

LEGAL BIOGRAPHY

LAW AS AN INTELLECTUAL VOCATION

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Academic law at the mid-20th century was a fledgling, uncertain of its place in relation to the profession and still finding its research legs. The institutional and political milieu of postwar Melbourne provided a fertile seedbed for those willing and able to shape the future of legal education and promote a vision of its relevance to a changing society. Exploring these propositions through a consideration of the lives of three leading figures in the Melbourne Law School in the 1950s, Sir Zelman Cowen, Norval Morris and Sir John Vincent Barry, this paper considers their academic, political and writing lives as the practice of a strong sense of vocation, of intellectual vocation, noteworthy for its intense engagement with the world beyond the university.

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I INTRODUCTION

In this article I consider the intersecting lives of three figures who played a significant role in shaping the Australian legal academy in the two decades after the Second World War. One, Sir Zelman Cowen, the subject of the conference gathered to reflect on his work as lawyer, university teacher and administrator, later Governor-General; the second, Sir John Vincent Barry,

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judge, criminologist, historian and civil libertarian; the third, Norval Morris, criminal lawyer, criminologist and penologist. To all three we could readily add the descriptor 'author', for the activity of writing helped define their impact and legacy. In reflecting on that legacy I seek to draw attention to the intensity of that commitment to writing, an intellectual activity that expressed their need to reflect on the world with which they engaged.

I was fortunate to be able to interview at some length the last of the trio of figures I discuss here, Norval Morris. This was in December 2003, just a couple of months before his death but at a time when his intellectual and political engagements were still very evident. Not only was he busy communicating with his long-time editorial assistant, a lifer in a Florida state penitentiary, but his office was dominated by archive boxes containing the defence files of an Illinois prisoner, client of one of the University of Chicago Law School's innocence projects.

These were characteristic symptoms of a lifelong interest in the fate of the incarcerated — the final sentence of the acknowledgments in Morris's first book, *The Habitual Criminal*, based on his University of London doctorate, reads: 'Finally, I would like to thank the prisoners themselves for their instructive, amused scepticism'.¹

These brief impressions of Morris already suggest the scope of my interest here. All three figures were lawyers, eminent and influential each in his own degree, but joined by their commitment to law as a public good. In that commitment they forged a role that was characterised by a readiness for public intervention when the cause warranted it. But, very importantly for the time, they also imagined themselves as intellectuals, researchers and writers who would advance understanding of law, society and government through a variety of media and personal performance.

Ideas were important to them, but in the service of a cause, a program of social improvement and even social defence — think on the one hand of Cowen's strong interest in privacy, an area in which Barry preceded him;² or Morris's interest in the possibility that all serious crime, above all murder, was the product of some kind of disadvantage and so most progressively dealt with through treatment program rather than hopeless prisons.³

¹ Norval Morris, *The Habitual Criminal* (Longmans, Green and Co, 1951) vi.

² See Zelman Cowen, *The Private Man: The Boyer Lectures 1969* (Australian Broadcasting Commission, 1969); Justice John Vincent Barry, 'An End to Privacy' (1960) 2 *Melbourne University Law Review* 443.

³ Norval Morris, 'Psychiatry and the Dangerous Criminal' (1967) 41 *Southern California Law Review* 514.

I seek below to recapture the sense of obligation these three felt in reconstructing legal education and legal research as practices that intersected powerfully with the political and social world of which they were, very self-consciously, a part. Hence the use in my title of the word ‘vocation’, with its allusions to a calling, in this case a secular one, and an alternative to that other pressing call of public intellectuals, politics and government. As Michael Ignatieff’s recent book (and personal experience) reminds us, this calling is for most intellectuals probably better resisted than heeded.⁴ But for intellectuals there are other ways of being political; all three figures considered here sought ways to shape the future through the kinds of activities and writing they might undertake in the present.

To a good degree the world they engaged in the period that concerns me was centred on the Melbourne Law School. In selecting the title of his chapter on this period in his history of the faculty, John Waugh lighted on Cowen’s own laconic description of the endeavour that preoccupied him during these years: ‘building the new Jerusalem’.⁵ That epithet captures well the energy and growth of academic law in these years, while preserving a sceptical distance about the limits of the achievement, especially evident in the barriers to the kind of social progress preferred by the three figures I discuss here. But it is that distance between aspiration and achievement that leads me to consider what I characterise in the title to this article as a sense of ‘law as an intellectual vocation.’ For all three of these figures their professional lives expressed a commitment to something more than the obligations inherent in their primary occupation. That at least is what I seek to address as a sense of vocation, one in which the intellectual activity of writing and reform was a necessary extension of the everyday work of judging (in Barry’s case) or teaching (in that of Morris) or institution-building (for Cowen).

This article is also something of an exercise in biography, a genre of writing that all three of my subjects also practised with considerable distinction. Cowen and Barry did so in conventional ways, making original and lasting contributions to the knowledge of Australian law and society in their work for the *Australian Dictionary of Biography* as well as in their monograph studies of the politician, judge and Governor-General Sir Isaac Isaacs (Cowen) and the penal reformer Alexander Maconochie (Barry).⁶ Late in life Norval Morris

⁴ Michael Ignatieff, *Fire and Ashes: Success and Failure in Politics* (Random House, 2013).

⁵ John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 152.

