A FULL DAY'S WORK: A STUDY OF AUSTRALIA'S FIRST LEGAL SCHOLARLY COMMUNITY

SUSAN BARTIE*

I INTRODUCTION

It is both tempting and convenient to use broad labels to explain the essence of a group of legal academics. Looking back on past generations, legal scholars and their scholarship are often caricatured in an effort to present an argument that we now exist in more enlightened times – 'look how far we've come' – or to highlight that the ugly remnants of prior orthodoxy have, despite best efforts, persisted. The unwitting victims in these stamping and labelling exercises are of course legal academics, with their varying abilities and interests either subsumed into general categories or explained as exceptions to the status quo.

This study grew out of a suspicion and uneasiness about labels commonly attributed to Australia's first community of full time legal academics. Before the Second World War law schools were run primarily by part-time practitioner teachers, led by a full time professor who acted as Dean.[1] In the late 1940s and early 1950s the number of law students grew and Australian law schools adopted the practice of appointing full time academic staff to replace/supplement the practitioner teachers, establishing the first community of full time Australian legal academics (the 'First Community'[2]). Members of the First Community have since been repeatedly portrayed in reports and articles as strongly wedded to expository techniques, possessing a formalist mindset and being heavily influenced by the needs of the profession. Their books and teaching methods are advanced as evidence of this fact. Few members of this group are thought to have engaged in serious jurisprudential study, critique or to have fully considered the adoption of learning and methods from other disciplines to law.

This study suggests that this characterization underestimates the strength and ambition of this First Community and that several of the premises upon which

---

* Adjunct Professor, University of Adelaide. I am grateful to John Gava, Anne Hewitt, Ngaire Naffine and an anonymous reviewer for their valuable comments on drafts of this paper and to David Hambly, Wilfrid Prest, Eric Richards, Margaret Thornton and Leslie Zines for their helpful suggestions during earlier stages of this project.

1 At the University of Melbourne in the 1930s Paton (Professor of Jurisprudence) and Bailey (Dean) constituted the full time academic staff. At the same time the University of Sydney was divided into two separate departments, the Department of Law and the Department of Jurisprudence and International Law with a professor heading each of the departments. Beasley was Dean at the University of Western Australia both prior and subsequent to the war. A further full time academic position was not established until 1947. Shatwell acted as Dean at the University of Tasmania Law School from 1934 until he moved to the University of Sydney to become Dean in 1947. He was the only full time academic member of staff. His predecessor, McDougall, had been assisted by a full time lecturer. Campbell, Bonython Professor of Law, was the only full time member of academic staff at the University of Adelaide's law school throughout the 1930s. An undergraduate law school was not established at the Australian National University until 1960 which was at that time largely staffed by full time legal academics. See also David Weisbrot, *Australian Lawyers* (1990) 122.

2 This is a study of the full time legal academics employed at the Universities of Western Australia, Queensland, Melbourne, Sydney, Adelaide, Tasmania and the Australian National University.

Australian legal scholarship have been explained and critiqued are false. To provide a more balanced and representative picture of the First Community's scholarly preferences and ambitions than can be attained from their book and article publication lists, this study draws on a less prominent part of Australia's legal scholarly landscape: the scholarly book review. As the First Community were prolific book reviewers, the first twenty years of their reviews published in university law journals are a rich repository of very good evidence of the thinking and workings of this group of academics.

Unlike the conventional portrayal, the book reviews reveal that many members of the First Community were strongly committed to legal meta-scholarship,[3] were familiar with leading jurisprudential thought on how law ought to be conceptualized and approached for the purposes of legal education and scholarship, and, strongly admired approaches to law associated with the American Legal Realist and Legal Process schools. They looked to eminent scholars for leadership, rather than taking their cues from the local profession or judges. From the outset, many members of this community viewed law as an instrument for social change and aspired to depart from the seemingly old fashioned ways of their English contemporaries. English books were the subject of many brutal critiques. The First Community wanted to write and read 'adventurous' scholarship that pioneered new ground and did away with conventional ideas. Many endorsed the incorporation of studies from disciplines outside of law and advocated for the critique of law and its institutions. Deeper learning – 'theory' – was generally embraced and encouraged, so long as it had a link to law reform. They were ambitious, robust and reflective.

The American influence may not come as a surprise. It has been noted elsewhere that many members of this First Community completed graduate degrees at elite American law schools and that professors from Harvard and other American law schools visited the First Community at this time, providing comment and encouragement on the development of the Australian schools.[4] Further, the presence of Julius Stone at the University of Sydney – who studied at Harvard in the 1930s, was influenced by Roscoe Pound and wrote books firmly located within the Realist tradition (developing the ideas within that movement or mood) – suggests that, at least at that Australian law school, there were clear Realist sympathies.[5]

What has not been clearly revealed in the general accounts of this period, however, is the *extent* of this influence on prominent members of the First Community throughout *most* of the Australian law schools. That is the extent to which the First Community aspired to be more like their American – as opposed to English – counterparts, wanting to engage in a rigorous critique of law and its institutions. Several general accounts seem to suggest that the First Community after the Second World War taught and wrote in a positivist, scientific, unquestioning and uncritical manner. The implication from this is that members of the First Community – at least in the late '40s

---

3 A term I use for convenience to describe scholarship about scholarship in law. See, Susan Bartie, 'The Impact of Legal Meta-Scholarship: Love Thy Navel' (2009) 18 *Griffith Law Review* 727.

4 For example, Zelman Cowen while Dean of the law school at the University of Melbourne in the 1950s took a Chair at the University of Chicago, developed a strong profile in the US and encouraged other members of full time staff to study and teach abroad. See, John Waugh, *First Principles: The Melbourne Law School 1857 - 2007* (2007) 152 – 153, 178 – 179.

5 This is captured well in Stone's biography by Leonie Star, *Julius Stone an Intellectual Life* (1992) 81-188. Star writes that 'it has been said that the focus of [Stone's] intellectual interests remained in the United States' at 116. Parkinson has said that the Realist critique had 'able exponents in Australia' and considered Stone to be the most influential: See, Patrick Parkinson, *Tradition and Change in Australian Law* (3rd ed, 2005) 198.

and early to late '50s – were mostly sympathetic to these ways of approaching and thinking about law.[6] The general accounts suggest that it was not until the late '60s/early '70s that the Realist way of doing things – along with other critiques of prior orthodoxy – grew in momentum and a larger number of scholars began to criticize and question the scientific method, some turning to learning in other disciplines.[7] In this the First Community are held to have much in common with their English counterparts. In England many scholars at this time were hostile to learning from the social sciences and refrained from earnest criticism of the common law or legal institutions – institutional respect was paramount to the integrity of the law and those who questioned it were outcasts.[8] Similarly in Australia it has been implied that it was only the scholars at the margins who dared divorce themselves from positivist conceptualizations of law and who engaged in open and frank critique of laws and institutions.[9] It suggests that Australia adopted England's approach to scholarship as well as their laws.

What this study demonstrates is that this general characterization underestimates the strength of ambition and desire held by *many* members of the First Community to approach both the study and teaching of law in a similar way to leading American jurisprudential thought at the time and robustly to criticize the development of the

---

6 Chesterman and Weisbrot wrote that prior to the 1960s '[t]he bulk of legal scholarship was firmly located in Austinian positivism, stressing above all the identification and analysis of "black letter" rules'. Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 714. They cited the section of the Pearce Report on 'research output' in support of this proposition: Dennis Pearce, Enid Campbell and Don Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), para 1.20. Writing of the same period James said that 'Australian law schools embraced legal scientism or the "law as science" approach that had been developed in the United States nearly three quarters of a century earlier. This approach to teaching law deemphasized the connections with legal practice and, at the same time maintained the separation of law from other disciplines in the university. The taking of a scientific approach to teaching law involved dividing the law into discrete conceptual fields, each with its own set of principles, while excluding questions of social policy, politics and the use of non-legal data. Law was taught as "a system of rules … ordered logically within an internally consistent, hermetically sealed legal universe". There was no need to look beyond the confines of legal doctrine to understand law and its operation. Legal scientism thus served to enhance and protect the disciplines new found academic credibility'. Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 968 quoting from Marlene Le Brun and Richard Johnstone, *The Quiet [R]Evolution: Improving Student Learning in Law* (1994), 8.

7 Kercher refers to Legal Realism as being 'so prominent in Australia's University law schools from the *1970s* onwards'. Bruce Kercher, *An Unruly Child, A History of Law in Australia* (1995) 189 (emphasis added). With respect to Realism James says that 'no comparable movement occurred in Australia, either contemporaneously or subsequently' (James, above n 6, 968 citing Margaret Thornton, 'Portia Lost in the groves of Academe Wondering What to Do about Legal Education' (1991) 9(2) *Law in Context* 9, 10) and that '[i]t was not until the influence of radicalism, feminism and the Critical Legal Studies ('CLS') movement in the 1960s and 1970s that the dominance of legal doctrinalism and scientism in Australian legal education began to be subverted'. (969)

8 See, the account of this same period in English legal academia in David Sugarman, 'Beyond Ignorance and Complacency: Robert Stevens' Journey through *Lawyers and the Courts*' (2009) 16 *International Journal of the Legal Profession* 7, 8-10.

9 James writes that 'Even with the new generation of professional teachers, legal critique remained relatively rare; indeed any suggestion that the scientific approach might be deficient was regarded as "deeply subversive"'. James above n 6, 969 quoting Rob McQueen 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture and Policy* 3, 5.

common law and its institutions. It confirms that, from the very inception of this First Community, the instrumental and critical spirit was alive and awaiting a time when greater opportunities for writing and publishing would allow it to flourish. It suggests that while there was some opposition to this approach, it was not as strong a deterrent as some accounts would lead us to believe. Unlike in England, the studying of law with reference to learning from other disciplines seemed like a viable option that would be well received by the First Community's peers. Many members of the First Community wanted – if not expected – to read critiques of the law and suggestions for reform by their academic counterparts. Fears about scholars threatening the integrity of institutions were certainly not nearly as great as those held in England.

II LOOKING BEYOND 'OUTCOMES'[10]

The findings outlined here are drawn from a neglected and endangered part of academic scholarship, the scholarly book review.[11] Many of the general accounts of this period focus either on what was happening in the class room *or* what substantial pieces of scholarship were being written and published by this First Community *or* on the advocacy that was launched during the 1960s in order to attract more resources to Australian law schools. They draw their impressions from the more obvious 'outward manifestations of Australian legal scholarship'[12] which were limited for various reasons including the general unwillingness of publishers to take on legal monographs that lacked commercial viability (non-student or practitioner texts) and the demands of teaching, which restricted the ability of Australian legal scholars to engage in research. MacDougall captured the situation well when in the mid 1960s he said that:

> For a variety of reasons lecturers at Australian law schools have not made many significant contributions to legal literature. Most publications have been teaching tools – with 'case books' becoming increasingly fashionable. Unfortunately this has meant that Australian publications neither reflect nor record the considerable amount of original and perceptive legal reasoning which emanates from the bench, the professions and the university in Australia.[13]

Focusing on these outward manifestations is therefore unlikely to capture the ambition and 'perceptive legal reasoning' that was circulating within Australian law schools at the time.

Adding to this general picture of legal academic thought, in reports and articles written in the 1960s the Australian law schools were portrayed as deprived institutions,

---

[10] The phrase 'research outcomes' is well known in Australian University circles as it is used frequently in University governance. It embraces the idea that scholarship is measurable and only published work in recognised scholarly journals counts for the purposes of funding and promotion. It embraces the idea that scholarship can and should be measured.

[11] There has been a noted decline in the number of book reviews written and published across disciplines.

[12] An expression used by Chesterman and Weisbrot who based their impressions of this period on the 'outward manifestations of Australian legal scholarship'. Chesterman and Weisbrot, above n 6, 713.

[13] Donald MacDougall, 'Review of Norval Morris and Colin Howard *Studies in Criminal Law*' (1963-66) 2 *Adelaide Law Review* 270, 270. In another review MacDougall lamented the fact that Australian legal academics were not able to embark on collaborative projects with other disciplines, as was the case in America: See, Donald MacDougall, 'Review of *Aims and Methods of Legal Research,* A Conference held at the University of Michigan Law School' (1960) 3 *Sydney Law Review* 401, 403.

starved of scholarly stimulation and overrun by increasing numbers of students, reports written largely in order to convince governments and others of the need to inject greater funding into the law schools.[14] The implication was that the law schools did not previously have the ability to engage in robust legal scholarship, and that the bulk of scholars were chewing over the doctrinal techniques of their predecessors and English ancestors. There is no reason to doubt that there were considerable pressures placed on this First Community, hampering their capacity to produce scholarship and that more resources were required for both teaching and scholarship. However, these accounts tend to ignore the extent to which many members of the First Community had already thought through the important role of the legal scholar, the types of ideas and methods in scholarship best suited to that role and had absorbed, considered and developed some of the more 'radical' ideas circulating in other common law countries. The general accounts, by focusing on the most visible outward manifestations, therefore tend to capture only a small selection of the First Community's views and attitudes towards scholarship. They present only a part of the picture, ignoring the fact that some of the inward manifestations of legal thought were being captured – at least in part – in other less prominent parts of university law reviews.

