Rumblings of Realism: A Bildungsroman of the Australian Legal Academy

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> Far from being an esoteric indulgence … the history of scholarly agendas and endeavours of the legal academy should be of primary interest and concern to all legal scholars of integrity—those who think hard about what and how to write and teach—and is important for rational discussion about both law and legal education.
>
> — Susan Bartie[1]

I. Introduction

THE TWENTIETH CENTURY was a vibrant, dynamic time for Anglo-American jurisprudence. Opening on the waning days of classical legal formalism, it soon witnessed the radical uprising of the legal realists and their polemical assault against formalist orthodoxy. As jurisprudential thought swung from rationalism to scepticism—and then back and forth again—the century marked its progress in spirited transatlantic debates that left their indelible mark on American and British law teaching, alike. It was an era characterized by dramatic growth, conflict, and transformation.

But for all that is made of philosophical contributions and confrontations

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1 Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 Melb U L Rev 480.

centred around the Atlantic, far less attention is devoted—at least in Anglo-American legal scholarship—to theoretical developments elsewhere in the common law world. Indeed, despite the shared genealogy and corresponding practices of British, American and Australian law, the Anglo-American legal academy has generally shown little interest in the Antipodes. As a result, scholars have had little to say about the complex interplay of clashing interests and assumptions that defined twentieth-century Australian legal philosophy and pedagogy. This Article, situated at the intersection of legal intellectual history, comparative law, and jurisprudence, seeks to break that silence, tracing the stages and influences that have shaped the Australian legal academy from its birth to its modern coming of age.

Proceeding in six chronological parts, the Article seeks both to sketch the historical development of Australian jurisprudential thought and to explicate the various theoretical commitments that have played a role in its evolution.[2] Part I traces the early history of Australian legal education, outlining the progression from apprenticeships to law schools. It also explores the classical formalist approach that came to define law teaching in the newborn legal academy. Turning briefly toward American jurisprudence, Part II introduces the legal realists of the 1920s and 1930s, reviewing their revolutionary ideas and defining traits before assessing their contemporary influence in Australia. Part III focuses on Julius Stone, the central figure in modern Australian jurisprudence, addressing his ideas, impact, and legacy. Building on the conclusion that Stone's brand of sociological jurisprudence has had little lasting influence in Australian legal philosophy, Part IV examines two analytical theories that have enjoyed far greater sway: Hart's modern formalism and Dworkin's legal idealism.[3] Opposed to these theories was the critical legal studies movement of the 1970s and 1980s. Investigating its origins and commitments, Part V assesses its sceptical contributions to the Australian legal

[2] In examining the historical progression of philosophical approaches, this Article takes no stance on the ultimate jurisprudential question of which perspective offers the best account of legal argument and judicial decision-making. Instead, it seeks clearly and accurately to describe each theoretical position, highlighting overlaps, drawing distinctions, and identifying the ways in which theories have built upon and reacted against one another.

[3] I am deeply indebted to Professor Lewis D Sargentich for my jurisprudential typology, which I share with Gregory C Keating, 'Fidelity to Pre-existing Law and the Legitimacy of Legal Decision' (1993) 69 Notre Dame L Rev 1. While I will elaborate this typology below, I can offer here no better introduction than Keating's:

> My interpretations ... of these traditions are driven by my [particular focus on] if and how (or if not, how not and why not) legal decision might be reduced to the enterprise of resolving present disputes by pre-existing norms. My interpretations of these positions, therefore, are likely to appear unbalanced and unsympathetic to their adherents. It might help the reader to place quotation marks around my use of terms like 'formalism' and 'positivism' and names like 'Hart' and 'Dworkin'.

ibid 9.

academy. Finally, drawing largely upon interviews and observations conducted in Australia, Part VI concludes this Article by considering the current state of Australian jurisprudential thought and legal pedagogy.

II. Birth of the Legal Academy

Early developments in Australian legal education were inextricably tied to the needs and concerns of the colony's nascent legal profession. Originally responsible for all legal instruction, the Bar was slow to share this function with the legal academy—especially given the abstract approach that initially dominated academic law teaching. When the profession finally did shift the training of its aspiring members to Australia's fledgling universities, it did so on its own terms, shaping the curriculum and providing instructors from its own ranks. As a result, the fin de siècle Australian legal academy was characterized by a heavily doctrinal approach, a tack it maintained well into the twentieth century.

A. Early Struggles

When the British colonized Australia in 1788, they brought with them their culture, their customs, and their common law tradition. Established as a penal outpost, New South Wales had from its founding a rudimentary legal system—albeit in the style of a military tribunal—to administer the colony's amalgam of criminal and civil matters.[4] The new courts, primitive as they were, could boast neither barristers nor solicitors, relying instead on the assistance of disbarred lawyers who had been transported as convicts.[5] By the early nineteenth century, however, efforts were underway to regularize and professionalize the practice of law, leading to the establishment of qualification requirements for prospective Australian lawyers.[6] Aspiring solicitors were obliged to complete a five-year practical apprenticeship with a qualified attorney, while barristers were required to study and sit for bar examinations in history, classics, mathematics, and law.[7] Whichever track a budding lawyer took, though, his training focused on legal

[4] Gregory D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press 2002) 21–23, 26.

[5] ibid 26, 42. Nor were there prosecutors. Rather, early colonial victims were left to argue their own cases. ibid 22.

[6] Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 UNSW LJ 113–14. Driving these efforts were concerns—both among leading practitioners and among certain laypeople—about the propriety of former convicts to practicing law. ibid 114.

[7] ibid 114–15, 118–19.

doctrine, with no overt theoretical instruction.[8]

Shortly after Australia's first university, the University of Sydney, was founded in 1850, calls sounded to introduce legal instruction into the curriculum.[9] The University Senate heeded these calls, establishing a Faculty of Law five years later.[10] Far from professional training, however, Australia's first law school was meant to offer students an education worthy of its university setting: theoretical instruction in jurisprudence.[11] Preaching the separation of practical and liberal education, the University's first Principal proclaimed that '[t]he soundest lawyers come forth from schools in which law is never taught; the most accomplished physicians are nurtured where medicine is but a name'.[12] Accordingly, the school's inaugural law lecture course eschewed the study of cases and 'mere professional details',[13] introducing students instead to the theory and principles behind constitutional law and the common law.[14] Envisioning law as a 'high and noble science,'[15] the course approached these subjects from a classical formalist perspective—the same theoretical viewpoint that animated the postbellum American legal academy.[16,17]

The central tenet of classical formalism was the notion of law as an affair of formal rules, knowable and applicable without moral inquiry. To the classical formalist, such rules constituted 'a body of scientific principle',[18] characterized by generality, universality, and continuity.[19] Declaring law's systematic and all-

[8] Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 Melb U L Rev 966.

[9] Martin (n 6) 123–25.

[10] ibid 123.

[11] ibid 122, 125, 127.

[12] Henry E Barff, *A Short Historical Account of the University of Sydney* (Angus & Robertson 1902) 34.

[13] Martin (n 6) 127 (internal quotation marks omitted).

[14] ibid 122. See also John F Hargrave, *Law Lectures* vii (John Ferguson 1878).

[15] Hargrave (n 14) vii.

[16] Leading American classical formalists included Harvard's Dean Christopher Columbus Langdell and his colleagues James Barr Ames, Joseph Beale, and Samuel Williston. The formalist movement also found favour within the conservative wing of the *Lochner*-era United States Supreme Court. Gerald B Wetlaufer, 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 Am U L Rev 10–11.

[17] It is important to distinguish between two variables that can aid in characterizing the legal academy of a particular time and place: (a) the prevailing theoretical perspective and (b) the level of theoretical engagement. While classical formalism came to dominate both the Australian and American legal academies, the two institutions differed in their emphases on theory. Whereas the Australian legal academy focused almost exclusively on theory, American law schools balanced an interest in theory with a concern for doctrine. The difference between these approaches is reflected in the two legal academies' contrasting attitudes toward the teaching of cases.

[18] Joseph H Beale, *A Treatise on the Conflict of Laws* (HUP 1916) 135.

