



BRIAN SIMPSON

*Caroline Pannell 1999*

# Alfred William Brian Simpson

## 1931–2011

ALFRED WILLIAM BRIAN SIMPSON (generally known as Brian) died on 10 January 2011 at his home in Sandwich, Kent, aged 79. Brian was a deeply committed scholar who wore his learning lightly. He combined being unequivocally committed to excellence in scholarship with a gift for a good story that made him a superb raconteur and an inspirational teacher. He was tolerant of human foibles except pomposity, self-deprecatingly witty, excellent company, and a natural storyteller. The editors of the *Festschrift* published in his honour in 2001 confessed in their introduction that they had thought seriously of sub-titling the volume ‘Essays in Law, History, Philosophy, *and Fun*’.<sup>1</sup> But there was a darker side to Brian’s personality, and there were periods of depression, ill health and marital breakdown. In particular, he retained a degree of self-doubt and he was often his own harshest critic.<sup>2</sup>

<sup>1</sup> K. O’Donovan and G. R. Rubin (eds.), *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford, 2001), p. 6.

<sup>2</sup> A note on sources: in addition to the published sources, cited according to the usual conventions, I have drawn on Brian’s own unpublished autobiographical material. These were treated with a degree of caution, given the context in which they were written, near the end of his life when the completion of his final book was a much higher priority. I have drawn on these without further citation; Brian’s views, if otherwise unattributed, are derived from these sources. In addition, I have drawn, with permission, on unpublished discussions of Brian’s work by Baroness Hale, FBA, Paul Brand, FBA, Nuala Mole, and John Langbein. These were presented at a Memorial Service for Brian held in Oxford on 11 June 2011, and are cited respectively in the form: BHM, PBM, NMM, and JLM.

## Early upbringing and education

Brian Simpson was born in Kendal, Westmorland on 17 August 1931, the son of the Revd Bernard W. Simpson<sup>3</sup> and Mary E. Simpson. Apart from the fact that his mother was an Irish Protestant of partly Huguenot descent, little else is known of her background. His father came from a Yorkshire farming family, although he had not been brought up on a farm himself. They were both graduates of Trinity College, Dublin, where presumably they met. He took a BA in the winter of 1915 and a BD in the summer of 1919. After ordination, he became a curate in a Dublin parish between 1915 and 1918 (and so was present in Dublin for the Easter Rising in 1916 and its aftermath). He and his wife subsequently served as missionaries in the Fukien Province of China between 1918 and 1928 (with one extended leave in Ireland between 1924–5), initially with the Church Missionary Society<sup>4</sup> and then the Dublin University Mission. On leaving China in 1928, they returned to Ireland, and his father served as Rector of Borrisokane, County Tipperary until 1930. Under family pressure, he moved back to England, becoming Vicar of Firbank with Howgill, Westmorland, where he was living at the time of Brian's birth. Brian grew up with two siblings: an elder sister, Dorothy, who became a schoolteacher (another sister, Margery, died as a baby in China), and an elder brother, Edward, who became a doctor after military service with the 1/10 Gurkha Rifles. Although they lived in genteel poverty, life in Firbank Vicarage gave Brian an enduring affection for the northern countryside, and in later life he often returned to the area. At times, he claimed that he only felt truly happy when walking on northern hills or fishing in northern rivers.

Once he was seven he was sent away to the private preparatory boarding school, Lancing House, in Lowestoft, Suffolk, to which Edward had been sent. Lancing House was chosen because it sent boys to St John's, Leatherhead, which offered cheap rates for parsons' sons. It was owned by Kenneth and Edith Milliken, who had achieved some celebrity by pioneering the teaching of history through the use of lead soldiers and cardboard models.<sup>5</sup> In 1939 Lancing House closed, possibly connected with the outbreak of war, and Milliken took over the Junior House at

<sup>3</sup>The Revd Simpson subsequently became an Honorary Canon of Bradford Cathedral (1958–61).

<sup>4</sup>See Jocelyn Murray, *Proclaim the Good News: a Short History of the Church Missionary Society* (London, 1985).

<sup>5</sup>They subsequently published a book on the subject: Edith Milliken and Kenneth Milliken, *Handwork Methods in the Teaching of History* second edition (Exeter, 1949).

Oakham School;<sup>6</sup> Brian and his brother were amongst the boys who moved with him. Brian took what was then called the School Certificate examinations when he was twelve, being a precocious child. He then went into the Classical Sixth. Brian stayed in the Classical Sixth until he took Higher School Certificate in Greek and Latin after two years; he performed well but not exceptionally. The standard he then attained would not at this time have been sufficient to give him a chance of a classical scholarship at Oxford or Cambridge.

By now he appreciated the limits of the classical education offered, and moved to the History Sixth under Robert Duesbury, a quite outstanding teacher who came to be idolised by his pupils.<sup>7</sup> He took the Higher School Certificate with history as his main subject when he was sixteen. He then sat for a history scholarship examination in The Queen's College, Oxford (Milliken had been a student there and this may explain his choice of Queen's), and was awarded an Eglesfield Scholarship, which was a closed scholarship only available to natives of the counties of Cumberland and Westmorland. Brian's subsequent academic work always emphasised the complexity of the world we live in. He considered that this approach was significantly affected by his historical studies at Oakham. There he read Arnold Toynbee's *A Study of History*<sup>8</sup> and found his attempts to detect recurrent patterns in the rise and fall of civilisations wholly unconvincing. Instead, he was permanently influenced by the views of H. A. L. Fisher,<sup>9</sup> whom he read at Oakham under the guidance of Duesbury, who was unable to see any pattern in history.

### National Service

Brian left Oakham in 1949 for National Service, and was at first placed in the Royal Army Educational Corps. He underwent officer training at

<sup>6</sup>According to David Sugarman, Oakham was 'a direct grant school that had become in effect the boys' grammar school for the county of Rutland, but with an independent boarding element': David Sugarman, 'Beyond ignorance and complacency: Robert Stevens' journey through *Lawyers and the Courts*', *International Journal of the Legal Profession*, 16(1) (2009), 7, 11.

<sup>7</sup>Robert Stevens, another legal historian who attended Duesbury's classes at much the same time, also considered him an inspirational teacher, from whom Stevens received 'a first rate training as a historian'. Sugarman, 'Beyond ignorance and complacency', p. 11.

<sup>8</sup>Arnold J. Toynbee, *A Study of History* (Oxford, 1934–61). Volumes 1–10 of the 12 vols. had been published by that time.

<sup>9</sup>Probably H. A. L. Fisher, *A History of Europe from the Beginning of the 18th Century to 1937* (London, 1952).

Eaton Hall OCTU and was commissioned into the 4th East Yorks Regiment, the 15th of Foot. Officers could express preferences for where they would serve, and Brian claims to have 'opted for units with funny names: the Trucial Oman Levies, the Somaliland Scouts, and the Royal West African Frontier Force'. He was posted to the Nigeria Regiment, part of the Royal West African Frontier Force. He served in Zaria, Enugu, Lagos and finally Abeokuta, where he commanded a company. His subsequent descriptions of National Service rivalled Evelyn Waugh's in capturing the absurdities of military life.<sup>10</sup> (He was once one of the two officers present at a mutiny. Order was restored, he said, 'by masterful inaction'.) There is little doubt that this period contributed to his fascination with the British colonial period and the end of Empire, and that he much enjoyed his time in Nigeria. After leaving the regular army he stayed in the Territorial Army with the 4th East Yorks for some years, eventually being promoted to Captain.

### Oxford undergraduate days

In the autumn of 1951, he went up to The Queen's College, Oxford, and decided to read Law (Jurisprudence as it was then termed) rather than modern history.<sup>11</sup> He was fortunate to be tutored by Tony Honoré, a South African Roman law and jurisprudence scholar of great distinction only ten years older than Brian. He found Honoré somewhat intimidating at first, but came to greatly respect him. Honoré insisted on high standards and extensive reading but in his first year at least Brian was not a diligent student, and was threatened with the removal of his scholarship. Subsequently, he had a distinguished undergraduate career. In 1952 he won the Winter Williams Studentship in Law, awarded after a two-day competitive examination (one of the papers he sat was on the history of the law of real property, 1066–1485). In 1953 he won the Gibbs Prize in Law. He became President of the University Law Society, enjoying considerable success in moots. By the end of his undergraduate years he had established a reputation as an up-and-coming scholar or barrister, and was thus presented in *Isis*, the university's student-run paper, as an 'academic idol' in its 'Isis Idols' series. In 1954 he was awarded a first in the Honour School of

<sup>10</sup>Evelyn Waugh, *Sword of Honour* trilogy consisting of three novels, *Men at Arms* (London, 1952), *Officers and Gentlemen* (London, 1955) and *Unconditional Surrender* (London, 1961).

<sup>11</sup>This section draws on PBM.

Jurisprudence, one of only eleven firsts in Law awarded that year, achieving the best Law first of the year. He has elsewhere given an account of the character of the Oxford Law School at this time.<sup>12</sup> He was not impressed.

In his second year, Brian sat the optional paper in the History of English Law, and prepared for that by attending the lectures of Derek Hall (1924–75), then a Fellow of Exeter College, the main Oxford legal historian of this period, and also Brian's tutor for the paper. (Hall went on to become President of Corpus Christi College, Oxford in 1969.) Hall gave lectures on 'Land Law in the Middle Ages' in 1952 and 1953 and also more general lectures on English Legal History in the same years.<sup>13</sup> He soon became a close friend, and greatly encouraged Brian's interest in the history of the law. Hall's interests in legal history were concentrated in the period 1100–1400; he was at this time working on an edition of *Glanvill*,<sup>14</sup> and Brian made some contributions to this edition.