The account of the First Community presented in this article is derived from a study of the book reviews written by the First Community and published in the Australian University Law Reviews established from 1948 onwards:[15] *University of Western Australia Law Review* 1948 – 1968; *University of Queensland Law Journal* 1948 – 1968; *Sydney Law Review* 1953 – 1968; *Melbourne University Law Review* 1957 – 1968; *University of Tasmania Law Review* 1958 – 1968; *Adelaide Law Review* 1960 – 1968; and, *Federal Law Review* 1964 – 1968. It is a study of the first 20 years of these book reviews which consist of the review of 357 books occupying over 807 pages of the university reviews.[16] The reviews averaged 2 1/3 pages in length, with the longest

---

[14] At this time the case was made that if more resources were injected into the law schools, proper research centres could be established to help with the important job of developing the law and law graduates could be trained to be better equipped to develop the law. The establishment of research doctorates and scholarship could also help with this task. This picture is presented in the section of the Martin Report (a report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commissions Committee on the Future of Tertiary Education) published in 1964 dealing with legal education. The report led to significant reforms of universities and additional funding. The section dealing with legal education is rumoured to have been written by Professor David Derham. For examples of similar advocacy see also, David Derham, 'Legal Education – University Education and Professional Training' (1962) 36 *Australian Law Journal* 212; David Derham, 'Legal Education – A Challenge for the Profession' (1969) 43 *Australian Law Journal* 530; Zelman Cowen, 'Legal Education at the Cross-Roads' (1957) 31 *Law Institute Journal* 213.

[15] The University of Western Australian Law Review (then entitled the *Annual Law Review*) was the first university law review. In 1935 the law student's society of Victoria established a journal, *Res Judicata,* which was a university journal of sorts. Its successor, a fully fledged university Law Review, the Melbourne University Law Review, appeared some years later in 1957 at the instigation of the Dean, Zelman Cowen.

[16] There were also several review essays, being longer book reviews that engaged more forcefully with the author's thesis and developed a thesis of their own. See, Hutley, 'Logic and the Legal Process' (1948) 1 *University of Western Australia Law Review* 172; Julius Stone, 'Legal Development and Trends of Thought in 20th Century England' (1960) 3 *Sydney Law Review* 439; Geoffrey Bartholomew, 'Dicey and the Development of English Private International Law' (1959) 1 *University of Tasmania Law Review* 240.

review consisting of 29 pages.[17] This study involves considering the selection of books reviewed, as well as the comments and evaluative criteria used by the First Community, with the aim of revealing their scholarly aspirations and interests.

The outcome of a review was frequently dependent on whether the author's conception of law matched that of the reviewer and whether it fitted with the goals associated with legal scholarship at this time. The book reviews can therefore tell us something about what this conception and those goals were and provide a resource for learning about the values and interests of the First Community that overcomes the limitations inherent in a study which is limited to the fewer books and articles written by this group. While it may not be a perfect method and does not provide a complete picture,[18] it does have its obvious strengths. The book reviews are a contemporaneous record of some of the thoughts of 89 members of the First Community. The record is not tainted by nostalgia or distorted by the humility that may come through in an interview with members of the First Community. They capture what the First Community was reading and being inspired by, which adds a further layer of insight alongside their published works. The book reviews are published in reviews which the First Community regarded as representative of the growing maturity of the law schools and their full time academics.[19] The law reviews provided a means by which the First Community could communicate their aims and aspirations to the outside world.

III THE BEAUTY OF BOOK REVIEWS

This study of book reviews is based on the premise that academic book reviews are valuable to disciplines in general and that the book reviews of the First Community are of special significance. These twin justifications for this study of book reviews are discussed in turn. The argument is that book reviews can tell us a great deal about a discipline – it is not a plea for more book reviews.[20]

---

17 See, Douglas Payne, 'Review of Peter Brett *The Beamish Case*' (1966) 7 *University of Western Australia Law Review* 576.

18 As most members of the First Community published book reviews primarily in their home journal the university book reviews of the first 20 years capture greater contributions from the academics from the longer established university journals. Members of the First Community from the University of Western Australia, Sydney and Melbourne are therefore more strongly represented. While the University of Queensland Law Journal was one of the earliest journals, established in 1948, it only included book reviews in its first two volumes. This dearth of meta-disciplinary discourse is consistent with reports of the law school at this time. Tarlo explained that '[f]or twenty years after the Second World War, during which period the other Australian schools were changing fundamentally, the University of Queensland Law School changed very little indeed'. He commented on the small number of staff, poor working conditions, crushing teaching loads, inadequate facilities and the dominance of the more 'conservative' elements of the legal profession. Hyman Tarlo, 'Law School in the Sixties: A Fragmented Memoir' (1985) 14 *University of Queensland Law Journal* 14, 16 -17. This study therefore provides an imperfect but largely representative picture. Further, some academic reviews have been left out where there was no clear indication of who had authored the review, for example, where a mere initial is provided at the end of a review. Reviews authored by Research Assistants have also been left out.

19 The development of university law reviews and the founding of the Australasian Universities Law Schools Association have been considered to be signs of the growing maturity of Australian law schools during the '50s and '60s. See, Hyman Tarlo, 'Law Schools and Law Teachers in Australia: 1946-1974' (1975) 9 *University of Queensland Law Review* 26, 26; Kenneth Bailey, 'Foreword' (1964) 1 *Federal Law Review* viii.

20 I would, however, support such a cause.

The academic book review has a long history with the first scientific scholarly journals, which were published in the 17th century, being established (at least in part) as a way to publish book reviews.[21] Ironically, as the number of academic book reviews published in journals across disciplines has declined there has been a sizable increase in the number of studies devoted to book reviews which recognise both their uniqueness and importance to university disciplines.[22] For example, in her study of the flow of information within and among academic disciplines in the social sciences and humanities, Lindholm-Romantschuk claimed that scholarly book reviews are 'significant indicators of scholarly communication, and can successfully be utilized to trace the flow of information within and across knowledge domains'.[23]

Book reviews are a form of scholarly communication and public peer evaluation. They are much shorter and are most often written in a more uninhibited style than a scholarly book or article. The reviews communicate with the author of the book under review and other scholars within the discipline as well as with some external audiences.[24] They are a form of publicity, notifying the academic world of a new contribution as well as a form of meta-scholarship seeking to engage with members of the discipline on questions of method and content – what should be studied, how and why? By responding to the ideas in the work and passing judgment over both the substance and methods used, as well as conversing with other reviewers, a review can 'locate its book in an ongoing conversation about the materials, methods, and values of a profession'.[25]

Hyland refers to book reviews as a 'crucial site of disciplinary engagement' where the 'personal stakes are much higher' than with the average review essay.[26] There is a heightened risk of personal conflict where 'we see the workings of the peer group in perhaps its most nakedly normative role, where it publicly sets out to establish standards, assess merit and, indirectly evaluate reputations'.[27] As the social consequences can be grave, 'interpersonal considerations are likely to be critical'.[28] A review therefore has the potential to tell us about the values of both the author and the

---

21 See, Ken Hyland, *Disciplinary Discourses: Social Interactions in Academic Writing* (2000) 42.

22 These studies have occurred in the social sciences and humanities where (unlike the natural sciences) scholarly books continue to be an important forum for the dissemination of ideas and have been fuelled in linguistics by the recent recognition of book reviews as a distinct literary genre. See, Ana Moreno and Lorena Surez, 'A Study of Critical attitude Across English and Spanish Academic Book Reviews' (2008) 7 J*ournal of English for Academic Purposes* 15, 16. Hyland refers to book reviews as a 'neglected genre': See, Hyland above n 21, 41.

23 Lindholm-Romantschuk studied scholarly book reviewing of an 'elite sample of scholarly monographs published by university presses between 1971 and 1991' (vii) and concluded that there is a 'great deal of cross-disciplinary information exchange within and among the humanities and the social sciences,' (viii) suggesting that the boundaries between disciplines may be 'more permeable than has previously been thought'. (ix) Her study supports the idea that book reviews may have a significant influence within a discipline. Book reviews are therefore being used to complement larger projects on the sociology of knowledge. Ylva Lindholm-Romantschuk, *Scholarly Book Reviewing in the Social Sciences and Humanities: The Flow of Ideas within and among Disciplines* (1998) viii.

24 Hyland refers to the author of the book reviewed as the 'primary audience of the review'. Hyland, above n 21, 41.

25 Michael Adams, 'In the Profession: Re-Viewing the Academic Book Review' (2007) 35(2) *Journal of English Linguistics* 202, 202.

26 Hyland, above n 21, 41.

27 Ibid.

28 Ibid.

reviewer as well as highlighting the standards of the entire discipline and what constitutes 'acceptable' critique.

Criticism has been levelled at the book review on the basis that it is a lesser form of scholarship. Because book reviews do not normally adhere to all of the scholarly conventions associated with larger works like articles and books (such as, centring on the book under review rather than related literature, expressing 'mere opinion',[29] failing to advance original ideas[30]) they have been consigned to the periphery of the discipline.[31] The decline in the number of book reviews supports this idea, as does the fact that reviewers generally receive little academic reward or acclaim for a review – no matter how insightful.[32] A common criticism of book reviews – which can be levelled at many forms of academic peer evaluation – is that there is an absence of clear evaluative criteria. It has also been said that not only are few book reviews written, even those in print are seldom read. Adam's writes that '[b]ook reviews aren't even the red-headed stepchildren of academic publishing; if they had red hair, people would notice them'.[33]

These critiques fail to appreciate that the informal, less guarded style is one of the chief virtues of book reviewing. The lower prestige afforded to this type of publication may lead the reviewer to believe that they have less to prove, they can:

> ... argue, correct, inquire, praise, quibble, speculate, suggest, and engage in other critical activities that thrive in a relaxed medium. ... Reviewers write with attitude, their meta disciplinary assumptions in full view. And we want it that way, because we value the reviewer's opinion, not only in the sense that we appreciate it, but also in the sense that we simultaneously weigh the value of the reviewer's response to the book and the value of the book itself. A good book review gives rise to meta disciplinary considerations: the book and the review triangulate with the reader's ruminations; the three parties sit down to conversation about the profession, if only in the reader's mind.[34]

Adams speaks of a casual conversation that can stimulate deeper insight and understanding. The shorter length of book reviews means that academics can read more of these reviews in a shorter time frame which is especially important in an age where the size and complexity of academic literature is generally growing and diversifying to a point where it is extremely difficult to keep up.

Several *legal* scholars have written in support of book reviews, arguing that their meta-disciplinary qualities are especially needed in law where from the 1980s there has been great change prompted by an increase in interdisciplinary and critical works. Scholars have also suggested that more reviews would improve the quality of law

---

29 See, Patricia Sabosik, 'Scholarly Publishing and the Role of Choice in the Post Publication Review Process' (1988) *Book Research Quarterly Summer* 10-18.

30 Lindholm-Romantschuk, above n 23, 37.

31 See, Nigel Jamieson, 'The Ubiquitous Book Review' (2006) 17 *Law Critique* 201, 204-206.

32 The exception to this rule is the larger more formal type of book review: the review essay. In contrast to the reviewer, the author of the book may find that the review has a significant bearing on his or her reputation and career, with favourable reviews being advanced in aid of promotion applications.

33 Michael Adams, above n 34, 202.

34 Adams, above n 34, 203.

books.[35] Allen in 1981 drew a causal link between the decline of book reviews and the decline of meta-scholarship which he felt was deeply needed in law at that time where 'new forms of legal scholarship [were] struggling to be born and when the premises upon which serious scholarship [were] to rest are rendered problematical by the anarchy of values characterizing all aspects of modern life'.[36]

Schneider in 1998[37] and Levinson in 2009[38] thought that book reviews would assist scholars to locate valuable interdisciplinary work in law in circumstances where accessing work from law and other disciplines was crucial to the disciplines' interdisciplinary development. They put a strong case for book reviews, supporting the Michigan Law Review's initiative of devoting a special annual issue to purely publishing book reviews.[39] These comments suggest that book reviews are as valuable – if not more valuable – in law as they are in other disciplines.

The First Community's book reviews are rich in meta-disciplinary discourse. The sheer number of First Community reviews (357) coupled with the number of reviewers participating in their production (89 – a majority of the First Community) suggests that the First Community took them seriously. As time went on the style of book reviews took on an air of greater formality.[40] Senior academics contributed just as much as their junior colleagues with many of the most frequent reviewers drawn from professorial ranks.[41]

Relative to subsequent years, the First Community's contribution to book reviewing is large. For example, if we consider the first volumes of each of the University law reviews studied here we find that they contain 97 book reviews written by members of the First Community. In comparison in the 2007 volumes of the same journals a mere 18 book reviews were published and in 2008 only 12 reviews were published (along with 2 review essays). Perusing Australian and international law journals beyond those studied here provides no reason to suppose that the current much larger generation of legal academics is simply diverting their book reviewing efforts elsewhere. The First Community, on the other hand, also published many book reviews in local professional journals as well as foreign journals, adding to the 357 figure. As developed further in the next part, the book reviews of the First Community were

---

35 Carver, for example, implied that in 1979 many law books were limited reference works, 'wedded to case analysis' and pedagogical concerns, rather than being scholarly works that 'can be read from cover to cover'. He aligned academic book reviews with the social sciences and humanities where the books reviewed are primarily scholarly monographs and forecasted that more book reviews in law would highlight the inferior status of works other than monographs (being books to be read in their entirety rather than reference works). David Carvers, 'Book Reviews in Law Reviews: An Endangered Species' (1979) 77 *Michigan Law Review* 327, 332-333.

