JUDICIAL BIOGRAPHY—A PRELIMINARY OBSTACLE

A persuasion of certainty is a manifest testimony of foolishness, and of extreme uncertainty.—MONTAIGNE.

I

A notable feature of legal writing in Australia has been the lack of biographical studies of judges who have been members of the High Court of Australia. This is surprising when the important creative function of the High Court in the interpretation of the Australian Constitution is taken into account.

The only two extensive biographies to have been published are of Sir Edmund Barton and Henry Bournes Higgins. Both of these works do not even pretend a serious evaluation of the judges' work on the High Court bench. John Reynolds' study of Sir Edmund Barton is more concerned with his work in New South Wales politics and in the movement for Federation than with his legal career.[1] This is not surprising as Reynolds is not a lawyer but a historian. The "Memoir" of Henry Bournes Higgins, written by one of his nieces, Nettie Palmer, is an affectionate literary remembrance rather than a biographical study.[2]

Sir Samuel Griffith has been the subject of a series of lectures[3] and an unpublished thesis[4] but both works are unsatisfactory. The first is a series of disjointed headings like "Griffith as a Friend to the Working Man", "Griffith as a Conversationalist", "His Loyalty to the Crown", etc., and the latter is a 300 page calendar of most of the things Griffith did and said in his life.

These to my knowledge are the only studies yet attempted of the judges of our High Court. There has not been one serious attempt by a lawyer to evaluate the contribution of any of the judges to Australian constitutional law apart from the mortuary estimates that appear when one of them dies. Obituaries are hardly the place for critical estimates.

In a recent article which surveyed the literature of Australian Government and Politics, S. R. Davis and C. M. Hughes drew attention to this gap in Australian legal scholarship. "One gap which we would record, but not hazard an explanation for, is the complete absence of the judicial biographies which have popularized

1. *Edmund Barton*, John Reynolds (1948).
2. *Henry Bournes Higgins: A Memoir*, Nettie Palmer (1931).
3. *Sir Samuel Griffith*, 1938 Macrossan Lecture in the University of Queensland, A. D. Graham.
4. *Sir Samuel Walker Griffith*, J. C. Vockler, unpublished thesis presented to the University of Queensland for B.A. (Hons.) Degree.

American jurisprudence, and particularly constitutional law."[5]

This article is written in an endeavour to discover what reasons, if any, there are which might explain the absence of this kind of research.

Some of these reasons are obvious enough. Before the very recent emergence of law teaching as an independent profession the most likely and best qualified people to undertake such studies were practising lawyers. However, the amount of time required in searching through primary material and the academic detachment necessary for evaluation were not available to them. Another reason was the small amount of post-graduate research that was pursued in Australian Law Schools. One might have expected such studies to be undertaken by students for the higher degrees but any student who had the desire and the ability for this kind of work left Australia to go to England or, more recently, to the United States. In such different environments, far away from the Australian source material, it was not surprising that critical studies of Australian judges were not selected as thesis topics.

These certainly must have been retarding factors, but over the last few years much of their force has been spent. Almost all of the Australian Law Schools now have a reasonably sized full time academic staff who might be expected to carry out this type of research work. Likewise there has been an increase in the number of students undertaking post-graduate work at home rather than overseas.

However, I do not think this will automatically mean that increased attention will be paid to judicial biography in Australia in the next few years. Before that can happen a much more fundamental objection to judicial biography must be exposed and answered.

Biographical writing in general since the turn of the century has been greatly influenced by the techniques and assumptions embodied in the work of Lytton Strachey. In his sketches of eminent Victorians, Strachey broke sharply with an older tradition of biography that was full of fatuous eulogy and badly digested history. He demonstrated successfully that it is not necessary to be tedious and dry in order to be scholarly and authoritative. His special talents were a lucid and urbane style, a brevity which excluded everything that was redundant but nothing that was significant, and a realism that produced insight through a nice combination of factual accuracy and iconoclasm. Above all, he insisted that personality, rather than achievement, must be the primary

5. The Australian Journal of Politics and History, Vol. IV, No. I, 107 (1958).

concern of biography, and he was a master in relating the particular episodes or aspects of his subjects' lives which most vividly revealed character.