⁶ See Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1962); Zelman Cowen, ‘Ashkanasy, Maurice (1901–1971)’ in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne

also took on the subject of Maconochie as a way of exploring issues in the morality and exercise of punishment. Morris did so in a somewhat idiosyncratic vein through a model of semi-fictional biography, an approach he had earlier explored in a book loosely based on the life of George Orwell in his colonial Burma days.⁷

Cowen was of course a practitioner late in life of autobiography. His very readable memoir nevertheless proceeds under the weight of his late-career assumption of high office as Governor-General of Australia.⁸ That is to say no more or less than that it leaves open to other writers the task of setting him in context. He is the only one of the three to have left an account of his own life. But all were avid communicators during an era in which handwritten letters were the major form of communication between people living more than a few miles from each other — and the legacy of such communications enables a reconstruction of an era, its possibilities and preoccupations in often remarkable detail. Such evidence has informed the reconstruction of the period I am discussing below, in accounts of both the Melbourne Law School and the life of Sir John Barry.⁹ In rarer cases this kind of evidence may be supplemented by personal diaries and ephemera, enabling an acute reflection on the conditions of intellectual and political engagement exemplified by the best biography and perhaps only justifiably deployed by the standing and influence of the person being considered — examples relevant to the period of this article being Nicola Lacey's life of the profoundly influential philosopher of jurisprudence H L A Hart, and in a different scholarly domain Mark McKenna's study of the Australian historian Manning Clark.¹⁰ That said, we have no shortage of materials on which to recount somewhat more modestly the intersecting lives and interests of the three figures discussed here.

University Press, 1993) vol 13, 78; Justice John Vincent Barry, *Alexander Maconochie of Norfolk Island: A Study of a Pioneer in Penal Reform* (Oxford University Press, 1958); Sir John V Barry, 'Kelly, Edward (1855–1880)' in Bede Nairn, Geoffrey Serle and Russel Ward (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1974) vol 5, 6.

⁷ See Norval Morris, *Maconochie's Gentlemen: The Story of Norfolk Island & the Roots of Modern Prison Reform* (Oxford University Press, 2002); Norval Morris, *The Brothel Boy and Other Parables of the Law* (Oxford University Press, 1992).

⁸ Sir Zelman Cowen, *A Public Life: The Memoirs of Zelman Cowen* (Miegunyah Press, 2006).

⁹ Waugh, above n 5; Mark Finnane, *J V Barry: A Life* (UNSW Press, 2007); Mark Finnane, 'Norval Morris 1923–2004' (2004) 15 *Current Issues in Criminal Justice* 267; Mark Finnane, 'The ABC of Criminology: Anita Muhl, J V Barry, Norval Morris and the Making of a Discipline in Australia' (2006) 46 *British Journal of Criminology* 399.

¹⁰ See Nicola Lacey, *A Life of H L A Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004); Mark McKenna, *An Eye for Eternity: The Life of Manning Clark* (Miegunyah Press, 2011).

In attending to my theme, law as an intellectual vocation, I want to draw attention to the work that these intellectual lawyers did, rather than consider what they wrote in the abstract. So the approach I take will attend less to the ideas than to the programmatic nature of their calling, as they imagined it and pursued it. And in considering their work and contributions I want to dwell on the milieu that encouraged it, the times and the city and the country in which they lived and worked. So this is less an essay in collective intellectual biography than an exploration of an institutional, political and professional context which was shaped by and which shaped the work of Cowen, Barry and Morris.

II LIVES

To this readership the life and career of Sir Zelman Cowen will be well-known. So I approach the task of locating him through focusing initially more on the biography of the others. In age he was closer to Morris than Barry, who was born in 1903. All three deserve to be remembered as Victorians, but in fact Cowen was the only one born in the state. Barry was born at Albury, and Morris in New Zealand during a brief visit by his parents in 1924. Morris was the single child of a relatively prosperous businessman, Cowen the son, as he tells us, of a storekeeper, later commercial traveller. The names of all three have their own idiosyncrasies. Morris was named after a small village on the Victorian goldfields where his mother's ancestors had settled; Cowen's unusual name was a rendering of Solomon; the commonness of John was turned by Barry into greater distinction by adding Vincent, a combination preserved jealously throughout his life.

Barry was the least privileged in background — his father was a house painter — but took enormous advantage from a solid education as a scholarship student at a Catholic boarding school in Goulburn. Nevertheless these were days when university education eluded almost all without significant money behind them. Unlike both Cowen and Morris, Barry's law came through the clerk's system. He had to wait another four decades before he received a university degree, an LLB by thesis in 1963, for two articles he had researched and written while a judge.¹¹

He was always the autodidact — while still a law clerk he commenced a pattern of reading that was voracious in capacity and intellectually curious in

¹¹ The two articles presented for the degree of Bachelor of Laws were Justice Barry, 'An End to Privacy', above n 2, and Justice John Vincent Barry, 'Treason, Passports and the Ideal of Fair Trial' (1955) 7 *Res Judicatae* 276.

its breadth. Like an earlier prodigy from his region (Sir Isaac Isaacs, whose maternal dependence was even more intense¹²), Barry appeared to draw much from his drive to match and exceed his mother's expectations. As a 21-year-old clerk he told his mother back in Albury about his experience of reading Oscar Wilde's *De Profundis*.¹³ 'I find I have 30 or 40 books,' he told her after talking about Wilde, 'most of them of little interest to you since they deal with such abstruse subjects as physiology, psychology, logic, ethics, political economy ... but would interest you greatly if the scope of them were indicated to you by me'.¹⁴

Being older than Cowen and Morris, Barry had also a different experience of war; too young for military service in the First, and too old for the Second. From the memories of both Morris and Cowen, one gets the sense that war service was an interruption in some other course, or perhaps better that it helped sharpen what would be valuable to them in subsequent careers. Before the war, Morris told me, 'I did a masters in billiards and I did a fairly indifferent first two years of law'.¹⁵ This was selective memory. The precocious Morris had been forced to take a year off from studies after completion of high school as he was too young to enter university. His first published article, a case note, with its acknowledgement of the 'Honour Class in Wrongs', in fact dates from his time as a student and before his war service, indeed when he was only 18.¹⁶ Like Cowen, who began publishing in the same outlet at this time, Morris benefited from the encouragement to think beyond Melbourne that came from George Paton, Dean of Law, author of an influential treatise on jurisprudence,¹⁷ and later Vice-Chancellor of Melbourne during a time when Cowen, Morris and Barry flourished.