[19] ibid 153–154.

encompassing nature, the classical formalists insisted that judges could rationally resolve novel legal problems through deduction from abstract formal propositions.[20] This process relied not on judicial discretion—which would have destroyed the predictability inherent in law[21]—or on purposive reasoning, but rather upon the professional techniques of 'legal logic'.[22] Through such techniques, the formalists contended, judges could apply legal doctrine 'with constant facility and certainty to the ever-tangled skein of human affairs … '.[23]

Unsurprisingly perhaps, given its purely theoretical approach, Australia's first law school garnered an apathetic response from the legal profession. Indeed, the Bar neither required aspiring practitioners to attend lectures nor even recognized attendance for professional admission purposes.[24] This indifference was reflected in discouraging attendance rates. Although the first lecture course initially attracted some thirty pupils, only five or six remained by the year's end, a fact largely attributable to the lack of professional incentives.[25] Struggling on in this manner until 1869,[26] the school eventually discontinued its lectures, leaving the small law faculty to act as a body of examiners for students who elected to study independently.[27] From its promising beginnings, the Australian legal academy had been dealt a disheartening setback.

B. Rebirth

Australia's first law school did not resume operation until two decades later, after significant liberalization in both the legal profession and the academy. Criticized for its social exclusivity and rigid control over admission, the profession gradually began recognizing and eventually requiring formal academic training.[28] Simultaneously, the University's new Chancellor adopted a more moderate approach toward professional education.[29] The University Senate followed suit when, receiving a large bequest, it established a chaired professorship in law

[20] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds, Univ Cal Press 1968) 657.
[21] Beale (n 18) 155.
[22] Weber (n 20) 657.
[23] Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (1st edn, Little, Brown & Co 1871) vi.
[24] Univ of Sydney Law Sch, *The Jubilee Book of the Law School of the University of Sydney, 1890–1940* (Thomas Bavin ed, Halstead Press 1940) 6.
[25] Martin (n 6) 126–27.
[26] Barff (n 12) 98.
[27] Martin (n 6) 128.
[28] ibid 142.
[29] ibid 131, 133.

along with four law lectureships.[30] Ushering in a new era of legal education, these developments helped shift primary responsibility for legal instruction from the profession to the University.[31]

This reconciliation of the legal academy with the needs of the Bar occurred on the legal profession's terms. The reanimated law school was located away from the main University campus and near the law offices and courts.[32] Moreover, the reconstituted law faculty consisted of a judge and several practicing barristers, 'an ample guarantee that the teaching would have a sufficiently practical bias'.[33] As the profession came increasingly to dominate the academy—a pattern not unique to Sydney Law School—practitioners-turned part-time faculty reshaped legal education into 'the imparting of information in the form of legal principles, rules and propositions ... to be committed to memory for examination purposes'.[34] While formalist assumptions continued to inform law teaching, overt theoretical engagement was all but abandoned in favour of practical instruction.[35] This doctrinal, practitioner-driven approach, starkly in contrast with the 1850s and 1860s' theory-steeped pedagogy, would define Australian legal education for the next half century.[36]

III. Polemics, Policy, and Pragmatism

In the 1920s and 1930s, the American legal academy was engulfed by a wave of radical scepticism:[37] the legal realist movement.[38] Realism represented the crest of a surge of progressive thought building since *Lochner*.[39,40] Tearing through classical formalist orthodoxies and sweeping away the vision of law as a neutral, apolitical science, realism transformed American jurisprudential thought and legal pedagogy.

30 ibid 139.
31 ibid.
32 ibid 142.
33 Pitt Cobbett, 'The Establishment of the Law School' *Sydney Morning Herald* (Sydney, 16 July 1890) 8.
34 Comm on the Future of Tertiary Educ in Austl, 'Tertiary Education in Australia' (1964) ¶11.38.
35 James (n 8) 967. cf Morton J Horwitz, *The Transformation of American Law: 1780–1860* (HUP 1977) 256.
36 James (n 8) 967.
37 Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (HUP 1992) 169–212.
38 With early beachheads at Columbia Law School and Yale Law School, legal realism counted Karl Llewellyn, Felix Cohen, Jerome Frank, and Walter Wheeler Cook among its leading academic voices. On the bench, Justices Oliver Wendell Holmes, Jr. and Benjamin Cardozo had anticipated realist insights, while Justice William O Douglas later reflected the movement's influence. Wetlaufer (n 16).
39 Lochner v New York, 198 US 45 (1905).
40 Horwitz, *Transformation: 1870–1960* (n 7) 170.

For all its seething intensity, however, the realist breaker never reached Australian shores.[41] Restrained by barriers both practical and theoretical, its insights were kept at bay until mid-century, rippling into the Australian legal academy only under the banner of other theories.

A. The Functional Approach

Although the realists often differed as much from one another as from the classical formalists they criticized, several defining characteristics were common throughout the movement.[42] The realists' unifying theme was their assault on the classical faith in formal rules, a campaign they prosecuted with gusto[43] on multiple fronts. One wave of attack—preaching the evils of rigid formalism[44]—echoed a millennia-old refrain.[45] More novel and radical was the charge of formal indeterminacy. Rejecting the formalist notion of law as systematic and continuous, the realists insisted that legal argument is riddled with ambiguity, gaps, and conflicts. Both general propositions and particular rules, they observed, can be construed either broadly or narrowly.[46] Moreover, judges must constantly choose among equally applicable rules and counter-rules that could yield polar outcomes in a given situation: '[i]n any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, [formal rules]—are at least two, and ... the two are mutually contradictory as applied to the case in hand'.[47] In view of such dilemmas, the realists maintained, formal rules leave judges not with determinate

41 James (n 8) 968.

42 Karl Llewellyn, 'Some Realism about Realism—Responding to Dean Pound' (1931) 44 Harv L Rev 1233–1255.

43 Radical polemicists in tone, the realists sought less to critique the old jurisprudence than to sweep away its very foundations. Max Radin, 'Statutory Interpretation' (1930) 43 Harv L Rev 872 ('A legislative intent, undiscoverable in fact, irrelevant if it were discovered ... is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?').

44 Felix Cohen, 'The Ethical Basis of Legal Criticism' (1931) 41 Yale LJ 213–217.

45 Aristotle, Rhetoric bk I (WD Ross ed, W Rhys Roberts tr, Cosimo 2010) 50 ('Equity bids us ... to think less about the laws than the man who framed them, and less about what he said than what he meant ... '.). Oliver Wendell Holmes, Jr offered a more recent rendering in *The Common Law* (1st ed, Little, Brown & Co 1881) 24, commending judges who refuse to 'sacrifice good sense to a syllogism'. But see Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175.

46 *See* Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960) 77–91 (detailing techniques for manipulating precedent).

47 Llewellyn, 'Some Realism' (n 42) 1239. See also Cohen, 'Ethical Basis' (n 44) 216 ('Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case'.); Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed' (1950) 3 Vand L Rev 401–406 (1950) (listing duelling canons of statutory construction).

resolution of legal problems, but with a menu of alternatives.

Hand-in-hand with their critique of formalism, the realists also derided the invocation of legal abstractions such as property rights, corporate entities, proximate cause, due process, and malice.[48] These manipulable concepts, they argued, are functionally inefficacious,[49] serving mainly to cloak formal indeterminacy and unarticulated judicial biases.[50] While such abstractions may be convenient shorthand, the realists cautioned against treating them as anything more than that: 'poetical or mnemonic devices' offering no foundation for adjudication, prediction, or critique.[51] Thus, the judge whose opinion turns, for instance, on a corporation's physical location—rather than the social facts and consequences of extending liability here or there—might just as fruitfully concern himself with the number of angels that can stand on the head of a pin.[52]

To the extent the realists offered a prescriptive program, it centred on judicial candour and open, intelligent policy deliberation.[53] Convinced as they were that underlying political and ethical considerations—not formal rules or concepts—ultimately decide cases, the realists urged judges to 'frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment ...'.[54] Returning to the example of personal jurisdiction over a corporation, then, a realist judge might balance 'the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation' versus 'the possible hardship to corporations of having to defend actions in many states'.[55] To foster sensible decisions and genuine debate, the realists insisted, law must trade the unarguable innuendo of formal rules and abstractions for the honest weighing of ethical values and pragmatic consequences.[56]

[48] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 820.

[49] ibid 820 ('Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormative principle'.).

[50] ibid 817.

[51] ibid 812. See also Karl Llewellyn, 'A Realistic Jurisprudence—The Next Step' (1930) 30 Colum L Rev 453.

[52] Cohen, 'Transcendental Nonsense' (n 48) 810–11.

[53] Llewellyn, 'Some Realism' (n 42) 1253 ('[O]nly policy considerations ... can justify "interpreting" ... the relevant body of precedent in one way or another'.).

[54] Cohen, 'Transcendental Nonsense' (n 48) 842.

[55] ibid 810.

[56] Cohen, 'Ethical Basis' (n 44) 202.