In the legal profession itself in Australia there seems to be a widely held opinion that judges should not be the subjects of such studies. In the case of a judge it is argued that personality and professional achievement have an intimate reciprocal relationship. A biography which did not deal with technical legal evaluation would be useless. And when emphasis on personality is coupled with a psychological interpretation of judgments in the fashion of the American realist school the result is an exaggerated stress on the arbitrary and uncertain aspects of the judicial process.[6]

These ideas seem to spring from two basic conceptions of a judge's function that are still quite current and which between them constitute in the present opinion the greatest impediment to the development of an Australian judicial biography.

The two conceptions concern the judge's relationship on the one hand to the judicial process and on the other to the community which he serves.

It is first of all contended that the judge's role in the judicial process is a very limited one. All he has to do in order to decide a dispute is to find the law applicable to the case before him and apply it. He is not influenced by political and social views, but merely performs the almost mechanical task of finding and applying law. Any critical study which endeavoured to trace factors outside the law which influenced a judge in determining a question one way rather than another would be misconceived. As his function is a static one there can be no value and positive mischief in any study that suggested that this was not so.

Again, it is contended that the relationship between the judge and the community would be endangered if the screen which obscures the judge's work from the public eye were parted. It would upset that air of mysticism, which we have on high authority, should surround the administration of the law in its higher reaches.[7] The public's respect for and confidence in the judiciary depends

6. This form of writing, or rather the threat of it, has led many judges to destroy their personal papers before they have died. In the United States Justices Wayne, Miller, Lurton, Peckham, White, McKenna, Jackson and Cardozo all destroyed their papers. Manuscript division, Library of Congress, *Location of Personal Papers of Justices of the Supreme Court*, 1956. Edward Morris, the rhapsodic biographer of the Victorian judge Sir George Higinbotham, recounts the following—"He [Higinbotham] . . . was shocked at the indiscreet revelations in some modern biographies, and left behind him a memorandum . . . requesting that all his manuscripts, books and accounts should be destroyed without being read or examined by anyone but his wife". Edward E. Morris, *George Higinbotham* (1895).

7. Sir Owen Dixon, the Melbourne *Age*, September 23rd 1959, p. 13, c. 1.

upon the complete removal of a judge from the influences that affect lesser men.

It can readily be appreciated that in a profession which moves in this sort of intellectual climate the work of the judicial biographer is almost subversive. The magnification of the individual will damage the administration of the law at the two points we have seen. Firstly, it will encourage the view that the law is not certain and that a judge has a creative choice in deciding many disputes. Secondly, it will take from the judiciary the air of aloofness and mystery which is essential if the confidence of the public is to be maintained.

It will be here contended that both of these views are unsound and should not be regarded as an obstacle to judicial biography. What follows is directed primarily at the role played by the justices of the High Court of Australia, but the general reasoning would also apply to State Supreme Court judges. Their contribution, although it is not as spectacular or momentous as that of the High Court judges, is none the less real.

II

When the various Australian Colonies came together at the end of the nineteenth century to create a system of federal government in Australia they defined the terms of their merger in the Commonwealth of Australia Constitution Act. That enactment of the Imperial Parliament set up a central government and allocated to it certain enumerated legislative powers. A few of these powers were given exclusively to the Commonwealth (*e.g.*, defence, customs and excise), but for the rest they were to be exercised concurrently with the States. However, when Commonwealth and State legislation came into conflict on these subject matters the Commonwealth law was to prevail.[8] The undefined residue of legislative power, after some particular powers had been withdrawn from both or either governments,[9] was reserved to the States.[10]

The responsibility for policing and maintaining the federal balance so created was given to the High Court of Australia.