For Barry, seeing out the war mostly in Melbourne nevertheless presented challenges of domestic politics and executive power and decision-making that he observed closely. His friendships and alliances were with leading Labor figures, especially H V Evatt (Attorney-General and Minister for External

¹² Cowen, *Isaac Isaacs*, above n 6, 2.

¹³ See Oscar Wilde, *De Profundis* (Methuen, 15th ed, 1911).

¹⁴ Letter from J V Barry to Jeannette Barry, 14 February 1924, Papers of Sir John Vincent Barry, MS 2505, 2/314-8, National Library of Australia (NLA).

¹⁵ Interview with Norval Morris (Chicago, 16 December 2003). The transcript is accessible at the National Library of Australia: National Library of Australia, *Norval Morris Interviewed by Mark Finnane [Sound Recording]* <<http://catalogue.nla.gov.au/Record/3095369>>.

¹⁶ Norval R Morris and William Rogers, 'Nuisance' (1941) 2 *Res Judicatae* 244.

¹⁷ Finnane, 'Norval Morris 1923-2004', above n 9, 267. The textbook is G W Paton, *A Text-Book of Jurisprudence* (Clarendon Press, 1946).

Affairs in the wartime Labor government from 1941) and Arthur Calwell (Minister for Information after 1943), and other civil libertarian and socialist figures, above all Brian Fitzpatrick. Barry, the judge who never made it to the High Court, was also the politician who never made it to Canberra. His single shot was in the 1943 federal election when he just failed to win the seat of Balaclava.¹⁸ His legal colleague and fellow civil libertarian, Maurice Ashkanasy, who had preceded Barry in taking silk (Ashkanasy took silk in 1940, Barry in 1942), contested the same seat for Labor, also unsuccessfully, at the next election in 1946.¹⁹ The association with Ashkanasy, formed through work on the Australian Council for Civil Liberties, was one of the many that focused Barry's energies on contemporary politics, especially regarding civil rights and toleration of racial and political difference. Congratulating Barry on his elevation to the Victorian Supreme Court in 1947, Ashkanasy went out of his way to thank the new judge for work done in another cause:

May I also include an informal word of congratulations and deep appreciation on behalf of the Victorian Jewish community of which I am at the moment the official head. You have a special place in the hearts of the members of our faith in Victoria, in fact throughout Australia, as a lover of liberty and a fighter for toleration and justice.²⁰

Barry was as passionate about politics as Brian Fitzpatrick. His correspondence with Morris, Fitzpatrick and especially his 20 years of letters to the American scholar of Australian industrial law and politics, Mark Perlman, deliver an inexhaustible commentary on contemporary Australian and world politics, economy and society. His intellectual interests and conversation were broad and deep, stimulating others and inciting conversation and dialogue with many he rarely met in person. We have among his papers a scribbled sheet from just before the war that records loans of books from his personal library. The titles include biography, fiction, social science, crime and justice, psychology, and Australian history — the borrowers include judges of the High Court and Victorian Supreme Court (Sir Owen Dixon and Sir Charles Lowe), colleagues at the Victorian Bar (Eugene Gorman, George Mooney,

¹⁸ I note here Lady Anna Cowen's memory of being approached while still a student at the University to assist with leafleting for Barry's campaign in 1943 (as recounted at the Zelman Cowen Conference, Melbourne Law School, The University of Melbourne, 27 March 2014).

¹⁹ Cowen, 'Ashkanasy', above n 6, 79.

²⁰ Letter from Maurice Ashkanasy to Justice J V Barry, 14 January 1947, Papers of Sir John Vincent Barry, MS 2505, 1/1073 (NLA). Zelman Cowen was later the author of Ashkanasy's biography in the *Australian Dictionary of Biography*: see Cowen, 'Ashkanasy', above n 6.

Wilbur Ham), writers and historians (Max Crawford, Brian Fitzpatrick).²¹ This breadth would continue — from his letters to Perlman in the 1950s and 1960s we could reconstruct a history of informed opinion for the entire era.

Cowen too was a political figure and observer from early on. He was inspired intellectually by lectures from the young political scientist William Macmahon Ball, later foundation Professor of political science at Melbourne, and contextually by his student days during a turbulent and increasingly ominous era, from the Spanish Civil War to the onset of the Nazi war. Although not inclined to electoral politics, he remained enamoured of the possibilities of government, perhaps watching jealously the progress of a predecessor Dean of Law, Kenneth Bailey, into Commonwealth government service as Secretary of the Attorney-General's Department and Solicitor-General. After more than a decade in the job of administering the Faculty of Law, Cowen reportedly hankered after a job in government in the mid-1960s before going on to the University of New England as Vice-Chancellor.²² He appraised the political world with a deep respect for constitutionalism and good government, nurtured no doubt by the chastening experience of war as well as his very early ascendancy to the demands of academic administration. He had barely returned to Melbourne when approached by the Australian Broadcasting Commission for regular radio commentary on contemporary law, politics and the state of international relations. It was a task he relished and maintained throughout his years as Dean of Law.²³

