian and international students invest considerable sums of money and time, along with their hopes, into Australian law schools. Dramatic changes in the nature of lawyering affect our graduates' prospects of employment and the role that they, and the law more generally, will play in society. All these forces require changes to existing law school models, which should be driven by intelligent, pioneering and creative legal scholars.[14] It is a desire to search for leaders within the academy and seek out an intellectual and, perhaps also, a moral core (or cores) for the discipline that drives this exercise in introspection.[15] A discipline that has little history or tradition and no real understanding of its identity or where it came from is vulnerable to external policies that fail to thoughtfully respond to the needs of society. It is at greater risk of losing its sense of self.[16]

Brett, Tay and Sawer

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.[17] This has meant concentrating on their experiences within three institutions. Australia's federal character and the geographical isolation of its major cities mean that experiences vary between different states. In each part, the local conditions are explained.

Peter Brett

Peter Brett began 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. Born Isidore Peter Bretzfelder to Jewish parents in England, Brett

[14] For some vivid accounts of the changes and their potential implications, see R Susskind and D Susskind, *How Technology will Transform the Work of the Professions* (Oxford, Oxford University Press, 2015); R Susskind, *Tomorrow's Lawyers: An Introduction to your Future*, 2nd edn (Oxford, Oxford University Press, 2017); M Kowalski, *Avoiding Extinction: Reimagining Legal Services for the 21st Century* (Bloomington, IN, iUniverse, 2012). For an Australian example, see V Waye, M Verreynne and J Knowler, 'Innovation in the Australian Legal Profession' (2018) 25 *International Journal of the Legal Profession* 213.

[15] Some of my motivations are explained further in Bartie (n 11).

[16] ibid.

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

began practising law at the age of 16, studied law part-time, worked at the Treasury Solicitor's Office, and served in the British Army during the Second World War. Despite his considerable achievements and his contributions to the Australian legal academy, Brett is not well known and very little has been written about him.[18]

Brett's commitment to reforming Australian legal culture bordered on obsession. He was a man of boundless energy, great industry and frank speech, who believed that complacency and elitism within the legal profession were creating terrible injustices within Australian society. He believed that his role as a legal scholar at the University of Melbourne gave him the opportunity to lead the reform of both Australia's law and legal profession. This belief led him to make several contributions that are essential to any understanding of the founding of modern Australian university legal education.

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. By arranging for him to study at Harvard, the then Dean at Melbourne, Zelman Cowen, helped Brett believe that he could contribute to the leading debates in criminal law theory and adopt an academic agenda that resembled those 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 this ground-breaking text, 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 the best of modern learning.

Brett's experience also sheds light on one type of influence that American law schools, in particular Harvard, had on Australian legal scholars. This book reveals that Brett brought to Australia the leading American jurisprudential school of his time, the Legal Process School. He was the only Australian legal scholar to advance a scholarly agenda that rested on the philosophy of science, which sat at the heart of this American school, and who was committed to the idea that for the law to be just, it needed to bridge the gap between science and morality. At Harvard, Brett was one of Henry Hart's most devoted students. Studying his efforts to bring Legal Process ideas to Australian shores and to the criminal law provides an insight into Australian scholars' appetite for American ideas, and sheds new light on how the US SJD (Doctor of Juridical Science) programme

[18] Brett is mentioned briefly in J Waugh, *First Principles – The Melbourne Law School 1857–2007* (Melbourne, Miegunyah Press, 2007); Z Cowen, *A Public Life – The Memoirs of Zelman Cowen* (Melbourne, Miegunyah Press, 2006); R Campbell, *A History of the Melbourne Law School 1857–1973* (Melbourne, University of Melbourne Press, 1977). The following short piece, written soon after Brett's death, is devoted to him: L Waller, 'Peter Brett Remembered' (1975) *Summons* 100.

facilitated the transplantation of American norms to Australian legal education and scholarship. This assessment of Brett's use of US legal theory also lends weight to recent US revisionist histories of the Legal Process School and provides material for new revisions.

Brett's theorising made its way into the classroom in the form of Australia's first full-length criminal textbook on Australian law.[19] Another reason that Brett is such an important figure is the popularity and longevity of this textbook and the problem method it expounded. The work was one of the first Australian textbooks to embody a clear pedagogical theory and concept of law. It raised the standard of textbook writing in Australia, and also provided a means for challenging narrow readings of Dixon's strict legalism. Brett and his co-author, Louis Waller, aimed to do more than educate competent lawyers. Their goal was to change the very culture of Australia's legal profession: to create more liberal, ethically minded and reformist-orientated lawyers. They sought to lift the profession out of the conservative and positivist quagmire in which they believed it was stuck.