B. All Quiet on the Antipodean Front

For all the iconoclastic reverberations realism sent through American law, the Australian legal academy felt none of its rumblings. Several factors account for the failure of realism to take hold in Australia. On a practical level, Australia's geographic remoteness and reliance on oceangoing commerce restricted outside contact.[57] The Great Depression, which struck just as the realist movement was beginning to coalesce, can only have hindered the exchange of jurisprudential ideas between Australia and faraway New York or New Haven.[58]

The tenor of contemporary legal education also impeded realist insights that reached Australian shores.[59] Theoretical engagement was at its nadir in the doctrinal 1930s, when legal education focused on grounding pupils in legal rules and practical skills. Controlled by practitioners who saw little value in legal philosophy or scholarly debates, the Australian legal academy was hardly fertile ground for revolutionary jurisprudential ideas.[60] The analytical methodology ingrained in Australian legal culture was inhospitable to the realists' pragmatic scepticism.[61] An inheritance from British legal thought, the analytical tradition prizes clarity, precision, and logical rigour, giving rise to theoretical arguments grounded in the *corpus juris*.[62] The realists, by contrast, were prone to bold assertions and fiery invectives, supporting their positions by reference to extra-legal social facts.

Owing to these barriers, Australian jurisprudential thought did not move beyond classical formalism until mid-century, when full-time academics wrested control of the legal academy from the Bar and respectable analytical theories incorporated realist insights.

[57] Kevin Burley, *British Shipping and Australia: 1920–1939* (CUP 1968) 1.

[58] ibid at 19 (detailing effects of the Depression); see also Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' (2005) 27 Sydney L Rev 323, 333 (remarking on Australian intellectual isolation).

[59] James (n 8) 969; see also Martin (n 6) 143.

[60] James (n 8) 969.

[61] Interview with Fleur Johns, Professor, Univ of NSW Law Sch (Sydney, Austl, 13 January 2015).

[62] Allan H Hutchinson, 'The Province of Jurisprudence (Really) Redetermined' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 88–91.

IV. *Enter* Julius Stone

It was against this rigidly doctrinal, classical formalist backdrop that Julius Stone,[63] soon to become one of Australia's foremost legal scholars, took the academic stage in 1942.[64] Appointed to a chaired professorship at Sydney Law School,[65] Stone, who had by this time earned five law degrees,[66] stood out in a faculty dominated by part-time practitioner-lecturers. Dedicated to theoretical scholarship and critical of classical formalism,[67] Stone would spend the next four decades working to reshape Australian jurisprudential thought. While his legacy reveals a mixed record of success, Stone's arrival marked a turning point for the Australian legal academy.

Born and educated in England, Stone spent the early 1930s studying at Harvard Law School, where, drawn into the intellectual orbit of Dean Roscoe Pound, he developed the jurisprudential ideas he would elaborate over his long career in Australia.[68] Echoing realist insights, Stone consistently emphasized law's openness and the attendant 'leeways of choice' available to judges.[69] He went beyond the realists, however, in his attempt at a prescriptive account of principled judicial discretion. Indeterminate cases, Stone argued, require judges to evaluate and adjust the interests at stake in light of the particular circumstances of the case.[70] Crucial to this inquiry is the process of sociological analysis, which promises to 'deliver law-like generalities about law' and to offer insight into the needs of a given social situation.[71] Echoing Pound, Stone thus advocated for a broader jurisprudence—a jurisprudence that would move beyond analytical

63 Leonie Star, *Julius Stone: An Intellectual Life* (Sydney Univ Press 1992).

64 Murray Gleeson, 'Julius Stone and the Legal Profession' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 9.

65 ibid.

66 Helen Irving, Jacqueline Mowbray & Kevin Walton, 'Introduction' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 1.

67 Gleeson (n 64) 10.

68 Kirby (n 58) 324–26. See also Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) UNSW LJ 107 (reviewing Stone's philosophical commitments).

69 Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford Univ Press 1964) 241.

70 Julius Stone, *The Province and Function of Law* (HUP 2nd prtg 1950) 146, 189, 782–85 (emphasizing the importance of ethical and sociological analysis of the needs of a concrete situation). See also Stone, *Legal System* (n 69) 241 (explaining that when legal 'syllogism' fails, a court must decide 'based on an evaluation, conscious or unconscious, of the social situation confronting it'.).

71 Julius Stone, *Social Dimensions of Law and Justice* (Stanford Univ Press 1966) 391, 783. Stone's emphasis of situation-oriented sociological inquiry is akin to that of Lon L Fuller, *Anatomy of the Law* (Praeger 1968) 59; Llewellyn (n 46) 121–22 (discussing courts' 'situation sense). See also Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 378.

'logic chopping'[72] to recognize that law is 'conditioned by the social, political, and economic environment as well as by human thought processes'.[73]

Eager to expound these ideas, Stone left Harvard in 1936 to seek a teaching post in his native England.[74] His hopes were soon dashed, however, as university after university rejected his overtures—rejections, Stone later learned, stemming from an academic reference who warned of his Jewish heritage and outspoken Zionist convictions.[75] Facing similar anti-Semitic rebuffs across the Atlantic, Stone widened his search, eventually accepting a chaired professorship in jurisprudence and international law at the faraway Sydney Law School.[76] For Stone, the post amounted to 'banishment'.[77] Despite his disappointment and isolation, he persevered in the face of prejudice, determined to leave his mark on the Australian legal academy.[78]

Among Stone's greatest legacies was rekindling the flame of Australian legal scholarship. Arriving at Sydney to find the law school practice-oriented and practitioner-driven,[79] Stone set out to increase its theoretical engagement, challenging the doctrinal focus on rule-mastery and encouraging the study of law as an academic discipline in its own right.[80] He began by revitalizing the teaching of jurisprudence[81] and helping to launch the *Sydney Law Review*,[82] along with lobbying for the hiring of more full-time academics.[83] A prolific scholar,[84] Stone also established himself as a leader within the broader legal academy, founding the Australian Society of Legal Philosophy[85] and promoting the further professionalization of law

[72] Hutchinson (n 62) 94.
[73] Stone, *Social Dimensions* (n 71) 190.
[74] Star (n 63) 42.
[75] Adrienne Stone, 'Julius Stone: A Reflection' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 16.
[76] Kirby (n 58) 327.
[77] ibid 333.
[78] Stone (n 75) 16–17.
[79] Gleeson (n 64) 9.
[80] Interview with Kevin Walton, Senior Lecturer; Dir, Julius Stone Institute of Juris, Univ of Sydney Law Sch (Sydney, Austl, 12 January 2015).
[81] ibid. See also Stone, *Legal System* (n 69) 14–20 (detailing recent developments in the teaching of jurisprudence).
[82] *See* Irving, Mowbray & Walton (n 66) 2; 'Professor Julius Stone: In Commemoration of Twenty-Five Years of Scholarship' (1967) 5 Sydney L Rev 352.
[83] Interview with Kevin Walton (n 80). See also James (n 8) 967–68 (detailing the professionalization of legal education and the 'concerted endeavor to adopt a more scholarly approach to the teaching of law').
[84] Stone authored more than 30 books and over 100 articles and chapters. Stone (n 75) 17.
[85] Irving, Mowbray & Walton (n 66) 2.

teaching.[86] Within two decades, Stone's 'leaven' was working.[87] Indeed, by 1960, as theoretical engagement was on the rise and law schools across Australia had begun replacing part-time practitioners with full-time academics,[88] a newly-minted legal theorist at the University of Queensland could report that '[o]ur jurisprudence is to some extent practice-oriented, as Anglo-American jurisprudence largely is, but we are also keenly aware of purely theoretical problems of law, and have made contributions in this field'.[89]

For all his success in reinvigorating legal scholarship, however, Stone largely failed in his assault against classical formalism and his efforts to introduce sociological jurisprudence into the legal academy.[90] In fact, with formalist thought running stronger than ever,[91] Stone's ideas gained little ground, either contemporaneously[92] or subsequently[93]—an unsurprising fate, given their place well outside of the philosophical mainstream. Dominated by the analytical approach Stone criticized,[94] Australian jurisprudential thought was prepared to accept neither Stone's methodology nor his insights.[95] Still, although his attempts

86 Interview with Kevin Walton (n 80).

87 'Professor Julius Stone: In Commemoration' (n 82) 352.