It was envisaged by the framers of the Constitution that the High Court would fulfill the same function in this regard that the Supreme Court of the United States had done in the American federation. That Court, very early in its history, had asserted its right to invalidate both Federal and State acts if they infringed the Constitution.[11] This mechanism for adjusting the conflicts

8. Constitution s. 109.
9. *e.g.*, Constitution ss. 90, 92, 116.
10. Constitution s. 108.
11. *Marbury v. Madison* (1803) 1 Cranch 137; *Fletcher v. Peck* (1810) 6 Cranch 87.

between the Federal and State Governments was found to be essential to ensure the continued existence of the federal system. Any body could, in theory, be vested with the power, but when governmental powers are found distributed by a legal document in a community where ideas of public law derive from the common law, it is natural that such conflicts should become legal issues to be resolved by a judicial rather than a political tribunal.

In Australia the delegates to the Federal Conventions were very conscious that they were building the High Court into the governmental structure of the Commonwealth. They realized that its task was the creative one of interpreting the Constitution to meet the changing needs of society rather than the static one of mechanically applying a document whose meaning was for ever fixed and all embracive. Sir Isaac Isaacs, for example, remarked in the course of a debate at the Federal Convention in Melbourne in 1898: "We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution not merely the Conventions who sat and the States who ratified their conclusions, but the Judges of the Supreme Court, Marshall, Jay, Storey, and all the rest of the renowned Judges who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions".[12]

This type of comment points up the fact that in the last resort the duty of applying the broad framework of government embodied in the Constitution to the varying changes in Australia's economic and social life was envisaged to be the task of the High Court. Conditions in a society change and the same words in the Constitution have to be applied to meet new and unanticipated circumstances. For example, the Constitution allocated to the Commonwealth legislative power over "postal, telegraphic, telephonic and other like services" at a time when wireless and television were not invented. Questions soon arose as to which government was going to have control over these media of communication, and in the case of wireless the High Court in *R. v. Brislan*[13] was called upon to decide the question. It held that the power went to the Commonwealth under the words "and any other like services". The point to be underlined here is that this decision was essentially a creative one. There was no "intention" in the actual words of the Constitution to allocate this power to the Commonwealth as commercial broadcasting was merely a dream at the time the Constitution was framed. Indeed any expressions concerning the

12. *Australian Federal Convention Debates* (Third Session, Melbourne, 1898), Vol. 1, 283.
13. (1935) 54 C.L.R., 262.

"intention" of a document are necessarily elliptical and to a great extent inaccurate and misleading. It is as if the written document is personified and endorsed with an intention and a will instead of being a mere verbal memorandum. It is individual human beings who have intentions and wills, who make choices and seek to accomplish things. Thus it was the High Court judges in *R. v. Brislan,* and not the Constitution, who decided that the Commonwealth should have the legislative power to control wireless. This decision has, it seems, been relied on to support Commonwealth regulation of television[14] but the High Court has never been called upon to decide the question.

As well as applying the Constitution to modern technological developments which were not envisaged when the Constitution was drafted the High Court has also been called upon to fill in areas where the Constitution is silent. The various problems of intergovernmental immunities, for example, constitute a body of law that has arisen independently of express constitutional provision.

Even where the Constitution on its face seems to give a clear answer to a constitutional problem the Court has an important task to play. Being couched in words, phrases and sentences as documents must be, the Constitution is susceptible of varying interpretation at almost every point. The meaning of concepts such as "excise", "absolutely free", "just terms", "taxation", and so on, can never be fixed with any precision but vary with the viewpoint of the judge called upon to decide their meaning. The meaning of the word "*excise*", for example, was said by the members of the first High Court to be a tax upon the production or manufacture of goods.[15] However, a glance through the judgments in *Parton v. The Milk Board*[16] decided some forty-four years later will show that the meaning of "*excise*" has so broadened as to have become almost unrecognizable as the same concept.

It might be best in order to show the importance of the role that the High Court plays in Australian federalism to look rather closely at a typical case that it is called upon to decide. Examination of *Municipal Council of Sydney v. The Commonwealth*[17] will show in a very clear way, in the context of a not very difficult case, the problems involved in the judicial review of a written constitution.

