

JUDICIAL BIOGRAPHY IN AUSTRALIA: CURRENT OBSTACLES AND OPPORTUNITIES

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I INTRODUCTION

Judicial biography – or the scarcity of it – is a matter of ongoing complaint in legal and academic circles in Australia. Judicial biography has been variously described as ‘an undeveloped branch of scholarship in Australia’,¹ ‘as rare as hen’s teeth’,² ‘small and undistinguished’,³ having ‘received little academic attention’,⁴ subsisting within the ‘wider malaise ... afflict[ing] the study of Australian legal history’,⁵ and, rather damningly, as an area of scholarship in ‘parlous condition.’⁶ Supreme Court judges, or judges of the colonial era, seem to have fared somewhat better than their High Court and Federal Court counterparts in having their intellectual portraits sketched by biographers,⁷ but this is not to suggest that there is burgeoning scholarship in the area in any sense.

Consider the production of biographies of High Court judges. Of the 53 justices of the High Court, only 15 have been the subject of an extended

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1 Stuart Macintyre, ‘What Makes a Good Biography?’ (2011) 32 *Adelaide Law Review* 7, 16.

2 Michael Kirby, ‘Kitto and the High Court of Australia – Change and Continuity’ (Speech delivered at the Sir Frank Kitto Memorial Lecture, Armidale, 22 May 1998) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_kitto.htm>.

3 Neville Crago, ‘Book Review – *Isaac Isaacs*’ (1967) 8 *University of Western Australia Law Review* 270, 270.

4 Sarah Burnside, ‘Griffith, Isaacs and Australian Judicial Biography: An Evolutionary Development?’ (2009) 18 *Griffith Law Review* 151, 151.

5 David Ritter, ‘Greatness as Measure? Recent Writings on the High Court of Australia’ (2004) 50 *Australian Journal of Politics & History* 434, 434–5.

6 James Thomson, ‘Biographies and Biographical Writing’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 63, 64.

7 See, eg, James A Thomson, ‘Judicial Biography: Some Tentative Observations on the Australian Enterprise’ (1985) 8 *University of New South Wales Law Journal* 380, 380–1, and Appendices A and B.

biography (or multiple biographies): there are book-length treatments of the lives of Justices Griffith, Barton, Isaacs, Higgins, Evatt, Dixon, Barwick, Murphy, Gibbs, Stephen, Wilson, Deane, Gaudron, Kirby, and Gleeson.⁸ Of these Justices, 10 had public careers outside of their life in the law: Griffith, Barton, Higgins, Evatt, Barwick and Murphy served as politicians; Isaacs served as a politician, and later, as Governor-General; Stephen and Deane also served as Governor-General; and Dixon took leave from the Court on several occasions to undertake diplomatic duties overseas. Others took on roles as champions of particular social causes within the law, either prior to judicial appointment, or in retirement. Biographers of these justices, therefore, have often dedicated a greater portion of their study to their subject's activities *off* the bench, rather than on it. Biographies of those judges who embarked on a career at the bar, and moved directly to a long period of service on the bench, are in short supply. The judicial life, it seems, is not a popular subject of extended biographical treatment.

Why might this be so? In recent years, the (few) biographies produced of eminent Australian jurists have been received with enthusiasm, both within and outside the legal arena⁹ – no argument could be made for a total lack of interest in

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- 8 These book-length biographies are (to the best of my knowledge, and with my apologies to the authors of biographies I have inadvertently omitted): A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (Law Book, 1939); Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984); John Reynolds, *Edmund Barton* (Angus & Robertson, 1948); Martha Rutledge, *Edmund Barton* (Oxford University Press, 1974); Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000); Max Gordon, *Sir Isaac Isaacs: A Life of Service* (Heinemann, 1963); Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967); Nettie Palmer, *Henry Bournes Higgins: A Memoir* (Harrap, 1931); John Rickard, *H B Higgins: The Rebel as Judge* (George Allen & Unwin, 1984); Allan Dalziel, *Evatt the Enigma* (Lansdowne Press, 1967); Kylie Tennant, *Evatt: Politics and Justice* (Angus & Robertson, revised ed, 1972); Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993); Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (Longman Cheshire, 1994); John Murphy, *Evatt: A Life* (NewSouth Publishing, 2016); Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003); David Marr, *Barwick* (Allen & Unwin, 1980); Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 2000); Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers, 1995); Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013); Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007); Tony Stephens, *Sir William Deane: The Things That Matter* (Hodder, 2002); Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010); A J Brown, *Michael Kirby: Paradoxes & Principles* (Federation Press, 2011); Daryl Dellora, *Michael Kirby: Law, Love & Life* (Viking, 2012); Michael Pelly, *Murray Gleeson: The Smiler* (Federation Press, 2014). (There is also a biography of Albert Piddington, who was appointed to the High Court but never sat: Morris Graham, *A B Piddington: The Last Radical Liberal* (UNSW Press, 1995).
- 9 A prominent example might be the publication of the first biography of Sir Owen Dixon in 2003 (Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003)). Ayres was granted access to the 'Dixon diaries' by Dixon's family in order to complete the task. Reviewers' curiosity over the diaries, and of Dixon's inner life, appeared to have been piqued (even if lawyers had hoped for further analysis of Dixon's judicial method): of the law journal reviews, consider Ritter, above n 5; Julian Leeser, 'Book Review: *Owen Dixon*' (2003) 26 *University of New South Wales Law Journal* 335; Tatum Hands, '*Owen Dixon*' (2003) 28 *Alternative Law Journal* 259; John Farrar, 'Book Review: *Owen Dixon* by Philip Ayres' (2003) 15(2) *Bond Law Review* 394; Fiona Wheeler, 'Book Review: *Owen Dixon*, Philip Ayres, The Miegunyah Press, 2003' (2003) 31 *Federal Law Review* 415; and, further afield, see Tony Blackshield, 'Strict Logic and High Technique' [2003] (232) *Australian Book Review* 8; Michael Sexton, 'Owen Dixon', *The Sydney Morning Herald* (online), 21 June 2003 <<http://www.smh.com.au/articles/2003/06/20/1055828478926.html>>; J J Spigelman, 'Australia's Greatest Jurist: Philip Ayres' *Owen Dixon*' (2003) 47(7–8) *Quadrant* 44; I C F Spry, 'An Important Biography of Sir Owen Dixon' [2003] (57) *National*

the genre. Admittedly, judicial biographies are unlikely to be commissioned as mass-market or popular biographies, as Stuart Macintyre describes them;¹⁰ these biographies are written for a general readership, and usually take widely known historical figures, celebrities, or even contemporary politicians as their subject. These are marketed seasonally as holiday-reads or gifts, and are notable for their straightforward narrative ('full of anecdote, lightly referenced')¹¹ and handsome production. Judicial biography more likely fits within the separate genre of scholarly biography: the biographer usually has expertise in their subject's field, is likely to be writing to a specific audience, and is expected to produce a rigorous critical analysis of their subject's intellectual influences and output – in addition to providing an account of their public life. The expectations of this type of biography are perhaps much higher than that of popular biography. The likelihood of judicial biographies being marketed as ideal gifts for all manner of festive occasions, of course, is low. But this is not to say that judicial biography ought have a narrow readership – David Marr's *Barwick*¹² and A J Brown's biography of Justice Kirby¹³ are prominent examples of judicial biographies that received accolades and attention in the wider literary sphere, and point to the potential for further penetrating work in the area that informs the public's conception of the judicial function.