36 Francis Allen, 'In Praise of Book Reviews' (1981) 79 *Michigan Law Review* 557, 558.

37 Carl Schneider, 'The Book Review Issue: An Owner's Guide' (1998) 96 *Michigan Law Review* 1363.

38 Sanford Levinson, 'Essay: The Vanishing Book Review in Student-Edited Law Reviews and Potential Responses' (2009) 87 *Texas Law Review* 1205.

39 This was an initiative of symbolic importance based on the idea that if leading journals encourage the writing of book reviews others will follow their lead. Carvers, above n 37, 332.

40 Reviewers in the Melbourne and Sydney Law Reviews routinely included footnotes, with the largest number of footnotes, 46, appearing in Professor Morrison's 4 ½ page review of Lon Fuller's, 'The Morality of Law' published in the fifth volume of the Sydney Law Review (1965) 5 *Sydney Law Review* 181.

41 Three of the four top reviewers, Peter Brett (38 reviews), Ross Parsons (18 reviews), and Zelman Cowen (12 reviews) all reached (or had already reached) professorial rank within the period studied and continued to review.

evaluative, critical works – not works of mere publicity. While like most collections of book reviews, the majority end on a positive note,[42] they contain layers of criticism. They also display desirably candid qualities, lacking the self consciousness found in most other works of scholarship.[43] The reviews of the Fist Community were written with ease, yet taken seriously.

IV THINKING HARD ABOUT HARD THINGS[44]

A *A Double Life*

Studying the Australian university book reviews reveals two striking features of the First Community's attitude towards scholarship. The first is their commitment to making sure that there were sufficient books and materials covering the growing body of Australian laws (case law and legislation). Providing access to commentaries and case and legislative extracts was crucial to the working of the profession and teaching of students. The second is the many prominent reviews that evaluate books based on the norms that first class scholarship should be (1) adventurous, (2) incorporate learning from other disciplines, (3) break away from the expository tradition and (4) view the law with an instrumental mindset. The reviews suggest that members of the First Community believed that they had a responsibility to reflect upon and shape the conception of law and its study for the purpose of legal education and law reform. In this way the reviews speak of a double life, one which is critical of formalist mindsets and another that appears to perpetuate them. These two lives, as revealed in the book reviews, are considered in turn.

It was becoming more and more apparent in the 1950s and '60s that Australia's laws were departing from the English and that English texts were therefore less relevant to practitioners and students in Australia.[45] Further, growing student numbers were placing a strain on library facilities, making it difficult for students to gain access to the

---

42 Studies of book reviews across disciplines demonstrate that most reviewers give mainly positive reviews. See, Lindholm-Romantschuk, above n 23, 38.

43 Numerous examples could be provided here. To provide some flavour, Pannam (breaking all current rules of political correctness) said that when reading Geoffrey Sawer's, '*Australian Federal Politics and Law 1929-1949*' (1963) 4 *Melbourne University Law Review* 290, 'one gets the same feeling as that which comes from looking at an X-ray photograph of a beautiful woman. You are shown the skeleton but something seems to be missing'. Downer began his review of Baxter, 'Studies in Accounting' (1951) 2 *University of Western Australian Law Review* 190, with a note of surprise: 'Accountants, it seems, are remarkably human'. Morris began a review with 'I confess (which does not come easily to a reviewer) that I have not read the book'. Norval Morris, 'Review of Rollin Perkins *Criminal Law*' (1960-62) 1 *Adelaide Law Review* 101, 101. He did go on to say that this was because he regarded it as a reference book, not a book to be read from cover to cover.

44 This is a quote from Zelman Cowen, 'Review of Morris Ginsberg, "Law and Opinion in the Twentieth Century"' (1960) 2 *Melbourne University Law Review* 434, 435.

45 See, comments to this effect in Horst Lücke, 'Review of Starke and Higgins (ed), "Cheshire and Fifoot, The Law of Contract"' (1966) 2 *University of Tasmania Law Review* 331, 331; Alex Castles and Colin Howard, 'Review of Peter Brett *Cases and Materials in Constitutional and Administrative Law*' (1963) 2 *Adelaide Law Review* 141, 142.

primary materials,[46] the availability of case books and texts containing extracts of primary materials was critical to the basic functioning of Australian law schools. A large number of the book reviews at this time were therefore devoted to commenting on the suitability of English texts to Australian conditions and whether the new Australian books appropriately covered the significant cases and legislation for use in the class room and by practitioners. The book reviews were used to assist practitioners in their selection of texts for practice as well as to help other academics choose books for students.[47]

English books were repeatedly evaluated according to whether they paid attention to Australian laws and whether they accurately captured the Australian position: for example, Brett said that he would like Robson in subsequent editions of his work to 'look overseas, not just in England'[48] and Waller criticised Cross for focusing on English rather than Australian cases.[49] Similarly Australian books were often critiqued according to whether they covered sufficient Australian material, as even within Australian texts there was a continued tendency to focus on developments in England: MacDougal praised Morris for providing a 'much needed Australian contribution to the literature on criminal law',[50] while Sutton found it 'regrettable' that Samek's work referred to 'so few Australian cases' in circumstances where the book was 'written primarily for Australian students'[51] and Kavass considered that the achievement of Higgins' work was that 'for the first time there is an Australian work on the law of

---

46 Morison refers to the strain on library facilities in William Morison, 'Review of Morris *Cases on Private International Law*' (1954) 1 *Sydney Law Review* 285, 285. MacDougall, in his largely negative review of 'Walter Harrison *Cases on Land Law*' (1958) 1 *Melbourne University Law Review* 578, 579: says that he has a 'grudging respect for what Professor Harrison has achieved. The desperate inadequacy of [Australian] university law libraries forced him to collect leading cases rather than teaching materials'.

47 For example, the following are reviews of books that are of a clear practitioner orientation: Walter Harrison, 'Review of William Allen *The Queensland Solicitor's Manual*' (1949) 1 *University of Queensland Law Journal* 85; Walter Harrison, 'Review of Percy Joske *The Law and Procedure at Meetings*' (1949) 1 *University of Queensland Law Journal* 87; Harold Ford, 'Review of Kevin Anderson *Workers Compensation Acts*' (1959) 2 *Melbourne University Law Review* 282; Francis Donovan, 'Review of Clive Schmitthoff *Palmer's Company Law*' (1960) 2 *Melbourne University Law Review* 435; Leslie Downer, 'Review of Bolton *Apportionment Tables*' (1951) 2 *University Western Australia Law Review* 185; Ian McCall, 'Review of Percy Joske *Law of Marriage and Divorce*' (1967) 8 *University of Western Australia Law Review* 267.

48 Peter Brett, 'Review of William Robson *Justice and Administrative Law*' (1952) 2 *University of Western Australia Law Review* 462, 464.

49 Peter Waller, 'Review of Rupert Cross and Asterley Jones, *An Introduction to Criminal Law*' (1961) 3 *Melbourne University Law Review* 92, 93. See, also Peter Waller, 'Review of Harry Street *Principles of the Law of Damages*' (1963) 4 *Melbourne University Law Review* 288, 288. See, also Douglas Smith, 'Review of Roger Rideout *The Right to Membership of a Trade Union*' (1964) 1 *Federal Law Review* 178, 181-182; Frank Nearsey, 'Review of Rupert Cross *Evidence*' (1958) 1 *University of Tasmania Law Review* 161, 162; Leslie Zines, 'Review of Wofgang Friedmann *Principles of Australian Administrative Law*' (1964) 1 *Federal Law Review* 172, 172; Peter Waller, 'Review of Glanville Williams *Criminal Law the General Part*' (1962) 3 *Melbourne University Law Review* 552, 553; Clifford Pannam, 'Review of Harry Street *The Law of Torts*' (1964) 4 *Melbourne University Law Review* 420, 422; Max Atkinson, 'Review of Rupert Cross *Evidence*' (1964) 2 *University of Tasmania Law Review* 100, 101; Lücke, above n 45, 333; Francis Donovan, 'Review of Chesire and Fifoot *Law of Contract*' (1957) 1 *Melbourne University Law Review* 278, 278.

50 MacDougall, *Criminal Law,* above n 13, 270;

51 Kenneth Sutton, 'Review of Robert Samek *An Analytical Guide to Contract and Sale of Goods*' (1963) 4 *Sydney Law Review* 337, 338.

partnership which relies for its authorities predominantly on Australian judicial decisions'.[52] The reviews therefore demonstrate that reviewers were searching for and locating books which adequately 'covered' Australian cases and legislation for use as reference and teaching materials.

The idea that the First Community was concerned with making sure that students and practitioners had sufficient and increasing access to summaries of Australian laws or of similar English laws is further supported by the number of English and Australian books reviewed. Of the 357 books reviewed by the First Community, 46% (164) were written from an English perspective, primarily consisting of references to English laws. Of the remainder, 36% (128), were of Australian origin and 13% (48) were from the US. There was a scattering of other foreign works – 5% (17) – from New Zealand, the Netherlands, Singapore, France, Scotland, India, Austria, Germany, Canada and South Africa.

By focusing so much on the coverage of cases and legislation the reviews display a positivist or formalist spirit which might suggest a strong alignment between legal academic thought in Australia and England at the time. Many of the practitioner references and student texts are in part evaluated according to whether they identified the most significant cases and got the ratio 'right'. For example, Donovan said that Chesire and Fifoot's *Law of Contract* was the 'most stimulating student textbook in this field of English law' providing 'clear statement of principle' and 'reasonably complete citation of authorities',[53] MacDougall commended the 'accurate table of cases and statutes, the valuable glossary, and the efficient index' of Megarry and Wade's *The Law of Real Property*[54]and Scott noted that Fricke and Strauss were '[c]oncerned to state the basic principles of their subject in an accurate and uncontroversial manner' while criticising the book for leaving out important contributions contained in significant cases.[55] These comments suggest that books for the classroom provided students with a positivist understanding of law, by being concerned most with covering the most significant cases and providing clear outlines of principle.

Practical necessity was clearly driving the First Community to undertake the role of checking that books were available that adequately summarized the legal principles of the Australian courts and legislatures. This largely accords with the general accounts of the period. However, what the general accounts do not do is provide us with an indication of how valuable these books were to the First Community, what members of the First Community thought of literature which moved out of the expository mindset and whether they considered that books falling within the expository tradition amounted to first class scholarship. If we look more carefully at the critique of the books reviewed in this period we find evidence to suggest that for a large band of the First Community producing and noting expository texts was a matter of duty rather than pleasure or honour. They did not believe that exposition would win academic prestige.

In addition to ensuring adequate coverage of the law, the book reviews suggest that members of the First Community believed that they had a responsibility for shaping

---

52 Igor Kavass, 'Review of Patrick Higgins *The Law of Partnership*' (1964) 4 *Melbourne University Law Review* 600, 600. See also, Zelman Cowen, 'Review of Ronald Graveson *The Conflict of Laws*' (1957) 1 *Melbourne University Law Review* 126; Peter Nygh, 'Review of Else Mitchell' (ed) *Essays on the Australian Constitution* (1962) 1 *University of Tasmania Law Review* 757, 757; Patrick Nash, 'Review of Harold Ford *Cases on Trusts*' (1959) 1 *University of Tasmania Law Review* 354, 355; Ross Anderson, 'Review of Nicholas *The Australian Constitution*' (1952) 2 *University of Queensland Law Journal* 90.

53 Donovan, above n 49, 278.

54 (1958) 1 *Melbourne University Law Review* 416, 418.

55 Michael Scott, 'Review of Graham Fricke and Otto Straus *The Law of Trusts in Victoria*' (1964) 2 *University of Tasmania Law Review* 98, 98.

and developing the study of law in Australian law schools and that this required careful reflection on the role of law schools, on different possible conceptions of law and on leading jurisprudential thought. Concepts and ideas coming from scholars associated with American Realism proved particularly attractive.

While there is no single doctrine of Legal Realism and attempts to describe the movement are often condemned as 'inadequate – indeed inaccurate'[56] there are nonetheless some views which are commonly – and can therefore somewhat safely – be termed as aspects of Realism. The Realist views which are most obviously present in the book reviews of the First Community include the idea that formalism ought to be replaced with a 'pragmatic attitude toward law generally' where law is treated as 'made, not found' and is 'based on human experience, policy, and ethics, rather than formal logic'.[57] The law is viewed as an instrument for social change, to achieve specific ends.[58] Many members of the First Community also embraced the realist idea that 'theorising, ought to make a difference to practice (or experience)'.[59] This places a limit on what 'sort of theorizing is worth doing'.[60] There is also the belief that the activities of a legal academic should extend to incorporating learning from the social sciences in order to assist with law reform designed to achieve specific goals. The reviews suggest that the First Community wanted to read and one day produce work that met with these ideas as well as some other leading American thought, such as Legal Process thinking. The nature and extent of this attitude, generally ignored by general accounts of the period, and what it tells us about the First Community is the focus of the remainder of this paper.