The case arose out of the physical as well as legal reshuffling caused by the transference of many State departments to the Commonwealth at Federation. Each State prior to Federation had been responsible for its own postal and telegraphic communications, customs charges, defence preparations and many other duties that

14. Broadcasting and Television Act, 1942-1956 (Commonwealth).
15. *Peterswald v. Bartely* (1904), 1 C.L.R. 497.
16. (1949) 80 C.L.R., 229. 17. (1904) 1 C.L.R., 208.

were vested by the Constitution in the Commonwealth Government. This transference of legal power made it a practical necessity that the various State buildings housing the records and staff of these departments should also be transferred to the Commonwealth. The Constitution made provision for this in section 69, in which it was provided that on dates to be proclaimed by the Governor-General the various departments in each State would become vested in the Commonwealth.

Before their transfer, many of their lands and buildings were liable to be rated by the municipality in which they were situated. The exemption from local taxation, as they were erected on lands held by the Crown, had been in many cases waived. For example, the Municipal Council of Sydney had for many years collected rates from the New South Wales government for the occupation of premises which had been used to house the departments of customs, posts and telegraphs, naval and military defence. When in 1901 these premises were transferred to the Commonwealth by virtue of the Governor-General's proclamation in pursuance of section 69 of the Constitution the question arose as to whether the Sydney Council could still impose rates on them. The question was a very real one to the Council as these rates amounted to several thousands of pounds annually.

However one section of the Constitution seemed to conclude the matter against them, section 114, which provided that, "A State shall not without the consent of the Parliament of the Commonwealth . . . impose any tax on property of any kind belonging to the Commonwealth".

This section seemed to flatly deny the power of the Sydney Council to collect the rates. The imposition had not been consented to by the Commonwealth, which now owned the buildings in question. In spite of this, however, the Sydney Council claimed to be entitled to levy a rate. Of course the Commonwealth denied its liability to pay, and a case was stated for the opinion of the High Court.

The Attorney-General for New South Wales at the time, B. R. Wise, K.C., appeared for the Council and in the course of an ingenious argument made the following points.

1. The municipal levy in question was not a "tax" within the meaning of s. 114 at all: it was only a "rate" which was not the same thing. He was able to support this argument by citing some cases which suggested the word "tax" in many English Acts did not include local county rates.

2. If these rates were taxes then they were not imposed by a "State", but only by a Municipal Council, and therefore s. 114 did not apply.

3. Even if the rates were State imposed taxes then the Commonwealth government had by its legislative silence on the matter consented to their imposition. If no Act had been passed taking away the right of the Council to impose the tax then the Commonwealth must be taken to have consented to the rate being levied.

4. Even if his first three points were not accepted and this was a State imposed tax without the consent of the Commonwealth then s. 114 still did not apply to the case as it was not a tax on the property of the Commonwealth but a tax on the Commonwealth itself measured by reference to the amount of lands it occupied.

5. That if this were so then it was not invalidated by the doctrine of *McCulloch v. Maryland*, which would forbid the taxation of one government by another, because (i) the doctrine does not apply to the Australian Constitution; (ii) if it does then it only invalidates the imposition of taxation that "unduly" hinders the Commonwealth and the tax in question here did not.

The arguments of Wise K.C., as can be seen, proceeded upon a very literal construction of the words used in section 114 and to a grammarian or a logician have something to commend them. They certainly succeed in taking away the veneer of certainty and clarity which the words of the section seem to have on first reading. We will be concerned to see how the Court answered these arguments and the basis on which it proceeded in so doing.

About the first argument the Chief Justice, Sir Samuel Griffith, seemed to have little doubt. He said: "It is true that the word 'tax' is sometimes used in the limited sense of an enforced levy for the purposes of general government, but if a State itself has no power to make such a levy it cannot confer the power under another name. In a constitutional enactment, therefore, defining and limiting the power of constitutional authorities, the word 'tax' *must* be construed in a wider sense, and a prohibition of the imposition of a tax *must* be held to include any such imposition by a delegated authority, by whatever name the tax is called".[18] The double use of the word "must" is worth noting in this passage as it seems to be Sir Samuel's sole reason for over-ruling Wise's argument.

Dealing with the second argument, Sir Samuel went on to say that the only origin which could be suggested for the right of the Council to impose the tax was an act of the New South Wales Parliament. If that were so then, "it follows that if the authority which assumes to create such a delegation does not itself possess the power, the delegation is void, since the spring cannot rise higher than its source".[19]

18. 1 C.L.R., 208, 230, italics supplied.