In these circumstances, why are book-length treatments of the lives of Australian judges so rare? Are there particular obstacles to producing judicial biography here, and, if so, how might these be overcome? These are the central enquiries examined in this article. I seek to examine briefly some of the difficulties in accessing the judicial 'archive' in Australia, and to provide some tentative suggestions as to how biographers might be encouraged to take on judges as their subjects in the future. If a case needs to be made *for* the production of judicial biography before proceeding further, however, let it be this, in the words of James Thomson:

does [the] nurturing of ... [judicial] biographical scholarship matter? Yes – if beneath the rhetoric of judicial neutrality and autonomy lurk personal values and

Observer 60; Geoffrey Bolton, 'Philip Ayres. *Owen Dixon*' (2005) 27 *International History Review* 868. See also the interest in, and widespread enthusiasm for, Pamela Burton's biography of Gaudron: Rhona Hammond, *Non-Fiction Review: From Moree to Mabo: The Mary Gaudron Story* (29 March 2011) Overland <<https://overland.org.au/2011/03/non-fiction-review-from-moree-to-mabo-the-mary-gaudron-story/>>; John Bryson, 'Australia's Feisty First Female High Court Judge' [2011] (330) *Australian Book Review* 37; Sylvia Marchant, *Book Review: From Moree to Mabo: The Mary Gaudron Story by Pamela Burton* (20 November 2010) National Centre of Biography <<http://ncb.anu.edu.au/book/export/html/255>>; Andrew Clark, 'What About My Little Mate?' (2010) *Justinian* <<http://www.justinian.com.au/featurettes/what-about-my-little-mate.html>>; Laura Hilly, 'From Moree to Mabo: The Mary Gaudron Story' (2011) 36 *Alternative Law Journal* 214; and even the warm reception given to the book by Sir Anthony Mason and Michael Kirby as reported in Claire Chaffey, 'Mason and Kirby Provide Comedy Show at Book Launch', *Lawyers Weekly* (online), 10 November 2010 <<http://www.lawyersweekly.com.au/folklaw/7229-mason-and-kirby-provide-comedy-show-at-book-launch>>.

10 Macintyre, above n 1, 8–9.

11 Ibid 9. This appears to be a trend established by trade publishers, rather than authors: Hermione Lee, *Biography: A Very Short Introduction* (Oxford University Press, 2009) 10–11.

12 Marr's biography of Chief Justice Barwick, above n 8, was awarded the New South Wales Premier's Literary Award in 1980.

13 Brown, above n 8. This biography was later placed on the Walkley Award longlist in 2011.

preferences. ... [and] revelation of previously undisclosed information concerning important cases might enhance understanding of judges' decision-making processes.¹⁴

A perceptive judicial biography, then, might disclose to the reader the extent to which contemporary legal principles have been shaped by an individual judge. Such a biography might shed light on how the judge's education, relationships, life experience, and career in the law ultimately shaped the judge's own perception of the judicial role. But there is a greater case to be made than this. It is the case for the writing of legal history itself.¹⁵ Just as Australian political and literary biography is appreciated for its role in preserving and providing an interpretation of the lives of prominent Australians who have shaped our social and cultural fabric, so should judicial biography be regarded. The individual forces that have developed the law of Australia should also be recorded, revealed, examined: judges also shape, albeit indirectly, the social and political fabric of the nation.

II POSSIBLE OBSTACLES, POTENTIAL ENCOURAGEMENT

I take as my focus, in the discussion below, the following obstacles as they currently appear to the enterprise of judicial biography in Australia: first, the relatively late arrival of legal realism to Australia and the associated academic interest in judicial 'life' in law faculties; second, the separation of the disciplines of law, history and politics in the Australian academy, with its potential to stultify the development of multi-disciplinary scholarship such as biography; third, the (un)availability of archival material on the workings of chambers; and fourth, the prevailing legal culture of discretion, which promotes a reticence in giving personal accounts of interaction with judges. The first and second of these obstacles are specific to biographers within the academy; the third and fourth to judicial biographers more generally. For the purpose of providing illustrations of each of these obstacles, I take as my focus the production of biographies of High Court judges, although most of the observations below are applicable to biographies of judges in other Australian courts. For some obstacles, I provide (potential) encouragement for how these might be overcome. In particular, I pay close attention to the manner in which these obstacles are dealt with in the United States, a jurisdiction in which judicial biography is flourishing.¹⁶

14 Thomson, 'Judicial Biography', above n 7, 381–2 (citations omitted).

15 See, eg, Ian Holloway and A R Buck, 'Why Legal History Matters' (2003) 7 *Australian Journal of Legal History* 1.

16 See G Edward White, 'The Renaissance of Judicial Biography' (1995) 23 *Reviews in American History* 716. Philip Girard argues that, outside of the United States, judicial biography has been 'halting and sporadic' in other common law jurisdictions such as Australia, New Zealand, Canada, and possibly England: Philip Girard, 'Judging Lives: Judicial Biography from Hale to Holmes' (2003) 7 *Australian Journal of Legal History* 87, 87, 106. Of course, the number of potential biographical subjects in the United States (given the size of the United States judiciary), as well as the size of the United States academy, partly explains why that jurisdiction produces a greater number of judicial biographies than Australia.

A Academic Legalism's Effect on Academic Lawyers becoming Biographers

John Waugh has observed that, in Australia, legal biographies are more likely to have been written by scholars *outside* the law schools than those within them.¹⁷ At first glance, this seems a curious fact, but upon further investigation, there appear to be several reasons as to why legal academics balk at the prospect of taking on projects such as judicial biography. Waugh speculates:

Perhaps a life story does not produce socially useful knowledge in the ways promoted by research policies. Perhaps personalising legal issues by giving them a biographical context runs counter to the abstract neutrality inherent in ... legalism.¹⁸

The pervading influence of legalism in Australian legal discourse cannot be underestimated, but its role in holding back judicial biography needs further investigation.¹⁹ A rudimentary conception of legalism can be taken as the idea that 'the law' exists separately from those who expound it, which, of itself, provides a very nice explanation for why judicial biography should not be a project of a legal academic: their focus is on the law, not the expounder. But this is an overly simplistic explanation for legal scholars' reticence to engage in biography. The legalism prevalent in Australia – the variety championed by Sir Owen Dixon from the 1940s onwards – was a nuanced understanding of law as 'high technique'. That high technique necessitated a complete disregard for the policy or social consequences that might flow from a decision (other than in constitutional cases).²⁰ Australian legalism was in fact a sophisticated approach in the hands of some judges, and could be read as being sympathetic to post-modern critiques and investigations of judicial temperament.²¹ The real question here is not whether the judges were legalists, however, but whether potential *biographers* were, as the scholar's perception of the judicial function would shape the very nature of their research into the individual judge. It is here that the question of timing becomes relevant: at what point did the legal academy begin

17 John Waugh, 'Cowan as Life-Writer: Sidelights from the Archives' (2015) 38 *Melbourne University Law Review* 1080, 1081. In recent decades, most judicial biographies of High Court judges have been written by those outside the law schools. Of the 14 biographies written since 1980, only two have been written by scholars working in law schools: Buti, above n 8; Brown, above n 8. Six have been written by historians: Joyce (who had legal training), above n 8; Bolton, above n 8; Rickard, above n 8; Murphy, above n 8; Crockett, above n 8; Buckley, Dale and Reynolds, above n 8. Three have been written by journalists: Marr (who had legal training), above n 8; Stephens, above n 8; Pelly, above n 8. Two have been written by academic/professional biographers: Hocking above n 8; Priest above n 8. Two have been written by an academic in the English department: Ayres, above n 8. One has been written by a barrister: Burton, above n 8. One has been written by a documentary filmmaker: Dellora, above n 8.

18 Waugh, above n 17, 1081. It is worth noting here, too, that Waugh's observation about law school research and publications policies is worth exploring further, although it is outside the scope of this article: perhaps there are disincentives to legal academics producing book-length biographies in this context.