88 James (n 8) 967–69.

89 RD Lumb, 'Recent Developments in Legal Theory in Australia' (1960) 46 Archiv für Rechts- und Sozialphilosophie 114.

90 Interview with Kevin Walton (n 80).

91 James (n 8) 968 (arguing that the new generation of full-time legal scholars embraced classical formalism and the notion of law as a science in order to 'justif[y] their own existence' and bolster their academic credibility). Formalist ascendency was not merely confined to the legal academy, however. Indeed, nowhere is the jurisprudential zeitgeist of postwar Australia better illustrated than in Chief Justice Dixon's avowed commitment to 'strict and complete legalism'. Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi. See also Helen Irving, 'The Dixon Court' in Rosalind Dixon & George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP 2015).

92 Interview with Kevin Walton (n 80).

93 ibid. cf Fleur Johns, 'The Gift of Realism: Julius Stone and the International Law Academy in Australia' in Helen Irving, Jacqueline Mowbray & Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press 2010) 22–25 (finding little engagement with Stone's ideas among international law scholars). Absent from modern syllabi, Stone's brand of sociological jurisprudence has faded into intellectual obscurity. Interview with Jeffrey Goldsworthy, Professor, Monash Univ Law Sch (Melb, Austl, 20 Jan 2015).

94 Julius Stone, 'The Province of Jurisprudence Redetermined' (1944) 7 Mod L Rev 98 (lamenting that 'analytical jurisprudence is "The Jurisprudence"').

95 Interview with Fleur Johns (n 61). Outside of the legal academy, however, Stone's insights did have a profound and lasting effect on many of his former students—most notably those who ascended to the Australian High Court. In particular, Stone's influence is commonly credited with inspiring the 'creative' Mason Court of the 1990s. Interview with Jeffrey Goldsworthy (n 93). See also Kirby (n 58) 334. For background on the Mason Court's innovations, see Paul Kildea & George Williams, 'The Mason Court' in Rosalind Dixon & George Williams (eds), *The High Court, the Constitution and Australian Politics* (CUP 2015).

to dislodge classical formalism proved unavailing, Stone's efforts in reshaping the legal academy may have helped indirectly to achieve this goal. Indeed, the reawakening of philosophical scholarship and the trend toward greater theoretical engagement arguably paved the way for a pair of post-realist analytical theories that moved Australian jurisprudential thought into the modern era.

V. A Middle Path: The Analytical Tradition

While the American and Australian legal academies reflected polar responses to realist insights—one fixated, the other essentially unaffected—British legal theorists took a middle road. Less shaken than their American counterparts, legal philosophers in the Oxbridge analytical tradition nonetheless grappled with the realists' indeterminacy thesis. By the 1970s, two responses had emerged, both asserting law's determinacy and upholding the possibility of rationally resolving legal questions. The first response, a modern reformulation of the classical formalism, incorporated realist insights while maintaining the formalists' emphasis on determinate rules. The second response, legal idealism, accepted the indeterminacy of formal rules but held out hope for rational resolution through practical moral reasoning.[96] Mainstream in their analytical methodology, these two approaches managed to introduce realist insights into Australian jurisprudential thought (albeit indirectly and in sublimated form) where Stone had failed, showing the legal academy a path forward beyond classical formalism.[97]

A. Modern Formalism

With the classical vision of law fracturing under realist onslaught, legal theorists committed to rule-oriented jurisprudence sought to develop a more modest formalism. Chief among these efforts—and most influential in Australia—was the work of British legal philosopher HLA Hart.[98,99] Hart discarded the notion of law as a grand, systematic body of scientific principles, viewing it instead as a collection of individual rules. The process of adjudication, he argued, requires judges not to

[96] In truth, the later idealists saw themselves as responding rather to the modern formalists than to the realist critique. Still, in their rationalism and methodology, the idealists unarguably stood opposed to the realist project.

[97] Interview with Jeffrey Goldsworthy (n 93).

[98] For an overview of the striking similarities between Hart and his fellow Oxonian—and sometime rival — Julius Stone, see Kirby (n 58) at 324–329.

[99] To be sure, Hart was not alone in his quest to rework formalism into a credible, post-realist jurisprudential theory. The Austrian legal philosopher Hans Kelsen, for example, developed a sophisticated formalist approach emphasizing judicial discretion within a framework of rules. Hans Kelsen, *The Pure Theory of Law* (Max Knight tr, Univ Cal Press 1967). Kelsen's ideas, however, have played a less prominent role than Hart's in the Australian legal academy.

deduce right answers from general propositions, but rather to determine whether or not specific rules apply in particular situations.[100] Contending that formal rules enable the rational resolution of most cases, Hart aimed to chart a middle path between the Scylla of blind formalism and the Charybdis of 'rule-scepticism'.[101]

Hart began by acknowledging law's openness, invoking the philosophy of language to elaborate upon realist insights. Because rules are communicated through language, he insisted, they are inescapably 'open textured'.[102] Every rule has both a core of settled meaning—a 'standard instance' in which it clearly applies—and a penumbra of uncertainty where its applicability is ambiguous.[103] A prohibition against vehicles in the public park, for instance, clearly covers automobiles, but it may or may not govern bicycles, toy cars, or airplanes.[104] This vagueness is magnified when rules incorporate practical moral criteria such as *due* care, the *best* interests of the child, or *unreasonable* restraint of trade.[105] While these standards, like rules, have core instances of certain applicability, they are fringed by especially wide, uncertain penumbrae.[106]

Faced with a penumbral case, Hart explained, a judge must choose 'intelligent[ly] and purposive[ly]' how to apply the rule or rules in question, deciding among alternative outcomes by reference to social aims and policies.[107] Hart rejected the notion that such principles, policies, or purposes constitute authoritative legal premises, however,[108] echoing the realists in denying that practical moral reasoning could guide judges to determinate answers. Thus, although formal law necessarily limits the scope of choice in penumbral cases—a judge could not dictate an outcome foreclosed by the relevant rules—judges exercise strong, essentially legislative discretion in deciding among the available alternatives.

Yet, while acknowledging that law is inherently open-textured, Hart accused the realists of exaggerating the extent of indeterminacy. Reproving these 'rule-skeptics' for overstating the proportion of penumbra to core,[109] Hart maintained

[100] *See* HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 607–08.

[101] *See* HLA Hart, *The Concept of Law* (1st edn, OUP 1961) 144.

[102] ibid at 125. ('[U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact'.).

[103] Hart, 'Law and Morals' (n 100) 607.

[104] ibid.

[105] Hart, *Concept of Law* (n 101) 127–28.

[106] ibid 128.

[107] Hart, 'Law and Morals' (n 100) 614.

[108] ibid.

[109] ibid 615 ('Of course, it is good to be occupied with the penumbra … . But to be occupied with the penumbra is one thing, to be preoccupied with it another'.).

that most cases fall clearly within the ambit of a formal rule, enabling determinate results 'in case after case, without further recourse to official direction or discretion'.[110] Thus, Hart insisted, notwithstanding the resort to discretion in fringe cases, judges' decisions are 'unquestionably rule-governed' 'over the vast, central areas of the law'.[111]

B. Legal Idealism

Less confident about formal determinacy were a group of theorists whose approach can be styled as legal idealism. Pioneered at Harvard, the idealist perspective found its fullest expression in the work of Ronald Dworkin,[112] who succeeded Hart as Oxford's chair of jurisprudence. The idealists, like the formalists, rejected the skeptical vision of law, maintaining that most legal problems are rationally resoluble. But whereas Hart saw formal rules as generally determinate and regarded practical moral reasoning as an indeterminate resort in penumbral cases, the idealists' commitments were precisely the opposite. Formal rules, they observed, are far more complex, conflicted, and open than Hart supposed, yielding indeterminate answers to most legal questions, just as the realists had insisted.[113] However, the idealists declared, legal ideals—that is, underlying principles, policies, and purposes—enable judges to reach right answers and determinate resolution when formal rules run out.

According to the idealists, behind every formal rule is a practical moral principle, policy, or purpose: an ideal objective the rule aims to achieve that can help resolve ambiguities about its meaning and application.[114] Anchored

[110] Hart, *Concept of Law* (n 101) 133.

[111] ibid 150.

[112] What follows, I hasten to emphasize, is self-consciously a reconstruction of one aspect of Dworkin's work—alongside that of legal scholars of a similar bent—and not an attempt fairly to summarize Dworkin's overarching theory of law. Specifically, while Dworkin wrote eloquently and voluminously about legal practice as 'guid[ing] and constrain[ing] the power of government', I will focus here on reconstructing certain threads of Dworkin's theory of adjudication. For a similar approach, see Keating (n 3) 16 (reconstructing Dworkin's writing to 'fashion the strongest argument that decision in accordance with pre-existing standards requires a holistic and coherentist form of legal justification'.).