19. 1 C.L.R., 208, 230.

A similar fate awaited the third argument advanced by Wise. "The consent *intended* by section 114 is a consent expressed by some positive action on the part of the Parliament, not one to be tacitly inferred from its inaction".[20] The comment might be made that whatever s. 114 "intended" it certainly did not seem to say so on its face.

The next two arguments were both overruled because of a previous decision of the Court in *D'Emden v. Pedder*[21] which had applied the doctrine of *McCulloch v. Maryland* to the Australian Constitution.

What appears clear so far is the completely different constructions placed on section 114 by Sir Samuel Griffith and B. R. Wise. Both constructions are, on the words of the section, permissible, but what is of present concern is what influences a judge to choose one rather than the other. The impact of his choice in a federal system is a tremendous one.

As O'Connor J. put it, "The section may in strictness bear either interpretation if we look merely at the words".[22] Each one of the judges in this case made certain assumptions about the nature of a federal system which determined the choice they would make when the final judgments were given.

Sir Samuel Griffith maintained: "There can be no doubt that the right of taxation is a right of sovereignty";[23] and that: "It is manifest from the whole scope of the Constitution that . . . the Commonwealth and the States are regarded as distinct and separate sovereign bodies".[24] Once he gets to this position it is easy to see that he is compelled to adopt a broad view of s. 114 in order to preserve this assumed "sovereignty" from destruction. If one sovereign can tax another then that other is no sovereign power at all. But it is only because there is "no doubt" about these propositions and that they are "manifest" to Sir Samuel that he comes to the decision he does. The basis for these unargued assertions will not be found in the judgments of the Court, or in the Constitution, but only in Sir Samuel Griffith's conception of the federal system.

O'Connor J., after honestly pointing out his predicament of choice that is cited above, went on to say: "But to get at the *real* meaning we must go beyond that, we must examine the context, consider the Constitution as a whole, and its *underlying principles* and any circumstances which may throw light upon the object which the Convention had in view, when they embodied it in the Constitution. . . . From the *very nature* of the Constitution, and

20. 1 C.L.R. 208, 232, italics supplied.
21. 1 C.L.R. 91.
22. 1 C.L.R. 208, 239.
23. 1 C.L.R. 208, 230.
24. 1 C.L.R. 208, 231.

the relation of States and Commonwealth, in the distribution of powers, it became necessary to provide that the sovereignty of each within its sphere should be absolute and that no conflict within the same sphere *should* be possible".[25] It will be seen that O'Connor J. gets to the same result as Griffith C.J. by appealing to the "real meaning" of the Constitution, its "very nature" and its "underlying principles". Again the reasons for decision are extra-legal.

The third judge, Sir Edmund Barton, put his judgment on a similar basis. In his view the Commonwealth "must be free"[26] from such impositions as the tax in issue so he too rejected the narrow view of section 114.

What comes out of an examination of this case is the fact that in the last resort the decision did not depend on the words of the Constitution because they were ambiguous and open to two quite different interpretations. The Court could only choose one interpretation rather than the other by making certain assumptions about the governmental system that was called into existence by the Australian Constitution. Whether these assumptions were correct or not is of no concern here; the important point is that the judges and not the Constitution decided whether the Municipal Council of Sydney could tax the Commonwealth Government. If this is true in the context of a case where there was a section of the Constitution directly purporting to deal with the point, how much more so must it be in other cases where the Constitution gives no, or only a partial, answer. No doubt it was this sort of consideration that led Professor (now Justice) Frankfurter to refer to the powers of a Court in a federal system as being "stupendous"[27] in their extent and implication.

This does not mean that a judge of the High Court has a completely free, unfettered, and so arbitrary, choice in each case that comes before him for decision. His choice is limited by the authority of decided cases and by the logic of the profession in which he is trained. But it should also be remembered that it is mainly the very difficult cases that get before the High Court, cases which go to the very fringe of authority or which raise novel questions. In this area the inevitability of choice determines the High Court's creative role.