B *Distinguishing Aspiration from Obligation*

Howard highlights the distinction between the aspirations and obligations of the First Community in the following comment from his review of Peter Brett's new work (a book based on a 'highly abstract and philosophical' approach):

> The volume of first class writing about the law being produced by Australian scholars is still small and much of the available effort has so far necessarily gone into the production of teaching materials. The publication of *An Inquiry Into Criminal Guilt* is a welcome sign that time is now being found for more purely speculative inquiry into specialized fields.[61]

Of all the full time legal academics at that time, Brett made the largest contribution to Australian university book reviews, reviewing 38 books. This amounts to a hulking 11% of all the full time academic reviews published in the period studied. His presence in the book review pages strongly enhances our impression that there were members of the First Community who were open to new approaches to studying and thinking about law, wanted Australian legal scholars to move on in their thinking about

---

56 Brian Leiter, *Naturalizing Jurisprudence* (2006), 15.

57 Joseph William Singer, 'Legal Realism Now' (1988) *California Law Review* 76, 474.

58 Tamanaha suggests that this idea of treating law as a means to an end, whilst common now, was in previous decades a novelty. He attributes the American Realists with inspiring this conception which was then further developed with subsequent movements. See, Brian Tamanaha, *Law as a Means to an End* (2006) 60 – 76, 101-107.

59 Leiter, above n 56, 48.

60 Ibid.

61 Colin Howard, 'Review of Peter Brett *An Inquiry Into Criminal Guilt*' (1963-66) 2 *Adelaide Law Review* 139, 139 – 140.

law and were disposed to viewing law in an instrumental way that would allow scholars to contribute to law reform.

Brett began his academic career at the University of Western Australia before moving on to the University of Melbourne where he was the faculty editor of the Melbourne University Law Review and, in 1961, was appointed a Professor of Jurisprudence. In a large number of his reviews Brett spoke of the frustration he felt about the way his English and Australian contemporaries had approached the study of law. For example, in a review of Julius Stone's 'Legal Education and Public Responsibility' he lamented that:

> ... as a whole the profession in England and Australia has reduced itself to the status of a body of priests performing a ritual without caring what its meaning may be or even whether it has any meaning at all.
>
> Of course, it has not always been so. In an earlier age, the legal profession was plainly conscious of its trust and of its position as guardians of our heritage of civil liberty. One need only think of the great lawyers of past ages. The present lack of responsibility which our own profession exhibits is of comparatively recent origin. My own belief is that much of the trouble must be attributed to John Austin, who convinced our lawyers that law and morality were utterly distinct and that the lawyer's task was merely to see that the command of the sovereign is obeyed. I am here speaking of the way in which Austin has been understood by later generations; he was, in fact, well aware that lawyers, as well as legislatures, make the law and thus have a responsibility for its shape, but this part of his message has gone unheeded.[62]

Brett displayed a preference for work with a distinctive Realist spirit written in his preferred areas – criminology and jurisprudence – with most of his reviews being of books on these topics. At the same time he also demonstrated that he was not above writing reviews of standard student and practitioner texts, contributing to the effort made to ensure that there was sufficient coverage of the law for some study of it to be achieved.[63]

While Brett may have felt alone in a sea of priests, book reviews published by his contemporaries demonstrate that at each of the Australian law schools there were scholars who similarly hoped that Australian legal scholarship would embrace broader conceptions of law and methods that would best assist with the important task of law reform. Most often their main point of reference was jurisprudential thought from America, but their comments suggest that they were also open to exploring different possibilities. In a review of a collection of lectures delivered at the London School of Economics by English lawyers, philosophers, historians and social scientists, Cowen wrote that:

> Books like this stimulate the law teacher particularly to think afresh on the framework of his teaching; and while it furnishes him with no easy answers, it helps to keep him at the task of thinking hard about hard things.[64]

---

62 Peter Brett, 'Review of Julius Stone *Legal Education and Public Responsibility*' (1960) 2 *Melbourne University Law Review* 568, 569.

63 See, for example Peter Brett, 'Review of Allen *Police Offences of Queensland*' (1951) 2 *University of Western Australia Law Review* 177 and 'Review of Piesse, The Elements of Drafting' (1951) 2 *University of Western Australia Law Review* 193.

64 Cowen, above n 44, 435.

The mere existence of so many book reviews suggests that the First Community were open to and engaged in meta-disciplinary discourse which explored a range of possibilities for the growing law schools.

C *Following America's Elite*

There are a number of ways to demonstrate that a prevailing norm in book reviewing during this period was that first class scholarship should depart (at least partially) from the expository tradition and follow the lead of scholars in elite American law schools. The first is by considering the subjects in which the greatest concentration of reviews fell. The books reviewed can be placed into 39 subject areas (see table 1), which largely accord with the classifications of law emerging from the common law or text book tradition.[65] The largest mass of full time academic reviews emerged in the areas of Constitutional Law (including foreign constitutional law and political institutions) with 60 books reviewed (17%), Criminal Law (including criminology) with 42 books reviewed (12%), International law with 38 books reviewed (11%) and Jurisprudence with 33 books reviewed (9%). The remaining 187 books were distributed amongst 35 other subject areas, with smaller numbers occurring in Property Law, Legal History, Administrative Law and Labour Law.[66] It is in the subject areas attracting the largest number of reviews that reviewers often critiqued the works according to whether the author embraced new conceptions of law which would best enhance the effort of 'realistic' law reform. The strong concentration of book reviews in these subject areas suggests that they were the 'scholarly' subjects in the law school's curriculum.[67] The reviews also suggest that certain reviewers were building up specialized knowledge within these areas, pointing to a clear differentiation from the practitioner teachers.[68]

The reviews of books on jurisprudence most clearly reveal the First Community's interest in American ideas. Jurisprudence was at this time a compulsory subject in the Australian law school curricula and several reviewers hailed its significance to the study of law, forecasted its ongoing rise and prominence in Australian law schools and regarded Australian law schools as superior to the American in their decision to compel

---

65 For an explanation of this tradition See, David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (1986) 26.

66 There were 21 reviews of property law books (including Trusts and Probate) (6%), 17 reviews of legal history books (including biographies) (5%), 17 reviews of administrative law books (5%) and 15 reviews of labour law books (4%).

67 In 2004 Australian Justice, Robert Austin, wrote that '[l]egal scholarship in fields such as jurisprudence, criminology, international law or comparative law has a function and purpose that is self-evident. Reflection about the province and function of law, the causes and effects of, and ways of dealing with crime, the role of law in the resolution of international disputes, and the insights that can be gained by understanding and comparing different national solutions to legal problems, are not only fundamentally important enterprises. They are enterprises to be undertaken principally within an academic institution. Those who do that work "belong" to the community of scholars whose ranks include philosophers, anthropologists, psychologists, sociologists, political scientists, economists and historians. They are occasionally heard to say (quite wrongly, in my experience) that their work is insufficiently appreciated by the legal profession and the wider community, but their security within the academic community is enviable'. Justice Robert Austin, 'Academics, Practitioners and Judges' (2004) 26 *Sydney Law Review* 463, 464.

68 For example, the majority of Zelman Cowen's reviews were in the area of constitutional law, the majority of Norval Morris' and Peter Brett's reviews were in the area of criminal law, the majority of David Derham's reviews were in the area of jurisprudence, and the majority of Johannes Leyer's reviews were in the area of international law.

students to study it.[69] It was regarded as vital to a practitioner's education.[70] The University journals contain reviews of a large array of jurisprudential works from various countries.[71] The First Community's preference for modern American approaches to jurisprudence over English analytical jurisprudence is communicated repeatedly through the reviews.[72] For example, volume one of each of the university law school reviews contains at least one review of a jurisprudential work displaying the reviewers' either Realist or Legal Process sympathies.[73] They suggest that in each law school there was at least one full time academic sympathetic to US approaches and that these sympathies existed from the late 1940s/early 1950s. Given the small cohort of full time academics, this points to a significant influence.

One of the very first reviews of a jurisprudential work to appear in an Australian law review, Ross Parsons' review of Jerome Frank's *Law and the Modern Mind*, illustrates the mood of subsequent reviews.[74] Parsons was a senior lecturer at the University of Western Australia and the editor of the University of Western Australia's law review. He was the second highest reviewing member of the First Community, writing and publishing 18 book reviews.[75]

Parsons' review of Frank's work is significant as it not only shows a strong sympathy for Legal Realism but it also demonstrates an engagement with some of the

---

69 See, for example, David Derham's comments in, 'Review of Edwin Patterson *Jurisprudence: Men and Ideas of the Law*' (1954) 1 *Sydney Law Review* 439, 439 and also in his review of 'Orvill Snyder *Preface to Jurisprudence Text and Cases*' (1957) 1 *Melbourne University Law Review* 127, 127. Harrison predicted that '[i]n the near future the teaching of jurisprudence in university law schools seems bound to expand far beyond what has been usual in the past'. Walter Harrison, 'Review of George Paton *The Teaching of Jurisprudence, A Text-Book of Jurisprudence*' and Julius Stone *The Province and Function of Law*' (1948) 1 *University of Queensland Law Review* 63, 63-64.

70 'This book provides a rich feast. It should be bought, read, and pondered, not only by students and academics, but most of all by practitioners. For it will enable them to pause for a moment in their mundane labours to scan some distant vistas; and at the same time as it proves much food for thought, it serves it up in a most palatable form'. Peter Brett, 'Review of Anthony Guest *Oxford Essays in Jurisprudence, A Collaborative Work*' (1962) 3 *Melbourne University Law Review* 402, 403.

71 See, for example, a review of a Brazilian jurisprudential work by the Estonian Research Assisant at the University of Sydney: Ilmar Tammelo, 'Review of Miguel Reale *Folosofia do Direito*' (1954) 1 *Sydney Law Review* 444.

72 Derham writes that he is 'convinced that some adventures into the areas where positive law is related to and affected by other spheres of knowledge and enquiry are necessary. ... We must at least introduce our students to the kinds of problems involved, else, in a very real sense, their understanding of the positive law and the legal system will be inadequate'. Derham, above n 69, 128-9.

73 See, Harrison above n 69; Ross Parsons, 'Review of Jerome Frank *Law and the Modern Mind*' (1950) 1 *University of Western Australia Law Review* 577; Samuel Stoljar, 'Review of Julius Stone *Legal System and Lawyers Reasoning*' (1964) 1 *Federal Law Review* 369; David Derham, 'Review of Glanville Williams (ed) *Salmond on Jurisprudence*' (1957-58) 1 *Melbourne University Law Review* 415; Robert Roulston, 'Review of Dias and Hughes *Jurisprudence*' (1958) 1 *University of Tasmania Law Review* 159; Daniel O'Connell, 'Review of Dennis Lloyd *Introduction to Jurisprudence*' (1960-62) 1 *Adelaide Law Review* 230.

74 Parsons, above n 73.

75 Parsons had a strong interest in jurisprudence which persisted throughout his career despite his later move to the University of Sydney where his interests expanded to also include commercial subjects. Parsons' trip to NYU in the 1960s, later used to inspire the establishment of a new LLM course at Sydney, demonstrates that he was interested in American law schools and teaching.

central ideas emerging in that work. Frank is strongly aligned with American Legal Realism and this book is perhaps his most significant work.[76] One of Frank's central critiques of the Langdellian approach concerned its focus and emphasis on the application of legal rules and principles by higher courts. Frank wanted greater attention paid to the fact finding role of first instance courts and the impact this had on the final determination in superior courts, who would normally accept the findings of the earlier courts. Parsons devoted his review to the significance of this platform in Frank's work.

Parsons was here reviewing the 1949 edition of the book which differed only from the 1930s version in that it contained a new preface by Frank. Parsons was critical of this preface as he believed that it failed to acknowledge that in subsequent work Frank had changed his position from being a rule sceptic[77] to a fact sceptic[78] and had changed his mood from one of glorifying in the uncertainty of law to conveying distress over this fact. This suggests that Parsons had a keen awareness of the change of jurisprudential mood in America following the Second World War, and the rise of the legal process schools of thought, and was noting Frank's desire both to keep with public sentiment and the desire to preserve the integrity of the courts. Irrespective of whether Parson's criticisms are valid they demonstrate an engagement with one of Frank's central Realist platforms and suggest that Parsons had given Frank's body of work some careful consideration and held it in high esteem:

> Withal the reviewer is an ardent admirer of Frank. The words that others have used of his writing, 'provocative', 'challenging', 'keen', 'cogent', are echoed enthusiastically. Frank is the enemy of all that respectable yet trite and stuffy nonsense which is so often trotted out as legal wisdom. He is an inspiration to any lawyer who is prepared to take up his challenge and whose soul is not therefore irrevocably committed to the uncritical worship of accepted ideas and institutions.[79]

It is a glowing review that demonstrates an appreciation of and interest in Legal Realism and Legal Process and a preparedness to promote challenges to the prior orthodoxy in America and England.