### Becoming an academic

Whilst at Oxford, Brian joined Gray's Inn, one of the Inns of Court, with a view to becoming a barrister. (He never took the Bar exams, only becoming a barrister many years later under a scheme which permitted senior academic lawyers to be called without having to do so.) He appears to have considered whether to go to the Bar or to become an academic and for a time he kept his options open. Shortly before taking Final Honour Schools (as the final examinations are termed in Oxford) he was encouraged by his tutors and by Rupert Cross,<sup>15</sup> then law tutor at Magdalen, to apply for a Fellowship at Jesus College; he was short-listed but failed to obtain the job. Soon after graduation he applied for a Junior Research Fellowship at Queen's, but was again unsuccessful. He was then offered a similar post at St Edmund Hall, and accepted it. Soon after that he met and later became engaged to be married to Kathleen Seston, then reading English Literature at St Hugh's College. They married soon after his graduation.

<sup>12</sup> A. W. Brian Simpson, 'Herbert Hart elucidated', *Michigan Law Review*, 104 (2006) 1437–59, 1438–9. See also Nicola Lacey, *A Life of H. L. A. Hart* (Oxford, 2004), pp. 112–78.

<sup>13</sup> He probably also attended Cecil Fifoot's lectures on 'Maitland's *Forms of Action*' in 1952 and perhaps his informal instruction on Year Book studies in Hilary term 1954.

<sup>14</sup> G. D. G. Hall (ed.), *The treatise on the laws and customs of the realm of England, commonly called Glanvill / Edited with introduction, notes and translation* (London, 1965; new edn., Oxford, 1993).

<sup>15</sup> Sir Rupert Cross (1912–80), later Vinerian Professor in the University of Oxford.

Although he has described how he ‘in a sense . . . drifted into becoming an academic, though the career had always been viewed as a possibility’, it seems better to describe his choice as a pragmatic way of addressing what he perceived as a significant domestic issue. He thought that marriage ruled out a career at the Bar, in the absence of a private income or other support. He had earlier applied for a Lincoln’s Inn scholarship, the Tancred, which would have solved the problem but, though short-listed, he had been not successful. So the offer of the job at St Edmund Hall was in part a welcome solution to a looming financial problem.

### Early legal history scholarship

In Michaelmas term 1954, he registered for a doctorate on ‘Law reporting in the Sixteenth and Seventeenth Centuries’ to be supervised by Derek Hall.<sup>16</sup> The second half of the 1950s and the 1960s has been described by Paul Brand<sup>17</sup> as ‘a golden age for the study and teaching of English legal history in Oxford’.<sup>18</sup> Brian’s colleagues included not just his doctoral supervisor, but also John Barton (1929–2008) at Merton, Toby Milsom (during his period at New College from 1956 to 1964) who regularly lectured on the history of torts, and Brian’s contemporary John Kaye at Queen’s (also awarded a first in 1954), who lectured on the history of criminal law. His earliest engagement in legal history scholarship was not, however, a success. His doctoral studies involved considerable archival work in the surviving MS law reports of this period, then mostly to be found in the Bodleian, the British Museum, the Inns of Court libraries, and Cambridge University Library. He describes how he ‘floundered about as he sat forlornly in libraries filling in notebook after notebook, and . . . became increasingly despondent, it becoming clear that he was never going to produce a decent doctoral thesis’.

In the course of 1954–5, Brian was invited to dinner in Lincoln College by the then Rector, Sir Walter Oakeshott (1903–87); he was in fact being inspected, and within a few days was offered a fellowship in the college. So after only a year as Junior Research Fellow at St Edmund Hall he became

<sup>16</sup>This section draws on PBM.

<sup>17</sup>FBA, Senior Research Fellow, All Souls College, Oxford; Professor of English Legal History, University of Oxford; William W. Cook Global Professor of Law, University of Michigan Law School.

<sup>18</sup>PBM.

Fellow and Tutor of Lincoln College, where he remained until 1973,<sup>19</sup> succeeding Robert Goff, later Lord Goff of Chieveley, a House of Lords judge. This position involved a heavy teaching load, often around twenty hours a week, in disparate subjects, a large number of pupils, and considerable involvement in the running of the internal affairs of the college. Despite this, by the end of his Oxford period he had become recognised as a leading historian of the common law. His early work on the history of land, trusts and contract, which continues to be exceptionally influential, illustrated his scholarly method: a profound knowledge of the sources, a willingness to get his hands dirty in original archival work, and an ability to write clearly and persuasively. He was awarded a DCL by Oxford in 1976 and elected a Fellow of the British Academy in 1983.

This success appeared only slowly, however. After becoming a Fellow of Lincoln Brian effectively gave up his doctoral work (although he remained formally registered for the degree until 1958), but retained his academic interest in early English legal history. Brian's contribution to legal history during his period in Oxford consisted initially of a series of lectures on the Year Books. His first university lectures in 1957 were on 'The Ending of the Year Books' and he lectured again the following year on 'The Year Books'. These appear to be related not only to the work he was doing for his doctorate but also to his first publications, all of which were published in the *Law Quarterly Review*. The first of these, a note on 'The reports of John Spelman' appeared in 1956 and identified the reports of the person who was then the earliest known identifiable law reporter.<sup>20</sup> This was followed in the next year by an article on 'Keilway's reports, temp. Henry VII and Henry VIII' identifying John Carell as the compiler of these law reports,<sup>21</sup> and a further article later that year on 'The circulation of Yearbooks in the fifteenth century' refuting Plucknett's theory of a narrow circulation of Year Book MSS.<sup>22</sup> As late as 1971 he produced a provocative *Law Quarterly Review* article on 'The source and function of the later Year Books'.<sup>23</sup> This presented conclusions that he had originally hoped would, in a more elaborate form, contribute towards an

<sup>19</sup> He was elected an Honorary Fellow in 1995.

<sup>20</sup> 'The reports of John Spelman', *Law Quarterly Review*, 72 (July 1956), 334–8.

<sup>21</sup> 'Keilway's reports, temp. Henry VII and Henry VIII', *Law Quarterly Review*, 73 (Jan. 1957), 89–105.

<sup>22</sup> 'The circulation of Yearbooks in the fifteenth century', *Law Quarterly Review*, 73 (Oct. 1957), 492–505.

<sup>23</sup> 'The source and function of the later Year Books', *Law Quarterly Review*, 87 (Jan. 1971), 94–118.



understanding of the way in which law reports were produced at this period. He never did produce the major work on law reporting himself, however, and he left the thesis unfinished. He did significantly help others. He is thanked by L. W. Abbott in his 1973 work on *Law Reporting in England, 1485–1585*<sup>24</sup> for his assistance in that work, and he prepared the ground for later work by Sir John Baker<sup>25</sup> on later fifteenth- and early sixteenth-century law reporting<sup>26</sup> and his editions of the unedited reports of this period.<sup>27</sup>

Brian's academic breakthrough began about 1959, when he was asked by the Oxford University Press, encouraged by the Oxford Faculty Board, to write a book to replace Sir William Holdsworth's 1927 *Historical Introduction to the Land Law*,<sup>28</sup> which had long been out of print. He responded with *Introduction to the History of the Land Law*,<sup>29</sup> which was written in a very short period in the long vacation in 1960, and published in 1961. It sold well but slowly, and in 1986 it appeared in a revised edition. As the title suggests, it was not a scholarly monograph but an undergraduate textbook, intended to 'make the doctrinal history' of the land law intelligible to law students, although it has copious references to the primary sources on which that doctrinal history is based. This book was mainly a work of exposition, and was assisted by many discussions with Derek Hall; it did not involve any original research into the sources.

Soon after its publication he began work on a doctrinal history of the common law of contract, later published under the title of *A History of the Common Law of Contract: the Rise of the Action of Assumpsit*.<sup>30</sup> This was to become the major original scholarly work that he produced during his time in Oxford (though it did not appear until 1975 and thus after his move to Kent). Brian had begun lecturing on the 'History of Contract' in 1957 and lectured on the subject almost every year thereafter. But he also began (in 1958) publishing a series of articles on the history of contract

<sup>24</sup> L. W. Abbott, *Law Reporting in England, 1485–1585* (London, 1973).

<sup>25</sup> Downing Professor of the Laws of England from 1998 until 2011, subsequently Downing Professor Emeritus.

<sup>26</sup> J. H. Baker, *The Common Law Tradition: Lawyers, Books and the Law* (London, 2000).

<sup>27</sup> Published by the Selden Society.

<sup>28</sup> Sir William Holdsworth, *An Historical Introduction to the Land Law* (London, 1927).

<sup>29</sup> *An Introduction to the History of the Land Law* (London, 1961; repr. with corr. 1967; second edn., entitled *A History of the Land Law*, Oxford, 1986).