No less than the others Morris came easily to political engagement. His inspired American political intervention of the late 1960s, *The Honest Politician's Guide to Crime Control*, was co-written with Sydney criminologist, Gordon Hawkins.²⁴ Hawkins had become a regular visitor to Chicago after Morris took up his post as inaugural director of the Ford Foundation-funded Centre for Studies in Criminal Justice in 1964. Their book was something for which we may see Morris's Australian career as a prelude. In 1958, on Cowen's recommendation, the 34-year-old Morris went to the University of Adelaide as foundation Dean of Law. There he ran into trouble with a conservative legal profession and judiciary. It all came to a head over the questionable conviction and impending execution of Rupert Max Stuart in 1959. As Ken Inglis later put it:

²¹ J V Barry, *Note Book*, Papers of Sir John Vincent Barry, MS 2505, 8/733 (NLA).

²² Waugh, above n 5, 153–4.

²³ See generally Cowen, *A Public Life*, above n 8.

²⁴ Norval Morris and Gordon J Hawkins, *The Honest Politician's Guide to Crime Control* (University of Chicago Press, 1970).

in asking Morris to take charge of its Law School, the university council [had brought] to Adelaide a man who would ask judges, and politicians, searching questions about the behaviour, punishment and treatment of law-breakers.²⁵

As we have seen earlier, Morris was a lawyer who was not satisfied with reading law books but went into prisons to get the other side of the story. Inglis illustrated his observation with a story from an early encounter of Morris with the South Australian judiciary. In 1953 he addressed the Eighth Legal Convention of the Law Council of Australia on the topic of sentencing.²⁶ His wide-ranging address questioned the narrowness of judicial knowledge about the people appearing before them, arguing strongly for rational sentencing based on psychological and sociological understanding of human and criminal behaviour. Justice Ligertwood of the South Australian Supreme Court was unimpressed:

the paper by Dr Morris irritated him and particularly the statement that judges came from people who had lived a sheltered life. That might be true in other States, but it was not true in South Australia where the busy life of a practitioner at the Bar was certainly not sheltered.²⁷

Morris saw such provocation as obligation, whether as teacher, scholar, practitioner or advocate of change. In spite of his progressive leanings, he ran into trouble with the radical left at Berkeley, who were successful in agitating against his appointment to a chair there in the early 1970s. But he also remained grateful to the National Rifle Association for successfully lobbying against his elevation to a political appointment in the administration of Jimmy Carter.²⁸ Like Barry and Cowen, he was inclined to the political but recognised why his time might be spent more fruitfully in the scholarship that might inform future choices, whether in lawmaking or social policy or the workaday world of the law in practice.

III AUSTRALIA IN THE WORLD

By the time they came together at Melbourne in 1951 all three of our subjects were already internationalist in their thinking and disposition.

²⁵ K S Inglis, *The Stuart Case* (Melbourne University Press, 1961) 54.

²⁶ Norval Morris, 'Sentencing Convicted Criminals' (1953) 27 *Australian Law Journal* 186.

²⁷ *Ibid* 205.

²⁸ Norval Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982) ix.

Remarkably, Barry, the one who had never been outside the region, had forged significant links through his avid reading and confident correspondence with those he found compatible and responsive to his queries and interests. Responding to introductions that came from George Paton, it was Barry's energy and initiative that drove the strong links to the Cambridge Institute of Criminology in the 1940s.²⁹ This led to the collaborative writing effort, involving Paton as well as Geoffrey Sawer, that produced in 1948 the first text on Australian criminal law, volume six in a Cambridge series, *English Studies in Criminal Science*, edited by Leon Radzinowicz and J W C Turner.³⁰ It retains value as an early essay in what might now be more generally considered a socio-legal study — it grounded its account of criminal law historically in specific Australian conditions, and also reflected attempts to learn, by survey, the patterns of punishment and treatment of offenders. In both respects the lead seems to have been taken by Barry who retained throughout the rest of his life this keen interest in the fate of those who came before the courts and were subsequently convicted of crime.

By the time the book was published Barry was a judge, yet this was just the beginning of his writing. He had been practising since the early 1930s in the popular press and in professional journals. Barry was as much at ease publishing on war crimes or the insanity defence in the *Australian Law Journal* or *Canadian Bar Review* in the 1940s as he had been in producing learned articles on the history of punishment for *The Age* newspaper as early as 1936.³¹

Though lacking formal university training or international travel, Barry was already thinking internationally and acting the public intellectual role in an exemplary manner by the time his later colleagues commenced their studies. Both Cowen and Morris were shaped in intellectual orientation and academic and institutional networks by their international training. Notable are the pathways of these international journeys. In the way that characterised their time, both were encouraged to postgraduate study in England, Cowen at Oxford, Morris at the London School of Economics. But in a way that mimics the national trajectory in shifting alliances this turn to England was followed

²⁹ Letter from George Paton to J V Barry, 9 July 1942, Papers of Sir John Vincent Barry, MS 2505, 41/1-3 (NLA).

³⁰ Justice J V Barry, G W Paton and G Sawer, *An Introduction to the Criminal Law in Australia* (Macmillan and Co, 1948).