Finally, Brett is an important figure because of the way in which he advocated for the rights of those he believed had been wrongly convicted of crimes. His tireless attempts to remedy substantial miscarriages of justice in notorious murder cases (the *Tait*, *Beamish* and *Ratten* cases), as well as his determination to improve the workings of Australian universities, provide us with further insights into what it meant to be a liberal lawyer in an Australian law schools in the 1950s and 1960s. While Brett's efforts were well known at the time, he has played little part in subsequent histories of Australian law schools and universities. In part, this is because many people did not warm to him personally. Brett did not make a good first impression, with many colleagues and acquaintances noting an arrogance and fierceness. With perseverance, some grew to develop a strong sense of admiration, both for his principles and his intellect, which resulted in deep and loyal friendships. Others continued to believe him to be a dogmatic and unsympathetic man. Students either admired or feared him, the latter believing he took pleasure in ridiculing them in class.

In this book, I attempt to challenge the marginalised place that Brett now occupies in the history of Australian legal education. I argue that his endeavours and intellectual agenda provide crucial insights into the motivations of Australian legal academics, the beginning of Australia's legal academy and the modern discipline of law.

Alice Erh-Soon Tay

Born in Singapore to Chinese parents, Alice Erh-Soon Tay began her academic career at the University of Malaya (now the National University of Singapore) in

[19] P Brett and PL Waller, *Cases and Materials in Criminal Law* (Sydney, Butterworths, 1962).

1958. In the 1960s, Tay moved to Australia, where she became a lecturer in the Faculty of Law at ANU. Personal circumstances, rather than career ambitions, had brought Tay to the nation's capital, Canberra. While at the University of Malaya, she had fallen in love with Eugene Kamenka, a married Australian intellectual historian, and to avoid further scandal over this relationship the couple returned to his home country. In Canberra, Tay commenced, while Kamenka completed, a PhD at the ANU Research School of Social Sciences (RSSS). Tay's thesis was an impressive work on the topic of possession; soon afterwards, however, her scholarship moved to a topic that more closely aligned with Kamenka's principal scholarly interests: Marxism. Tay's scholarly stature grew as she travelled with Kamenka to Russia, China and New York and wrote about the role of law within communist societies. She sat firmly within the sociological tradition, and one of her greatest contributions was to devise a set of ideal types that sought to highlight the commonalities between legal systems to allow for stronger comparisons.

Holding a doctorate, travelling overseas to conduct field work, and publishing numerous articles within the sociological tradition made Tay seem more accomplished than most other members of Australia's overwhelmingly male legal academy. These activities, and the networks she established, led to the defining moment of her career: her appointment in 1975 as Challis Professor of Jurisprudence and Head of the Department of Jurisprudence at the University of Sydney. In many ways, it is remarkable that at this early time, when so few women held academic positions or practised as lawyers in Australia, and even fewer were Chinese, Tay should have been elevated to this post. In 1998, towards the end of her career, she was recognised yet again through her appointment as President of the Human Rights and Equal Opportunities Commission. This book considers the role of gender and race in Tay's elevation.

In this book, I argue that Tay's primary contribution to Australia's legal academy was her maintenance, in the face of considerable opposition, of 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 she funnelled her intellectual convictions into a partly organisational role. She sought to provide a safe haven for jurisprudential scholars, where they would be freed from the increasing 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 the world stage, and she encouraged legal scholars to seek out broader horizons. She reacted against the mediocrity and complacency that she perceived within Australia's legal academy, believing that this not only served as poor opposition to tyrannical aspects of government, but also promoted ideas that would erode existing safeguards in Australia's legal system. She railed against the growing managerialism within universities, the attempts to measure intangible products that promoted competition over collegiality, and the commodification of research.

This part of the book relies heavily on Tay's scholarship, as well as on 18 interviews conducted with her former colleagues, associates and students. In several ways, of the three scholars studied in this book, Tay was the most difficult to depict. This was partly because she was the most divisive figure and remains intensely disliked by some. As explained in this book, by fighting to maintain the existence of a separate Department of Jurisprudence she sustained a divide that had already existed within the Faculty of Law at the University of Sydney for many decades. 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.[20]

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 holds 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.