[113] See, for example, Charles Fried, 'The Laws of Change: The Cunning of Reason in Moral and Legal History' (1980) 9 JL Stud 340. See also Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart (1958) 71 Harv L Rev 662–69.

[114] Henry M Hart, Jr. & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent edn, Foundation Press 1958) 166. Even in seemingly straightforward cases, the idealists insisted, it is not formal rules but rather these underlying principles, policies, and purposes that guide judges' decisions. Fried (n 113) 340. See also Fuller (n 113) 663 ('If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule "is aiming at in general" so that we know there is no need to worry about

in the formal law, such ideals can be rationally derived through careful analysis of particular rules.[115] This process, the idealists explained, begins by attributing plausible objectives to a specific rule, reasons that might properly have persuaded the legislature to enact it. From among these possibilities, a judge must identify the objective that fits the rule most coherently and offers the best justification for it.[116] When the rule's purpose is thus established, this purpose can be deployed to guide and shape the rule's application, resolving formal indeterminacy.[117]

But since attributing a purpose to every rule would merely replicate formal disarray at a new level—pitting purposes against counter-purposes—the idealizing project necessarily takes on a more expansive scope. Indeed, according to the idealists, a judge seeking to wring right answers from ambiguous, conflicted rules must find 'a larger and subtler purpose as to how … particular [rules are] to be fitted into the legal system as a whole',[118] developing a coherent theory to identify the overarching purpose of a given body of law.[119] As the idealists realized, 'the organizing and rationalizing power of this idea is inestimable'.[120] In building such a theory, however, a judge is bound to encounter tensions and inconsistencies that defy perfect reconciliation. Thus, the idealists observed, if a theory is to harmonize discordant doctrines, it must have a critical edge that subordinates certain rules while emphasizing others[121]—that is, it must fit *most* but not *all* of the underlying formal law. Guided by the analytically rigorous[122] tests of fit and justification, this approach allows a judge to bring coherent order where formal chaos once reigned.[123]

Of course, more than one theory might be advanced for any given body of

the difference between Fords and Cadillacs'.).

115 Thus, crucially, the idealist's brand of moral reasoning looks not to unconstrained individual or societal *background morality*, but rather to *law's morality*—moral principles that, grounded in formal law, can be derived through careful analysis of the *corpus juris*.

116 Ronald Dworkin, 'Hard Cases' (1975) 88 Harv L Rev 1085–87. See also Hart & Sacks (n 114) 1414–15. This approach, it should be noted, is not limited to statutory cases. Dworkin (n 116) 1083–85 (constitutional rules), 1087–90 (common law rules).

117 Dworkin (n 116) 1085–87.

118 Hart & Sacks (n 114) 1414.

119 Dworkin (n 116) 1064, 1085, 1094.

120 Hart & Sacks (n 114) 167.

121 ibid 1097–1101.

122 Dworkin personifies this rigor in a mythical judge called 'Hercules', a 'lawyer of superhuman skill, learning, patience, and acumen'. Dworkin (n 116) 1083. Faced with a question of constitutional interpretation, Dworkin explains, Hercules first 'develop[s] a theory of the constitution in the shape of a complex set of principles and policies ... by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution'. ibid.

123 For examples of ideal theories, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (HUP 1981) (arguing that the notion of free choice offers the governing ideal of contract

law.[124] In such situations, the tests of fit and justification again come into play, eliminating theories that fail sufficiently to cohere with or account for the underlying formal rules.[125] Using this analysis, the idealists maintained, a judge can identify the best theory for a particular body of law.[126] After all, only rarely will conflicting theories be in perfect equipoise; in almost every case, the idealists insisted, a single theory will enjoy better support and offer a better explanation of the underlying law than will its rivals.[127] By the idealists' account, reference to this correct theory can ultimately resolve ambiguities, gaps, and conflicts in the underlying formal law, enabling a judge to reach rational resolution and right answers.

VI. Critical Re(Awakenings)

By the late 1970s, the analytical theories had gained widespread acceptance throughout Australia, Great Britain, and the United States. Incorporating skeptical insights into their overarching rationalist visions of law, they had become the dominant schools of jurisprudential thought and the perspectives implicit in most law teaching. The realists' skeptical impulse, meanwhile, seemed all but dead; in the words of Roberto Unger, the leading scholars of the day 'were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars'.[128] All of this was to change, however, with the eruption of the critical legal studies movement.

A. A Tale of Two Theses

The critical movement that emerged in the late twentieth century was less an organized school than a coalescence of the legal left,[129] an umbrella under which diverse groups joined in their common critique of the prevailing legal order.[130] Two claims about the nature of law and legal argument can be distilled from the

law); Richard A Posner, *The Problems of Jurisprudence* (HUP 1990) 353–392 (expounding an economic theory of the common law founded on the principle of wealth maximization); Samuel D Warren & Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193 (advancing the principle of privacy to account for various tort and property doctrines).

124 Dworkin (n 116) 1084.

125 ibid 1084–86.

126 Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 283–90.

127 ibid.

128 Roberto M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harv L Rev 674.

129 For a first-hand reflection on the nature of the 'legal left', see, for example, Zinaida Miller & Brishen Rogers, 'Radicalism and Responsibility: An Introduction to Unbound' (2005) 1 Unbound: Harv J Legal Left 1.

130 Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 Yale LJ 1516 (describing critical legal studies as a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy'.).

corpus of this heterogeneous movement.[131] These claims are not equally on display in every work of critical scholarship; some critical theorists, for example, tended to elaborate one line of argument while the other idea featured only as a background assumption or a logical entailment of their contentions. Despite such variations in form and emphasis, however, these claims reflect the central convictions that unified critical scholarship.

The first critical thesis—the 'conflict thesis'—offers a radically sceptical response to modern formalism and legal idealism, projecting a vision of law as plagued with indeterminacy and admitting of no right answers.[132] Echoing realist insights, the thesis begins by affirming the openness of formal law. Formal rules, the critical theorists observed, are beset with vagueness, gaps, and conflicts. Going beyond the penumbral uncertainty that Hart recognized, this pervasive ambiguity renders formal argument indeterminate in all but the simplest of cases.[133] Accordingly, judges necessarily resort to Dworkin's brand of purposive reasoning to resolve most legal questions.

But just as the realists exposed the problem of rule and counter-rule, the critical theorists seized on the dilemma of theory and counter-theory,[134] challenging the idealists' faith that judges can identify correct theories by means of fit and justification. The test of fit, the critical theorists explained, acts as a threshold criterion, eliminating theories that fail sufficiently to cohere with the underlying formal law.[135] Yet beyond this threshold, it offers no guidance; a sprawling, apologetic theory that fits more of the established doctrine is not necessarily privileged over its narrower, more critical rival.[136] As such, the critical theorists observed, judges

[131] To my knowledge, no one has explicated the commitments of critical jurisprudence more clearly than Professor Lewis D Sargentich. While I am indebted to him for the jurisprudential typology used throughout this Article, I wish to credit him specifically for the following insights.

[132] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1737 (describing 'conflicting visions' that claim 'universal relevance, but [are] unable to establish hegemony anywhere').

[133] Mark Tushnet, 'Legal Scholarship: Its Causes and Cure' (1981) 90 Yale LJ 1210.

[134] Although the idealists acknowledged that a given body of law might give rise to more than one theory, (see n 122 and accompanying text), they treated these theories as fundamentally commensurable. The critical theorists, by contrast, observed that theories of the same general area of law may differ in the specific domains they identify, in their overall degree of criticism, and in the particular doctrines they criticize. For example, Fried's will theory of contract (n 125) subordinates the doctrines of duress and unconscionability, while excluding reliance, which it classifies under the banner of tort law. The regulated theory of contract, meanwhile, regards reliance, duress, and unconscionability as among its core doctrines. See also Horwitz, *Transformation: 1780–1860* (n 35) 264 (insurance law).

[135] Tushnet (n 133) 1212. For instance, while the will theory, Fried (n 123), fits most of the doctrines found in contract law, it would be rejected as a theory of torts.