There is, however, a theory that has a good deal of currency in Australia that claims the role of the judge as a mechanical one. To this theory and the reasons behind it we must now turn.

25. 1 C.L.R. 208, 239, italics supplied.
26. 1 C.L.R. 209, 233.
27. *Encyclopaedia of the Social Sciences*, Vol. IV, 132.

III

The most remarkable feature of the High Court's exercise of the power of judicial review has been the denial by its members that it is a process involving creative choice on the part of the persons in whom the power is vested. Sir Samuel Griffith's remark that, "it would indeed be a lamentable thing if this Court should allow itself to be guided in the interpretation of the Constitution by its own notion of what is expedient that the Constitution should contain or the Parliament should enact . . .",[28] finds its echo in the judgments of almost every justice who has ever sat on the Court. It was amplified by Sir Owen Dixon in a speech he made when he was sworn in as Chief Justice. He said on that occasion that, "the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatsoever to do with the merits or demerits of the measure. Such a function has led us all to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".[29]

This conception of the process of constitutional adjudication has had the affect of completely minimising the part played by the individual judge in that it suggests that the "law" and "legal reasoning" provide the answer to any question that may come before the Court. This "law" is completely apart from the judges who administer it and their sole function is to "find" it and then to "apply" it. It is to be found in the words of the Constitution, in decided cases and in the general principles of federal government. Once found its application to a particular problem is mechanical. Thus to criticize a judge for the result he comes to on the ground that another would be preferable is misconceived. The judge's choice is inevitable and determined for him by the "law". Personal preferences that stem from political and social ideas are completely irrelevant.

The fictional nature of this theory has been demonstrated by almost every writer who has written on the function of a Court in a federal system.[30] It will suffice to recall here Lord Denning's

28. *Attorney-General for New South Wales v. The Brewery Employees Union* (1908), 6 C.L.R. 486, 500.
29. (1952) 85 C.L.R. xi, xiii-xiv.
30. One of the earliest sophisticated discussions by an Australian writer is that by A. Inglis Clarke in *The Interpretation of a Written Constitution* which constituted ch. 11 of his book *Studies in Australian Constitutional Law* (1st ed. 1901).

thrust: "In theory the judges do not make law, they expound it, but as no one knows what the law is until the judges expound it, it follows that they must make it".[31]

The theory, no matter how artificial, has been a convenient one for the High Court and it helps to explain why it has never been subjected to the same rigorous criticism and analysis as the Supreme Court of the United States. Most commentators have been concerned to link the High Court's theory of judicial positivism with its readiness to strike down unconstitutional legislation and with the limited facts it deems relevant to enquire into when disposing of such issues.[32] In both enquiries the Supreme Court provides an interesting contrast. It has developed a number of doctrines which enable it to refuse to pass on many questions of constitutionality. These doctrines it seems spring from a self consciousness in the exercise of the power of judicial review that comes from a frank realization that it is a creative function with a tremendous impact on the government of the United States. It has no salve to its conscience that some "brooding omnipresence" called law provides mechanical answers that have no relation to the policy preferences of its justices.

Likewise the social and economic evidence that is heard by the Supreme Court in passing on constitutional questions is indicative of its awareness of the implications of judicial choice. The High Court on all but a few occasions has thought such material irrelevant to the legal issues before it.

All this is not necessarily to say that the High Court is a stupid body of lawyers who do not realize the importance of the role they play in Australian federalism and who subscribe to fictitious theories about the nature of the judicial process. It should be remembered that Sir Owen Dixon gave a reason for his insistence on a "strict and complete legalism". He said that this was "the only way to maintain the confidence of all the parties in federal conflicts."[33] By this he meant that in framing decisions, by methods and in terms, which suggest that they are decided by principles of law independent of the judges the confidence of the public in the court will be preserved. If decisions were seen sometimes to depend on no more than the personal preferences of the judges then the Court would be rocked by the storms that have at times threatened the Supreme Court of the United States. It is essential in his view that a legal approach to constitutional questions