<sup>30</sup> *A History of the Common Law of Contract: the Rise of the Action of assumpsit* (Oxford, 1975; new edn. 1987).

that clearly prepared the way for the eventual book.<sup>31</sup> Notwithstanding its defects, some of which were pointed out in a sympathetic review by Sir John Baker,<sup>32</sup> the book was well received. It is a major *tour de force* covering the development of legal doctrine in the area of contract law during the period of almost five centuries from the later twelfth century down to 1677 (and the Statute of Frauds) and it shows a mastery of the relevant case law, particularly in the printed Year Books and printed and unprinted law reports of the early modern period.

This book was originally planned as a study covering the complete history of the subject up to modern times. It was published in a format that enabled it to be presented as the first volume of a two-volume work in the event that the second volume was ever published. It never was, and Brian confined his writings on the later history of contract law to periodical articles and book reviews. He did indeed begin work on the second volume dealing with the subsequent history of contract law down to the nineteenth century, as can be seen from his paper on 'Innovation in nineteenth century contract law'.<sup>33</sup> But in about 1976 he abandoned the second volume, he said later, 'with guilt, but no regret'; an albatross no longer hung around his neck. He was later to draw on this work in his review of Morton Horwitz's book, discussed below.

His approach to legal history at the time of the first volume was what Paul Brand has described as 'a relatively austere "internalist" view of the subject that saw its proper subject as the development of legal thought and doctrine'.<sup>34</sup> According to his own account, Brian came to lose interest in its completion. He subsequently came to think that a history of contract law based almost exclusively on legal sources, though perhaps tolerable for the early history, would be impossible for the eighteenth and nineteenth centuries, a view reinforced in discussions with Derek Hall. He also increasingly became disillusioned more generally with the study of the evolution of legal doctrine solely through the analysis of the legal sources. He came to view the first volume as belonging to a genre that had become

<sup>31</sup> These are: 'The place of Slade's Case in the history of contract', *Law Quarterly Review*, 74 (July 1958), 381–96; 'The equitable doctrine of consideration and the law of uses', *Toronto Law Journal*, 16 (1965), 1–36; 'The penal bond with conditional defeasance', *Law Quarterly Review*, 82 (1966), 392–422.

<sup>32</sup> *American Journal of Legal History*, 21 (1977), 335.

<sup>33</sup> Given in 1974 to a one-day session of the British Legal History Conference in the Old Hall of Lincoln's Inn, and Subsequently published in *Law Quarterly Review*, 91 (1975), 247–78.

<sup>34</sup> PBM.

unfashionable, being based on the assumption that law can legitimately be studied as an autonomous discipline.

### Early jurisprudential scholarship

At the same time as he was building a reputation in the field of legal history, Brian was also part of the discussions that so significantly affected the method and scope of Oxford legal philosophy. Through the influence of Tony Honoré, and because the Professor of Jurisprudence, H. L. A. Hart, had been one of his examiners, Brian was invited to attend the informal jurisprudence discussion group, organised by Hart. This met once a week in Rupert Cross's rooms in Magdalen to discuss issues, many of a philosophical nature, connected with the law. As a result of being a member of the Hart group Brian became a close friend of Rupert Cross, and of Tony Guest<sup>35</sup> and Patrick Fitzgerald,<sup>36</sup> who were also members. He never became a close friend of Herbert Hart. In Hart's time the group provided what Brian had previously lacked, which was a forum at which such issues could be discussed informally and without an intimidating atmosphere. This led to an increased interest in philosophy, and Brian began to read extensively in this area. He attended the Hart discussion group regularly from 1955, an involvement that not only contributed to the lucidity and sophistication of his legal history scholarship but also led to his own original contributions to legal theory.

His initial entry into jurisprudential scholarship arose, however, from his sceptical reaction as an undergraduate to the merits of the then widely read article by Arthur Goodhart<sup>37</sup> on determining the *ratio decidendi* of a case.<sup>38</sup> At this time, the received wisdom was that the doctrine of precedent required courts, appropriately placed in the hierarchy, to follow earlier decisions, which were binding on them, and what this involved was the identification of the reason for the decision, the *ratio decidendi*, which would isolate what aspect of the decision bound subsequent courts. The

<sup>35</sup> Professor Anthony (Tony) Guest, Fellow and Praelector, University College Oxford, 1955–65; Professor of English Law, University of London, 1966–97.

<sup>36</sup> Fellow, Trinity College, Oxford, 1956–60; Professor of Law: University of Leeds, 1960–6; University of Kent at Canterbury, 1966–71.

<sup>37</sup> Master of University College, Oxford, 1951–63; Professor of Jurisprudence, Oxford, 1931–51; Editor, *Law Quarterly Review*.

<sup>38</sup> A. L. Goodhart, 'Determining the ratio decidendi of a case', *Yale Law Journal*, 40 (1930), 161, repr. in A. L. Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge, 1931), p. 1.

problem, it was thought, was how this was to be done. Goodhart's article had claimed to solve the problem. Brian was unconvinced, and published an article to that effect in the *Modern Law Review*.<sup>39</sup> It generated a considerable three-way debate between Brian, Professor J. L. Montrose of Queen's University, Belfast,<sup>40</sup> and Arthur Goodhart,<sup>41</sup> and came to be widely read. Brian later came to think that, although he was right to be sceptical about Goodhart's theory, his then views as to the process of reasoning used by courts were simplistic. When the Hambleton Press published a collection of his writings he excluded his pieces on the *ratio decidendi* from the collection.<sup>42</sup> They were not a product of his participation in the Hart group, and indeed Hart never showed any particular interest in the controversy.

Brian's early publication on precedent, and his membership of the Hart group, came to suggest that he was likely to develop into a jurisprudence scholar. In 1964 he was invited to be a visiting professor at the Dalhousie Law School in Nova Scotia to teach a jurisprudence course there, not a course in legal history. The perception that Brian was going to become a legal philosopher was enhanced when, together with Harold Cox,<sup>43</sup> the philosophy tutor at Lincoln, he led a seminar in Oxford on Hart's *The Concept of Law*,<sup>44</sup> in which they subjected the text to detailed critical analysis. This seminar ran from around 1965 to 1967, and was attended by undergraduates, graduate students in both law and philosophy, and a number of academics.

Brian largely lacked the self-confidence, however, to publish his views on philosophical issues at that time. Part of his nervousness was a reflection of what he perceived as the arrogance of Oxford philosophers towards members of the law faculty. The Simpson/Cox seminar, for example, did not lead to a book or even an article. Brian's interest in legal reasoning in the common law system did, however, generate two significant articles.

<sup>39</sup>'The ratio decidendi of a case', *Modern Law Review*, 20 (July 1957), 413–15.

<sup>40</sup>Professor J. L. Montrose, Dean of the Faculty of Law and Professor of Law, Queen's University, Belfast, 1934–63.

<sup>41</sup>J. L. Montrose, 'The ratio decidendi of a case', *Modern Law Review*, 20 (Nov. 1957), 587–95; A. W. B. Simpson, 'The ratio decidendi of a case', *Modern Law Review*, 21 (March 1958), 155–60; A. L. Goodhart, 'The ratio decidendi of a case', *Modern Law Review*, 22 (March 1959), 117–24; A. W. B. Simpson, 'The ratio decidendi of a case', *Modern Law Review*, 22 (Sept. 1959), 453–7.

<sup>42</sup>A. W. B. Simpson, *Legal Theory and Legal History* (London, 1987).

<sup>43</sup>Fellow and Tutor in Philosophy, Lincoln College, Oxford (1929–70).

<sup>44</sup>H. L. A. Hart, *The Concept of Law* (Oxford, 1961). A second edition was published by Clarendon Press in 1994 with a postscript by H. L. A. Hart and edited by Penelope A. Bulloch and Joseph Raz. A third—and the most recent—edition was published by OUP in 2012, with an introduction by Leslie Green, also edited by Bulloch and Raz.

'The analysis of legal concepts' appeared in the *Law Quarterly Review* in 1964;<sup>45</sup> it criticised the idea that legal concepts possessed a special logic of their own, a view which had been put forward by a number of scholars, including Hart. It was discussed in the Hart group somewhat inconclusively, and Hart never responded to it. In 1973 he acted as editor and contributor to the influential second series of *Oxford Essays in Jurisprudence*,<sup>46</sup> but he was particularly nervous about the publication of his own essay in the book on the nature of the common law, 'The common law and legal theory', which nevertheless has come to be seen as one of his most important works.

Both publications reflect the fact that although Brian retained a great respect for Hart and his theoretical work he nevertheless had begun to think that Hart's application of philosophical ideas to the understanding of law had not been wholly successful, and that some of Hart's views were simply mistaken. It was not until much later, however, towards the end of his life, that he returned to consider these concerns in greater detail and ventured into print with his criticisms.<sup>47</sup> It is clear that heavy teaching and other responsibilities combined with a distressing family life also restricted Brian's scholarly output during the 1960s.

### Domestic turmoil and itchy feet

The 1960s was a period of considerable career uncertainty and domestic turmoil. His marriage to Kathleen broke up in 1967, when there was an uncontested divorce. In addition, the pay of a law tutor was not good; Brian augmented his income by teaching for the Workers' Educational Association. Around 1963, the University of Liverpool approached him with the offer of a chair, but the salary offered was little better than Oxford, so he declined. In 1964 he applied for, but failed to be elected to,

<sup>45</sup> A. W. B. Simpson, 'The analysis of legal concepts', *Law Quarterly Review*, 80 (1964), 535–58.

<sup>46</sup> *Oxford Essays in Jurisprudence*, 2nd series (Oxford, 1973).