19 Clifford L Pannam, 'Judicial Biography – A Preliminary Obstacle' (1961) 4 *University of Queensland Law Journal* 57, 67–70.

20 Tanya Josev, 'The Late Arrival of the "Judicial Activism" Debate in Australian Public Discourse' (2013) 24 *Public Law Review* 17, 32–3.

21 *Ibid* 32–4; see also Michael Coper, 'Concern about Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 562–4.

to look beyond judgments, to the authors of those judgments? At what point did the legal academy begin to investigate legalism with the tools of a legal realist? It is at this point that we would expect a flowering of interest in the judge as an individual – that is, if there were no other obstacles to judicial biography other than the stultifying effect of legalism. Curiously, this shift to ‘realism’ – an academic movement that began in the United States in the early decades of the 20th century – took some time to mature in Australia.

By the 1930s in the United States the utility of legalism (or formalism, as it is perhaps better known there) as judicial language – if not a legitimate judicial *method* – and as a teaching philosophy began to be questioned in light of the developments taking place in other social sciences. Although this academic realist movement consisted of a broad range of theorists, its participants were uniformly doubtful about the determinacy of law, and hence critical of the formalist style. They embraced the use of empirical and behavioural techniques to determine how the courts approached cases, preferring the courts to be transparent in their reasoning.²² The advent of legal realism also brought with it new methods and tools to assess judicial behaviour, thus opening up the possibility of looking beyond the final written record of judgments to more fully assess a judge’s judicial philosophy.²³ In Australia, law schools held onto the classical, ‘doctrinal’ approach to teaching and research for far longer: Bruce Kercher has suggested that realism only became ‘prominent in Australia’s university law schools from the 1970s onwards’.²⁴ Nickolas James found that while there was no wholesale adoption of the legal realist project in Australian law schools at any point, there *was* a move away from the doctrinal approach to teaching in the 1960s and 1970s.²⁵ This very late move away from classical teaching methods was largely due to the fact that law schools operated as trade schools until the 1960s, with an emphasis on practical training rather than academic critique.²⁶ For instance, recalling his student experience in the Sydney Law School in the late 1950s, former Chief Justice Gleeson explained:

Most of our lectures were given by judges, barristers or solicitors. ... Legal education had a strong practical emphasis. ... Because most of the lecturers were not full-time teachers, the overall standard of legal education was not as high as I believe it to be today, but undergraduates of that time were probably better acquainted than modern undergraduates with the law in action.²⁷

By the mid-century, of the full-time legal academics working in law faculties, there existed only a handful of early proponents of realist techniques. Among them was Geoffrey Sawer, who openly acknowledged judges’ social and political

22 Laura Kalman, *Legal Realism at Yale, 1927–1960* (University of North Carolina Press, 1986) 3, 7.

23 Ibid. See generally William M Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (Oxford University Press, 1998) 197–200.

24 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 189.

25 Nickolas J James, ‘A Brief History of Critique in Australian Legal Education’ (2000) 24 *Melbourne University Law Review* 965, 969.

26 Ibid 970–2.

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

preferences in their decision-making,²⁸ and Julius Stone, whose seminal text *The Province and Function of Law* set out potential categories of illusory reference in judicial decision-making.²⁹ Neither were budding biographers, however. Many prominent academics and jurists in the generation following Stone and Sawyer, both in Australia and overseas, have since acknowledged publicly their intellectual debts to these early realists.³⁰ Many members of this next generation went on to undertake analyses of judges and the judiciary with wider critical perspectives.³¹ It is this next generation of legal scholars whom we might expect to have undertaken biographical projects as academic legalism receded from view.

Waugh's suggestion that legalism historically impeded judicial biography in law faculties is ultimately persuasive. Yet there is no great blossoming of judicial biography evident in the legal academy in the 1970s and 1980s, when realism had begun to be embraced. Nor is there evidence of a resounding interest in judicial biography from scholars in other disciplines, who were further removed from the shackles of legalism in any event. The demise of academic legalism at least theoretically opened up the possibility of biographical projects being undertaken by academic lawyers, but this failed to materialise. It seems there were other compelling reasons for academic lawyers (and university academics more generally) to refrain from undertaking biographical projects, as we will see.

B Separation of the Disciplines of Law, History and Politics in Australia

Biography can be conceived of as a multi-disciplinary endeavour, perhaps even more so in the case of judicial biography. While many biographers borrow from sociology, ethnography, philosophy and psychoanalysis to provide an illuminating account of a life, a judicial biographer also acts to some extent as a historian, political scientist, psychologist and legal critic. Biography as a genre is often treated with scepticism (or outright hostility) from practitioners of these specialised disciplines,³² but the criticism that judicial biography seems to have attracted in Australia relates less to the endeavour itself, and more to the

28 Geoffrey Sawyer, 'The Constitution and its Politics' in Henry Mayer (ed), *Australian Politics: A Reader* (Cheshire, 1966) 85, 95, 98.

29 Julius Stone, *The Province and Function of Law* (Associated General Publications, 1946).

30 For a summary of those judges, including Lord Denning in the United Kingdom, see Adrienne Stone, 'Julius Stone: A Reflection' in Helen Irving, Jacqueline Mowbray and Kevin Walton, *Julius Stone: A Study in Influence* (Federation Press, 2010) 13, 24–5 nn 17–22; Anthony R Blackshield, 'The Legacy of Julius Stone' (1997) 20 *University of New South Wales Law Journal* 215, 225. For an exploration of Sawyer's impact, see Ninian Stephen, 'A Recollection of Geoffrey Sawyer' (1980) 11 *Federal Law Review* 261; Michael Coper, 'Geoffrey Sawyer and the Art of the Academic Commentator: A Preliminary Biographical Sketch' (2014) 42 *Federal Law Review* 389.

31 See below n 46 for examples.

32 Lee, above n 11, 15. Wilfrid Prest also notes the *American Historical Review's* 'disdain' for biography, and its assertion that it is merely reflecting the ambivalence of academic historians to the genre: Wilfrid Prest, 'History and Biography, Legal and Otherwise' (2011) 32 *Adelaide Law Review* 185, 186. The *Review* generally avoids commissioning book reviews on biographies, and accepting articles of a biographical nature. See also R Gwynedd Parry, 'Is Legal Biography Really Legal Scholarship?' (2010) 30 *Legal Studies* 208; Richard A Posner, 'Judicial Biography' (1995) 70 *New York University Law Review* 502.

weighting given to each of these modes of analysis in a biographer's work. As discussed above, judicial biography is not widely written here, and many scholarly readers express hope that the genre will expand in the future. The reception of existing biographical projects upon their completion is another matter. Lawyers seek in-depth treatment of a jurist's output as a whole and are disappointed when this is not given adequate treatment;³³ historians demand detailed context;³⁴ and revelations as to the subject's inner life are often welcomed. Griffith's biographer, Roger Joyce, who had training in both law and history, attempted to give appropriate attention to all these matters in his 750 000 word manuscript on Griffith, but his publisher preferred that it be abridged to 200 000 words.³⁵

Publishers' demands aside, it is very telling that some judicial biographers have felt it necessary to explain, or justify, the extent to which they are willing to take on one or other of the roles of lawyer, historian or political scientist in their research. An apologia offered by the biographer for the limitations of their expertise is not uncommon. Consider the caution that both David Marr and Philip Ayres expressed about their analysis of judgments as limited by their professional backgrounds.³⁶ Consider also the defence that Ronald Wilson's biographer, Antonio Buti, himself then a legal scholar, felt compelled to offer in light of criticism that he had devoted too little attention to Wilson's jurisprudence (in favour of Wilson's work on the Stolen Generations).³⁷ One of Evatt's biographers, Ken Buckley, recognised the lack of analysis given to Evatt's judicial output in his biography at the very outset, promising a separate