³¹ See John V Barry, 'Insanity in the Criminal Law in Australia' (1943) 21 *Canadian Bar Review* 427; John V Barry, 'The *Sodeman* Case and the Defence of Insanity' (1936) 10 *Australian Law Journal* 3; John V Barry, 'The Trial and Punishment of Axis War Criminals' (1943) 17 *Australian Law Journal* 43; J V B, 'Samuel Romilly: Law Reformer and People's Tribune — A Study of a Great Career in Three Parts', *The Age* (Melbourne), 12 September 1936, 4.

within a short period of time by an eager, and in Morris's case eventually a lifelong, embrace of the United States. Cowen's memoir represents his trajectory as possibly more autonomous than it was — but he was certainly proactive in seeking out the major opportunity available to aspiring colonials, a Rhodes Scholarship that took him to Oxford.³² Yet, much more so than their colleagues in disciplines like history for example, their orientation in the 1950s shifted to the United States. Again these paths were forged by what the demographers call 'chain migration'.

The chain developed in this way. In 1948 Cowen received an invitation to lecture in the Chicago Law School over the summer term of 1949. This, he tells us, came at the suggestion of a Chicago doctor whom he had met in Brisbane during the war.³³ Wartime and its aftermath provided a great variety of opportunities for Cowen and he wasted few of them. His time in the United States introduced him to a new culture and society, and an ever-wider set of American associates. In the year of his arrival at Melbourne, he was able to welcome Erwin Griswold, then Dean of the Harvard Law School, who had come to Australia to attend a conference of the Law Council celebrating 50 years of Australian Federation. Before long Griswold was pressing on Cowen an invitation to visit the United States — in 1953 Cowen did so as visiting professor in the Harvard Law School. In turn this generated offers of permanent chairs, including a protracted and somewhat disastrous negotiation with Chicago over a chair which Cowen first accepted and then rejected in 1955.³⁴ The experience did not dim his enthusiasm for building and maintaining strong links with many American law schools throughout his time at Melbourne.

The chain continued through Griswold's invitation to Norval Morris to teach at Harvard in 1955, an undertaking that helped change the way Morris taught law. In contrast to the difficulties seemingly faced by Herbert Hart, who was another Griswold invitee in the following year, Morris was an enthusiast for the American case law study.³⁵ While there he also taught criminology at Boston University at the invitation of Albert Morris, a criminologist who had already visited Melbourne on a Fulbright Fellowship to give his own lectures. Some indication of the impact of teaching at Harvard is

³² Cowen, *A Public Life*, above n 8, 82–4.

³³ See *ibid* 163.

³⁴ *Ibid* 194–5.

³⁵ See Lacey, above n 10, 182.

evident from Norval's letters back to Jack Barry in Melbourne, in October 1955:

I find that I have never read more cases & articles than over these early weeks of teaching criminal law at Harvard. My first lecture was at 9 am on the Monday after my arrival, the next on Tuesday at 9 am. The class is intelligent determinedly busy, & considerably vocal — it is exciting, stimulating and clearly very good for me. Further, & immodestly, it is going well and the students are as actively interested as I am.³⁶

Morris quickly captured the essentials of teaching from the cases. Within a month 'a cartoon appeared in the *HLS Record* in which I am caricatured, standing on the rostrum strangling a student, with the caption underneath "that's what I like about Morris's course — makes the cases come to life!"³⁷ In 1962 Ken Inglis visited Morris at Harvard and 'sat enthralled on the steps of a crowded lecture theatre on Saturday morning in the Law School as he gave an interactive lecture in the Harvard case study mode'.³⁸

The flow of traffic across the Pacific continued through the 1950s, supported by the big American cultural foundations, especially Fulbright and Carnegie.³⁹ Well before his own sojourn to the United States in 1955, Jack Barry was already being drawn into the American network by his weekly correspondent Mark Perlman — Perlman had come to Melbourne in 1949 to research Australian labour law and industrial relations for his Columbia doctorate. America appealed perhaps more in the imagination than the reality. Early on there was a fascination with nylon shirts and electric razors as Barry responded to his generous friend's offer to purchase American goods rare or too expensive in Australia. When he got there in 1955, America in reality proved to be both 'an extraordinary place' capable of great innovation, but one whose enthusiastic democracy had its dark side in the populism inflaming agitation against disliked groups and other signs of reaction and 'torpor' — a favourite Barry word. Typically of Barry he did not lose sight of the opportunity to reflect at some length on the experience of his visit and

³⁶ Letter from Norval Morris to Justice J V Barry, 6 October 1955, Papers of Sir John Vincent Barry, MS 2505, 1/2468 (NLA).

³⁷ Letter from Norval Morris to Justice J V Barry, 21 October 1955, Papers of Sir John Vincent Barry, MS 2505, 1/2476 (NLA).

³⁸ Finnane, 'Norval Morris 1923–2004', above n 9, 268.

³⁹ See Alice Garner and Diane Kirkby, "Never a Machine for Propaganda"? The Australian-American Fulbright Program and Australia's Cold War' (2013) 44 *Australian Historical Studies* 117.

how things looked to an Australian encountering a culture so similar and different. The nationalist in Barry was predictably enough reinforced in his concerns about the dangers of Americanisation, especially of the press — but he was relieved by 1955 to see signs of the waning of McCarthyism.⁴⁰

IV AN INTELLECTUAL IN THE LAW

When I refer to law as an intellectual vocation in the title of this article I seek to recapture the double dimension of the work that Cowen, Barry and Morris engaged in during the '50s. The language of research impact would have seemed foreign to them — for what was the purpose of the research unless it had impact? These elements of commitment both to reflecting on law, on its modes of thought, its procedures, its authority, its faults and blockages, its possibilities, *and* to engaging a variety of audiences can be seen in the extraordinary range of their activities.