<sup>47</sup> At that time, the only criticism of H. L. A. Hart that Brian published—in a review of Hart's, *The Morality of the Criminal Law* (London, 1965), [1966] *Criminal Law Review*, 124—concerned Hart's view on criminal responsibility. His criticism was of the lecture 'Changing conceptions of responsibility', republished as Chap. VIII of *Punishment and Responsibility* (Oxford, 1967). Hart responded to the criticism in Chap. IX of *Punishment and Responsibility*, 'Postscript: responsibility and retribution', at pp. 222–3. Significantly, however, the review considered, at p. 125, that 'Hart may be over-impressed by the legal rule defined characteristics of lawyers' language.'

an All Souls Readership at Oxford;<sup>48</sup> Guenter Treitel<sup>49</sup> was the successful candidate. He increasingly threw himself into academic administration of various kinds. He served as Junior Proctor (with John Roberts<sup>50</sup> as his senior colleague) at a turbulent period in the University of Oxford's history (during the so-called Oxford 'student revolution'). He began to think that there was little future for him in Oxford, more particularly because he had no wish to move, as other former proctors had done, into full-time university administration.

In 1967, he was asked by Peter Carter, the law tutor in Wadham,<sup>51</sup> if he would like to go to Ghana as Dean of the Law Faculty, helping to found the post-independence law school; Carter was a friend of the then Vice-Chancellor, Alex Kwapong.<sup>52</sup> Brian thus became one of that generation of English legal scholars who spent periods in post-independence Africa during the 1960s.<sup>53</sup> In Ghana he had no time for academic research, but his visit did generate an interest in African customary law, which later led to an article on the colonial civil servant and ethnographer, R. S. Rattray, published in 1986.<sup>54</sup> Attempts were made to persuade him to stay on in Ghana, but he persuaded Kwapong that the law school needed a Ghanaian Dean, and Austin Amisah,<sup>55</sup> then a Court of Appeal judge, was appointed as his successor. The University of Ghana subsequently recognised his services by awarding him an honorary D.Litt. in 1993.

After his return to Oxford from Ghana, Brian found it difficult to settle back into the life of a college don. Soon after his return he was appointed a magistrate with the Bullingdon Bench (the magistrate's court for the area north of the city of Oxford), and he served as a magistrate there and

<sup>48</sup>The Readership was supported by All Souls College but did not bring any other connections with the college.

<sup>49</sup>Sir Guenter Treitel, All Souls Reader in English Law, University of Oxford, 1964–79; Vinerian Professor of English Law, University of Oxford, 1979–96; Fellow of All Souls College, Oxford, 1979–96.

<sup>50</sup>1928–2003, Merton College, Oxford: Fellow and Tutor, 1953–79 (Honorary Fellow, 1980–4, 1994–); acting Warden, 1969–70, 1977–9; Senior Proctor, University of Oxford, 1967–8; Warden, Merton College, Oxford, 1984–94.

<sup>51</sup>1921–2004; Fellow, Wadham College, Oxford, 1949–88.

<sup>52</sup>Professor of Classics, University of Ghana, 1962; Dean of Arts, Pro-Vice-Chancellor, University of Ghana, 1962–5, Vice-Chancellor, 1966–75.

<sup>53</sup>For example, William Twining, Robert Stevens, Patrick Atiyah, John Finnis, and Patrick McAuslan.

<sup>54</sup>A. W. B. Simpson, 'R. S. Rattray and Ashanti law', in A. W. B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London and Ronceverte, WV, 1987), pp. 403–26.

<sup>55</sup>Director of Public Prosecutions, Ghana 1962–6; Acting Attorney General, Ghana 1966, Attorney General 1979; Judge of the Court of Appeal, Ghana 1966–76; Professor and Dean of the Faculty of Law, University of Ghana 1969–74.

later in Canterbury for some years. He was involved in attempts to break down the rigidity of the Oxford law syllabus, but failed to win the day, and he and Christopher Ball<sup>56</sup> attempted to persuade Lincoln College in 1971 to admit women, but this proposal, which created pandemonium, was lost by one vote.<sup>57</sup> These frustrations were also combined with an increasing sense of intellectual isolation in Oxford, more particularly because his closest Oxford friend, John McMahon, an international lawyer who had become the law tutor (and subsequently Dean) at Hertford College, had committed suicide in 1969 at the age of 32 whilst working at the United Nations in New York. Derek Hall had become a remote figure as President of Corpus. Gareth Jones, who had become a close friend when he held a joint lectureship at Exeter and Oriel Colleges,<sup>58</sup> had long since left Oxford. For Brian, Oxford had become ‘a city of ghosts’, as he put it subsequently.

In Ghana he had met Caroline Brown, then working as an archaeologist. Her father, Felix, was a consultant psychiatrist, and her mother was a well-known character actress whose stage name was Eileen Way. They married in 1968, and there were to be three children (Tim, Zoë, and Jane) of this second marriage, added to his two children with Kathleen (Charles and Carol). By his death, there were, in addition, twelve grandchildren and five great-grandchildren. Outside his academic work his principal interest was in his family life, and in his children. His love of children, not only his own, was well known among his friends who had children. He had a piper-like ability to get into their world and enliven it.

Brian engaged in little research during his post-Ghana years in Oxford. He was approached by Glanville Williams<sup>59</sup> about the possibility of a move to Cambridge, but he was not attracted to the position. By about 1970, however, a decision had been made to leave Oxford, and Brian was short-

<sup>56</sup> Sir Christopher Ball, Fellow and Tutor in English Language, Lincoln College, Oxford, 1964–79 (Bursar, 1972–9); Warden, Keble College, Oxford, 1980–8.

<sup>57</sup> Soon after, he engineered the appointment of Christine Chinkin to a college lectureship, the Governing Body having delegated the power to appoint a lecturer without thinking to limit it only to males. This too created some internal strife. For an account of the admission of women by the college historian, see, Vivian H. Green, *The Commonwealth of Lincoln College 1427–1977* (Oxford, 1979), pp. 551–2. Christine Chinkin’s subsequent career (FBA; Professor of International Law at the London School of Economics; William W. Cook Global Professor, University of Michigan Law School) is evidence of Brian’s good academic judgement.

<sup>58</sup> Lecturer, Oriel and Exeter Colleges, Oxford, 1956–8; KCL, 1958–61; Trinity College, Cambridge: Lecturer, 1961–75; Tutor, 1967; Senior Tutor, 1972; Vice-Master, 1986–92 and 1996–9; University Lecturer, Cambridge, 1961–75; Fellow of Trinity College, Cambridge, since 1961; Downing Professor of the Laws of England, Cambridge University, 1975–98.

<sup>59</sup> Glanville Llewelyn Williams (1911–97) Rouse Ball Professor of English Law at the University of Cambridge from 1968 to 1978.

listed for a chair at the University of Keele, which he failed to obtain. He also applied for the headship of University College, Durham, but did not get the job. Soon after Brian applied for two chairs then on offer, one at Queen's University, Belfast, and the other in Botswana. Caroline, his new wife, was not enthusiastic about living in Belfast, not least because the Troubles had just recommenced, and his application was withdrawn; Botswana never replied. Claire Palley<sup>60</sup> was at this time about to leave Queen's for a chair at the University of Kent. She took a copy of Brian's file to Kent and Brian was offered an appointment there, which he accepted.

### Revolution, rape, pornography, and academic administration at Kent

Brian left Oxford in 1973 to become Professor of Law at the University of Kent. It was not a happy time. The University of Kent had adopted an innovative approach to higher education and there was much questioning of perceived orthodoxies. The Board of Studies in Law was located within the Faculty of Social Sciences. The first Professor of Law was Patrick Fitzgerald, an Oxford friend and former member of the Hart jurisprudence discussion group, who was committed to a progressive approach to the study of law. The board came to be dominated by a group of young academics of radical left wing leanings, influenced by the sociological study of law that was then developing in Britain; the dominant members of this group had been disillusioned by their legal studies at Cambridge. The result was a period of academic turmoil that tested even Brian's tolerance. One can only speculate how far this experience may have affected his subsequent reaction to Critical Legal Studies, when he encountered it in the United States. His description of academic manoeuvrings at lengthy faculty meetings was retrospectively hilarious, but must have been draining at the time. (He recollected how, in frustration, he sowed weeds in some of the Kent's manicured lawns as a token, but highly symbolic, act of revenge.) In order to get away from the 'horrors' of the Law Board ('Collectively the Law Board in session resembled a group therapy session for seriously disturbed teenagers.') Brian agreed to succeed Maurice Vile<sup>61</sup>

<sup>60</sup>Professor of Public Law, 1970–3; Dean of Faculty of Law, 1971–3; Professor of Law, 1973–84, and Master of Darwin College, 1974–82, University of Kent.

<sup>61</sup>Dean of Faculty of Social Sciences, 1969–75; Pro-Vice-Chancellor, 1975–81; Deputy Vice-Chancellor, 1981–4, University of Kent.



as Dean of the Faculty of Social Science in the mid-1970s. He remained Dean for three years. As Dean, Brian felt his only positive achievement had been that of establishing Social Psychology in the Faculty. He had little time for academic work.