31. *The Changing Law* (1950), Preface.
32. *e.g.*, Kadish, *Judicial Review in the High Court and the Supreme Court of the United States* (1959) 2 Melbourne U.L.R. 4 and 127; Sawer, *The Supreme Court and the High Court of Australia* (1957) 6 Journal of Public Law 482.
33. *op. cit.* note 29, xiv.

be utilized to preserve the respect and even the awe in which High Court judges are held. This approach is made very much easier in Australia than it would be in the United States because of the fact that the High Court is a general court of appeal on common law matters and also because in the last forty years almost all its appointees have been eminent silks with little or no political experience.[34] The first factor ensures the carrying on of the English legal traditions and the second means that the judges are not often in the public eye. Both make for a vastly different court from the Supreme Court of the United States.

The present interest in this theory of judicial positivism, whatever its reasons, is the effect it has had upon biographical interest in the members of the High Court. As has already been pointed out, there are only two such studies that have been published. This is in marked contrast to the position in the United States where there have been over one hundred published book length studies dealing with the lives and work of Supreme Court justices. As well as this the law reviews contain a veritable flood of articles written on particular aspects of a justice's work. It is surely no accident that this has happened in a country where the creative, governmental role of judges is freely avowed and where Supreme Court personnel are drawn from the politically active.

Once it is assumed that policy preferences enter into the judicial process then the influences that determine these preferences become a legitimate subject of study. Not only does it give coherence to the work of the individual judge, but such studies throw valuable light on the problems of government in a federal system.

In Australia we have seen, however, that objections to judicial biography are twofold. The first which would deny the need for such studies was based upon the view that the judges role was merely passive. Enough has been said already to demonstrate the falsity of this. The second was based upon the kind of reason that Sir Owen Dixon mentioned, that a strict legalism was necessary to the preservation of the confidence in the judiciary. This means, as he has claimed elsewhere,[35] that the administration of the law in its higher reaches should be cloaked by an anonymity and an air of mystery that will screen the work of the individual judge from the public eye.

It is true that using the guise of a rule of law dictating an inevitable result to cover up decisions based upon other factors undoubtedly preserves the dignity of the Court as an institution. This is a value that is not lightly to be discarded. On the other hand, constant repetition of the fiction obscures the necessity for

34. See Sawer *op. cit.* note 32, 496-502.

35. *op. cit.* note 7.

choice and prevents a clear statement of reasons, philosophies and ideals which have motivated the various justices of the High Court. If one disagrees with the assumptions made by the justices one can validly criticize the decisions to which they give rise. In a federal system as we have seen, the problem of judicial review is a problem of government, and in a federation where government is based upon democratic conceptions that aspect of government should not be entirely removed from public scrutiny. Awe and mystery are strange conceptions with which to surround an institution in a democratic country and they should give way to a respect and confidence born of a frank appraisal and understanding of the Court's function in the community.

IV

It has become increasingly common when writing on problems that are common to Australia and the United States to sub-title the article, "the Australian Experience". Thus one can read articles on, for example, "Full Faith and Credit, the Australian Experience".[36] In this area of judicial biography, however, we have no "experience" to contribute, so a brief examination of the United States experience in this area might be useful.

The vast mass of the writing may be roughly divided into four main categories.

First there is the "Life and Correspondence of . . .", which usually is a nostalgic literary remembrance written by a member of the justice's family or a close personal friend. It is interspersed with selections from the letters and the public papers of the judge. As a rule the only value in its publication would seem to be the personal papers it reproduces because it contains no critical comment.[37]

One Australian judicial biography would seem to fit into this category, and that is the biography of Sir George Higinbotham, who was Chief Justice of Victoria. It was written by his close friend, Professor Edward Morris of the University of Melbourne.[38]

Second, there is the published thesis that has been prepared in order to qualify for a post-graduate degree. This type of work

36. Zelman Cowen (1952) 6 Res Judicatae 1. See also Donovan *Retail Instalment Sales The Australian Experience* (1958), 33 New York U.L.R. 666; Cowen, *Diversity Jurisdiction: The Australian Experience* (1955), 7 Res Judicatae 1.