Disappointed, bored, by the large part of the work of the Victorian Supreme Court, Barry sought to continue his intellectual and public interests. He did so, as Norval Morris put it, and as Barry's letters make clear, by getting 'himself put to undefended divorce',⁴¹ giving him the time to devote to the problems of criminology and the criminal law. In so describing the stratagem he demeaned his work in divorce — 'defended divorce' threw up many problems of policy, procedure and evidence which Barry made the subject of published case reports. This also was a field in which he exercised what influence he might to advocate a new approach, based on human behaviour rather than 'theological assumptions' as he put it, in particular seeking to reduce the need for litigation.⁴² He welcomed the creation of a Commonwealth matrimonial jurisdiction in the *Matrimonial Causes Act 1959* (Cth) ('*Matrimonial Causes Act*') and played a part in advising the Attorney-General, Sir Garfield Barwick, on the draft Bill preparing the way. But the reform did not go far enough; he told Barwick privately:

Personally, I would prefer an entirely different approach to the problem of divorce, basing it not on the concept of fault or matrimonial offence, but on the social inutility or worse of preserving a marriage bond that has no meaning.

⁴⁰ Justice John V Barry, 'Law Enforcement in the United States of America' (1956) 7 *Proceedings of the Medico-Legal Society of Victoria* 97.

⁴¹ Interview with Norval Morris (Chicago, 16 December 2003).

⁴² Letter from Justice J V Barry to Victor Wallace, 26 August 1953, Papers of Sir John Vincent Barry, MS 2505, 1/1998–1999 (NLA).

I recognise, though, that such an approach is outside the realms of practical politics.⁴³

In spite of his reservations he was proactive in shaping the practice of the jurisdiction as it was established and joined with Cowen in professional education to prepare lawyers for the changes. It was on Barry's suggestion that Cowen guided the Law School into the course of lectures on the *Matrimonial Causes Act* in 1961 that became the basis for Cowen's book on the subject published in the same year.⁴⁴

The greater part of his intellectual work, however, was cultural, political and professional in a way that exemplified his activism. The one-time President of the Council of Civil Liberties had to curb his public engagements to a degree — but working away behind the scenes he continued to advance his causes, especially, in the 1960s, that of abolition of capital punishment. In this cause, the judge was joined with Morris and Cowen, whose academic independence gave them the freedom to agitate the case in ways not open to a judge of the Supreme Court, who still had to sit on capital cases. Both the academics were outspoken in their advocacy of abolition through writing, broadcasting and speech-making during a period in which Victoria became the centre of Australian public debate over the death penalty.⁴⁵ It was Barry who was approached in 1958 to conduct the Commission of Inquiry on Capital Punishment in Ceylon, a task he pushed in Morris's direction.⁴⁶ As the debate intensified in the 1960s Barry no longer felt constrained to keep quiet. To his personal cost, emotionally and physically, he was caught between his judicial office requiring him to pass sentence in capital cases and what he saw as an intellectual and ethical duty to add his opposition to the growing public campaign.⁴⁷

⁴³ Letter from Justice J V Barry to Sir Garfield Barwick 11 June 1959, Papers of Sir John Vincent Barry, MS 2505, 20/1977 addition (NLA).

⁴⁴ See Zelman Cowen and Derek Mendes da Costa, *Matrimonial Causes Jurisdiction: Being the Law of Jurisdiction, Choice of Law and Recognition of Foreign Decrees under the Matrimonial Causes Act 1959* (Law Book, 1961); University of Melbourne Law School, *The Law and Practice under the Matrimonial Causes Act 1959: A Series of Lectures Delivered to Legal Practitioners, May 1961* (The University of Melbourne, 1961).

⁴⁵ Cowen, *A Public Life*, above n 8, 213–15; Norval Morris, 'Daniel M'Naughten and the Death Penalty' (1953) 6 *Res Judicatae* 304; Norval Morris, *You the Hangman?: Thoughts on Capital Punishment* (Howard League for Penal Reform, 1952); Justice John V Barry, '... Hanged by the Neck until ...' (1958) 2 *Sydney Law Review* 401.

⁴⁶ Finnane, 'Norval Morris 1923–2004', above n 9, 269.

⁴⁷ Finnane, *J V Barry: A Life*, above n 9, 260–1; Barry Jones, *A Thinking Reed* (Allen & Unwin, 2006) 84; Barry Jones (ed), *The Penalty Is Death: Capital Punishment in the Twentieth*

Through his association with the journal *Meanjin*, Barry encouraged the cultural nationalists, supported the journal's urbane liberalism, and drew attention to issues that he thought warranted attention. At the journal's 21st anniversary dinner in 1961, its founder and long-time editor Clem Christesen spoke of the judge as the 'patron saint of *Meanjin*'.⁴⁸ Barry's capacity for long service in enterprises which were the first of their kind was evident in two roles that were central to his concerns about the social function and impact of law and punishment — Chair of the Board of Studies in Criminology at the University of Melbourne from its beginnings in 1951 to the end of his life, and Chair of the first Parole Board in Australia from 1957. These were more than formal tasks. He lectured frequently in the criminology program, even taking over Morris's course when the latter went on leave to Harvard in 1955–56. His work with the Parole Board placed him at the heart of decision-making post-sentence. Shortly after his appointment to the new Board, which had been established by a statute which came into effect in 1957,⁴⁹ he commented to his correspondent Justice Martin Kriewaldt of the Northern Territory:

I am confined myself for the moment to the Divorce jurisdiction and my duties as Chairman of the Parole Board: the latter are not very interesting, and I don't imagine that much community benefit will come of them, but the inutility and wastefulness of our penal methods is being forced more and more upon our attention. Vinogradoff was right when he said imprisonment was the most unsatisfactory of all methods of punishment.⁵⁰

Even if his initial impressions of the work were negative, the place of parole in a system of punishment made the more urgent the business of understanding the foundations of penology.