His intellectual life largely took place outside the university. He served on an Advisory Group on the law of rape, under the chairmanship of a High Court Judge, Mrs Justice Rose Heilbron.<sup>62</sup> This had been established by the Home Secretary, Roy Jenkins, as a response to public outcry over the House of Lords decision in *D.P.P. v. Morgan*,<sup>63</sup> in which the Law Lords ruled that a genuine belief in the woman's consent, however unreasonable, was a defence to a charge of rape. The issue could not be referred to the Criminal Law Revision Committee, which at the time had sixteen male members and one female. The Advisory Group had a majority of female members, the first such government body ever in Britain. It reported in December 1975<sup>64</sup> and largely affirmed the principles stated by the majority in *Morgan*. The group did not recommend legislation to reverse the *Morgan* decision, which was thought to have little practical as opposed to symbolic significance. The report attracted little criticism, for by the time it appeared public protest over the *Morgan* case had died down. Some of its recommendations were partially adopted, such as that there should be a statutory definition of the crime, subsequently included in the Sexual Offences (Amendment) Act 1976.

More interestingly still, during his time at Kent, he was also a member and deputy chairman of the Williams Committee on Pornography and Film Censorship, which reported in 1979.<sup>65</sup> The Williams Committee meetings 'provided welcome relief from the tedium of existence at Kent', as he subsequently put it. They resembled the best sort of academic seminar, and its chairman, the noted philosopher Bernard Williams,<sup>66</sup> was only one of the impressive members who had been recruited to it; they included David Robinson, the London *Times* film critic,<sup>67</sup> Anthony Storr, a prominent psychiatrist,<sup>68</sup> and Polly Toynbee, a well-known journalist.<sup>69</sup> He was

<sup>62</sup> 1914–2005.

<sup>63</sup> *DPP v. Morgan* [1976] AC 182.

<sup>64</sup> Report of the Advisory Group on the Law of Rape, Cmnd. 6352, Dec. 1975.

<sup>65</sup> Report of the Committee on Obscenity and Film Censorship, Cmnd. 7772, London: HMSO, 1979.

<sup>66</sup> Professor Sir Bernard Williams (1929–2003).

<sup>67</sup> David Robinson, Assistant Editor of *Sight and Sound* and Editor of the *Monthly Film Bulletin*, 1957–8; film critic of *The Financial Times*, 1958–73, film critic *The Times*, 1973–90.

<sup>68</sup> Anthony Storr (1920–2001) psychiatrist and author.

<sup>69</sup> Columnist, *The Guardian*, 1977–88 and since 1998, writer.

an influential member of the committee. The report, which adopted John Stuart Mill's position that legal restrictions on freedom of expression were justifiable only where harm was evident, and that the harm of pornography in general had not been established, proved unpalatable to, and was immediately mothballed by, the incoming Conservative Government led by Margaret Thatcher.

After the report was published Brian was persuaded by Sam Silkin,<sup>70</sup> whose brainchild the committee had been, to write a short book on his experiences on the Williams Committee. This book, *Pornography and Politics* (1983),<sup>71</sup> is an entertaining and perceptive retrospective view of the committee and should be compulsory reading for anyone ever tempted to serve on similar groups. Serving on these committees triggered a continuing fascination with the processes of government, an interest that was further deepened by his experience of dealing with Home Office officials. For a while, he chaired the Home Office Police Promotions Examination Board, for which, he said, the civil servant Secretary produced minutes in advance of the meeting, and gave Brian elaborate advice before each meeting as to how to produce the result the Secretary wanted.

### Escape to the United States

Despite these external diversions, by 1978 Brian had more or less come to the conclusion that he had better resign himself to remaining a university administrator at Kent. He had come to the university with high hopes, but by then he was disillusioned. Things were not well on the domestic front either. Brian's second marriage had not proven to be a success, and he ended up living in a mobile home in a caravan park some miles from Canterbury near Petham, Kent.

Brian was 'saved', as he put it, by John Langbein of the University of Chicago Law School.<sup>72</sup> Langbein decided that Brian must be 'rescued from this awful world' and secured him an invitation to visit the Law School, as a visiting professor in the winter of 1979. The experience of joining the intense intellectual community that then constituted the Chicago Law School restored his interest in the academic study of the law,

<sup>70</sup>From 1974 to 1979, he served as Attorney General for England and Northern Ireland under Labour Prime Ministers Harold Wilson and James Callaghan.

<sup>71</sup>*Pornography and Politics: a Look Back to the Williams Committee* (London, 1983).

<sup>72</sup>John H. Langbein, Sterling Professor of Law and Legal History, Yale Law School; Professor of Law, University of Chicago, 1971–90.

notwithstanding the fact that he disagreed with many of the views then current there. He visited again in 1980 and in 1982. The University of Kent had responded to government cuts in funding by encouraging those of its teachers who were readily employable elsewhere to take early retirement. Brian took early retirement. This gave him a lump sum and a modest pension, but it was essential for him to find employment to avoid living thereafter in penury, and he accepted a tenured job at Chicago in 1984. In 1985 Brian was invited to visit the Michigan Law School to teach first year contract law, and was offered a job there, which he only accepted after much thought, since in many ways he liked the Chicago Law School; Brian had made numerous friends there (in particular Richard Helmholz, Richard Posner, and John Langbein), and was sorry to leave. The considerably higher salary at Michigan and an intellectual milieu more sympathetic to his work were strong incentives for this move.

In 1986, he moved to the University of Michigan Law School, where he taught for a quarter of a century, becoming Charles F. and Edith J. Clyne Professor of Law. He remained at Michigan until his retirement in 2009, enjoying the intellectual diversity he found at the Law School. (He also shared with several members of the Michigan faculty a *penchant* for piloting light aircraft, although the enthusiasm of his instructor waned somewhat after he accidentally turned off the engine during a training flight.)

Although his academic career was latterly spent mostly in the United States, and he was a respected member of the American academic community, becoming a Fellow of the American Academy of Arts and Sciences in 1993, and an Honorary Fellow of the American Society for Legal History in 1994, he remained determinedly English, both in his outlook and in the inspiration of much of his scholarship. He never had the least wish to settle in the US, or become an American citizen. Michigan allowed Brian to compact a full year of teaching into a semester, a daunting schedule that enabled him to split each year between his professorship in Ann Arbor and his family and his archive-based research in England. He tended, therefore, to spend the winter and spring in Ann Arbor ('because the Americans understand winter, unlike the English', he was fond of saying), but the summer and autumn would find him back in England, often ensconced in the then Public Record Office in Kew. In 1993–4 he was the Arthur Goodhart Visiting Professor of Legal Science at Cambridge University. He was the general editor of the Oxford University Press series of monographs on modern legal history for many years. After he retired from Michigan, he accepted a Visiting Professorship at Bristol University, which illness prevented him from taking up.

## Engaging with American legal ideology

Politically, like his father, he began life as a Conservative, and indeed acted as a Conservative speaker in the Skipton constituency whilst in his late teens. The Suez affair of 1956 permanently alienated him and his father from the Conservative Party, and his views tended to become more left wing as he grew older. An English liberal to his core, however, he viewed the growing extremism of American politics with concern. In his later years, he became somewhat uneasy about continuing to work in a country whose government behaved internationally, he believed, 'in so barbarous a way', although he was comforted by the fact that most of his American friends thought the same way (he considered that the United Kingdom 'behaved almost as badly, though its capacity for doing harm was much more limited'). But he was not a committed person politically.<sup>73</sup> Nor was his work as an academic lawyer driven by political ideology, although it never lacked a passionate commitment.

Brian came on the American law school scene at a time of considerable intellectual ferment about how to think about law.<sup>74</sup> The American legal realist movement had inculcated a pervasive scepticism about legal rules and legal doctrine. Many academics and practitioners purported to regard legal rules as a smoke screen, mere pretexts for what actually motivated judicial decisions. Others had developed more theoretical explanations that were either focused on legal process or avowedly pragmatic. By the late 1970s, when Brian arrived, two newer contending schools of thought were attempting to offer alternative theories. One, called Critical Legal Studies, centred at the Harvard Law School, was New Leftist and frequently post-modernist in tone; its adherents, the so-called 'crits', regarded existing legal rules and legal institutions as instruments of class subordination, but saw the law as capable of being captured to enable a better society to be created. An opposing school, which has been more enduring in the United States than Critical Legal Studies, was the law-and-economics movement, the most influential branch of which was then thriving at the Chicago Law School; these law-and-economics scholars contended that much of what the law does is to apply principles of microeconomics. The result was a fierce contest between the few remaining traditional legal doctrinalists ('black letter lawyers'), the Crits, and Law and Economics.

<sup>73</sup>Late in life his somewhat romantic interest in his partly Irish ancestry impelled him to acquire an Irish passport, and he toyed with the idea of moving to live there, although he did not do so.

<sup>74</sup>This section draws extensively on JLM.

Brian had barely arrived at Chicago before he entered the fray. His most celebrated contribution to the debate was an article that he published in the spring of 1979 in the *University of Chicago Law Review*.<sup>75</sup> Morton Horwitz,<sup>76</sup> then a leading member of the critical legal studies movement, had undertaken to reinterpret the history of contract law, arguing that nineteenth-century capitalists transformed contract law from its originally benign roots into a market-serving tool for exploitation of the weak.<sup>77</sup> Brian considered that Horwitz had, in his view, systematically distorted the historical evidence in order to further his ideological theories of legal evolution. Brian's article was not driven by an opposing political ideology but merely by his astonishment at what he considered to be the loose and deceptive use of evidence, and by his concern that in the world of American law school scholarship it was possible to get away with this. His review ranged across English and American case law and treatise literature of the eighteenth and nineteenth centuries to show that no such transformation had in fact occurred. The Chicago Dean at the time was nervous lest the article should be demolished, and allocated special funds to enable it to be very carefully checked and edited. The article attracted considerable attention, but no rebuttal from Horwitz. It delighted the many academics who detested the crits and caused fury in their camps. This had the 'unfortunate' result, from his point of view, of casting Brian in the role of an ideological enemy of the progressives.