[136] Consider, for example, the theories of equal protection reflected in the Supreme Court's landmark segregation cases. Whereas *Plessy v Ferguson*, 163 US 537 (1896) insisted that equality

are left to ask which theory offers the best justification for a given body of law. This inquiry, however, involves not a rationally constrained analysis, but an unbounded, indeterminate moral or political decision among conflicting theories.[137]

Accordingly, the critical theorists concluded, with formal argument mired in indeterminacy—just as the idealists insisted—and ideal argument generating a menu of alternatives—as the modern formalists suggested—most cases culminate in judicial choice.[138] Far from Hart's collection of 'determinate rules which ... do not require ... a fresh judgment from case to case'[139] or Dworkin's system of coherent ideals offering 'a single right answer to complex questions',[140] law proves to be an indeterminate endeavour, shaped ultimately by the collective choice of legal elites.[141] Thus, denying the analytical claim to right answers and rational resolution, the conflict thesis proclaims that discretion is inescapable and that law is open.[142]

Notwithstanding this openness, however, the second critical claim—the more socially radical 'structure thesis'—asserts that law is also fundamentally closed. Whereas the conflict thesis takes a telephoto view of legal argument, exposing the indeterminacy of formal doctrines and the chaos of ideal reasoning, the structure thesis surveys law through a wide-angle lens, revealing its overarching ideological framework. Even as rival theories clash within this framework, the critical theorists maintained, law's ideology forecloses countless positions that would challenge society's existing rules and legal institutions.

According to the critical theorists, every field of law is surrounded by a discursive perimeter that describes and constrains the contours of legal argument within its bounds. Conflicted though they may be, theories developed inside this perimeter nonetheless overlap, united within an overarching ideology—a structure of shared themes and commitments that suffuses argumentation throughout the entire body of law. The defining feature of this framework is its justificatory nature. Indeed, the critical theorists asserted, by 'presuppose[ing] both the existence of and

is compatible with the 'separate but equal' doctrine, *Brown v Board of Education of Topeka*, 347 US 483 (1954) offered a more critical account of the same ideal.

137 Tushnet, (n 133) 1206, 1212–15.

138 Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 J Legal Educ 340.

139 Hart, *Concept of Law* (n 101) 132 (emphasis omitted).

140 Dworkin, (n 126) 279.

141 See Horwitz, *Transformation: 1870–1960* (n 35) 180–85 (describing conflict and choice in contract law).

142 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (NYU Press 2004) 36 ('Legal reasoning is not distinct, as a method for reaching correct results, from ethical and political discourse in general ... There is never a "correct legal solution" that is other than the correct ethical and political solution ...'.) (emphasis omitted).

the legitimacy of existing hierarchical institutions',[143] law's ideological structure melds the descriptive with the prescriptive to project a social vision[144] that justifies and perpetuates[145] the prevailing legal order.[146] In law's ideology, 'what is, ought to be'.[147]

The upshot of this justificatory hegemony is the foreclosure from legal discourse of perspectives at odds with the dominant framework.[148] For example, the critical theorists observed, law's ideological structure rejects the arguments of feminist jurisprudence[149] and critical race theory[150] as radical and inconsistent with prevailing legal norms. Law thus privileges a narrow band of ideals while ignoring or dismissing positions foreclosed by its ideological framework.[151] The problem with this state of affairs, the critical theorists warned, is the danger that law will 'present[] as just and fair that which is inequitable, cruel, and inhumane'.[152] To the critical theorists' estimation, this danger was often a reality.

[143] Peter Gabel & Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982–83) 11 NYU Rev L & Soc Change 373.

[144] Henry J Steiner, *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law* (Univ Wisc Press 1987) 92–98.

[145] Recall the idealists' emphasis on fit and *justification*.

[146] See Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harv L Rev 1350.

[147] Peter Gabel, 'Reification in Legal Reasoning' in Steven Spitzer (ed), *3 Research in Law and Sociology* (Jai Press 1980) vol 3 29. This assessment, of course, was not a novel one. See also Frederick Engels, 'The Housing Question' in *Karl Marx and Frederick Engels, Selected Works* (Lawrence & Wishart 1962) vol 1 624 ('[F]or the jurists … justice is but the ideologised, gloried expression of the existing economic relations ...'.).

[148] Karl E Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937–1941' (1978) 62 Minn L Rev 292.

[149] Robin West, 'Jurisprudence and Gender' (1988) 55 U Chi L Rev 58 ('The values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law'.).

[150] See Crenshaw, *supra* note 146 at 1350.

[151] This observation is by no means limited to issues of gender and race, however. See, for example, Gerald Frug, 'The City as a Legal Concept' (1980) 93 Harv L Rev 1095–1120 (finding the ideal of powerful, self-governing cities rejected in municipal government law). See also Klare (n 148) (noting that, in interpreting the National Labor Relations Act, the Supreme Court 'foreclosed those potential paths of development most threatening to the established order'.).

[152] Karl Klare, 'Law-Making as Praxis' (1979) 40 Telos 132 (1979). For a dire example, see *State v Mann*, 13 NC (2 Dev) 263 (1829) (legitimating the practice of slavery in antebellum North Carolina).

B. *L'émeute*

The 1980s witnessed an uprising in the Australian legal academy.[153] The revolt began with three small sparks; lighting on dry analytical tinder, these sparks sprang to life and united in the flame of critique. As with the American critical movement, the first spark came from the legal left.[154] Free from McCarthy's pall,[155] Australian leftist thought drew explicitly on vigorous, unfettered Marxism, wielding its blistering critique against the existing legal order.[156] The second spark took the form of a growing coalition—feminist scholars, critical race theorists, queer theorists, and the like—joining their voices to decry law's preservation of the status quo and rejection of foreclosed positions.[157] Lighting their brands in the critical flame, they resolved to illuminate law's legitimating structure. Finally, the uprising also drew strength directly from the American critical legal studies and British critical legal conference movements.[158] Joining friends and colleagues from overseas, academics throughout Australia rallied to these critical banners.

As the 1980s progressed, so did the critical rebellion, spreading chiefly through the influence of individual scholars.[159] Aspiring professors who studied abroad often returned to Australia with a more sceptical outlook; as these academics distinguished themselves, their underlying theoretical commitments gained influence along with their scholarship.[160] Fanned by calls to integrate critical jurisprudence into the law school curriculum, the flames of critique thus tore from faculty to faculty, licking up at the gates of even the most established institutions. Indeed, the venerable Melbourne Law School became a bastion of critical jurisprudence in the 1980s and 1990s, animating doctrinal courses with legal critique and sceptical perspectives.[161] Although the analytical theories remained dominant at most other law schools,[162]

[153] Interview with Kevin Walton (n 80). See also James (n 8) 969.

[154] James (n 8) 969.

[155] Even '[i]n the late 1970s and early 1980s, there was still a real fear of orthodox, determinist Marxism [in the United States,] and ... "red baiting" was not an uncommon practice, even in academia.' John Henry Schlegel, 'CLS Wasn't Killed by a Question' (2007) 58 Ala L Rev 972.

[156] Interview with Fleur Johns (n 61). See also James (n 8) 976.

[157] Interview with Fleur Johns (n 61). See also James (n 8) 969–70.

[158] James (n 8) 970.

[159] For example, Regina Graycar pioneered feminist theory within the Australian legal academy, becoming Australia's first chair of feminist jurisprudence. Interview with Fleur Johns (n 61). See, for example, Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed), *Public and Private Feminist Legal Debates* (OUP 1995) 262.

[160] Hilary Charlesworth, for instance, introduced feminist jurisprudence into the field of international law through precisely this process. Interview with Fleur Johns (n 61). See, for example, Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 Am J Int'l L 379.

[161] Interview with Dale Smith, Senior Lecturer, Univ of Melb Law Sch (Melb, Austl, 19 January 2015).

[162] James (n 8) 972.

Australia was nonetheless ablaze with critical jurisprudence.

Crucially for this critical uprising, the academic atmosphere of the 1980s offered the perfect climate for combustion. With the legal academy in the hands of scholars—not practitioners—increased theoretical engagement fostered the exchange of sceptical insights and radical perspectives. Furthermore, while critical jurisprudence was revolutionary by any account, it could locate each of its seeds (formal indeterminacy and ideal indeterminacy) in the prevailing analytical theories.[163] As such, the distance between the critical scholars and their analytical rivals was far less than the gulf between, for instance, classical formalists and legal realists. Critical jurisprudence succeeded in igniting the Australian legal academy where both realism and sociological jurisprudence had failed.