Harrison, in a 1948 review published in the first volume of the University of Queensland Law Journal, based his evaluation of the two books under review, George Paton's *A Text-Book of Jurisprudence* and Julius Stone's *The Province and Function of Law*, on whether the authors paid sufficient regard to jurisprudence as a social science. This resulted in Stone's work receiving much higher praise than Paton's.[80] Harrison suggested that Australian law schools had not yet met the challenge of introducing sociological jurisprudence into studies in law but he considered that the First Community should persist in doing so. He argued that the analytical approach to jurisprudence represented by the work of Salmond failed to provide a:

> stimulating inquiry into the theory of justice, the relation between law and the State, the function of law, the process by which law is expanded and adapted to the changing ideas, desires, and needs of men, and all the other problems that appear when the law is

---

76 For a further discussion of Frank's platform see, Neil Duxbury, 'Jerome Frank and the Legacy of Legal Realism' (1991) 18 *Journal of Law and Society* 175.

77 Rule scepticism is based on 'the claim that talk of rules is a myth, cloaking the truth that law consists simply in the decisions of courts and the predictions of them'. Leiter, above n 56, 68.

78 Fact sceptics 'concentrate on trial courts and seek to show that these courts have a such a wide discretion in fact-finding, that however precise and certain the rules may be they cannot dictate decisions'. Parsons, above n 73, 577.

79 Ibid. 579.

80 Harrison, above n 69.

> recognised as being an instrument of politics and not a mere natural feature of static social landscape.[81]

For Harrison the future involved a shift towards recognising jurisprudence as a social science: '[t]he tendency, indeed, is to give up treating jurisprudence as an isolated science and to view it as one of the social sciences which cannot be adequately studied except in conjunction with other related social sciences'.[82]

These are not isolated reviews.[83] Not only are there similar reviews in volume one of each of the university law reviews but we also find, throughout the first 20 years of Australian university law book reviews, reviewers saying that law ought to be approached as a social science, that lawyers need to be equipped with knowledge of politics, sociology and philosophy and that law needs to be used as an instrument of social policy.[84] Catch phrases of Pound, Llewellyn and Holmes, such as the 'life of the law has not been logic: it has been experience',[85] 'in order to know what the law is, we must know what it has been and what it tends to become',[86] and 'that each generation should rethink its laws'[87] appear in several of the reviews.[88] These American figures are portrayed as authorities on how law ought to be approached. This sentiment appears in the reviews of all different kinds of work, both inside and outside the field of jurisprudence.

For example, in the area of international law scholars critique books based on whether the author acknowledged the need to confront the prevailing political reality

---

81 Ibid 63.

82 Ibid 64.

83 For other examples of reviews of jurisprudential works that demonstrate Realist or Legal Process sympathies See: Ross Parsons, 'Review of Jerome Hall *Theft, Law and Society*' (1954) 3 *University of Western Australia Law Review* 179; Kenneth Shatwell, 'Review of Hoebel *The Law of Primitive Man*' (1959) 3 *Sydney Law Review* 186; Ilmar Tammelo, 'Review of Fridrich Stumpfl, Review of *Motiv and Schuld*' (1963) 4 *Sydney Law Review* 338; Morison, above n 40; Kingston Braybrooke, 'Review of George Paton and David Derham *A Text-Book of Jurisprudence*' (1965) 5 *Melbourne University Law Review* 103.

84 In 1958 Baker wrote that '[t]here are many law teachers in Australia today, and practitioners as well, who, aware of the mass of able work on Torts produced by Americans in the last two decades and who, heeding the wise words of Oliver Wendell Holmes to the effect that 'in order to know what the law is, we must know what it has been and what it tends to become,' believe that it is the function of a book and of a teacher in training and developing the legal mind to show the reader and the student that the rules of law today have developed out of the conditions of the past and that existing rules have nothing immutable and fixed about them but will as surely change and develop with the needs of the future. A book that in substance contains only the law as it is no longer is acceptable to those of this attitude'. Robert Baker, 'Review of John Fleming *The Law of Torts*' (1958) 1 *Tasmania University Law Review* 149, 149. See, also Peter Brett, 'Review of Geoffrey Sawer *Law in Society*' (1966) 2 *Federal Law Review* 139, 139.

85 Patrick Higgins, 'Review of Sir Owen Dixon *Jesting Pilate and other Papers and Addresses*' (1965) 2 *University of Tasmania Law Review* 327, 329.

86 Baker, above n 84, 149. (Holmes)

87 Colin Howard, 'Review of Turner *Kenny's Outlines of Criminal Law*' (1963) 2 *Adelaide Law Review* 137.

88 See, for example: Morison, 'Review of Kemp and Kemp *The Quantum of Damages*' (1958) 2 *Sydney Law Review* 611; Patrick Higgins, above n 85; MacDougall, above n 13. Maher quotes from Llewellyn in his 'Review of Else-Mitchell's *Essays on the Australian Constitution*' (1963) 4 *Melbourne University Law Review* 156, 157.

and to take an approach adapted to 'modern' times.[89] Reviewers advocated that criminal law be 'studied with learning from the social sciences'[90] (building on the number of criminology works) and that constitutional law must go beyond the study of law reports and legislation, with constitutional lawyers speaking to 'political scientists, historians and administrators' and being as 'legitimately concerned with society as with logic'.[91] Baker criticised Wynne's *Legislative, Executive and Judicial Powers in Australia* for its legalistic, positivist approach, which was viewed as out of harmony with the methods and ideas of existing law schools.[92] The editors of Torts books are criticised for refusing

---

89 See, Leslie Downer, 'Review of Julius Stone *Legal Controls of International Conflict*' (1954) 3 *University of Western Australia Law Review* 172; Ross Parson, 'Review of Hans Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems,* Eric Beckett *The North Atlantic Treaty, The Brussels Treaty and the Charter of the United Nations* and Pitirim Sorokin *Russia and the United States*' (1950) 1 *University of Western Australia Law Review* 556; Julius Stone, 'Review of Oppenheim and Lauterpacht *International Law, A Treatise*' (1954) 1 *Sydney Law Review* 270. Richard Lumb, 'Review of Julius Stone *Aggression and World Order*' (1959) 1 *University of Tasmania Law Review* 368.

90 Morris laments that '[i]n Australia and England, criminology is thought to be an appropriate though neglected off-shoot of the study of the criminal law and of jurisprudence – at all events, is regarded as primarily for the lawyers. Judges, indeed, have no hesitation in expressing opinions on criminological issues based solely on their knowledge of law and their experience at the Bar and on the Bench. In America, however, there is a growing awareness that the problems of criminology trespass far outside the field of law and demand, both for their sufficient adumbration and certainly for their ultimate solution (where solution is possible) knowledge drawn at least from the related fields of sociology, psychology, and medicine'. Norval Morris, 'Review of Albert Morris *Criminals and the Community*' (1954) 1 *Sydney Law Review* 443, 443. See also, Stanley Johnston, 'Review of Jerome Hall *Studies in Jurisprudence and Criminal Theory*' (1959) 2 *Melbourne University Law Review* 119, 122; Norval Morris, 'Review of Radzinowicz (ed) *Sexual Offences: A Report of the Cambridge Department of Criminal Science*' (1957) 1 *Melbourne University Law Reviews* 283; Norval Morris, 'Review of Hermann Mannheim *Pioneers in Criminology*' (1960-1962) 1 *Adelaide Law Review* 229; Norval Morris, 'Review of Glanville Williams *The Sanctity of Life in Criminal Law*' (1960-62) 1 *Adelaide Law Review* 114; Peter Brett, 'Review of Jerome Hall *Theft, Law and Society*' (1954) 3 *University of Western Australia Law Review* 179; Peter Brett, 'Review of Richard Donnelly, Joseph Goldstein and Richard Schwartz *Criminal Law: Problems for Decision in the Promulgation, Invocation and Administration of a Law of Crimes*' (1963) 4 *Melbourne University Law Review* 162; Stanley Johnston, 'Review of Martin *Cambridge Studies in Criminology XVI: Offenders as Employees*' (1963) 4 *Melbourne University Law Review* 155, 155-156; Peter Brett, 'Review of Norval Morris *The Habitual Criminal*' (1952) 2 *University of Western Australia Law Review* 466.

91 Garth Nettheim, 'Review of Geoffrey Wilson *Cases and Materials on Constitutional and Administrative Law*' (1967) 5 *Sydney Law Review* 510, 510. Brett writes that John Mackintosh's 'The British Cabinet' should be of much interest to lawyers 'for if they are to succeed, they need to understand many things besides the rule of cases and statutes; and among those other things the way in which government works holds an important place'. Peter Brett, 'Review of John Mackintosh *The British Cabinet*' (1963) 4 *Melbourne University Law Review* 150. See also, Nash's review of Leicester Webb *Church and State in Italy, 1947-1957* (1959) 1 *University of Tasmania Law Review* 372. Nygh wrote that 'Dr Lane's attempts to expound the factors motivating the High Court in its decision, which lie behind the often meaningless 'formulae' and 'labels' used by the august tribunal, make for stimulating reading'. Peter Nygh, 'Review of Patrick Lane *Some Principles and Sources of Australian Constitutional Law*' (1965) 2 *University of Tasmania Law Review* 217, 218.

92 Robert Baker, 'Review of Anstey Wynes *Legislative Executive and Judicial Powers in Australia*' (1958) 1 *Tasmania University Law Review* 150.

'to concede that law is a method of social control not an abstract intellectual exercise'.[93] Not only do these ideas appear in different subject areas, such reviews appear throughout the period of this study starting in 1948.

American lawyers were admired by the First Community for seeming 'so much readier than others to take a stand on fundamental questions'[94] and collaborative projects involving essays written in the area of law, politics, sociology and philosophy were generally praised as worthwhile exercises[95] (although sometimes considered not so well executed). For example, Ford referred to the collection of essays on *Legal Personality and Political Pluralism* as a 'stimulating example of joint scholarship' and considered that 'there may be much interest for [social scientists] in the reasons which prompt the legal system when it selects or rejects possible object-entities'.[96] Scott wrote that Foenander's book was to be recommended as a most readable and interesting introduction not only to the legal but to the social and political aspects of Australian trade unionism'.[97] The interest in multidisciplinary study is also demonstrated by the subject matter of books reviewed. The journals contain reviews of books on the American legal system and politics[98] as well as purely political, historical and

---

93 John Fleming, 'Review of Landon (ed) *Pollock's Law of Torts*' (15th edition) (1954) 1 *Sydney Law Review* 282, 283. See also, John Fleming, 'Review of William Morison (ed) *Cases on Torts* and Cecil Wright *Cases on the Law of Torts*' (1956) 2 *Sydney Law Review* 212, 214 where Fleming prefers Wright's approach which 'provides a startling contrast in conception and design' from Landon's book: 'Instead of conservatism, we encounter a spirit of adventure; instead of concentration on 'safe law', ample space for decisions which have tentatively probed the frontiers of legal control. Refusing to regard law as an aggregate of static solutions clothed in oracular pronouncement, the stress is on the experimental nature of court reactions to the manifold social conflicts of our time'. Other examples include Peter Brett, 'Review of Glanville Williams *Joint Torts and Contributory Negligence*' (1951) 2 *University of Western Australia Law Review* 174; William Morison, 'Review of William Prosser *Selected Topics on the Law of Torts*' (1957) 2 *Sydney Law Review* 393; Donald MacDougall, 'Review of Brennan *The Australian Journal of Social Issues* Vol 1' (1962) 4 *Sydney Law Review* 170.

94 Ross Parsons, 'Review of Harold Reuschlein *Jurisprudence – Its American Prophets*' (1954) 3 *University of Western Australian Law Review* 193.

95 Kingston Braybrooke, 'Review of Leicester Webb *Legal Personality and Political Pluralism*' (1958) 4 *University of Western Australia Law Review* 347; Julius Stone, 'Review of Association of the Bar of the City of New York *Jurisprudence in Action: A Pleader's Anthology*' (1956) 2 *Sydney Law Review* 197; MacDougall, *Aims and Methods,* above n 13; Daniel O'Connell, 'Review of McDougal and Feliciano *Law and Minimum World Public Order: The Legal Regulation of International Coercion*' and 'Myres McDougal and Associates *Studies in World Public Order*' (1963) 4 *Sydney Law Review* 318; MacDougall, above n 93; Pannam, above n 43; Harry Calvert, 'Review of Nicholas Mansergh *Commonwealth Perspectives*' (1959) 1 *University of Tasmania Law Review* 357; Cowen, above n 44.

96 Harold Ford, 'Review of Leicester Webb *Legal Personality and Political Pluralism*' (1958) 1 *Melbourne University Law Review* 569, 570.

97 Michael Scott, 'Review of Orwell Foenander *Trade Unionism in Australia – Some Aspects*' (1958 – 1963) 1 *Univerity of Tasmania Law Review* 885, 886.