33 See Macintyre's observations on the reaction to Ayres' Dixon biography in the Melbourne Law School, and how this differed from his own reaction as a historian (Macintyre, above n 1, 15). See also law journal reviews of Ayres' work, above n 9; Thomson's dismay at only 23 pages being dedicated to Higgins' constitutional law judgments in Rickard's biography (Thomson, 'Judicial Biography', above n 7, 391); and Michael Kirby's desire for Antonio Buti's portrait of Ronald Wilson to have delved further into the Judge's jurisprudence: 'Review of *A Matter of Conscience: Sir Ronald Wilson*, Antonio Buti (2007)' (2009) 31 *Sydney Law Review* 331, 337, 340, with Kirby acknowledging that the addition of further details 'may not be all that interesting to a lay reader': at 337. This can be compared, though, to a review by the academic lawyer James Goudkamp of Brown's Kirby biography, in which Goudkamp commends the author for 'ensur[ing] that his book could be enjoyed by laypersons' given that '[i]t would have been much easier ... to write [for] ... lawyers alone': James Goudkamp, 'Book Review: Michael Kirby: Paradoxes and Principles' (2011) 35 *University of Western Australia Law Review* 432, 435.

34 See Macintyre's comments on the deficiencies in Zelman Cowen's biography of Isaacs: Macintyre, above n 1, 13, citing Cowen, above n 8. Macintyre also argues that Cowen's (62-page) biographical study of Latham is lacking, as Latham's 'style and character', only mentioned in passing, are not examined: Macintyre, above n 1, 13–14, citing Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965).

35 Macintyre, above n 1, 12.

36 Marr, himself a law graduate, remarked in an afterword to Barwick's biography: 'I leave to academic lawyers the task of surveying Barwick's decisions on the High Court ... This is not a textbook': Marr, above n 8, 300. Ayres, in his preface, explained that 'I accepted [the commission] on the understanding that I would receive intensive advice ... from senior lawyers ... this is not a textbook, and the narrative is designed to integrate the personal and the professional': Ayres, *Owen Dixon*, above n 8, xvi.

37 Antonio Buti, 'The Man and the Judge: Judicial Biographies and Sir Ronald Wilson' (2011) 32 *Adelaide Law Review* 47, 51–2.

monograph on that point.³⁸ But a substantial focus on judicial output at the expense of a detailed character study might also generate disappointment. Zelman Cowen, one of the very few legal academics (as he then was) prepared to indulge in biographical projects, was extremely hesitant to assess Isaacs' private persona or interpret personal correspondence – and this hesitancy has been noted by some critics.³⁹ There is some suggestion that Cowen produced a dull biography as a result. Joyce, too (in his 200 000 word undertaking), was still reproached by some critics for failing to take the opportunity to delve behind Griffith's public façade.⁴⁰ Meanwhile, biographers who *do* seek to expose some of the judge's everyday travails may not fare any better. Ayres, who appreciated the likely interest in Sir Owen Dixon's personal diaries (which had remained private and in the hands of the Dixon family since the judge's death in 1972), sought to use them to reconstruct Dixon's day-to-day activities while on the bench and while overseas. In response, a critic opined:

[there] is a tendency to drift into minutiae of Dixon's numerous social engagements ... [that can be read] ever so slightly like Basil Fawcett boasting that his inaugural gourmet night is to be attended by 'Colonel and Mrs Hall, *both* JPs, and Lionel Twitchen, one of Torquay's leading Rotarians'.⁴¹

I confess to a sympathy for each biographer here: it seems the appropriate 'mix' of character analysis, compelling narrative and content *and* in-depth jurisprudential analysis is nearly always elusive, according to the critics. What might satisfy a lawyer-reader may not satisfy a historian, and vice versa. Having made this observation, there is perhaps a more substantial argument to be made about why would-be judicial biographers, or at least those from the Australian academy, might be reticent to engage in a multi-disciplinary project in any event, notwithstanding the common criticisms above. One wonders whether the long-standing demarcation between the disciplines of law, history and politics in the Australian academy has had a detrimental effect on biography-writing. Perhaps the psychological and historical aspects of judicial biography are still regarded as too far removed from the study of law to be undertaken by legal scholars, as these aspects go far beyond the remit of realist scholarship. Perhaps the political scientist views judicial biography as carrying with it an expectation of rigorous case law analysis that is outside of their expertise. Even *outside* of the biographical genre, there is very limited multi-disciplinary scholarship on the courts generally, at least across the disciplines of law, politics and history. The

38 Macintyre, above n 1, 14, citing Buckley, Dale and Reynolds, above n 8. This monograph remained incomplete upon Buckley's passing.

39 See Waugh, above n 17, 1084–5; Macintyre, above n 1, 13; Burnside, above n 4, 164–5. Crago, on the other hand, while acknowledging Cowen's 'almost over-cautious' approach to discussing Isaacs' personality, nevertheless concluded that the problem was not with Cowen's writing, but (rather sensationally) with the subject himself: Isaacs was 'humourless: a kind of intellectual bore. Isaacs was a small man physically and he appears to have possessed all the little man's passion for recognition': Crago, above n 3, 273.

40 George Shaw, 'Roger Bilbrough Joyce 1924–84' (1984) 30 *Australian Journal of Politics & History* 324, 326; F G Clarke, 'Roger B Joyce, *Samuel Walker Griffith*' (1986) 91 *American Historical Review* 451, 451.

41 Ritter, above n 5, 435 (citations omitted) (emphasis altered). Macintyre also suggests that some academic lawyers see the coverage of the diaries as 'digressions': Macintyre, above n 1, 15.

lack of judicial biography might therefore be seen as part of a wider predicament. The Australian experience is much removed from the situation in, for instance, the United States, where analyses of the Supreme Court as a political institution, or the judges as cultural institutions, abound, both inside and outside the law faculty.⁴² In Australia, this demarcation – or, expressed another way, the prevalence of academic super-specialisation – may have led to an environment where scholars feel unqualified to undertake a biography that requires a number of critical approaches to be conducted simultaneously. The result is that judicial biography is seen by scholars as a worthy task to be undertaken – but a task to be undertaken by someone other than them.

This situation has been compounded by the discrete organisation of the study of political science, history and law in Australian universities. Two of the major Australian scholars who have written on High Court politics and history – Brian Galligan and Haig Patapan (again, not biographers) – have noted that the distinction between studies of the High Court by lawyers and other social scientists has been regrettably strict, and that because of the different methodologies employed by these disciplines there has been little ‘cross-over’ of the kind that is often achieved in the United States, that is, the sort of cross-over that makes works of judicial history and biography possible. For instance, Galligan noted in 1987:

Unfortunately for the proper understanding of both law and politics in our society, the respective academic disciplines have largely accepted this formal line of demarcation, and ‘law’ and ‘politics’ are narrowly defined as separate and distinct subjects. What was only a conventional distinction, based on constitutional separation and professional specialization, became de facto generic because the separate disciplines of politics and law each used different methodologies and studied their subjects for very different purposes.⁴³

Thirteen years later, Patapan agreed when he wrote in the preface to his book, *Judging Democracy*:

Informed criticism [of the High Court] require[s] more than the usual categories or dichotomies – of activist/deferential, progressive/conservative – that tend to dominate commentary, not because they tend to partisanship and therefore inaccuracy, but because they are often inadequate intellectual tools that do not do justice to the fundamental legal and political changes we need to consider in evaluating what I have termed the new politics of the High Court ... I am well aware of the considerable obstacles in the way [of appraising the High Court and its justices]. The principal difficulty ... is the problem of specialisation. We know

42 These works run from the expansive to the ‘niche’. For expansive, see, eg: in legal history, Lawrence M Friedman, *American Law in the 20th Century* (Yale University Press, 2002); in cultural history, John E Semonche, *Keeping the Faith: A Cultural History of the US Supreme Court* (Rowman & Littlefield, 1998); in political history, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009); in constitutional history, Bruce Ackerman, *We, The People: 1 – Foundations* (Belknap Press, 1993); Bruce Ackerman, *We, The People: 2 – Transformations* (Belknap Press, 1998); Bruce Ackerman, *We, The People: 3 – The Civil Rights Revolution* (Belknap Press, Cambridge, 2014). For ‘niche’, see, eg: Irin Carmon and Shana Khiznik, *Notorious RBG: The Life and Times of Ruth Bader Ginsberg* (Dey Street Books, 2015) – a biographical project assessing Ginsberg’s status in American cultural life that initially began as a Tumblr and ended up a best-selling book.