Yet for all its raging advances, the critical impulse was checked by the firewalls of Australia's analytical tradition—the same barriers that had helped to block realist forays. Monash Law School, for example, proved largely resistant to critical thought, a fact owing much to the Hartian influence of Jeffrey Goldsworthy.[164] A broader backlash against the critical insurgency built throughout the 1980s. Striking back at their rivals, the analytical theorists dismissed critical insights[165] and questioned whether students trained from a critical perspective would even be employable.[166]

These tensions came to a head in 1987. Concerned with the quality of higher education, the Australian government had commissioned reviews of all the commonwealth's academic disciplines. The 1987 Pearce Report, which evaluated the legal academy, offered a harsh appraisal of the critical movement.[167] Commending the incorporation of theory and critique into legal education, it nonetheless denounced critical legal studies as 'attack[ing] law schools very fundamentally' and 'oppos[ing] strongly efforts to educate students for careers requiring full legal qualifications'.[168] The Report reserved its sharpest assessment, however, for Macquarie Law School, then a hotbed of critical thought. Observing

[163] Recall that legal idealism preaches formal indeterminacy, while modern formalism insists that ideal reasoning is ultimately open.

[164] Interview with Dale Smith (n 161).

[165] James (n 8) 971–72. For a contemporary American critique, see Paul Carrington, 'Of Law and the River' (1984) 34 J Legal Educ 227 ('[N]ihilist teachers are more likely to train crooks than radicals ... [T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school.').

[166] Andrew Lang, 'Will Macquarie Law Graduates Remain Employable?' (1989) May Law Soc NSW J 41.

[167] James (n 8) 973–74.

[168] Dennis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) vol 1 49. See also James (n 8) 974.

the bitter ideological clashes among Macquarie's faculty[169]—and attributing this conflict to radical efforts to undermine professional legal education—the Report recommended that the law school be 'phased out' or reconstituted.[170]

While Macquarie ultimately endured, this moment of crisis represented a turning point for critical legal studies and for the Australian legal academy more broadly.[171] The critical inferno, dampened by official censure, began to subside as fewer scholars openly aligned themselves with its insights.[172] At the same time, conflicting visions of critique led to discord within the critical movement itself.[173] Thus, while the flame burned on throughout the 1990s—kept alive mainly by feminist legal theory—it had lost much of its influence in Australian jurisprudential thought.[174]

VII. Today's Legal Academy

Over its first 160 years, the Australian legal academy has grown from struggling infancy into robust, flourishing maturity. At each stage of its development, the academy has been animated by wide-ranging perspectives on the nature of law and legal argument. Vying for the heart of Australian jurisprudential thought, some of these theories attained the status of orthodoxy—at least for a time—while others faded quickly into obscurity. The resulting interplay among approaches has fostered vigorous, organic growth within the legal academy as theorists in each successive generation of scholars build upon (or dismantle) the commitments of earlier generations. Admittedly, the wide variations among and within today's law faculties complicate efforts to characterize the modern legal academy with any precision. Still, certain generalizations can be drawn about Australian law teaching in the twenty-first century.

The pulse of today's Australian legal academy can be felt in its legal philosophy and its legal pedagogy. First, it is useful to consider which theoretical perspective enjoys the most currency in modern jurisprudential thought. This line of analysis reveals how today's legal academy has received the theories elaborated in Parts I through V of this Article. Second, it is also instructive to evaluate the nature of

[169] These clashes paralleled the 1987 tenure denial battles at Harvard Law School. Tushnet (n 130) 1530 n.60. See also Jennifer A Kingson, 'Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial' *NY Times* (New York, 30 August 1987) <http://www.nytimes.com/1987/08/30/week-inreview/ harvard-tenure-battle-puts-critical-legal-studies-on-trial.html> accessed 29 October 2017.

[170] David Weisbrot, *Australian Lawyers* (Longman Cheshire 1990) 130.

[171] Interview with Fleur Johns (n 61).

[172] James (n 8) 976. See also Schlegel (n 155) 968.

[173] James (n 8) 976.

[174] Interview with Fleur Johns (n 61).

Australian legal pedagogy as a whole, beyond the narrow field of legal philosophy. Legal pedagogy is always informed by a set of assumptions—be they explicit or unconscious—about the nature of legal argument. Formalist assumptions will give rise to a pedagogy where right answers can usually be derived from concrete rules and doctrines. Critical assumptions, by contrast, will support a pedagogy of indeterminacy and conflicting perspectives.[175] Considering both the prevailing (if implicit) theoretical perspective underlying regular doctrinal courses as well as the extent to which such courses engage with theoretical issues can help illuminate the range of jurisprudential commitments and engagement within the Australian legal academy.

A. Jurisprudential Thought

The Australian legal academy, long a bastion of classical formalism, today bears the marks of modern formalist, idealist, and critical perspectives. With scholars working within each theoretical school, Australian jurisprudential thought has proven rich, creative, and dynamic. Still, the bulk of today's Australian legal philosophers subscribe to Hartian formalism.[176] Thus, most theorists regard formal rules as generally determinate, while acknowledging that certain marginal cases defy formal resolution. In such situations, legal argument necessarily turns to moral principles, policies, and purposes, although most scholars agree ideal inquiry fails to provide the rational constraint the idealists supposed. Notwithstanding these marginal cases, however, formal rules are commonly thought to offer determinate answers to the great majority of legal questions.[177]

Since its high point in the 1980s and 1990s, the influence of legal skepticism has steadily ebbed within the Australian legal academy.[178] To be sure, a number of critical enclaves continue to flourish—Melbourne Law School, for instance, still boasts a robust contingent of critical theorists[179]—but the last two decades have seen a definite shift in tides. For one matter, as Australia's critical legal studies movement has fractured and gone out of vogue, most of the theorists who accept its insights have ceased to identify themselves with the movement or to invoke it in their work. More significantly, the analytical schools have experienced a recent scholarly influx, further cementing their dominance over critical jurisprudence within Australian legal thought.[180] Accordingly, while the critical impulse lives on,

[175] I owe these insights to Professor Lewis D Sargentich.
[176] Interview with Jeffrey Goldsworthy (n 93).
[177] ibid.
[178] Interview with Fleur Johns (n 61).
[179] Interview with Dale Smith (n 161).
[180] ibid. See also Hutchinson (n 62) 91.

sustained in part by young academics who have studied outside of Australia,[181] it enjoys only limited influence among today's legal philosophers.[182]

This jurisprudential landscape is reflected in the general pedagogy of legal theory courses. At Melbourne Law School, for example, Dale Smith leads a seminar exploring the philosophical foundations of law and the connections between legal rules and moral philosophy. Taught from an analytical perspective, the seminar encourages honest critique, but stops short of overt legal scepticism.[183] Kevin Walton takes a similar approach in the jurisprudence course he teaches at Sydney Law School. Covering the likes of Marx, Foucault, and McKinnon alongside Austin, Hart, and Dworkin, the class presents critical perspectives within a generally analytical framework. While both courses emphasize philosophical rigor and seek to foster a degree of critique, neither course prioritizes the arguments of critical legal studies, and—consistent with the Hartian approach—neither dwells on the critical indeterminacy thesis.

B. Legal Pedagogy

Outside the specialized field of jurisprudence, modern formalism also tends to underlie the teaching of most doctrinal courses.[184] This perspective, however, is usually implicit.[185] Indeed, the chief pedagogical difference between today's Australian and American legal academies lies in the extent of their overt theoretical engagement. While scholars at America's top law schools—even those professors with no specific interest in jurisprudence—often infuse their courses with theoretical overtones, the law faculty at Australia's leading universities are generally less engaged with legal theory.[186] As a result, Australian law teaching tends to be concrete and doctrinal, with comparatively little time spent on abstraction or ambiguity. While most Australian law schools require students to take an introductory course in jurisprudence,[187] this class has a limited impact on students' academic development.[188]

Although Australia's leading universities are generally united in their modern

[181] Interview with Fleur Johns (n 61).
[182] Interview with Kevin Walton (n 80).
[183] Interview with Dale Smith (n 161).
[184] Hutchinson (n 62) 90 (observing that the analytical-formalist approach 'can be treated as the default theory of the legal world; its influence is so common and so ingrained that it has become almost pervasive and unappreciated'.).
[185] Interview with Jeffrey Goldsworthy (n 93).
[186] ibid.
[187] Interview with Helen Irving, Professor, Univ of Sydney Law Sch (Sydney, Austl, 8 January, 2015). See also James (n 8) 966.
[188] Interview with Kevin Walton (n 80). Indeed, many students regard their obligatory legal philosophy course as one 'to be painfully endured and quickly forgotten'. James (n 8) 966.