Interviews form an important component of this part of this book, not only because of the paucity of personal papers, but also because they revealed how important the 'social dimension'[21] is 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 the 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, which are also relied upon in this study.[22] The window into Tay's life has been 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 book.

[20] W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (Cambridge, Cambridge University Press, 2012) 401.

[21] KA Ziegert, 'AEST – An Attempt at Explaining the Phenomenon' in G Doeker-Mach and KA Ziegert (eds), *Alice Erh-Soon Tay – Lawyer Scholar, Civil Servant* (Stuttgart, Franz Steiner Verlag, 2004) 7, 7.

[22] J Horne, 'Alice Erh-Soon Tay, The Making of an Intellectual' in G Doeker-Mach and KA Ziegert, *Alice Erh-Soon Tay – Lawyer, Scholar, Civil Servant* (Stuttgart, Franz Steiner Verlag, 2004) 13; J Horne, 'The Cosmopolitan Life of Alice Erh-Soon Tay' (2010) 21 *Journal of World History* 419.

Geoffrey Sawer

Geoffrey Sawer began 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. Here 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.

Sawer pioneered a distinct brand of constitutionalism.[23] He also advanced significant bodies of scholarship that provided strong foundations for studies in Australian public law and politics. The final part of this book concentrates on the various ways in which Sawer challenged the concept that law was an autonomous entity, including through his leadership of a Department of Law within a School of Social Sciences.[24]

Sawer's most remarkable contributions consisted, first, of the robust case 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 he encouraged others to study law alongside other social facts. For Sawer, the discipline of law was not a social science. Yet, he believed that it ought to be a subject of social science; he also 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 the 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 also saw merit in existing practices.

In this part, I raise the question whether Sawer's appointment to the RSSS constituted a missed opportunity. Of the three scholars studied here, Sawer has received the greatest praise, and he continues to be remembered fondly by many.

[23] Former Chief Justice of the High Court of Australia, Sir Anthony Mason, described Sawer as a 'constitutionalist': see A Mason, 'Geoffrey Sawer: The Priceless Professor', *Canberra Times* 21 December 1990, 7; Interview with Sir Anthony Mason (Sir Anthony Mason's Chambers in Sydney, 9 December 2014).

[24] To date, the most substantial works on Sawer are M Coper, 'Geoffrey Sawer and the Art of the Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389; R Cranston, 'Lawyer in the Social Sciences – Geoffrey Sawer' (1980) 11 *Federal Law Review* 263.

Nonetheless, several of his associates remain puzzled that he did so little to build his law department within the RSSS. I outline the many reasons and circumstances that help explain his decision to keep the department small, including the expectations of the broader university and government as well as attitudes of the legal profession. However, I also suggest that his scholarly position, sceptically appraising ambitious sociological theories and taking a measured approach to the potential of social science for law, limited his enthusiasm for increasing the size of the department. Another scholar, sitting more firmly within a sociological tradition, might have fostered a more vibrant and ambitious department that demonstrated the potential for legal research to extend well beyond doctrinal studies and to be led by disciplinary practices from the humanities and social sciences. I also consider, with the benefit of hindsight, what this missed opportunity meant for a discipline that is judged largely by its research outputs, and is increasingly being judged by its ability to compete with other disciplines for research funding.

Why Brett, Tay and Sawer?

My goal in writing this book was to understand how legal scholars who were theoretically inclined and reflective sought to improve the standing and intellectual credentials of Australia's discipline of law during its early modern formation. I therefore needed to find scholars of this ilk. I do not claim that Brett, Tay and Sawer were the most important law professors of the twentieth century, and my curiosity about the discipline extends far beyond these three individuals. I do, however, suggest that these three professors matched the profile of well-known international pioneering legal scholars and that these commonalities speak of their potential to shape the intellectual and cultural underpinnings of Australia's discipline of law.

This matching exercise involves seeing similarities between the efforts of Langdell[25] and the English dons[26] to create an enduring textbook tradition based on a liberal science paradigm, with Brett's creation of the most popular early Australian legal textbook embodying a scientific and philosophical paradigm. It draws parallels between Tay and Sawer's leadership of law departments and attempts by some American Legal Realists to challenge formalist paradigms in legal education by creating interdisciplinary departments.[27] It makes connections

[25] See Kimball (n 12).

[26] D Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W Twining (ed), *Legal Theory and Common Law* (Oxford, Blackwell, 1986) 26. This tradition is explained further in chapter two.