43 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 1.

more and more about less and less. Specialist knowledge and disciplinary expertise are increasingly imposing boundaries on deliberation, debate and discussion. The problem is arguably exacerbated in Australia by the strict demarcation between law and politics.⁴⁴

As recently as 2015, constitutional scholars Rosalind Dixon and George Williams drew attention to the ‘striking’ gap in scholarship on the relationship between politics and the High Court, and Ryan Turner argued for further cross-disciplinary scholarship on how High Court judges exercise power.⁴⁵ This is not to say that the relatively small number of multi-disciplinary accounts of the High Court have been insignificant in impact.⁴⁶ But these studies are few and far between, and oftentimes seem to be regarded by the scholarly community as works directed at a readership within a singular discipline, and therefore of limited utility to others.⁴⁷ We still have work to do in encouraging collaboration between the disciplines to ensure these types of multi-disciplinary works continue to be produced and read across traditional disciplinary bounds. This is a precondition of conducting research that examines the individual judge.

This project needs to begin at the level of teaching, not just research, if we are to produce future scholars more willing to cross the disciplinary divides. The study of ‘judicial politics’, if it may be called that, is not regularly offered as a subject in political science departments in Australia;⁴⁸ history departments rarely offer contemporary Australian legal history as a specialty – these are seen as part of the offerings of the law faculty. Within Australian law faculties, the teaching of legal history is piecemeal at best:⁴⁹ perhaps an elective subject or two may be offered, but no longer as part of the compulsory curriculum. Within the

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- 44 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) xi.
- 45 Rosalind Dixon and George Williams, ‘Introduction’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 2; Ryan Turner, ‘The High Court of Australian and Political Science: A Revised Historiography and New Research Agenda’ (2015) 50 *Australian Journal of Political Science* 347.
- 46 See, eg, Galligan, above n 43; Patapan, above n 44; Dixon and Williams, above n 45; J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972); Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956); Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (Melbourne University Press, 1963); L F Crisp, *Australian National Government* (Longmans, 1965); Edward McWhinney, *Judicial Review in the English-Speaking World* (University of Toronto Press, 1956); David Solomon, *The Political High Court: How the High Court Shapes Politics* (Allen & Unwin, 1999); Jason L Pierce, *Inside the Mason Court Revolution* (Carolina Academic Press, 2006). See also Tony Blackshield’s foray into jurimetrics in the 1970s: A R Blackshield, ‘Quantitative Analysis: The High Court of Australia, 1964–1969’ (1972) 3 *LawAsia* 1; A R Blackshield ‘Judges and the Court System’ in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 105; A R Blackshield, ‘X/Y/Z/N Scales: The High Court of Australia, 1972–1976’ in Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (George Allen & Unwin, 1978) 133.
- 47 For an analysis of those working at the intersections of law, politics and history in the 20th century, and the seeming exclusion of some scholars in popular analyses of ‘law and politics’ study, see generally Turner, above n 45, especially 348–9.
- 48 Ibid 357–60.
- 49 See, eg, Wilfrid Prest, ‘Legal History in Australian Law Schools: 1982 and 2005’ (2006) 27 *Adelaide Law Review* 267. See also Holloway and Buck, above n 15, 3 (who speculate that ‘legal history still suffers from the taint of unfashionability in Australia’).

compulsory subjects taught in law faculties, the study of the political impact of cases is often only elaborated upon, or commented on, in passing, while examining the development of legal principle; but the possibility of an individual judge's work being examined as a whole is extremely unlikely. If we wish to encourage future scholars to work in multi-disciplinary areas so as to produce comprehensive judicial histories and biographies, then a more integrated approach needs to be undertaken to teaching in these areas.

A cursory examination of the situation in the United States, a jurisdiction in which judicial biography is in a 'renaissance',⁵⁰ reveals that the multi-disciplinary study of the individual judges, or courts as institutions, is encouraged. Constitutional scholars work and teach across the history and politics disciplines; and journalists and political scientists often find themselves working from within law faculties.⁵¹ There seems to be an implicit understanding that the judiciary, as an arm of government, is open to various disciplinary analyses. This is especially so in the conducting of longitudinal research of a particular court or judge, where a discrete disciplinary analysis may well yield an incomplete narrative of that subject's output and behaviour. An understanding of this kind is perhaps what allows the production of judicial history and biography to flourish in the United States, to the extent now that judicial biographies, as multi-disciplinary works, *are* marketed to a very wide audience in some cases.⁵² Girard suggests that judicial biographies there are regarded as intellectual biographies,⁵³ and Kalman suggests they are a subset of the political biography genre;⁵⁴ but there is no

50 White, above n 16. See also the symposium component in Volume 70 of the *New York University Law Review* dedicated to the celebration and criticism of judicial biography (particularly of the Warren Court 'era') in the United States: (1995) 70 *New York University Law Review* 485–810, which includes contributions from Richard A Posner, G Edward White, Morton J Horwitz, Mark Tushnet and Laura Kalman, amongst others. I am keen not to overstate the success of the genre, however. Laura Kalman, an eminent legal historian, still observes that, despite the number of judicial biographies being produced, the genre is 'hardly trendy', 'generate[s] little income' and leaves its authors 'on the defensive': 'The Power of Biography' (1998) 23 *Law and Social Inquiry* 479, 482.

51 Consider scholars as diverse as Linda Greenhouse, the former *New York Times* Supreme Court reporter who is now based within the Yale law faculty; the constitutional historian Jack Rakove, a professor of history, political science and law who is based within the history department at Stanford; the legal historian Laura Kalman, who researches in the history of legal thought, legal biography and political history working from the History Department of the University of California (Santa Barbara); or the political scientist John A Ferejohn, a professor of law and politics at NYU Law School.

52 See, eg, Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsberg Went to the Supreme Court and Changed the World* (HarperCollins, 2015), a *New York Times* best-selling joint biography of the Supreme Court's first two female justices. The book has been profiled on television, National Public Radio, the subject of an author 'ask me anything' Reddit forum, recommended in fashion magazines such as *Elle*, and has also been taken on as a book club selection, complete with pre-prepared discussion points: see, eg, CSPAN, 'Notorious RBG', *BookTV*, 5 November 2015 (Irin Carmon and Shana Knizhnik) <<https://www.c-span.org/video/?400230-1/irin-carmon-shana-knizhnik-notorious-rbg>>; *Book Club Discussion Guide for 'Notorious RBG by Irin Carmon and Shana Knizhnik* (20 July 2016) Just Us Gals Blog <<http://www.justusgalsbos.com/blog/2016/7/19/book-club-discussion-guide-for-notorious-rbg-by-irin-carmon-and-shana-knizhnik>, <http://uvanyc.org/event/book-club-notorious-rbg/>>. Other recent biographical studies that have received attention across disciplines include Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve, 2010); William Domnarski, *Richard Posner* (Oxford University Press, 2016).