The judicial task of sentencing was something that Barry sought to avoid, but this also drove him on to explore the rationale and exercise of punishment. He did so not as a philosophical exercise but through the practice of history. His close friendship with two very different historians, Brian Fitzpatrick and Mark Perlman, doubtless played a key role in sustaining such an

Century — Retentionist and Abolitionist Arguments with Special Reference to Australia (Sun Books, 1968) 168; Mike Richards, *The Hanged Man: The Life & Death of Ronald Ryan* (Scribe Publications, 2002) 297–8.

⁴⁸ 'Meanjin Quarterly's 21st Anniversary Dinner' (1962) 21 *Meanjin Quarterly* 99, 113.

⁴⁹ See *Penal Reform Act 1956* (Vic) pt II div 1.

⁵⁰ Letter from Justice J V Barry to Justice Martin Kriewaldt, 2 October 1957, Papers of Sir John Vincent Barry, MS 2505, 1/3152 (NLA).

approach. His role as Chairman of the Board of Criminology at Melbourne also gave him context — from 1951 he shared closely with Morris and Cowen the task of building a discipline that would provide a research base and professional training that might shape what Morris called ‘rational punishment’.⁵¹ While his two colleagues, Cowen in particular, shared his appreciation of the historical contexts of legal practices and institutions, their research practice was closer to the work of case analysis that dominated the legal journals and monographs of their time. By contrast, Barry broadened the scope of his inquiries to develop a long-term and highly productive research agenda, involving archival research and travel to historic sites, that produced the first scholarly accounts of some key stages of penal and criminal justice history in Australia.⁵² A field trip in 1950 with his friend Judge Alf Foster to Kelly country in north-eastern Victoria was undertaken to gather material for a planned book on ‘The Law and Edward Kelly’. Its potential scope was indicated by his advice to popular author Frank Clune that there was more than ‘lawlessness involved in the Kelly outbreak. It did have something of the nature of a social protest against the rapacity of the large landowners’.⁵³

Barry was probably unaware of his Australian Security Intelligence Organisation file, but knowledge of it would only have increased his determination to speak for the value of privacy and the dangers of surveillance, two of the subjects on which he wrote for both professional and lay audiences. When Cowen came to deliver his Boyer Lectures on privacy in 1969, he acknowledged and drew on the original work that Barry had published on the subject at the time of Sir Garfield Barwick’s *Telephonic Communications (Interception) Act 1960* (Cth). It was the citizen’s ‘right to be let alone’ that Barry saw under threat as the 1960s increased the possibilities of unwarranted telephonic interception and other kinds of surveillance.⁵⁴ Such surveillance provided a record of the Cold War years that we may now access, a privilege whose ironies would not have been lost on Barry.

Cowen, Barry and Morris all came to law in the 1950s as people committed to law and politics in ways that drew on and informed their sense of what

⁵¹ See, eg, Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, 1990).

⁵² Justice Barry, *Alexander Maconochie of Norfolk Island*, above n 6; Sir John Vincent Barry, *The Life and Death of John Price: A Study of the Exercise of Naked Power* (Melbourne University Press, 1964); Barry, ‘Kelly’, above n 6.

⁵³ Mark Finnane, ‘Pursuing Ned Kelly in the 1950s’ (2007) 17(9) *NLA News* 10, 12.

⁵⁴ Justice Barry, ‘An End to Privacy’, above n 2; Sir John Barry, ‘The Right to Be Let Alone’ (1968) 27 *Meanjin Quarterly* 291.

kind of values were embedded in law — constitutional, respect for privacy and dignity, a framework for social order and civility. They saw themselves as reproducing a legacy, and creating one. Their responsibilities in this task were something that all of them felt deeply and reflected on, in the mode that intellectuals do. So it seems appropriate in this case to conclude by noting some observations from Zelman Cowen's own reflections on Barry, not from the vantage point of some decades on, but in the memoir he composed in the year after the latter's death, delivered as the Turner Lecture at the University of Tasmania in 1970 and republished in 1972 in the Barry memorial volume edited by Norval Morris and Mark Perlman.⁵⁵ The latter volume included also a searching appraisal of Barry's judicial work by Geoffrey Sawer, his co-author from 25 years before.⁵⁶

Cowen had the advantage both of knowing Barry well, and engaging closely with some of his key concerns. His memoir commences with a story about the composition of the Boyer Lectures on privacy, 'a subject which had actively engaged Barry's voice and pen over a long period'.⁵⁷ He acknowledges too, and evaluates, Barry's extensive work in divorce, including his role in enabling the working of the Commonwealth's new matrimonial causes jurisdiction in the 1960s. This was work, especially in the consideration of custody issues, that Cowen considered 'able, important and ... trail blazing'.⁵⁸

The legal academics, Cowen and Sawer, nevertheless considered that Barry had fallen short as a judge; the failure to secure a High Court place had its consequences, with Barry unable to find in the work of a state court the material to craft enduring or influential judgments. And so for Cowen 'it is not for his work as a judge' that Barry would be remembered but 'for [his] writings, interests and activities, which while they were those of a working judge, extended far beyond his work on the Bench'.⁵⁹

This observation highlighted the tension that Barry embodied. This tension between the demands of judging and the work of writing and politicking arguably wore him down in a way that the academic lawyers, Cowen and

⁵⁵ Zelman Cowen, 'A Memoir' in Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (Gordon and Breach, 1972) 222; Zelman Cowen, 'J V Barry: A Memoir' (1970) 3 *University of Tasmania Law Review* 237.