98 Leslie Downer, 'Review of Charles Kinnane *A First Book on Anglo-American Law*' (1954) 3 *University of Western Australia Law Review* 165; Zelman Cowen, 'Review of *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*' (1957) 1 *Melbourne University Law Review* 135; Alex Castles, 'Review of Carroll Moreland *Equal Justice Under Law*' (1960) 1 *Adelaide Law Review* 119.

sociological works[99] and some of the reviews were written by academics from disciplines outside of law.[100] Parsons, adopting Maitland's words, lamented the tendency of historians and social scientists generally to 'ignore legal institutions, or, at best, to attend only to their obvious aspects'.[101] He was also skeptical of Jerome Hall's attempts to restrict the meaning of law.[102]

Some of this sentiment was no doubt motivated by the presence and influence of Professor Julius Stone in Australia. Stone's books attracted seven reviews by members of the First Community, all positive and most containing glowing praise for the works.[103] However, the book reviews containing Realist or Legal Process sentiment, written by academics from around Australia and referring to a range of American thought, suggest that Stone was only partly the cause behind this sentiment.

Based on the book reviews outlined above it is therefore misleading to believe that there was generally a strong sense of loyalty to expository methods amongst the First Community. It would nonetheless also be wrong to suggest that all members of the First Community shared this affection for American ideas and the mixing of law with the social sciences. We can unearth anti-Realist sentiment in several places. For example, Scott said that he was not 'in the least intimidated by the threat of being considered narrow and outdated in believing that the lawyer's role in society is confined to law', this being separate from the political sphere.[104] Further, arguments were raised that conditions in Australia and England, where 'English and Australian judges at least seek the law not by induction of principle from fact situation and results but rather from the words of judicial pronouncements in the most senior court', meant that the American books focusing on deductive reasoning often did not 'accord with [the Australian] experience'.[105] Kavass criticised Ingles' *Family Law* for emphasizing psychological and

---

[99] See: Morris, above n 90; Thomas Fry, 'Review of Gordon Greenwood, *The Future of Australian Federalism*' (1948) *University of Queensland Law Journal* 69; Anonymous review of **'**Crisp *The Parliamentary Government of the Commonwealth of Australia*' (1948-1950) *University of Western Australia Law Review* 362 (Crisp was a Professor of Political Science at Canberra University College).

[100] For example, Professor DeVyver, Professor of Economics at Duke University, contributed a review to the second volume of the Sydney Law Review ((1958) 2 *Sydney Law Review* 621); Encel, a Senior Lecturer in Political Science, contributed a review for the fourth volume of the Sydney Law Review ((1963) 4 *Sydney Law Review* 321), Kewley, a senior lecturer in government and public administration, contributed a review to the third volume of the Sydney Law Review ((1960) 3 *Sydney Law Review* 406), Creighton Burns, a politics professor, contributed a review of the first volume of the Melbourne University Law Review ((1958) 1 *Melbourne University Law Review* 574); and Professor Reid, a professor of government at the University of Western Australia, contributed a review to the seventh volume of the University of Western Australia Law Review ((1966) 7 *University of Western Australia Law Review* 615).

[101] Ross Parsons, 'Review of Jerome Hall *Living Law of Democratic Society*' (1954) 3 *University of Western Australia Law Review* 189, 189 - 190.

[102] Ibid.

[103] Harrison, above n 69. Downer above n 89; Brett, above n 62; Partridge, 'Review of Julius Stone *Human Law and Human Justice*' (1966) 2 *Federal Law Review* 140; Lumb, above n 89. In a review of an English Jurisprudential work Roulston said that the book 'does not stand up to comparison with such giants in the field as Stone's 'Province and Function of Law' or Friedman's 'Legal Theory'. See, Roulston, above n 73. Hutley's review essay of Stone's 'Law and Logic' was, however, largely negative. See, Hutley above n 16.

[104] Michael Scott, 'Review of Geoffrey Wilson *Cases and Materials on Constitutional and Administrative Law*' (1966) 2 *University of Tasmania Law Review* 342.

[105] Ross Parsons, 'Review of Cecil Wright *Cases on the Law of Torts*' (1954) 3 *University of Western Australia Law Review* 194, 195.

physiological issues at the expense of an emphasis on the law.[106] Maher agreed with Cross that the American Realists engaged in excessive criticism and that the 'extreme Realist position can in fact only be supported on the assumption that our judges are capable of the grossest hypocrisy'.[107]

Further a number of reviews contain comments that suggest that some scholars clearly believed that at least part of a legal scholar's role involved mastering the 'labyrinth of decision' in a particular area.[108] However, on the whole, the bold statements written in support of seeing law as an instrument for social change, for lawyers to incorporate learning from other disciplines and the need to see law within its broader context, were not met with widespread words of dissent. The glowing compliments of American ideas were largely advanced without fear of causing controversy or disfavour from other academics.

The harshest words voiced against Australian scholars for adopting American approaches were written by a practitioner rather than a member of the First Community. They are contained in Coppell's review of John Fleming's *Law of Torts* published in the first volume of the *Melbourne University Law Review*.[109] So cutting was Coppell's review that the editors invited Fleming, a member of the First Community, to respond.[110] Coppel charged Fleming with using the word 'law' in a 'pretentious way, as meaning something more than what the courts will do', taking a so-called 'realistic' approach which was very different from the use of the term by Holmes and naively thinking that he could discover the philosophy behind decided cases.[111] He considered that the American sociological jurisprudence was not suited to Australian conditions, where greater regard is paid to the doctrine of precedent, and considered that Fleming had engaged too much in speculation while getting the existing law wrong and generally writing in an unclear and imprecise manner.[112] Fleming's book was also reviewed by two members of the First Community – Baker and Da Costa – who both gave the work strong endorsements: Baker praised Fleming for breaking with orthodoxy and adopting an American approach[113] and Da Costa said that the book had 'excellent qualities' and was 'an example of the rich harvest that can be garnered from Australian jurisprudence'.[114] Professional opposition to the Realist ambition therefore existed but was met with a strong defence by some members of the First Community.

The American influence was also clearly felt in debate over the use of casebooks and the Socratic method of teaching law, which was partly played out in book reviews

---

[106] Igor Kavass, 'Review of Brinsley Inglis *Family Law*' (1960 – 1962) 1 *Adelaide Law Review* 363, 364.

[107] Frank Maher, 'Review of Rupert Cross *Precedent in English Law*' (1962) 3 *Melbourne University Law Review* 400, 401 – 402.

[108] Patrick Nash, 'Review of Sheridan *Fraud in Equity*' (1958) 1 *University of Tasmania Law Review* 140.

[109] Coppell, 'Review of John Fleming *The Law of Torts*' (1957) 1 *Melbourne University Law Review* 272.

[110] John Fleming, 'Reply to Review of *The Law of Torts*' (1957) 1 *Melbourne University Law Review* 274.

[111] Coppell, above n 109, 272-273.

[112] Ibid 273-274.

[113] Baker, above n 84, 149.

[114] Mendes Da Costa, 'Review of John Fleming *The Law of Torts*' (1962) 3 *Melbourne University Law Review* 550.

written during this period.[115] Morrison said that the First Community's enthusiasm for case books was connected to the 'development of closer intellectual contacts between Australian and American legal scholars in the past few years'[116] and was associated with the increase in full time legal academics.[117] While case books are typically associated with Langdell's Socratic method and a scientific approach to law, the support for case books was often based on an idea that they would assist with teaching law in a more 'realistic' fashion.[118] As Duxbury explains 'Realism represented the feeling that it was time to inject into legal research at least a semblance of the frisson that the case method had already brought to teaching'.[119] It did not upset the case method but instead extended the same rigour into research.

In these ways the book reviews throw some considerable doubt on the idea that the First Community 'embraced Austinian positivism'[120] for the purposes of scholarship. If anything, the strongest sympathies rested with the ideas that had come out of the elite American Law schools post Langdell. Just how 'Realist' or 'Legal Process' they were is of course open to debate. Did the First Community really let go of expository orientations or were they simply paying lip service to seemingly fashionable ideas? The membership of these American clubs, how much they took from the expository tradition and the boundaries of their ideas, have been subjects of perennial conflict. Some of the expository writings of the First Community could be used as evidence against the notion that its members strongly embodied this spirit. However, here we are considering the sentiment, influence and aspiration of scholarly thought, rather than the way that it was crystallized in standard forms of scholarship. In this we can say that a large proportion of the First Community scholars were predisposed to thinking about law in strongly instrumental terms and were largely happy to view law as a social science which could draw upon knowledge and learning from the other disciplines. While some reviewers' names appear frequently in this regard – which might lead to the inference that the predisposition was only contained within a handful of frequent book reviewers – closer inspection of the range of reviewers reveals that the feeling circulated more broadly. This would explain the candidness with which the sentiment was expressed.

---

115 See, for example, Patrick Nash, 'Review of Walter Harrison *Cases on Land Law*' (1958) 1 *University of Tasmania Law Review* 157; Jack Richardson, 'Review of Edward Barrett *Constitutional Law: Cases and Materials*' (1964) 1 *Federal Law Review* 167; Arthur Turner, 'Review of Megarry and Baker *Snell's Principles of Equity*' (1961) 3 *Melbourne University Law Review* 272, 273; Scott above n 73.

116 William Morison, 'Review of Morris *Cases on Private International Law*' (1954) 1 *Sydney Law Review* 285, 285.

117 Baker said that the introduction of Brett's 'Cases on Constitutional and Administrative Law' is 'a further addition to the growing number of case books prepared and published by law teachers in Australian Universities and illustrates the changes, apparent in all Australian law schools, made consciously and as a result of experience and deliberation, in methods of law teaching'. Robert Baker, 'Review of Peter Brett *Cases on Constitutional and Administrative Law*' (1962) 1 *University of Tasmania Law Review* 760, 760.

118 'In America, it has been long realized that the dogmatic exposition of so-called legal principles in textbooks and orthodox lectures provides an inadequate introduction to legal method and falls down on the job of furnishing the novice with the technical equipment required for successful practice'. Fleming, above n 93, 214.

119 Neil Duxbury, *Patterns of American Jurisprudence* (1995), 79.

120 See, Chesterman and Weisbrot, above n 6, 714.

V THE PATH OF CONVENTIONAL POPULARITY *OR* THE PATH OF CREATION?[121]

Not only do we find strong advocacy within the First Community book reviews for treating law as an instrument for social change, we also find a strong critique of a large amount of the English scholarship because such works were out of step with the 'modern' approaches to law. The books receiving the harshest reviews were those which followed a pattern associated with the classical English legal scholars. English authors were criticized for their failure to critique laws and their institutions, and for propping up works of long dead colleagues rather than writing new texts. Reviewers note the English hostility towards American legal thought.[122] The elite English universities were far from revered; they were often treated with disdain. This sentiment is captured in Fleming's review of the fifteenth edition of *Pollock's Law of Torts* edited by Landon:

> If the value of a text-book be assessed by reference to the criterion whether it conveys an up-to-date, dynamic impression of the law, this second posthumous edition of Pollock's treatise on Torts must be regarded as a failure. … The editorial policy of preserving the text of the 13th (1929) edition intact without amendment (except by exclusion where the 'treatment is *obviously* out-of-date') already lends the book an antiquarian flavour which in the Olympian atmosphere of Oxford might be regarded as a mark of commendation but could elsewhere be diagnosed as a symptom of sterility.
>
> His repeated emphasis on the self-sufficiency of 'rules' created by 'just men of past generations' (the older, the better) and his contempt for 'the fluid and ephemeral morality and sociology which in some circles, especially in America, are nowadays set up as the sole objective of modern law' reveal a mind fundamentally out of sympathy with contemporary law and legal thought.[123]

The repeated critique of orthodox English scholarly practices found in the book reviews reinforces the impression that the First Community preferred scholarship which was adventurous, incorporated learning from other disciplines, broke away from the expository tradition and viewed the law with a strong instrumental mindset.

The critique of orthodox English scholarly practices extended far beyond the reviews written by Fleming and Stone. For example, Howard in his review of Kenny's *Outlines of Criminal Law* strongly condemned the English practice of perpetuating texts of deceased authors and said that it is 'difficult to understand the assumption that lawyers prefer to buy an out-of date book by a famous author who happens to be dead rather than an up-to-date book by a less well-known scholar who retains the advantage of being alive'.[124] He also criticised *English Courts of Law* on the grounds that the book 'perpetuates the insularity and self congratulation universally regarded as the hallmark of the English Law' and provided examples of Hanbury's uncritical approach,

---

[121] A phrase used by Norval Morris in his 'Review of Sir Patrick Devlin *The Criminal Prosecution in England*' (1962) 4 *Sydney Law Review* 156, 157.

[122] O'Connell worried that two books emanating from Yale would not receive the acclaim outside of America they clearly deserved because the work 'is stamped with an American character': 'it is both law and political science, and its relativism tends to be offensive to the English lawyer with his system of precedent and his sharp distinction between law and politics'. O'Connell, above n 95.

[123] Fleming, above n 93.

[124] Howard, above n 84, 137.

condemning him for it.[125] Similarly Derham applauded Williams' policy of treating the update of 'Salmond on Jurisprudence' as a 'text-book of living thought rather than as a dead classic'.[126] Morris considered that Sir Patrick Devlin ought to have been more critical of the English legal system in 'The Criminal Prosecution in England', saying that Devlin's approach is 'the path of conventional popularity; it is not the path of creation'.[127]

Indeed what these criticisms imply – wanting new books containing robust criticism of the law and its institutions – is that Australian legal scholars wished to be on a path of creation.[128] They wanted to embody the American critical spirit and reformist attitudes and they wanted more robust criticism. MacDougall's 'most serious criticism' of Megarry and Wade's *The Law of Real Property* is that they while they 'had the qualifications and the opportunity to suggest criticisms of the existing rules and the path of reform' they 'let the opportunity slip'.[129] Books written by members of the First Community are subject to considerable scrutiny as well as praise and several of these books contain suggestions for reform of the law.[130] No one seems immune from criticism.