37. *e.g.*, Clifford, *Nathan Clifford: Democrat* (1922); Jay, *The Life of John Jay: with selections from his correspondence and miscellaneous papers* (1833); Kent, *Memoir of Henry Billings Brown* (1915); Mayes, *Lucius Q.C. Lamar: His Life, Times and Speeches* (1896); McRee, *Life and Correspondence of James Iredell* (republished 1949); Schuckers, *The Life and Public Services of Salmon Portland Chase* (1874); Story, *Life and Letters of Joseph Story* (1851).

38. Morris, *A Memoir of George Higinbotham* (1895).

generally focuses on the legal philosophy of the justice. It is usually entitled, "The Constitutional Doctrines of . . .", or "Mr. Justice . . . and the Supreme Court". Generally it contains a quite short biographical chapter followed by an analysis of the justice's opinions.[39] Increasingly volumes of this sort are appearing while the justice is still alive.[40]

The third type is the personal biography in which the man's life and public career are presented, but his work on the Supreme Court receives little or no treatment. It is regarded as an epilogue rather than as a climax of a career. In some cases this is due to the short period that the justice served on the bench, but in others the biographer is not professionally equipped and contents himself with stringing out quotations from the leading opinions his subject gave for a chapter.[41]

Three of the Australian biographies of members of the High Court fall into this category.[42] Indeed, so little did John C. Vockler think of Sir Samuel Griffith's work as Chief Justice of Australia that he treated this part of his career along with his poetical endeavours in a short chapter called "Chief Justice and Poet".[43]

Fourth, there is the full scale judicial biography. Here the man's formative years, his political career, his judicial work, etc., all receive extensive and detailed treatment.[44]

As well as these book length studies there are hundreds and hundreds of law review articles on various aspects of the work of each of the United States Supreme Court justices who have ever sat on the bench. The Index to Legal Periodicals is the catalogue of these.

If there is to be any development in this field of scholarship in Australia then it may well be that it will be mainly of the second and fourth type listed above. The first would not find a publisher

39. *e.g.*, Clark, *The Constitutional Doctrines of Justice Harlan* (1915); Hendel, *Charles Evans Hughes and the Supreme Court* (1951); Klinkhamer, *Edward Douglas White, Chief Justice of the United States* (1943); Konefsky, *Chief Justice Stone and the Supreme Court* (1945).
40. *e.g.*, Frank, *Mr. Justice Black, The Man and his Opinions* (1949); Williams, *Hugo L. Black—A Study in the Judicial Process* (1950).
41. *e.g.*, Cate, *Lucius Q.C. Lamar: Succession and Reunion* (1935); Hellman, *Benjamin N. Cardozo* (1940); Monaghan, *John Jay, Defender of Liberty* (1935); Smith, *James Wilson, Founding Father* 1742-1798 (1956); Weisenburger, *The Life of John McLean* (1937).
42. J. Reynolds, *Edmund Barton* (1948); Nettie Palmer, *Henry Bournes Higgins* (1931); J. C. Vockler, *Sir Samuel Griffith*, unpublished thesis in University of Queensland (1953).
43. *op. cit.*, Ch. XI.
44. *e.g.*, Mason, *Brandeis: A Freeman's Life* (1946); Paschal, *Mr. Justice Sutherland: A Man against the State* (1951); Pusey, *Charles Evans Hughes* (1951); Mason, *Harlan Fiske Stone: Pillar of the Law* (1956); Howe, *Justice Holmes: The Shaping Years* 1841-1870 (1957. This is the first of a projected three volume study); Beveridge, *The Life of John Marshall* (4 Vols. 1916-1919); Bent, *Justice Oliver Wendell Holmes* (1932); Biddle, *Mr. Justice Holmes* (1943).

in Australia and the third may not be written for the very good reason that the practice has been towards only appointing justices who are distinguished lawyers. In the nature of things it would be hard to write about a lawyer and ignore his life's work. The development we may expect in the next few years in Australia will most probably be in the second category. With the development of post-graduate facilities in our Law Schools it seems inevitable that judicial biography in some form will become the subject of many theses submitted for the higher degrees. For the rest the increasing size of the full time academic staff of our Law Schools provides the hope that one day full scale studies of our High Court justices will appear.

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