53 Girard, above n 16, 89.

54 Kalman, 'The Power of Biography', above n 50, 480.

suggestion of judicial biography existing in some sort of separate category with its own specialised readership. Whatever the case as to their characterisation, judicial biographies remain titles written by, and read by, scholars of various disciplines in the United States. Certainly, as in Australia, criticism as to the weighting of certain analyses over others might prevail when reviewing a particular work, but unlike Australia, there appears to be no expectation that the academic biographer express regrets as to their area of specialisation as par for the course.⁵⁵

C The Availability of Archival Material

There is also a more practical obstacle facing the judicial biographer (whether based in the academy or otherwise) in Australia, and that is the availability of documentary resources on the workings of judicial life. This includes, but is not limited to: draft judgments; communications between judges sitting on a case together; the personal papers of judges; research memoranda prepared for judges; bench books; and other chambers correspondence, usually between the judge and their associate, or their executive assistant. (These documentary resources may even extend to a catalogue of the judge's personal library in rare cases).⁵⁶ Obviously, it is access to these resources that enables the biographer to flesh out a judge's day-to-day activity in chambers, and sheds light on the manner in which judgments were developed or attuned over weeks and months. The influence of case law, extraneous materials, associates' memoranda, and comments provided by other judges on a draft decision may become apparent from these documents – these influences are not always obvious in a (relatively opaque) final judgment.⁵⁷

In the United States, some of these resources can be found in the court's own files – Supreme Court archives occasionally contain miscellaneous memoranda, opinions and correspondence.⁵⁸ The Federal Judicial History Office maintains a register of all private papers of federal judges and their repository location. Many eminent judges' papers are available, even digitised. These papers often include law clerk memoranda, personal correspondence, diaries, and, more recently, even email repositories and word processing documents.⁵⁹ It would not be an

55 In fact, one of Kalman's primary complaints is that judicial biography, as a cross-disciplinary exercise, is so popular that it attracts more 'nonscholars' to undertake it now than academics: *ibid* 483.

56 Thomson, 'Judicial Biography', above n 7, 385–6, citing an observation made by the United States Supreme Court Justice Felix Frankfurter.

57 Consider, for instance, the ongoing debate about the extent to which the historian Henry Reynolds' work influenced the High Court in the case of *Mabo v Queensland [No 2]* (1992) 175 CLR 1: Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title, A Memoir* (Chancery Bold, 2011) vol 1, 557.

58 Jonathan W White, *Guide to Research in Federal Judicial History* (Federal Judicial Center and Federal Judicial History Office, 2010) 44.

59 *Ibid* 169. See Federal Judicial History Office, *Biographical Directory of Federal Judges, 1789–Present* <<http://www.fjc.gov/history/home.nsf/page/judges.html>>. The Centre even provides guidance to chambers staff on what materials to preserve for scholars: see 'A Guide to the Preservation of Judges' Papers' (Guide, Federal Judicial History Office and Federal Judicial Center, 1996) <[http://www.fjc.gov/public/pdf.nsf/lookup/judgpaps.pdf/\\$File/judgpaps.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judgpaps.pdf/$File/judgpaps.pdf)>.

exaggeration to suggest that the American writer can face an over-abundance of materials from which to construct a judicial biography.⁶⁰ Such is the volume of some of the archives that when a thousand papers from the archives of (the prolific) Supreme Court Justice Felix Frankfurter were stolen from the Library of Congress, their absence was not noticed by scholars and librarians for up to a year.⁶¹

Meanwhile, in Australian courts, and in the High Court in particular, a case file usually consists of the parties' filed documents and submissions; transcripts; the original judgment(s); and occasionally correspondence, either between the parties, or between the Registry and chambers. All other material prepared in chambers by judges and their staff – draft judgments, correspondence, memoranda from associates – are regarded as part of the private papers of the individual judge, to be dealt with as the judge sees fit upon retirement.⁶²

Would-be biographers can certainly access case files, which are stored at the National Archives of Australia ('NAA') and the Court itself. However, they are unlikely to have access to these 'private' resources, particularly if the judge is alive: in recent decades, Barwick was hostile to Marr's research;⁶³ Gaudron's 'dread' of biographies led her to refuse Burton access to her papers;⁶⁴ and Gleeson consented to be interviewed by Pelly, but not to his personal papers being read.⁶⁵ Even Dixon, who publicly commended biographer Gordon for his work on another judge, Isaacs (and at the same time seemingly acknowledged the necessity of the study of judicial life),⁶⁶ famously withheld his own papers from being stored at the National Library of Australia ('NLA') in the 1970s.⁶⁷ On the other hand, Wilson, although initially 'lukewarm' to the idea of a biography, did give Buti access to his papers;⁶⁸ but the clear outlier here is Kirby, who provided

60 Kalman, 'The Power of Biography', above n 50, 482: '[a]ll too often, the individual and the detritus of his or her life overwhelm the biographer'.

61 For a fascinating account of the Frankfurter archives, Supreme Court attitudes towards document preservation, and the subsequent (inconclusive) FBI investigation into the theft, see Jill Lepore, 'The Great Paper Caper', *The New Yorker* (online), 1 December 2014 <<http://www.newyorker.com/magazine/2014/12/01/great-paper-caper>>.

62 My thanks to Emma Will, National Registry Manager, High Court of Australia, for assistance with this information.

63 Marr, above n 8, 300–1.

64 Burton, above n 8, xv.

65 Pelly, above n 8, vii.

66 Writing in the foreword to the Isaacs biography, Dixon observed that '[t]he life and work of each of them [Isaacs and Griffith] deserve close and detailed study and yet ... nothing is more remarkable than the neglect their careers have suffered': Sir Owen Dixon, 'Foreword' in Gordon, above n 8.

67 Ayres, 'Owen Dixon', above n 8, xvii. In 2009, while working on another legal history project, I was given access to Dixon's papers by his surviving daughter, Mrs Betty Danby, who kept Dixon's diaries and correspondence at her home in suburban Melbourne for nearly 40 years, other than the periods in which these documents were entrusted to James Merralls QC (a former judicial associate of Dixon) in the hopes of producing a biography (although such a biography was not produced), and later, to Philip Ayres. Shortly after I accessed the Dixon papers, the National Library of Australia reiterated its request for the papers, and the Dixon family then provided them.

68 Buti, above n 8, ix.

his biographer with special access to ‘117 metres of personal records’ held at the NAA.⁶⁹

Australian judges that decide to retain their papers tend to do so by keeping them at home, with all the risks that entails to the quality of archival preservation.⁷⁰ Recent retirees from the High Court have not left a large tranche of material with either the Court or the NAA, with the exception of Justice Kirby. Justices Heydon and Crennan left no papers with either institution; Justices McHugh and Hayne left their bench books with the Court. Chief Justice Gleeson provided some papers to the Court and the NAA.⁷¹ Those that have provided papers are likely to have placed limits and conditions on their access for future researchers.