⁵⁶ Geoffrey Sawer, 'The Judgments of Sir John Barry' in Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (Gordon and Breach, 1972) 3.

⁵⁷ Cowen, 'J V Barry', above n 55, 238.

⁵⁸ *Ibid* 251.

⁵⁹ *Ibid* 250.

Morris, could avoid. A story told by Cowen highlighted Barry's impatience with the academic world, where he also sought recognition:

I remember a dinner party in the 1950's when he sailed into me with what seemed to me unnecessary vehemence, saying that it would do me and the likes of me a great deal of good if I involved myself in the hurly burly of Petty Sessions.⁶⁰

For all the writing, the journal articles, the biographies of judicial and penological luminaries and those more notorious, Barry's everyday work as a lawyer and later as a judge burdened him with responsibilities of decision-making that intellectuals might largely escape. After the 1920s he probably avoided the Petty Sessions himself but his practice and his judging brought their worries and anxieties. In the 1930s, which was also the decade of *his* 30s, he was already seeking, in intellectual reflection, relief as well as insight from the daily grind of legal practice. This was evident in his crucial involvement in the Medico-Legal Society, his civil liberties work with Fitzpatrick and the Australian Council for Civil Liberties and his writing and private reflections on key cases, especially the Davies and Cody appeal to the High Court in 1937 in which he triumphed in a capital case — eventually saving two men from the noose.⁶¹

These intellectual habits continued into his years of judging. His voluminous correspondence was not infrequently conducted during breaks in court. This was a man who could not stop thinking and writing, even more so than his friends Cowen and Morris. I can do no better in concluding this excursion into the world they, but especially he, inhabited than finish with words he wrote himself in what always seemed the gloomy days of the early 1950s, with war threatening from outside and ideological conflict derailing careers and prospects domestically. By 1953 Barry had known Mark Perlman for a little more than three years. This friendship across the Pacific was fuelled by their mutual intellectual engrossment in seeing how the world, in particular how democracies, worked. The correspondence was a vehicle for developing ideas about the role and obligations of lawyers, judges and politicians in expressing values and disposing interests. In October 1953 the scene presented on both sides of the Pacific made for a multitude of observations on the world Barry surveyed, a world that demanded of a lawyer and judge something more than

⁶⁰ Ibid 240.

⁶¹ See *Davies v The King* (1937) 57 CLR 170; Finnane, *J V Barry: A Life*, above n 9, 65–6.

mere judgment, something that might be captured in the epithet 'intellectual vocation'.

Dear Mark

I see that Warren is to be the new CJ. I do not know much of him, but I presume that the appointment suits Nixon. I don't think he will be able to do much to pull the court together. When a society is in doubt concerning its postulates, the judges can't supply the deficiencies. When there is a dominant class seated firmly in the saddle, the courts can enunciate rules that have the appearance of certainty and inevitability, but this is a time of doubt & indecision with no section claiming to itself as of right the prerogatives of a dominant class. A dominant class is, after all, one that accepts the responsibilities as well as the privileges of governing, & the present time is marked by an evasion of responsibility. Your present administration furnishes an example.

I doubt if there will be any effective swing to the Left anywhere in the democracies. The advances of the last 10 years have been, so far as the 'lower classes' are concerned, very great, and time is needed to consolidate. Moreover, the Left doesn't know what it wants next to do. Here, as I have often said to you, the Labour [sic] Party has accomplished all the reforms of significance for which its platform provides, & it is at a dead end. There is no articulate demand for common ownership, and no longer any confidence that any practicable scheme to achieve it, were it constitutionally possible, has been suggested. (With the CA [Catholic Action] in control, no dynamic political theory objectionable to the Church can become acceptable). Socialization, in the sense of common ownership rather than in the true sense of translating the Christian ethic into communal behaviour, has been made impossible by the High Court here, & would be similarly dealt with by your Supreme Court. It is a feature often unperceived that the function intended by the Conservatives to be performed here by the Senate as a non-party house of review (how greatly the party system prevented that concept from becoming a political reality!) has in fact been done by the [High Court] under the guise of judicial review! That, I think, is the real justification for criticism of 'constitutional law', that political measures are frustrated by a non-elected body, which is not responsive nor responsible to the electors, in judgments that are unintelligible to any but those skilled in the jargon, & often not even to them.

The enclosure is fairly accurate, except the suggestion that Kennelly [a key Victorian Labor faction player in the developing party split] started the row. I don't know who did, but Kennelly focused in on a particular issue not really relevant to leadership. The Party should hold together until after the next election, & when (not if, in my opinion) it fails at the polls there will be some

upheavals. Evatt simply hasn't got what it takes, & Menzies is making a monkey of him. That incidentally, is the measure of his ineffectiveness, for Menzies is no Jack Dempsey.⁶²

In another context the activities, roles and responsibilities of people like the judge and academics discussed here, and of this era, have been characterised as those of self-styled 'Platonic guardians,' a liberal elite forging a more rational world.⁶³ Part only of that epithet seems to apply to Barry, Cowen and Morris. Far from them representing an era in which crime was unnoticed and manageable and a public lying ready to be tutored by experts like them, the challenges of law, government and politics were all too threatening and alarming. Barry's letter to Perlman captures both the sense of threat and the obligation of continuing struggle to shape institutions that were more democratic as well as respectful of human dignity and freedom. It was such work that I have argued here represented the work of law as also embodying an intellectual vocation in the service of the society in which they lived.

⁶² Letter from Justice J V Barry to Mark Perlman, 2 October 1953, Papers of Sir John Vincent Barry, MS 2505, Acc03.143 (NLA).

⁶³ Ian Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46 *British Journal of Criminology* 561.