[27] See JH Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill, University of North Carolina Press, 1995).

between the pioneers of all major jurisprudential movements and Brett's argument that the discipline ought to draw from the best of modern learning, Sawer's efforts to demonstrate the value of studying law with politics, and Tay's attempt to foster comparative sociologist analysis in order to break down Australian insularities. Further, Sawer and Brett's efforts to free practitioners from restrictive interpretations of Sir Owen Dixon's strict and complete legalism reveal the desire for cultural change that has been felt by many of the better known American legal theorists.[28]

Brett, Tay and Sawer held crucial leadership positions at a time of transformation within Australian universities and law schools, and there are signs that they moved beyond the noble drudgery associated with creating essential Australian legal materials for students and the profession. This book critically analyses how they responded to the opportunities they were given.

My selection of subjects for this study would always be controversial, and to some it might seem strange. Beyond Julius Stone, Australian legal scholars have not (in keeping with their ahistorical tendencies) identified prominent figures who have shaped the discipline in a similar manner to their international counterparts, such as Langdell or HLA Hart. When speaking of leadership, discussion often moves to Deans. To me, this seems to overlook the reality that while sometimes institutional and intellectual leadership combine, this is not always the case.

It might seem peculiar to group together scholars who studied very different fields: criminal law theory (Brett); comparative law and the sociology of law (Tay); and constitutionalism (Sawer). However, their importance to this study rests with their shared pioneering characteristics rather than the artificial divides created by disciplinary categorisations. Brett, Tay and Sawer are studied through the lens of legal education,[29] rather than their particular scholarly specialty. They were selected through a process of deduction, working through a list of all potential candidates. Other strong contenders included Julius Stone, Zelman Cowen and David Derham, and initially Stone and Derham were included in this project. Stone was, however, removed from this study as his scholarly agenda was formed before his move to Australia and he wrote very little on the importance of legal education and Australian law schools.[30] Moreover, including Stone among the subjects of this book risked confirming, rather than debunking, the common myth that he was the only notable scholar of this period. Some aspects of Stone's legacy are, however, addressed in the chapters on Tay. Derham was respected as a teacher of

[28] Most obviously Langdell (Kimball, n 12) and many others: see, eg, the efforts of Herbert Wechsler explained in A Walker, 'The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course' (2009) 7 *Ohio State Journal of Criminal Law* 217.

[29] The importance of studying scholars through the lens of legal education is explained in Bartie, 'Towards a History' (n 1).

[30] J Stone, 'The Role of Universities: Views of a Scholar of the Last Century' in H Irving, J Mowbray and K Walton (eds), *Julius Stone, A Study in Influence* (Sydney, Federation Press, 2010).

jurisprudence; however, he was removed from this study as he published very little on the topic and his greatest contribution was to University governance. Cowen was not included because his career, as Dean and Vice Chancellor, was focused on institution building and there are few signs that he was a legal theorist. Other theoretically inclined scholars, such as Norval Morris and John Fleming, moved to the US or UK early in their careers, never to return. Daniel O'Connell was also considered but eventually rejected as he spent the latter years of his career largely at the University of Oxford.

As it turns out, Brett, Tay and Sawer had more in common than simply their roles and potential. All three were imbued with post-war optimism and the liberal spirit. By 'liberal' I mean simply that they were committed to the rule of law, held faith in the common law and the democratic system, and looked to them to provide protections to human rights and help achieve equality. They were not legal liberals in the American sense of this phrase. For example, Owen Fiss[31] (following from Laura Kalman[32]) defines American legal liberals as lawyers who held faith in the US Supreme Court to act in dynamic ways to protect against social injustice, as inspired by the Warren Court in *Brown v Board of Education*.[33] Sir Owen Dixon's presence as Chief Justice no doubt quelled any ambitions Australian legal scholars might have had for Australia's High Court to assume a similar mantle. While they would not have objected to the outcome in *Brown*, Brett, Tay and Sawer disapproved of the Warren Court's instrumental reasoning in the 1950s and 1960s. They believed that Australian courts should robustly develop the common law with an awareness of the broader social context. But they also believed that there remained a strong role for principle and reason. Furthermore, all three rejected the central tenets of Marxism, and rejected it as a source for thinking about Australian law.

Brett, Tay and Sawer viewed social issues through this liberal paradigm. For example, Tay's position on feminism was liberal, as she believed that equality could be achieved through the existing system and a human rights paradigm.[34] Neither Brett nor Sawer wrote on women's rights and feminism. Brett, Tay and Sawer all wrote a small number of pieces on Aboriginal issues from liberal perspectives and Tay, as a part-time commissioner of the Australian Law Reform Commission, participated in inquiries into Aboriginal Customary Law. While never a radical, Tay was deeply dismayed at Australia's treatment of Aboriginal and Torres Strait Islander peoples and believed that wide-ranging political reform was required.