Two years later, in 1981, Brian published in the same journal his path-breaking work on the history of the Anglo-American legal treatise,<sup>78</sup> which this time attacked the American Legal Realists' legacy more broadly. Brian had long been interested in the history of legal literature and of legal education; he saw these subjects in part as windows on legal theory, because the way lawyers write about the law and teach the law reveals how they think about and categorise law. In the 1950s, Brian had already written about the origins of the later medieval yearbooks and their relation to the instructional program of the Inns of Court.<sup>79</sup> Brian's article on the

<sup>75</sup> A. W. B. Simpson, 'The Horwitz thesis and the history of contracts', *University of Chicago Law Review*, 46 (Spring 1979), 533–601.

<sup>76</sup> Harvard Law School: Assistant Professor of Law, 1970, Professor of Law, 1974, since 1981 Charles Warren Professor of American Legal History.

<sup>77</sup> Morton J. Horwitz, *The Transformation of American Law, 1780–1860: the Crisis of Legal Orthodoxy* (Cambridge, MA, 1977).

<sup>78</sup> A. W. B. Simpson, 'The rise and fall of the legal treatise: legal principles and the forms of legal literature', *University of Chicago Law Review*, 48 (Summer 1981), 632–79.

<sup>79</sup> Simpson, 'The circulation of Yearbooks in the fifteenth century'.

history of the treatise developed the theme that the treatise was a pre-vaillingly nineteenth- and early-twentieth-century genre, which came to fruition in consequence of the emergence of university legal education in the common law. Brian concluded his account by pointing to the irony that the tradition of academic treatise writing—which reached its highest expression in the United States in the first half of the twentieth century in the multivolume treatises such as *Wigmore on Evidence* and *Williston on Contracts*—had become largely extinct. Brian blamed the American Legal Realists. The prevailing legal culture of ‘cynicism about the significance of legal doctrine’<sup>80</sup> had discredited ‘the work of analyzing doctrine and expounding it as the principled science of the law’.<sup>81</sup>

That his concerns about the American approach to legal theorising were not politically ideological was soon demonstrated by his criticism of the work of right-leaning law and economics scholars. His time at Chicago led to an interest in the application of economic ideas to the study of the law, and at Chicago and later Michigan he regularly attended law-and-economics seminars. He had, however, serious doubts as to the validity of some of the claims advanced by devotees of the movement. His principal target in both his critiques of Critical Legal Studies and Law and Economics was the tendency, as he saw it, of academic lawyers to fall in love with simplistic and highly generalised theories of law and legal evolution. The success of the Law and Economics movement in the academy, attempting to explain the whole history of common law development by reference to the concept of economic efficiency, depended in part on this love of all embracing theory.

His scepticism resulted in an article published in 1996,<sup>82</sup> which criticised some of the views of Ronald Coase,<sup>83</sup> regarded as one of the founding fathers of the Law and Economics movement. This enraged Coase, who published an angry reply<sup>84</sup> that failed, however, to address the substantive points that had been made.<sup>85</sup> In the main, Brian’s article was ignored by academics committed to the economic analysis of law, much as his criticism

<sup>80</sup> A. W. B. Simpson, ‘The rise and fall of the legal treatise: legal principle and the forms of legal literature’, *University of Chicago Law Review*, 48 (1981), 632, 677.

<sup>81</sup> *Ibid.*, p. 678.

<sup>82</sup> A. W. B. Simpson, ‘Coase v. Pigou reexamined’, *Journal of Legal Studies*, 25 (Jan. 1996), 53–97.

<sup>83</sup> Professor of Economics (1964–70), then Clifton R. Musser Professor of Economics (1971–81), University of Chicago; Nobel Prize in Economics, 1991.

<sup>84</sup> R. H. Coase, ‘Law and economics and A. W. Brian Simpson’, *Journal of Legal Studies*, 25 (Jan. 1996), 103–19.

<sup>85</sup> A. W. B. Simpson, ‘[Coase v. Pigou reexamined:] An addendum’, *Journal of Legal Studies*, 25 (Jan. 1996), 99–101.

of Horwitz was largely ignored by scholars committed to critical legal studies. This phenomenon—the failure to respond to seriously presented criticism of theoretical views—led Brian to adopt a somewhat disdainful attitude to the culture of American law schools, too much of which, in his view, was driven by political ideology.

### ‘Doing a Simpson’

This scholarship, whilst attracting much attention, was nevertheless something of an intellectual sideshow for Brian. His main scholarly efforts were elsewhere. During his time at Kent, but increasingly after he went to the United States, he developed the original idea, as Joshua Getzler,<sup>86</sup> the Oxford legal historian, has pointed out, that the ‘leading cases’ of the common law deserved the fullest possible study in their historical context.<sup>87</sup> He made this approach his own special area, drawing out new facts, emphasising the contingency of these leading cases, and deepening our understanding of their particular meaning and significance. This genre of scholarship is now commonly known, according to Richard Helmholz,<sup>88</sup> his former colleague at the University of Chicago Law School, as ‘doing a Simpson’.<sup>89</sup>

Typically, Brian described his ‘eureka moment’ in colourful terms. It was, so he said, when he was lying in a bath on his first visit to a wintery Chicago in 1979, trying to get warm, that it occurred to him that the celebrated case of *Rylands v. Fletcher*,<sup>90</sup> in which the doctrine of strict liability for inherently dangerous activities was developed, must have had its origins in some major reservoir failure, a hypothesis he soon found to be true after a visit to Chicago’s Regenstein Library. This generated an article that appeared in the *Chicago Journal of Legal Studies* in 1984.<sup>91</sup> This was not the first attempt to study a leading case in its social and political context; the pioneer was Richard Danzig who had in 1975 published an article of

<sup>86</sup> Professor of Legal History, University of Oxford; Fellow, St Hugh’s College, Oxford.

<sup>87</sup> J. S. Getzler, ‘A. W. B. Simpson, *Leading Cases in the Common Law*’, *Journal of Legal History*, 18 (1997), 116–18.

<sup>88</sup> University of Chicago Law School, Professor of Law, 1981–4; Ruth Wyatt Rosenson Professor of Law, 1984–99; Ruth Wyatt Rosenson Distinguished Service Professor of Law, 2000–present.

<sup>89</sup> R. H. Helmholz, ‘Brian Simpson in the United States’, in Donovan and Rubin *Human Rights and Legal History*, pp. 285, 288.

<sup>90</sup> *Rylands v. Fletcher* [1868] LR 3 HL 330.

<sup>91</sup> A. W. B. Simpson, ‘Legal liability for bursting reservoirs: the historical context of *Rylands v. Fletcher*’, *Journal of Legal Studies*, 13 (1984), 209–64.

this type on the 1854 contract case of *Hadley v. Baxendale*.<sup>92</sup> But Brian made this approach very much his own, and it was best exemplified in his book *Cannibalism and the Common Law* (Chicago, 1984).<sup>93</sup>

In about 1981 he had written to the Home Office to see if he could obtain access to any surviving papers connected with the notable case of *R. v. Dudley and Stephens* (1884).<sup>94</sup> At this time, the Home Office followed a practice of not releasing files on capital cases for a century; Brian thought that in view of the work he had done for the Home Office on pornography and earlier on the law of rape that he might obtain access a little earlier. At this time he was teaching criminal law at Kent and he thought that access to the file might enliven his teaching. The case concerned the scope of the defence of necessity in criminal law. It dealt with the trial of two shipwrecked sailors who had killed the ship's cabin boy and eaten him to save themselves. The killers survived, were prosecuted for murder, and were ultimately convicted but pardoned. Once he saw the archives, he realised that there was a book in it, and the outcome was *Cannibalism and the Common Law*. Combining these archival with newspaper sources, Brian reconstructed in astonishing detail not only the judicial machinations that led to the conviction, but also the horrific dangers of nineteenth-century maritime life.

Brian's scholarship was closely connected to his general interest in history, which he read voraciously. But his other non-academic interests were also often drawn on in his scholarly writing. *Cannibalism*, in particular, brought together his love of history with his interest in the way law is practised, and with his abiding maritime connections. His first wife, Kathleen, together with her new husband, had earlier disappeared in a yacht that sank without trace in the Pacific. It is probable that the yacht foundered in a tropical storm in October 1978. Brian himself was for many years an intrepid (if somewhat haphazard) sailor who loved messing about in boats. He began with a Gull sailing dinghy, which he towed out to Greece on several occasions, and then progressed to chartering yachts in the Falmouth area and on the Dart. Indeed, partly to equip himself to write about the technical aspects of sailing involved in the *Dudley and Stephens* case that was central to *Cannibalism*, he worked on

<sup>92</sup>Richard Danzig, 'Hadley v. Baxendale: a study in the industrialization of the law', *Journal of Legal Studies*, 4 (1975), 249.