---

[125] Colin Howard, 'Review of Hanbury *English Courts of Law*' and 'Geldart (revised by Sir William Holdsworth and Hanbury) *Elements of English Law*' (1960-1962) 1 *Adelaide Law Review* 233, 233.

[126] David Derham, above n 73, 416.

[127] Morris above n 121, 157. Brett praised Hart and Honoré's 'Causation in the Law' on the basis that its 'appearance is particularly welcome at the present time, when the tendency of English legal writers seems to be that of devoting themselves to the preparation of new editions of outdated works, rather than to the task of breaking new ground'. Castles praised Jackson's 'The Machinery of Justice in England' for containing refreshing 'candour and vigour' and 'close critical scrutiny' of the legal system 'which unfortunately is often lacking in a book of this nature'. See, Peter Brett, 'Review of Hart and Honoré *Causation in the Law*' (1961) 3 *Melbourne University Law Review* 93, 94. Alex Castles, 'Review of Jackson *The Machinery of Justice in England*' (1960-1962) 1 *Adelaide Law Review* 236, 236.

[128] Thomson considered that the greatest importance of 'The Development of Australian Trade Union Law' 'lies in the fact that it is, in many respects, a pioneer in its field and that it may inspire others to specialize and develop the areas which the author has opened up for research and scholarship'. D Thomson, 'Review of Portus *The Development of Australian Trade Union Law*' (1960) 3 *Sydney Law Review* 382, 386.

[129] (1958) 1 *Melbourne University Law Review* 416, 417. There are many examples of this critical spirit. For example, Roulston said that he preferred the third part of the English text 'Jurisprudence' as 'the authors here permit themselves greater freedom in criticism and in the expression of their own opinions'. Roulson, above n 73, 160. Pannam is scathing of Hannan's uncritical biography of Sir Samuel Way: 'To sum up, the book is satisfactory for one purpose and for that only – to help remind the citizens of Adelaide of the virtues of a man they all want to believe was great and blemishless. Such books are, however, completely useless. They read like funeral orations and only serve to perpetuate false impressions about a man who, at least, led a fascinating life full of interest but whose character becomes, in the hands of a biographer like Mr Hannan, saintly, instead of Machiavellian'. Clifford Pannam, 'Review of Albert Hannan *The Life of Chief Justice Way*' (1960) 2 *Melbourne University Law Review* 575, 577 – 578. See, also Peter Brett, 'Review of Guest *Oxford Essays in Jurisprudence*' (1962) 3 *Melbourne University Law Review* 402, 402-403; Maurice Cullity, 'Review of Benjafield and Whitmore *Principles of Australian Administrative Law*' (1967) 2 *Federal Law Review* 306, 307.

[130] Brett, for example, 'emphasises the need for the reform of the criminal law which he considers to be based upon seventeenth century philosophy and eighteenth century psychology'. Mary Daunton-Fear, 'Review of Peter Brett *An Inquiry into Criminal Guilt*' (1961) 1 *University of Tasmania Law Review* 883, 883. See, the harsh criticism of Brett's work in Payne, above n 17.

The perpetuation of the techniques and ideas of Albert Dicey, a leading classical scholar of the late 19th century and Vinerian Professor of English Law at Oxford, attracted particular criticism on two grounds. First on the basis that his scholarly method of setting out the 'Rule, Comment and Illustration' was misleading as it embraced the old positivist way of approaching the study of law. Downer wrote that the 'statement of the law by way of dogmatic Rule can be quite misleading – and perhaps dangerously so for students who might too easily be encouraged to accept the potential utterances of the textbook uncritically and as a complete and final exposition of the law'.[131] Secondly Dicey was criticized for limiting the study and approach to administrative law. Benjafield praised Hamson's book on administrative law for 'making clear features obscured by Dicey's work'[132] and Sharwood similarly complimented deSmith for being 'one of that small group of men which, over the last twenty or thirty years, has endeavoured to correct the English-man's vision of law in administration which Dicey had so successfully distorted'.[133]

The reviewers of administrative law books show marked sympathies for the Legal Process mood that was permeating America at this time. Since the Second World War a growing number of American legal scholars turned their attention to the reasoning and processes of administrative bodies, partially shifting focus from appellate court decision making.[134] This was fuelled in 1958 by the distribution of teaching materials by Hart and Sacks entitled *The Legal Process.*[135] The Legal Process school, like the Realists, acknowledged the strong discretionary nature of State decision making however, as Tamanaha explains, their 'central insight was that social policies should be determined and principles identified by funnelling the decision [about the goods and wants of society] to appropriate institutions, which then utilize fair procedures when rendering decisions'.[136] The legislature was prioritised as the supreme democratic body, best equipped to design and implement broad social and economic reform based on clear policy choices, thereby 'designating courts and administrative agencies as important collaborators, but subordinate institutions that carry out legislative purposes'.[137] The danger that administrative bodies with their broad discretions could trespass into areas of broad public concern was strongly acknowledged by many leading legal scholars and considered worthy of study and scrutiny.

The First Community book reviews similarly display favour for the study of administrative processes – not just appellate court decisions – and the limiting of

---

131 Leslie Downer, 'Review of Clive Parry *British Nationality*' (1952) 2 *University of Western Australia Law Review* 451, 452. See also, Waller, above n 49. Illiffe says that Morris and the other editors of Dicey's Conflict of Laws (7th edition) should consider whether 'Dicey's method of Rule, Comment and Illustration [is] a satisfactory one and, as a special question, do the illustrations themselves serve a useful purpose and whether the proportion of prose texts should be reduced'. John Illiffe, 'Review of Morris *Dicey's Conflict of Laws*' (1960) 3 *Sydney Law Review* 387. Neitheim writes 'This book has one notable virtue and two principal drawbacks. The notable virtue is the refreshing breadth of approach adopted by the author. From the outset he rejects the strict Diceyan separation of law from convention'. Garth Nettheim, above n 131, 510.

132 David Benjafield, 'Review of Hamson *Executive Discretion and Judicial Control: As Aspect of the Conseil d'Etat*' (1956) 2 *Sydney Law Review* 206, 206 -207.

133 Robin Sharwood, 'Review of De Smith *Judicial Review of Administrative Action*' (1960) 2 *Melbourne University Law Review* 431, 431.

134 See, William Chase, *The American Law School and the Rise of Administrative Government* (1982) 147-156.

135 Eventually published as William Eskridge and Philip Frickey (ed) Henry Hart and Albert Sacks, *The Legal Process* (1994).

136 Tamanaha, above n 58, 104.

137 Ibid.

judicial and administrative discretions. Whitmore, for example, in a review of Brett's *Cases on Constitutional and Administrative Law* put forward the idea that while the case book method is probably the more effective form of teaching, its very nature leads to over-emphasis on judicial review by the superior courts – the smaller part of administrative law.[138] He preferred using text books for teaching this subject as they could provide the basis for detailed discussion of the whole fabric of the administrative process:

> [I] wholeheartedly agree with the assessment that 'the vital problem of the present day is a thoroughgoing investigation and analysis of the multitudes of discretions which are vested in administrative authorities with a view to determining how they may be regularised and systematized and what types of control, both in the ordinary courts and in the departments of government themselves ought to be instituted for the protection of the citizen.[139]

This is in keeping with the idea embodied in Legal Process thought that only democratically elected bodies should exercise wide discretions. It demonstrates that Australian scholars wanted to carve out their own approach in this area that departed from traditional English ideas. Sharwood wrote that '… Australia is no replica of the Mother Country. We need to "know ourselves", to examine our own public life with care and honesty, and to tailor our public law to its particular conditions, needs and philosophies'.[140]

VI THEORIZING AND LAW REFORM

A further notable feature of the reviews written during this period is that reviewers often explicitly identified the audience of the work under review and spoke of the utility of the work in light of that audience. The criteria used by the reviewer would be modified depending on whether the book was for practitioners, students or law reformers. There are only a small handful of books reviewed that were identified as works of theory intended to be read by a purely academic audience.[141] While most such monographs are praised there is a sense that the reviewers do not know quite what to do with them. An exception to this treatment of 'purely academic' works is found in the review of history books, including biographies, however the reviewers of these books often noted that they were intended for broader audiences including the general public and lawyers and considered that legal history was an important part of a practicing lawyer's ongoing legal education.

---

[138] Harry Whitmore, 'Review of Peter Brett *Cases on Constitutional and Administrative Law*' and 'Wolfgang Friedmann *Principles of Australian Administrative Law*' (1963) 4 *Sydney Law Review* 313.

[139] Ibid 318.

[140] Sharwood, above n 133, 434.

[141] An interesting example of one of this small number of reviews is Norval Morris's review of Hermann Mannheim (ed) *Pioneers in Criminology,* above n 90. Morris explains that 'seventeen of the world's currently prominent criminologists write about seventeen of their great predecessors who laid the foundations of criminologocial theory'. (229) Morris, in his review of Justice Barry's *Alexander Maconochie of Norfolk Island,* said that in 'the final chapter of this biography, Mr Justice Barry assesses Maconochie's achievements and relates his ideas to current theoretical problems in criminology. This work is therefore a judicious combination of biography, of vignettes in Australian history, and of studies in the history of ideas (which is, perhaps, the most important form of history)...' (1959) 2 *Melbourne University Law Review* 279, 280. See, also Shatwell above n 83, 186.

The works that received the greatest praise were those which adopted an instrumental spirit, recognised that law does not operate in a vacuum and demonstrated obvious links between the work and potential law reform. In essence, they endorsed theoretical books with a clear link to practice. The reviews of Glanville Williams' books serve as good examples. Williams' books on criminal law attracted eight reviews, seven of which were strongly positive.[142] His works are portrayed as displaying a refreshing, novel, academic – 'almost revolutionary'[143] – approach to criminal law, tort and jurisprudence while retaining a useful quality: his work 'is replete with discussions of problems that arise in everyday practice, and the practitioner who has to advise a client involved in, say, an ordinary running-down action will neglect the learned author's views at his peril'.[144] Edwards, in his review of *The Sanctity of Life and the Criminal Law* accepted Williams' justifications for his 'trespasses outside of the lawyer's proper sphere and into the moral, religious, medical, social, eugenic, demographic and penological aspects of' criminal law on the basis that these things 'are important not only in considering the political question of the possible change in the law but also in the approach one makes to its present administration'.[145] Brett thought that 'in light of [Williams'] work the traditional treatment of the law of torts in existing textbooks becomes outmoded if not actually misleading'.[146] Williams' instrumental approach to criminal law, involving the incorporation of learning from other disciplines was strongly praised for being both intellectual and useful because it could assist with the important task of law reform and guide practitioners.

In contrast Stone's work, while reviewed largely in positive terms,[147] was not as warmly embraced. The more mixed reviews seem to arise from the more theoretical aspects of the work. The reviewers do not quite appreciate the relevance of such

---

[142] The one negative review of Williams' work is by Brett. Here we surprisingly find Brett, a reviewer with strong Realist sympathies, criticizing Williams' treatment of issues of morality and religion. He writes '[i]t is curious that such an acute thinker as Dr Williams should so often fail to grasp what the theologians are saying'. Peter Brett, 'Review of Glanville Williams *The Sanctity of Life*' (1957) 1 *Melbourne University Law Review* 556, 563. For a recent critique of this work along similar lines see, John Keown and David Jones, 'Surveying the foundations of Medical Law: A Reassessment of Glanville Williams's The Sanctity of Life and Criminal Law' (2008) 16 *Medical Law Review* 85, 88.

[143] Brett, above n 93, 177. See, also Brett's strong praise of Williams in Peter Brett, 'Review of Glanville Williams *Criminal Law: The General Part*' (1956) 2 *Sydney Law Review* 199, 199.

[144] Brett, above n 93, 174 – 175.

[145] Eric Edwards, 'Review of Glanville Williams *The Sanctity of Life and the Criminal Law*' (1957-1959) 4 *University of Western Australia Law Review* 336, 336.

[146] Ibid 177. In his review of 'Criminal Law the General Part' Brett referred to Williams' 'great industry, tireless research and ingenuity of reasoning'. Brett, above n 143, 199. Waller, in his review of 'Criminal Law: The General Part' referred to Williams as a 'writer of extraordinary merit' and considered that his scholarship was 'the most important event in English scholarship in criminal law since Stephen's great magisterial writings in the last century'. Waller, Criminal Law above n 49, 552-553. Morris hailed Williams as the 'leading academic legal author in the British Commonwealth' and referred to Williams' work 'Proof of Guilt: A Study of the English Criminal Trial' as 'erudite and clear', 'full of critical wisdom' and providing 'the student a better general perspective on criminal procedure and evidence than he will find in any similar book'. Norval Morris, 'Review of Glanville Williams *The Proof of Guilt: A Study of the English Criminal Trial*' (1957) 1 *Melbourne University Law Review* 134, 134 - 35.