[31] O Fiss, *Pillars of Justice: Lawyers and the Liberal Tradition* (Cambridge, Harvard University Press, 2017) 1–2.

[32] L Kalman, *The Strange Career of Legal Liberalism* (New Haven, Yale University Press, 1996) 4.

[33] 347 US 483 (1954). Fiss identifies the following lawyers as possessing this faith: Thurgood Marshall, William Brennan, John Doar and Burke Marshall.

[34] This is considered further in chapter eleven and in S Bartie, 'Studying Women Legal Scholars: The Challenges of Life History' (2018) 25 *International Journal of the Legal Profession* 279.

All three believed that Parliament held the greatest promise for achieving social reform (as opposed to the courts), and each was involved in lobbying and advising government on social justice issues. To some, these attitudes would peg them as conservatives, but of course this is a relative term and Tay, Brett and Sawer would no doubt have rejected this label. Brett and Sawer, in particular, were dismayed at what they perceived as a deep conservatism throughout Australia's legal profession, as well as Dixon's influence which encouraged practitioners to see the common law as autonomous from other bodies of learning and almost mechanical in its operation. Compared with the practising lawyers of their age, and several of their 1950s and 1960s colleagues, they were progressive liberals. As their brand of liberalism increasingly comes under attack, it is worth considering their reasoning and rationale and its continued presence in the legal academy today.

Feminism and Life History

This book is based on 33 interviews, archival work and an analysis of the scholarship of Brett, Tay and Sawer. Of the 32 interviewees who were willing to be named, 28 were men over the age of 60 and had been judges, senior lawyers and law professors. By contrast, I am a woman, who was then in my late thirties. As a feminist, I wanted to learn more about how my subjects treated women and what role gender played in Tay's rise to prominence.[35] While I felt that the responses of each interview participant to this line of questioning were frank, I cannot be sure that this was the case. Would different responses have been elicited if I were a man? I therefore 'must accept responsibility for [my] share in creating new evidence'.[36] 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 particularly odd. I was not wholly placated by the fact that few other men of their generation 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.

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 gender inequality in law and therefore was more enlightened than either Brett or Sawer. On the other hand, she appeared to do relatively little to mentor

[35] I consider that this work contains many of the hallmarks of feminist legal history identified by Ericka Rackley and Rosemary Auchmuty: E Rackley and R Auchmuty, 'Introduction' in *Women's Legal Landmarks* (Oxford, Hart Publishing, 2018) 1, 5.

[36] J Tosh with S Lang, *The Pursuit of History*, 4th edn (Cambridge, Pearson Education, 2006) 318.

or advance the careers of women law graduates – something I found disappointing. Unlike Brett and Sawer, Tay's rise to prominence coincided with a larger number of women students entering law schools, and 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'[37] and also to rob them of their context. In the body of this work, I have tried to explain the conflicting strands and noted her views on the law's treatment of women and feminist legal scholarship.

Concluding Remarks

The objective behind this book 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,[38] 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, 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 shaped the discipline during its pioneering phases. These assumptions and ideas might serve as more reliable and interesting reference points than the vague portrayals of the discipline previously offered. They might support more robust and critical appraisals of the current generation's contributions and practices.

In short, in this book I do as much as I can within the space afforded to explain how each of the three scholars studied and responded to their intellectual and institutional 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 study demonstrates that Australia has had scholars of a similar type and with similar motivations to

[37] M Theobald, 'Teachers, Memory and Oral History' in K Weiler and S Middleton (eds), *Telling Women's Lives – Narrative Inquiries in the History of Women's Education* (Philadelphia, Open University Press, 1999) 9, 17. This tendency is discussed in detail in Bartie (n 34).

[38] TS Kuhn, *The Structure of Scientific Revolutions*, 3rd edn (Chicago, University of Chicago Press, 1996). Legal scholars have similarly recognised that, in the discipline of law, 'the impression is not one of continuity': R Cotterrell, *The Politics of Jurisprudence – A Critical Introduction to Legal Philosophy* (London, Butterworths, 1989) 18.

the English and American legal scholars who have become household names. It demonstrates that some early Australian legal scholars advanced distinctively 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, and the nature of their individual contributions. This book provides part of the basis for meaningful and critical questioning of the discipline.