The staff at the High Court are particularly keen to ensure that judges are informed of the availability of the Court and the NAA as potential repositories for their papers, so as to ensure the preservation of these resources for future scholarly work about the Court. In 2010, staff at the High Court Registry assisted in the drafting of a specific section in the NAA’s High Court protocol to make explicit provision for the storage of private papers, in addition to court files, at the NAA. That section stops short of active encouragement of repository placement, but does suggest the crucial importance of preserving these papers:

A Judge’s own papers may be disposed of as and when their owners or controllers deem appropriate. *These records may be of great interest and value because they complement the Court’s records and have national importance as archival resources of the Commonwealth.* Such records may be transferred to the National Archives of Australia for continuing care and preservation. Judges who wish to discuss the deposit of their papers should contact the Archives, Personal Papers section via the switchboard ...⁷²

A similar provision was placed in the Federal Court protocol in the following year.⁷³ Federal Court puisne judges, it seems, are also welcome to submit their private papers to the NAA, but they are not approached by the NAA for this purpose upon retirement (as High Court justices, and the Chief Justice of the Federal Court, may be).⁷⁴ As yet, however, there is no protocol for the storage of electronic papers – that is, the email correspondence and draft judgments contained on the judge’s computer in chambers. At both the High Court and the

69 Brown, above n 8, 447.

70 See especially above n 67. Ronald Wilson kept his personal papers at home. Biographer Buti recalls being given access to the judge’s ‘study’ to view the papers: ‘calling it a study would be generous. It was merely an alcove, a mess of papers and magazines on the floor and desk ... There was no filing or catalogue system that could be observed. Still, the “mess” provided a rich source of letters and draft speeches’: Buti, above n 37, 50.

71 My thanks to Emma Will, National Registry Manager, High Court of Australia, for assistance with this information.

72 National Archives of Australia, ‘Records Authority 2010/00663993 – High Court of Australia’ (Records Authority, 22 November 2010) [9] <<http://www.naa.gov.au/naaresources/ra/2010-00663993.pdf>> (emphasis added).

73 National Archives of Australia, ‘Records Authority 2010/00315821 – Federal Court of Australia’ (Records Authority, 19 October 2011) [11] <<http://www.naa.gov.au/naaresources/ra/2010-00315821.pdf>>.

74 My thanks to Lyn Nasir, Records and Archives Project Manager, Federal Court of Australia for this information.

Federal Court, a judge's files are kept on servers for a set period after they retire, but are not retained permanently. No 'image', for instance, is taken of computer hard drives at the point of the judge's retirement.

What might be done to preserve these papers for future biographers? It is not my suggestion to compel judges to submit *all* private and personal papers to the Court, the NAA or the NLA upon retirement, nor is it appropriate to copy the entirety of a judge's email correspondence and word processing documents for preservation for future scholars and biographers. This would be invasive and unnecessary. However, in an era where collaboration – even judicial collaboration – often takes place via electronic communication, and with 'track changes' and 'comment'-laden documents being exchanged by email, it may be worth considering whether there are any means by which such documents could be preserved without also retaining the personal and/or domestic communications of judges inadvertently mixed with chambers correspondence. Some options might include the aptly-named 'Litigation Hold' function on some email servers, which allows only certain emails to be preserved (those involving certain keywords, for instance, or correspondence between specifically selected people); or taking an image only of a judge's shared drive, or the folders containing memoranda and drafts. Of course, the use of these facilities would require the consent and cooperation of judges.

Similarly, consideration could be given to an opt-out, rather than an opt-in policy for the retaining of judge's private papers in various courts: that is, judges could choose what they wished to retain in a personal capacity after they leave the court, rather than decide what to leave *with* the court. A protocol might be established for the types of cases in which working papers could be retained.⁷⁵ Understandably, there may not be the resources available for the materials associated with every decision of every judge in every court to be retained, but a policy as to subject-matter/legal significance might ensure that those cases most likely to be of interest to future historians and biographers are adequately preserved. Finally, draft opinions and memoranda might be placed on a court file *after* it has been archived – restrictions could be placed on access to these particular documents, such as a 30- or 50-year embargo before they are made available to researchers for use along with the 'standard' documents in the file.⁷⁶

75 The NAA and the Courts of course already have the authority to retain files of significance for longer periods than is prescribed in the relevant records authority. It should also be noted that this type of protocol has not yet been achieved in the United States either: despite the Supreme Court's best efforts, no policy or guidelines for staff as to how to preserve or dispose of the judges' personal papers has been adopted: Lepore, above n 61. The Federal Judicial Center has provided its own guidance, however: see above n 59.

76 For example, in the United States, one of the restrictions put on part of the late Chief Justice Rehnquist's papers was that they could not be accessed until after the death of *all* judges that had served with him (Lepore, above n 61), presumably so as to avoid any impact on Rehnquist's colleagues. It is worth noting here too that research memoranda are usually drafted by the judge's associate, and it may be necessary to also secure associates' consent to their work being archived in this manner. In fact, the contents of draft materials from the Supreme Court of the United States has significantly altered the reputations of some of the law clerks (associates): Rehnquist, when a clerk to Justice Jackson in the 1950s, wrote a memo for his judge recommending that the segregation policy laid down in *Plessy v Ferguson*, 163 US 537 (1896) be upheld in *Brown v Board of Education of Topeka* 347 US 483 (1954) ('I realise it is an unpopular and

In being broadly supportive of attempts to encourage the preservation of these resources in secure settings such as the courts, the NAA or the NLA, I am also acutely aware of the cultural factors that will likely impede any developments on this front in the near future. Although higher court judges are highly influential on the Australian social and political landscape, they are not public figures in the way that their United States Supreme Court counterparts are. Anecdotally, senior Australian judges have been known to express disbelief, even suspicion, as to the possibility of interest in their personal papers (and indeed, in their lives more generally). To this end, they appear to be far less willing than United States judges to supply institutional repositories with their papers upon their retirement. To some extent, this could be explained by the notion of judicial modesty, but perhaps, lurking further down, this hesitance to supply papers might also hark back to the powerful effect of legalism, even outside the courtroom. What remains of their judicial record, they may hope, is a series of final judgments: practitioners cannot later have recourse to private papers and draft judgments to illustrate ‘what the judge really meant’ in advancing their own arguments. A lack of archival material may also assist in a judge remaining above the fray of public commentary and avoiding trivial curiosity in the minutiae of their daily lives.

D The Australian Legal Culture of ‘Discretion’

If archives are hard to come by for the judicial biographer, then the next course of action might be to conduct interviews with the subject,⁷⁷ or those who have worked closely with the judge. Interviews might be conducted with fellow judges, academics and even counsel that appeared regularly before the judge. Recent biographers of living justices, such as Brown, Burton and Pelly, appear to have had no trouble in securing such interviews. However, probably the only person privy to the day-to-day work of the judge *within their chambers* is the judicial associate.⁷⁸ In the High Court and Federal Court, judges are generally

unhumanitarian position ... but I think *Plessy* ... was right and should be reaffirmed’), a recommendation which Jackson refused to follow. This memorandum, discovered by *Newsweek* in the course of Rehnquist’s own Supreme Court nomination hearings in 1971, provoked Rehnquist to allege that he was merely reflecting Jackson’s *own* ‘tentative views’ and did not represent his own position on segregation. In 2012, scholars discovered correspondence revealing that the memorandum was likely to have represented Rehnquist’s personal views, suggesting that his 1971 denial constituted a smear on Jackson’s reputation: Brad Snyder and John Q Barrett, ‘Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and *Brown*’ (2012) 53 *Boston College Law Review* 631. The renowned scholar Alexander Bickel is thought to have secured his position at Yale on the strength of his memorandum for Justice Frankfurter of the history of the Fourteenth Amendment, after Frankfurter encouraged him to make the document public: Feldman, above n 52, 379; see also Del Dickson (ed), *The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (Oxford University Press, 2001) 658 n 68; see also Kalman, *Legal Realism at Yale*, above n 22.

77 The NLA has a collection of recorded interviews with former justices as part of its Oral History collection: these interviews have been conducted with the cooperation of the High Court and the Australian National University. Judges can request that an embargo be placed on these interviews so that they remain inaccessible to the public for a certain period of time after the interviews are conducted.