<sup>93</sup>The book was first published by the University of Chicago Press, and then by Penguin in the UK and reprinted by the Hambleton Press.

<sup>94</sup>*R. v. Dudley and Stephens* [1884] 14 QBD 273 DC.



a square-rigger, *Eye of the Wind*, on a voyage from Copenhagen to Southampton; thereafter some reference to futtock shrouds appeared in all his books.<sup>95</sup>

The maritime background to *Dudley and Stephens*, and the ultimate fate of one of the killers, Tom Dudley, as a victim of bubonic plague, made for a good story, but the real subject matter of the book went deeper: the conflict between middle class morality and the practices of seamen; the conflict between notions of the survival of the fittest and the value of the sanctity of human life; the conflict between the rule of law and necessity; and the complexities of the interaction between lawyers, courts and politicians, on the one hand, and elite and working class public opinion, on the other.

The book attracted considerable attention, and sold well for an academic monograph, but it was described by William Twining as ‘a magnificent failure’ (a phrase Twining later regretted using) and as lacking ‘focus’.<sup>96</sup> The ‘failure’ of the book was that its larger themes did not have a strong intellectual impact within the world of academic law. The claim that the book lacked ‘focus’ meant that Brian did not spell out what the book was about, in the sense that there was no attempt to overlay the story with an explicit theory (although *implicitly* the book was centrally concerned with the hostility of state law to legal pluralism), or to point to the moral of the story and that as a result the book came to be read primarily as entertainment rather than for its intellectual content. Nevertheless, with these books and articles, Brian thereafter came to be viewed as something of a pioneer in what some have called ‘legal archaeology’.<sup>97</sup> Work on *Cannibalism and the Common Law* involved research in the papers available in the Public Record Office, now The National Archives, and Brian continued to be fascinated by archival research into relatively modern legal history. Extensive use had been made of archives by medievalists and the editors of texts for the Selden Society, but until then virtually no use had been made of them for the study of modern legal history.<sup>98</sup>

<sup>95</sup> On several occasions he worked on a historic Bridgwater ketch, *Irene*, on coastal voyages, and on one trip to the Channel Islands and back. Later in life he bought and sailed *Cosmic Wind*, a decrepit 26 ft Eventide, and *Edelweiss*, an Elizabethan 23 ft yacht. Later still, he gave up solo sailing under pressure from his children, and acquired a sea-going motor launch, *Cheybassa*.

<sup>96</sup> William Twining, ‘Cannibalism and legal literature’, *Oxford Journal of Legal Studies*, 6(3) (1986), 423.

<sup>97</sup> e.g. Debora L. Threedy, ‘Unearthing subversion and legal archaeology’, *Texas Journal of Women and Law*, 13 (2003), 133.

<sup>98</sup> With the notable exception of Robert Stevens, who had made extensive use of PRO records in Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (London, 1967), Brian Abel-

Brian's next project was suggested by a conversation he had with a Canadian scholar, DeLloyd Guth,<sup>99</sup> who told him that he and Robert Heuston<sup>100</sup> had discovered that Robert Liversidge,<sup>101</sup> the litigant in the important wartime case of *Liversidge v. Anderson* (1942),<sup>102</sup> was still alive and living in the Vancouver, British Columbia area. The case concerned the legality of internment without trial in Britain under emergency powers permitting the incarceration of suspected fascist sympathisers during the Second World War. Out of this came Brian's book, *In the Highest Degree Odious*, which dealt with the detention without trial of British citizens during the First and Second World Wars.<sup>103</sup> The book, favourably reviewed by Richard Posner, his former colleague at Chicago,<sup>104</sup> explored the interaction between the military, the security services, the civil servants, internal governmental committees, the lawyers and the courts, members of Parliament and the media, and the detainees and their families. It was a broad-based study of the working of the British governmental machine in times of stress.

It also allowed him to indulge a long-standing interest in the world of the British security services. He had been, on his own telling, a rather lacklustre talent spotter for them during his time at Oxford. Researching *In the Highest Degree Odious* enabled him to immerse himself more deeply in this world and his account drew on a wide range of sources, including interviews with former members of the British Union of Fascists, members of the Security Service (MI5), and many telephone conversations with Robert Liversidge himself. (His interest in this secretive world remained. He subsequently explored H. L. A. Hart's involvement in counter-espionage during the Second World War,<sup>105</sup> and he assisted in the case that George Blake—the double agent—took to Strasbourg, discussed below.)

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Smith and Robert Stevens, *In Search of Justice* (London, 1968), and Robert Stevens, *Law and Politics: the House of Lords as a Judicial Body 1800–1976* (London, 1979).

<sup>99</sup> Assistant Lecturer, Universities of Bristol, 1974–5, and Lancaster, 1975–7; Assistant Professor, University of Michigan, 1966–73; Visiting Associate Professor (Law), University of British Columbia, 1982–93; Professor of Law and Legal History, University of Manitoba since 1994.

<sup>100</sup> Fellow, Pembroke College, Oxford, 1947–65; Professor of Law, University of Southampton, 1965–70; Regius Professor of Laws, Trinity College Dublin, 1970–83.

<sup>101</sup> 1904–94.

<sup>102</sup> *Liversidge v. Anderson* [1942] AC 206.

<sup>103</sup> *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford, 1992).

<sup>104</sup> Richard A. Posner, 'Executive detention in time of war', *Michigan Law Review*, 92 (1994), 1675.

<sup>105</sup> A. W. Brian Simpson, 'Herbert Hart elucidated', *Michigan Law Review*, 104 (2006), 1437 at 1443–4.

Brian continued working in this vein of immensely detailed case studies, publishing further studies of leading English cases in tort, contract, and property law. He collected many of these studies in a book published by Oxford University Press in 1995, as *Leading Cases in the Common Law*.<sup>106</sup> In more recent times there has developed in the US legal academic world a story-telling movement, and Brian's work may have had some part in encouraging this development. Articles of his have been included in *Property Law Stories*<sup>107</sup> and *Contract Stories*,<sup>108</sup> recent examples of this type of writing about the law.

There are many strands to Brian's contextualising historical studies; in one dimension, they were part of his reaction against the prevailing anti-doctrinalism of American legal academia. Brian thought rules mattered and, to that end, he wanted to show where important rules came from, and why. The approach he adopted demonstrated a view about the appropriate way of thinking about the evolution of legal doctrine. Brian came to consider that in legal academia there existed a deep reluctance to allow the intricacies of the workings of the real world to get in the way of facile generalisations and the cultivation of romantic theoretical myths. One of the anonymous readers of *In the Highest Degree Odious* for Oxford University Press criticised the draft on the ground that it lacked theoretical analysis, and Brian therefore stitched on a final theoretical chapter which he wrote in two days, but he did it under protest and with distaste.

### Human rights scholarship

Although he combined many non-scholarly interests with his scholarship throughout his life, he often appeared sceptical of scholarship driven by political or moral commitments. Brian's next major academic project was somewhat different, therefore, for he was to discover a personal commitment to human rights that was to bring together a strong strand of personal idealism with academic scholarship. During his year at Cambridge (1993–4) he had re-established contact with a former pupil, Nuala Atkinson, later

<sup>106</sup> A. W. B. Simpson, *Leading Cases in the Common Law* (Oxford, 1995).

<sup>107</sup> A. W. B. Simpson, 'The story of *Sturges v. Bridgman*: the resolution of land use disputes between neighbors', in Gerald Korngold and Andrew P. Morriss (eds.), *Property Stories* (New York, 2004).

<sup>108</sup> A. W. B. Simpson, 'Contracts for cotton to arrive: the case of the two ships *Peerless*', *Cardozo Law Review*, 11 (Dec. 1989), 287–333, in Douglas G. Baird (ed.), *Contract Stories* (New York, 2007).

Nuala Mole,<sup>109</sup> who had established a human rights NGO in London, the AIRE Centre. He was attracted by the idea that Michigan law students might work in the centre as interns, and arrangements for this were in due course set up. Resulting discussions led to a developing interest in the international protection of human rights. This linked naturally to his earlier work on detention without trial in the Second World War.<sup>110</sup>

Brian decided to embark on a study of the genesis of the European Convention on Human Rights (ECHR). He had never studied or indeed shown any particular interest in international law, and had therefore to acquire knowledge of this as he was doing the archival work on which the study was to be based. As this study progressed, Brian decided to relate the story of the development of the Convention to the dismantling of the British colonial empire, and this linked the work to his interest in colonial history. Fascinated as he was by the residue of Empire and its continuing effects in British and Commonwealth law, he showed that the origins and drafting of the Convention needed to be seen from the perspective of a British government obsessed with its colonies, an important corrective to the popular view that the Convention was simply a response to wartime Axis brutalities.

His timing was impeccable, if accidental. The Human Rights Act 1998 came into effect in the United Kingdom in 2000, effectively incorporating the European Convention on Human Rights. In 2001 he published his monumental study *Human Rights and the End of Empire* (Oxford), based on his intensive study of the British and American archives, explaining not only the genesis of the Convention but also the interrelationship between the various persons and entities involved in adapting to the changed world once the Convention came into force and began to have practical consequences that had never been anticipated.

He subsequently published several other pieces on issues of international law,<sup>111</sup> some based on the huge body of archival material in The National Archives. One, on the application of the ECHR to overseas colonial territories, appeared in the *British Yearbook of International Law* in 2007.<sup>112</sup> This was his first joint publication. The co-author, Louise Moor,

<sup>109</sup> Founding director of the AIRE Centre, formerly Director of Interights, St Anne's College, Oxford (1964–7).