formalist approach to law teaching,[189] they do differ in their level of theoretical engagement. A degree from Melbourne Law School, for instance, tends to be more theoretical than one from Monash, which has traditionally placed greater emphasis on clinical education than on legal philosophy.[190] Similarly, whereas Sydney Law has historically taken a more scholarly, theoretical approach to legal instruction, U.N.S.W. Law has tended to emphasize social justice and pragmatic coursework.[191] Likewise, as in the United States, the extent of overt theoretical engagement also depends on the level of instruction, with a substantial difference existing between undergraduate and graduate teaching.[192]

Of course, individual professors also vary widely in their pedagogical approaches, with members of the same faculty offering a study in contrasts. For example, Michael Skinner, a barrister who teaches corporations at Sydney Law School, represents one pole of the theoretical engagement spectrum. Focusing on concrete cases, statutes, and doctrines, his course omits theoretical issues,[193] and he insisted in conversation that theory is the province of the legislature, not the courts.[194] Implicit in his perspective was a staunch commitment to formalism: Skinner presented rules as clear and determinate, entertaining no discussion of ambiguity or of the principles, policies, and purposes underlying corporate law.[195] In marked contrast to Skinner's approach is that of Jennifer Hill, also of Sydney Law, who directs the school's Ross Parsons Centre of Commercial, Corporate, and Taxation Law. While Hill's courses, like Skinner's, focus on doctrine, Hill takes care to emphasize theoretical issues and relevant policy considerations, presenting conflicting perspectives and competing theories:[196] Hill's approach accords with the insights of critical legal studies.

Despite the wide variations among faculties and faculty members, Australian legal pedagogy viewed overall reflects a formalist perspective and to favour the

[189] Interview with Jeffrey Goldsworthy (n 93). See also Interview with Dale Smith (n 161); Interview with Kevin Walton (n 80).

[190] Interview with Dale Smith (n 161).

[191] Interview with Fleur Johns (n 61). This is not to say, of course, that Monash or UNSW are bereft of theoretical engagement; indeed, Monash is home to Jeffrey Goldsworthy, one of Australia's foremost legal philosophers. Still, as a general matter, Sydney Law and Melbourne Law have historically been more prominent in the field of jurisprudence than their fellow top-tier Australian law schools.

[192] ibid.

[193] Michael Skinner, Adjunct Lecturer, Univ of Sydney Law Sch, Corporations Law Seminar Lecture (14 January 2015).

[194] Interview with Michael Skinner, Adjunct Lecturer, Univ of Sydney Law Sch (Sydney, Austl, 14 January 2015).

[195] Michael Skinner Lecture (n 193).

[196] Interview with Jennifer Hill, Professor; Director, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Univ of Sydney Law Sch (Sydney, Austl, 12 January 2015).

practical over the theoretical.[197] To be sure, this is not to say that the average Australian law professor is theoretically unsophisticated or subscribes unquestioningly to formalist assumptions. The widespread teaching of policy-based reasoning, for instance, clearly reflects a post-realist perspective and a rejection of the classical formalist vision of legal argument.[198] On the whole, however, law teaching in Australia generally places little emphasis on theoretical abstraction, ambiguity, or conflict, while foregrounding formal rules and rigorous doctrinal argument.[199]

VIII. Conclusion

In 1951, then-Harvard Law School Dean Erwin Griswold spent five weeks in Australia, visiting law schools in Sydney, Canberra, Melbourne, and several other cities.[200] Along with droll assessments of Australian society ('a Queenslander may think a Victorian rather effete, and the Victorian may regard the Queenslander as a bit of a roughneck')[201] and the struggles of newly-minted lawyers ('the students must for some time be little more than office boys, hanging around for a crumb of practical experience which may be found in a potpourri of errands and odd jobs'),[202] Griswold spent his trip recording observations about Australia's law schools, which he declared were 'doing good work'.[203] He also noticed, however, the scarcity of professional scholars[204] and the 'restraint against novel thinking and suggestions'[205] in that practitioner-dominated era.

In these latter regards, today's Australian legal academy would be almost unrecognizable to Griswold. The modern institution is comprised mainly of full-time academics, many of whom have gained international recognition for their scholarship. Moreover, notwithstanding the general doctrinal tenor of legal education, the luminaries of Australia's legal academy are uniformly engaged in sophisticated, theory-steeped scholarship, often with complex interdisciplinary overtones. Helen Irving,[206] for instance, is pursuing ground-breaking research at

[197] Interview with Kevin Walton (n 80). Indeed, even in courses such as criminal law that lend themselves to theoretical or interdisciplinary approaches, there is little departure from formal doctrine. ibid.

[198] Interview with Fleur Johns (n 61).

[199] Interview with Kevin Walton (n 80).

[200] Erwin N Griswold, 'Observations on Legal Education in Australia' (1952) 5 J Legal Educ 139.

[201] ibid 142.

[202] ibid 144.

[203] ibid 154.

[204] ibid 146–47.

[205] ibid 148 ('I am not making an argument for crackpots or mere iconoclasts. But the universities should be centers of progressive thought, of stimulation, of new ideas ... '.).

[206] See, for example, Helen Irving, 'Federalism is a Feminist Issue: What Australian Can Learn from the United States Commerce Clause' (2007) 28 Adel L Rev 159.

the intersection of constitutional law and gender, while Fleur Johns[207] is conducting similarly innovative work at the crossroads of international law and feminist jurisprudence. Likewise, while Jennifer Hill[208] has blazed a trail in corporate governance law and theory, Rosalind Dixon[209] has earned international acclaim for her work on constitutional design and comparative constitutional law. All four scholars have studied, taught, and published prolifically within and outside of Australia.

Meanwhile, Australian legal philosophers—working predominantly in the analytical tradition—have both strengthened theoretical education within Australia and burnished the legal academy's international reputation. Eminent in philosophical and constitutional circles, Jeffrey Goldsworthy,[210] for example, is recognized as a leading scholar not only in Australia but also throughout the entire common law world. Similarly, Dale Smith,[211] an expert in analytical legal philosophy and statutory interpretation, and Kevin Walton,[212] who has written extensively on legal and political philosophy, have taught and published in Australia and around the globe. With dozens of similarly accomplished philosophers, the legal academy boasts an impressive corps of jurisprudents dedicated to advancing theoretical teaching and scholarship.

But another fact would surprise Dean Griswold nearly as much as the transformation of Australian legal education: in the sixty years since his first visit, precious little British or American scholarship has focused on Australian comparative legal thought and pedagogy. Indeed, while Griswold would make several more trips to the Antipodes,[213] few Anglo-American scholars since have shared his interest in Australian legal education and jurisprudential thought.[214]

[207] See, for example, Fleur Johns, 'International Legal Theory: Snapshots from a Decade of International Legal Life' (2000) 10 Melb J Int'l L 1.

[208] See, for example, Jennifer Hill, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25 UNSW LJ 294.

[209] See, for example, Rosalind Dixon, 'A Democratic Theory of Constitution Comparison' (2008) 56 Am J Comp L 947.

[210] See, for example, Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft & Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011) 42. See also Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 Can J L & Juris 305.

[211] See, for example, Dale Smith, 'Theoretical Disagreement and the Semantic Sting' (2010) 28 Ox J Legal Stud 635.

[212] See, for example, Kevin Walton, 'Jurisprudential Methodology: Is Pure Interpretation Possible?' in Jordi F Beltran and others (eds), *Neutrality and Theory of Law* (Springer 2013) 255.

[213] 'Dean Griswold Will Tour In Australia, New Zealand' *Harv. Crimson* (Cambridge 13 Nov 1958) <http://www.thecrimson.com/article/1958/11/13/dean-griswold-will-tour-in-australia/> accessed 29 October 2017.

[214] Craig M Bradley, 'Legal Education in Australia: An American Perspective' (1989) 14 J Legal Prof 27 (offering brief overview of enrolments and other quantitative data) for an example of

Thus, if Susan Bartie is correct and 'the history of scholarly agendas and endeavours of the legal academy ... is important for rational discussion about both law and legal education',[215] this insularity has deprived us of valuable insights.

In examining the birth and growth of the Australian legal academy, this Article has sought to recall those insights, carrying on Griswold's project and exploring important moments in the field of comparative jurisprudence. Worth investigating in its own right, the history of Australian legal education also offers new perspectives on familiar movements in American and British jurisprudential thought. From the reign of formalism, to the realists' startling absence and the rise of analytical jurisprudence, to the critical uprisings and their fallout, the Australian narrative is valuable for the ways it traces—and departs from—our own. This coming of age story, long overlooked and bursting with unexplored chapters, beckons to Anglo-American scholars.

American scholarship on Australian legal education.

[215] Bartie (n 1) 480.