78 Some judges also employ an executive assistant, who is also likely to have knowledge of the day-to-day proceedings in chambers. Their accounts of chambers life should also be highly valued.

permitted to employ one or two law graduates (typically very recent graduates), usually on a 12–18 month basis, to assist with general research, proofreading of judgments, and administrative tasks in the courtroom. Associates, like all court staff, are expected to adhere to the highest standards of discretion: they tend to avoid discussions with ‘outsiders’ about matters currently before the judge, matters already heard by the judge, even matters likely to come before the judge; and they are usually unwilling to discuss how their chambers work. This ensures that the administration of justice (and the appearance of it) are not compromised in the public’s eyes. In Australia, the prevailing view is that the associate should remain at all times discreet about the work of the judge in chambers – a discretion to be maintained not only while under the employ of the court, but long after the associate has moved on. If former associates are asked to assist scholars and biographers, they will likely first secure permission from the judge to speak.⁷⁹

This, again, can be contrasted against the situation in the United States. Law clerks, as associates are known there, appear to retain discretion while working for a judge, but some clerks, in recent decades, have become more than willing after leaving the court to comment upon the judge’s character, working practices and decision-making methods. The publication of *The Brethren* in 1979,⁸⁰ which was billed as an ‘insider’s account’ of the workings of the Supreme Court under Chief Justice Burger, was mired in controversy as it appeared to have relied heavily on off-the-record interviews with 170 former clerks (and five judges).⁸¹ These accounts revealed not only personal animosity between judges still sitting, but also yielded information on how each case was considered in conference. A book reviewer wryly commented of the work: ‘[i]t is said that, like frankfurters, laws cease to inspire respect in proportion as we know how they are made.’⁸² The book, in providing a narrative of how still-sitting judges worked, subjected the Court to unforgiving public scrutiny: not of its output (that is, scrutiny which is rightfully expected), but of the negotiations and tentative opinions offered in the privacy of the judicial conference room. This might have been less controversial had none of the judges still been hearing cases, but this was not the case: the book appeared to describe the current workings of the court. In response to the book’s publication, the Court appeared to take steps to remind current clerks of the requirement of discretion: at the ‘initiation tea’ each autumn, the Chief Justice now swears clerks to secrecy; further, the clerks (who are already compelled to follow the Code of Conduct for Federal Judicial Employees) have

79 I wish to stress here that this is a summary of anecdotal evidence, and reflective of my own views, as a former associate, of the proper course of conduct in these circumstances.

80 Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon and Schuster, 1979). Woodward is one of the journalists that broke the news of the Watergate scandal in US politics.

81 For an interesting examination of the Supreme Court judges’ and clerks’ ‘damage control’ following the publication of the book, see David J Garrow, ‘The Supreme Court and *The Brethren*’ (2001) 18 *Constitutional Commentary* 303.

82 Dierdre A Burgman, ‘Book Review – *The Brethren: Inside the Supreme Court*’ (1980) 14 *Valparaiso University Law Review* 617, 617 (citation omitted).

also been required, since 1989, to adhere to a Code of Conduct for Law Clerks.⁸³ The Code requires clerks to

never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain, ... so as [not] to compromise their confidentiality within chambers or the Court building in general.⁸⁴

This does not necessarily prevent clerks from discussing the operation of chambers *after* they have left the Court, however. While there is a long history of clerks publishing first-person accounts of their experiences,⁸⁵ since the publication of *The Brethren* there appears to have been a greater willingness of former clerks to also participate in academic studies of the Court. Ward and Weiden's *Sorcerer's Apprentices* contains assessments of clerk selection processes, their duties, and the degree to which they are involved in the writing of judicial opinions – aided by survey data compiled from 160 former clerks.⁸⁶ Peppers and Ward's *In Chambers*⁸⁷ and Peppers and Cushman's *Of Courtiers and Kings*⁸⁸ contain extended accounts of the clerks' relationships with their judges, often written by the clerks themselves. These accounts seem relatively benign when offered after a judge has retired (or passed away) and are highly useful to the judicial biographer. However, there appears to be some suggestion that, in recent years, the discretion required of former clerks of still-sitting judges has become less strict. Justice Ginsberg, for instance, is herself happy to acknowledge that her clerks will write the first draft of her judgments for her;⁸⁹ and anecdotal evidence suggests that recent former clerks list the judgments they assisted in drafting on their curriculum vitae. To an Australian scholar, these latter revelations are somewhat startling, as they appear to invite again the public scrutiny of 'current' internal court workings so condemned in *The Brethren*. They also suggest that law clerks have a far greater involvement in the drafting process that would be regarded as appropriate in an Australian court, although this is a topic for another day.

I would strongly caution against a softening of the culture of discretion amongst Australian associates, regardless of what the American experience produces. The biographer's duty to provide an account of chambers life is important, but it is not a duty that should ever cut across the proper functioning of the court. If associates are to be approached, biographers should expect that they may be unwilling to speak about certain matters; or, at the very least, unwilling to speak until the judge has retired. But this does not mean that the

83 Artemus Ward and David L Weiden, *Sorcerer's Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York University Press, 2006) 16.

84 *Ibid* 17.

85 *Ibid* 18.

86 *Ibid* 10.

87 Todd C Peppers and Artemus Ward (eds), *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press, 2012).

88 Todd C Peppers and Clare Cushman (eds), *Of Courtiers and Kings: More Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press, 2015).

89 As quoted in Todd C Peppers, 'The Modern Clerkship: Justice Ruth Bader Ginsberg and Her Law Clerks' in Peppers and Ward, above n 87, 391.

former associate has to remain an underutilised resource for the judicial biographer. There is a more gentle approach that could be adopted here that might satisfy biographer, associate and judge. Rather than leaving the task of the courting of former associates to the biographer (and to the associate securing the appropriate permissions from their judge), the courts, the NAA and NLA might have a role in preserving the resources of the associate. Perhaps each associate could, upon their departure from the court, be invited to produce a short account or memoir of their time at the court (at their leisure), to be placed in a repository of their choosing. The associate could be given full discretion as to how such a memoir might be accessed in the future (for instance, access could be made conditional upon gaining written permission of the judge and/or associate; access could be made available after a certain time; or access could be made available only after the judge and/or associate's passing). The judge, of course, would not be privy to any material produced by the associate, so as to ensure that the associate writes candidly about their experience. Associates should not be *compelled* to provide any such accounts, however – again, the point is to encourage the retaining of these resources, not to force their production.

III CONCLUSION

David Marr summarised it well when he described the challenges of judicial biography thus:

[it] presents to those who write and read it two familiar problems. Lawyers are shadows falling over other people's lives. They rarely trigger the events which absorb their careers; they arrive on the scene once things have begun ... The second difficulty ... is difficulty itself. Barwick made his name in areas of recondite complexity which must be explored to come to an understanding of his impact (largely hidden) on Australia...⁹⁰

Taking on the project of a judicial biography is not for the faint-hearted. Judges work behind closed doors; and their output is extensive and complex. Making an assessment of a judge's influences, their temperament and their impact on the legal landscape (and beyond) requires the biographer to act as scholar, lawyer, historian, political scientist and psychologist, even if not in the formal sense. It is true that, in weighing these different roles, the judicial biographer is unlikely to satisfy every potential reader of their work. Nor, owing to the Australian legal culture, may the biographer have the documentary resources or accounts available to them that their counterparts may have in other jurisdictions. But we cannot allow these obstacles to continue to prevent judicial biography from flourishing in Australia. Perhaps, with gentle urging of the academy, the judges, and their staff, to assist in making the project of the biographer a little easier, we may see better days yet for this still developing genre.

90 Marr, above n 8, 300.