[147] See, above at note 103.

theory.[148] For example, Brett writes of Stone's *Human Law and Human Justice* that it is:

> far too elaborate [to be a student text book]. Yet at the other end of the scale it is far more than a reference book to which recourse is made to ascertain some precise point of information. In this respect it falls a little uncomfortably between two stools.[149]

Partridge puts forward similar concerns about this book saying that there is:

> [s]ome uncertainty about its function or its 'public', is it primarily a definitive textbook, a work of reference or a contribution to original thought. It is meant, one imagines, to do all three jobs and this may be why there is rather too much very compressed exposition and discussion of writers of great philosophical difficulty and obscurity; for instance, it is hard to know what a reader not already possessing considerable philosophical knowledge and understanding would make of the extremely compressed discussion of German existentialism; and this reader found very difficult some of Stone's later argument with the modern British linguistic philosophers.[150]

Most of the books reviewed concerned matters of judging and the common law. Judges and practitioners were invited to contribute to the book review section as well as to other parts of the law review and such contributions were considered to bring prestige to the journal.[151] Further, members of the First Community also urged foreign writers to acknowledge the significant contribution that Australian High Court judges were making to the common law, therefore suggesting that they held the current bench in high esteem.[152]

The very idea that the First Community viewed the law in strongly instrumental terms raises the question of whether they intended to embark on a 'partnership' with

---

[148] For an analysis of Stone's influence on early and subsequent Australian International Law scholars see, Fleur Johns, 'The Gift of Realism: Julius Stone and the International Legal Academy in Helen Irving, Jacqui Mowbray and Kevin Walton (eds) Australia' in *Julius Stone: A Study of Influence* (forthcoming).

[149] Peter Brett, 'Review of Julius Stone *Human Law and Human Justice*' (1967) 5 *Melbourne University Law Review* 510, 511. Similarly Burns writes that Stone's *Aggression and World Order: A Critique of United Nations Theories of Aggression* has a limited audience, confessing that much of it is beyond his comprehension and that it is 'an expert's book for experts'. See, also Creighton Burns (a Social and Political Scientist) 'Review of Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*' (1958) 1 *Melbourne University Law Review* 574, 575.

[150] Partridge, above n 103, 141.

[151] Star comments that the '*Australian Law Review* marked the first issue of the *Sydney Law Review* with high praise, commenting that few similar publications had for their first volume contributions from such distinguished legal figures as Lord Wright, Sir John Latham, former chief just of the High Court of Australia, and Sir Gerald Fitzmaurice, soon to become a judge of the International Court and of the European Court of Human Rights. Contributions from these figures had been sought by Stone in order to stress the learned nature of the journal'. Star, above n 5, 119.

[152] Derham writes 'Of recent years, however (particularly since 1945), the quality of the work of the highest English courts has declined in comparison with that of the highest Australian courts'. David Derham, 'Review of Wheare *The Constitutional Structure of the Commonwealth*' (1961) 3 *Melbourne University Law Review* 254, 259. Higgins writes that 'no one in Australia has done more than Sir Owen [former Chief Justice of the High Court of Australia] to maintain and enhance the reputation of our profession for learning'. Patrick Higgins, 'Review of Sir Owen Dixon *Jesting Pilate and other Papers and Addresses*' (1965) 2 *University of Tasmania Law Review* 327, 327 – 328.

judges or were hoping that judges would be openly instrumental in their reasoning processes. This cannot be definitively answered through this study of book reviews. However, there are some features of the book reviews which work against the latter idea, such as the legal process sentiment and the fact that most often when a book's potential to assist with law reform is discussed, it is in relation to legislative rather than judicial reform.[153] Other features of the book reviews work in favour of a partnership, such as the reviews which criticize a book on the basis that it does not engage in sufficient critique of the courts and their judgments and the general characterization of formalist approaches as old fashioned which might suggest either that courts ought to be less restrained, sometimes adopting the more 'radical' ideas for law reform put forward by academics, or that legislatures need to be more dynamic.[154] The most that can be said is that the book reviews do not provide the impression that the First Community were overawed by judges or considered that their status depended on some form of partnership with them. The influence of Realist views did not necessarily extend to treating academic lawyers as partners with judges.

The strong criticisms of English works and the emphasis on utility, reinforces the impression that the spirit of this Community was that of liberal instrumental pioneers. The legal scholar's ability to assist with law reform presents as a tantamount concern. However, this did not involve relying on a practitioner's or judge's conception of law. Nor did it involve perpetuating traditions in English scholarship. The First Community both pitied and made fun of the state of much English scholarship and felt equipped to critique leading scholars in England. They wanted to be on the path to creation.

VII CONCLUSION

Why does it matter that this vibrant strongly instrumental spirit, dislike of English orthodoxy and clear willingness to criticize existed almost from the inception of the First Community rather than from the late 1960s onwards? We already know that there was some American influence. What bearing does it have on scholarship today? These features of the First Community, by adding a further layer of depth to our understanding of this group of scholars, can help explain at least part of the subsequent trajectory of legal scholarship in Australia. They suggest that some of the premises upon which Australian legal scholarship has been critiqued are false. The misleading impression hampers the ability of Australian scholars to reflect upon predispositions and assumptions, and to engage in open critique with a view to expanding horizons.

The book reviews suggest that even from the earliest days of Australian Law Schools legal scholars have been strongly predisposed to treat law as an instrument for

---

[153] For example, Campbell writes '[i]t is to be hoped that the book will commend itself to those within whose power it is to direct the course of constitutional and legislative reform, and that its author's wish that it be relegated "to the shelves of legal history" may be fulfilled before the accretion of further complexities in the law of federal jurisdiction obliges him to write a second and revised edition'. Enid Campbell, 'Review of Zelman Cowen *Federal Jurisdiction in Australia*' (1960) 1 *University of Tasmania Law Review* 1, 521. Most of the reviews of works in the area of criminal law and criminology, such as the work of Glanville Williams, speak in terms of legislative reform.

[154] There are a small handful of books that mention the adoption of academic ideas by the courts. Donovan praises Cheshire's 'Law of Contract' partly on the basis that 'on a number of occasions already it has been officially adopted in judgments of the courts'. Donovan, above n 49, 278. Baker refers to Fleming's work as being of considerable assistance to counsel and judges in a case before the Supreme Court of Tasmania. Baker, above n 84.

social change and to create scholarship which is 'useful'.[155] In this they are strongly aligned with their American counterparts. In fact, given the small size of the First Community relative to the number of full-time American legal academics employed during the same period, it could be argued that the influence of the elite American scholars was more strongly felt in Australia than in America at that time. The book reviews speak of a strong revolt against legal formalism in all of the law schools. The fact that much purely expository work was also produced does not distinguish the Australian experience, as the US literature points to the same persistence of exposition.

This study places serious question marks over the idea that Australian legal scholarship was, like the English, founded on the expository tradition. Instead it suggests that present trends in Australian legal scholarship, such as the greater incorporation of knowledge and methods from other disciplines, instrumental orientation and marginalisation of 'pure' theory (that is, lacking obvious links to law reform) have a much earlier origin in Australian legal scholarship than is commonly recognised.[156] It suggests that the First Community's legacy runs wide and deep.

Recognising the strength and longevity of these inclinations should be part of a process of reflection and revision which could open up Australian legal scholarship to a range of alternative approaches and the asking of probing questions. For example, why has the study of jurisprudence dwindled rather than thrived in Australia given the early and persistent enthusiasm, predictions of its rise to glory and the glowing pride voiced by those who historically taught the subject in the First Community? Has the utility narrative been taken so far as to cast a shadow over works that do not have an obvious link to law reform? Does this ignore the fact that it was an interest in American jurisprudence and theory that helped to set Australian legal scholars on their current path? Does scholarship following on in this tradition really have utility? Who reads it? Is the anthem 'regulate more to make society better and lawyers relevant' the default position in most works of legal scholarship? Has this led legal scholars to align themselves closely with law makers and thereby limit the range of possibilities and perspectives for critique and reflection? While such questions have been discussed and debated fiercely in the US literature, Australian scholars have been less inclined to voice publicly the view that there are predilections that are causing the discipline to stagnate. Literature containing open and frank critique of legal scholarship and its orientation based on explicit norms concerning the conception of law, is now far less

---

[155] The foreword to the first volume to *Res Judicatae*, the law review published by the Law Students Society of Victoria and predecessor to the Melbourne University Law Review, suggests that this conception existed much earlier in some law schools. The foreword states that '[i]t is the proud aim of the Law Faculty at Melbourne to foster the idea of law not merely as an examination study or as the equipment for eking out a doubtful living, but as a social science to be continually moulded and remade as the needs of society change. And if this magazine serves to assist the Faculty to that end, if it serves to encourage amongst students at Melbourne an active, critical and creative interest in the current development of the law, it will not have been entirely fruitless'. (1935) 1 *Res Judicatae* v, v.

[156] See, Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) *Legal Studies* (forthcoming). Johns succinctly runs the argument that Australian legal scholarship has a instrumental focus, referring to the problem solving mentality and utility focus of legal academics, and attributes the entrenchment of such trends (at least in part) to the influence of the agenda of the Australian Research Council, suggesting that it is dangerous not to conform: See, Fleur Johns, 'On Writing Dangerously' (2004) 26 *Sydney Law Review* 474, 476- 480.

common than it was in the days of the First Community.[157] In this respect, Australian legal scholars today seem far less robust and reflective.

The critiques of exposition that have been made over time tend to place the First Community in a negative light and ignore the reasons why such works were given prominence in the first place. Unlike the founding fathers of England and America's expository tradition, the above analysis suggests that members of Australia's First Community were not in general trying to win the support of the profession by showing their superiority in cataloguing cases in neat artificial categories. They were well aware that this was a task undertaken by their scholarly predecessors in other countries and that such ideas were out of step with thinking about the law at that time. The primary reason they wanted to help with the effort of providing 'coverage' of Australian law was simply as a means to make primary materials available to the profession and students. Limited library resources and the neglect of Australian cases and legislation in Australian and foreign text books meant that accessing these materials was extremely difficult. The First Community were not claiming special expertise in this task (after all, many of the books following in the expository tradition were written by practitioners) but were merely meeting a practical necessity. The question this point raises is whether scholars commenting and/or building on this tradition recognised that this exercise was not designed to bring scholarly or professional prestige. It was considered by many in the First Community to sit much lower in the scholarly hierarchy than more pioneering work. Have the First Community's actions been wrongly construed as warmly embracing this form of scholarship and did this then lead to the entrenchment of the practice? Have some subsequent scholars 'reacted' against a practice that was never really warmly embraced by the First Community?

In addition the reviews speak of an independence of this First Community that was motivated by American intellectual thought rather than judicial trends within Australia. They were influenced by academic rather than judicial leadership. Even if the above points are treated as matters of pure speculation, what this study does strongly demonstrate is that members of this First Community were bold, ambitious, and far from complacent. Perhaps one of the most important lessons of this study is that you shouldn't judge a community of legal academics purely by their publication list. Not only might this fail to capture contributions to teaching, but it may also wrongly characterise the spirit of a community and their aspirations for future works of legal scholarship. It ought to be kept in mind that the legal profession in Australia at that time was not wholly accepting of the idea of university legal education – it was not a pre-requisite for practice in Queensland or New South Wales and tension between the profession and the academy had been felt and noted in numerous places.[158] The effort of coverage no doubt pleased the profession and was considered constructive, but viewing law as a social science and pushing for broader conceptions of law brought with it obvious risks amongst a conservative profession; risks which the First Community's English contemporaries were hoping to avoid. Ultimately the story is one of dedication and ambition: members of the First Community were true pioneers who wanted Australian law schools to achieve greatness by embracing broader conceptions of law and approaches to study.

---

[157] This might also suggest that the early Australian scholars were ahead of their American counterparts. Meta disciplinary discourse only took off in America in the 1980s. See, Laura Kalman, *The Strange Career of Legal Liberalism* (1996), 94-95.

[158] See, Weisbrot above n 1, 120-121. Dunbar's inaugural speech as Dean at the University of Tasmania was arguably an attempt to win over the profession: See, Norman Dunbar, 'Common Sense in the Law School' (1961) 1 *University of Tasmania Law Review* 541.

Appendix

TABLE 1
First Community Book Reviews by Subject Area: 1948 to 1968

Subject Areas	**Total Number of Reviews**
Constitutional (including matters of constitutional politics, legal institutions, foreign and international constitutions)	60
Criminal Law (including criminology)	42
International Law	38
Jurisprudence	33
Property Law (including Trusts and Probate)	21
Administrative Law	17
Legal History (including biography)	17
Private International Law/ Conflicts of Law	15
Labour Law	15
Torts	14
Commercial Law	10
Company/Partnership/ Agency	10
Civil Law	6
General Introductory Text to Law	6
Family Law	5
Evidence	4
Remedies	4
Entertainment (lawyers anecdotes)	4
Contract	4
Psychiatry	4
Legal Writing/Research	3
Taxation Law	3
Restitution	3
Advocacy/ Procedure	2
Statutory Interpretation	2
Banking Law	2
Practitioner Manual	2
Equity	2
Sociology	2
Comparative Law	2
Politics	1
Accounting	1
Mining	1
Competition Law	1
Insurance Law	1
Total	357