<sup>110</sup> *In the Highest Degree Odious*.

<sup>111</sup> See, for example, his important essay, 'Hersch Lauterpacht and the genesis of the age of human rights', *Law Quarterly Review*, 120 (2004), 49.

<sup>112</sup> Louise Moor and A. W. Brian Simpson, 'Ghosts of colonialism in the European Convention on Human Rights', *British Year Book of International Law*, 76(1) (2006), 121–94.

was a New Zealand lawyer working for Amnesty International in London, who had studied for an LLM at the Michigan Law School. The impetus which generated this article was *pro bono* work in which Brian was then engaged with the AIRE Centre in connection with the expulsion of the Chagos Islanders from their homeland in the late 1960s and early 1970s.

Later, Brian was approached by a former Foreign Office Legal Adviser, Sir Frank Berman,<sup>113</sup> who suggested he undertake a comprehensive study of the Foreign Office Legal Advisers. He turned down this suggestion as being a task more appropriate for a younger scholar, given the inevitable scale of such an undertaking. In 2009, Brian collaborated with Dino Kritsiotis,<sup>114</sup> with whom he had run a joint seminar in Michigan, in writing a piece on the international law aspects of the prosecutions of a number of Pitcairn Islanders for offences against the Sexual Offences Act 1956 for inclusion in a volume of essays on the cases.<sup>115</sup> Another international law piece dealt with the Genocide Convention<sup>116</sup> and the Maccabean Lecture in Jurisprudence (2003) investigated in detail the rule of law in international affairs in relation to the incident of the *Altmark* in 1940, in which a German ship was intercepted by the Royal Navy and boarded in neutral Norwegian waters.<sup>117</sup>

### Legal practice: direct and indirect

Brian's interest in human rights was not only academic. He was also deeply committed to the use of law to secure the common good and advance human rights in practical terms. This use of law in practice led him occasionally to regret never having gone into legal practice (although he poked fun at the pomposity of barristers), and he also came to think that he would have greatly enjoyed working in the Foreign Office. His work with

<sup>113</sup> Sir Franklin (Frank) Berman was Legal Adviser to the Foreign and Commonwealth Office from 1991 until 1999.

<sup>114</sup> Dino Kritsiotis is Professor of Public International Law in the University of Nottingham, where he has taught since October 1994.

<sup>115</sup> Dino Kritsiotis and A. W. B. Simpson, 'The Pitcairn prosecutions: an assessment of their historical context by reference to the provisions of public international law', in Dawn Oliver (ed.), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (Oxford, 2009).

<sup>116</sup> A. W. B. Simpson, 'Britain and the Genocide Convention', *British Year Book of International Law*, 73(1) (2002), 5–64.

<sup>117</sup> A. W. B. Simpson, 'The rule of law in international affairs', *Proceedings of the British Academy*, 125 (2004), 211–63.

the AIRE Centre during the late 1990s and early 2000s therefore filled something of a gap in his life. He came to be involved in *pro bono* work associated with the London NGO, some related to cases in both the UK courts and Strasbourg.<sup>118</sup>

In 1995, the AIRE Centre asked if he would help in the cases before the European Court of *Hussain and Singh*,<sup>119</sup> which concerned the detention at Her Majesty's Pleasure of juveniles convicted of murder. His advice in *Hussain and Singh* was then used before the House of Lords and in Strasbourg in the more publicised cases of *T and V*, the Jamie Bulger murder case, in which a two-year-old boy was abducted, tortured and then murdered by two ten-year-old boys.<sup>120</sup> The paper submitted to the ECHR in *Singh v. United Kingdom* was cited by Lord Goff (his predecessor as law fellow at Lincoln) in the case of *R v. Secretary of State for the Home Department, ex parte Thompson and Venables*, albeit to disagree with it.<sup>121</sup> He was called on again to provide advice in *Dobbie v. UK*,<sup>122</sup> which concerned the 'date of knowledge' for time to start running to commence litigation. *Dobbie* was followed by *Osman*,<sup>123</sup> which concerned the refusal to recognise a duty of care in negligence in a case where the police had been alerted to the dangerous obsession shown by a disturbed schoolmaster to a thirteen-year-old pupil but did nothing to protect the child. Brian provided a comprehensive account of the genesis of Article 13 of the ECHR, the right to an effective remedy, which won the day for the Osman family. This advice was subsequently also used in the later Strasbourg cases of *Z v. UK* and *TP and KM v. UK*.<sup>124</sup>

Brian was also involved in providing advice in the case taken to the European Court of Human Rights by George Blake, the double agent, challenging the novel legal mechanisms adopted by the British Government to prevent Blake (whom he nevertheless thoroughly disapproved of) from receiving royalties from his book. The Strasbourg court rejected most of the claims, but Blake was partially successful.<sup>125</sup> Brian also assisted the AIRE Centre as a third party intervener in the case of *Hirst v. UK*,<sup>126</sup> the

<sup>118</sup> This section draws on NMM.

<sup>119</sup> *Hussain and Singh v. UK* (1996) 22 EHRR 1.

<sup>120</sup> *T and V v. UK* (2000) 30 EHRR 121.

<sup>121</sup> [1998] AC 407, at p. 481.

<sup>122</sup> *Dobbie v. United Kingdom* (application no 28477/95; declared inadmissible: 16 October 1996).

<sup>123</sup> *Osman v. United Kingdom* [1998] EHRR 101.

<sup>124</sup> *TP and KM v. United Kingdom* (2002) 34 EHRR 2.

<sup>125</sup> *Blake v. United Kingdom* (2007) 44 EHRR 29.

<sup>126</sup> *Hirst v. UK* (2006) 42 EHRR 41.

prisoners' voting case, providing advice to explain how and why convicted felons did not have the right to vote. He put his knowledge of the complex legal relationship between colonial law and the Convention to good use in assisting the Chagos Islanders in their legal claim before the European Court of Human Rights.<sup>127</sup> It was the research he did in connection with his involvement in that litigation that led him to write the scholarly piece with Louise Moor mentioned earlier.<sup>128</sup>

Brian's involvement with the world of the practice of law was also more indirect, most particularly through the influence of his academic writing on the UK highest court.<sup>129</sup> Lady Hale cited *Introduction to the History of the Land Law* in a House of Lords opinion on the scope of possession orders.<sup>130</sup> *In the Highest Degree Odious* has been cited twice in the House of Lords, once by Lord Walker in his dissenting judgment in the *Belmarsh* case, *A v. Secretary of State for the Environment*,<sup>131</sup> and once by Lord Brown in *R (Al-Jedda) v. Secretary of State for Defence*,<sup>132</sup> both of them cases about detention without trial.<sup>133</sup> *Cannibalism and the Common Law* was cited by Lord Hailsham in *R v. Howe*,<sup>134</sup> and his article on *Rylands v. Fletcher*<sup>135</sup> was cited by both Lord Bingham and Lord Hoffmann in *Transco v. Stockport Metropolitan Borough Council*,<sup>136</sup> when deciding that a burst water pipe was not to be equated with a mill lodge. The respect for his academic work in legal practice was further acknowledged when he was appointed an honorary QC in 2001.

### Oxford (and Oxford jurisprudence) revisited

As pointed out earlier, Brian was critical of what he saw as H. L. A. Hart's lack of attention to the workings of the common law tradition, but that

<sup>127</sup> An application was lodged before the ECtHR in 2008 following the defeat of the final British lawsuit before the House of Lords, and that case remains in litigation as of August 2011.

<sup>128</sup> See above, n. 102.

<sup>129</sup> This paragraph draws on BHM.

<sup>130</sup> *Secretary of State for the Environment, Food and Rural Affairs v. Meier* [2009] 1 WLR 2780, para. 33.

<sup>131</sup> [2005] 2 AC 68.

<sup>132</sup> [2007] UKHL 58.

<sup>133</sup> Indeed, his paper 'Europe must go it alone: the European Convention on Human Rights: the first half century' was also cited in *Al Jeddah*.

<sup>134</sup> [1987] 1 AC 417, at 430.

<sup>135</sup> 'Legal liability for bursting reservoirs: the historical context of *Rylands v. Fletcher*', *Journal of Legal Studies*, 13 (1984), 209.

<sup>136</sup> [2004] 2 AC 1, at paras 3 and 28.

his lack of self-confidence in the jurisprudential field when at Oxford meant that he was uneasy about publishing these views. After leaving Oxford, whilst continuing to be interested and to read widely in the area, Brian's subsequent writings did not directly engage with Oxford analytical jurisprudence, until the last decade of his life. His last book, with the title of *Reflections on The Concept of Law*, delivered to Oxford University Press some months before his death and published posthumously, made these reservations public, although some of this material was published earlier in Brian's reviews of Nicola Lacey's illuminating biography, *A Life of H. L. A. Hart: the Nightmare and the Noble Dream*,<sup>137</sup> in the *Times Literary Supplement*,<sup>138</sup> and in the *Michigan Law Review*.<sup>139</sup> *Reflections* revisits Brian's fascination with, and ambivalent respect for, Hart's *The Concept of Law*<sup>140</sup> and analytical jurisprudence more generally (whether of the Oxford variety, or those originating elsewhere).

There are several different ways of reading *Reflections*.<sup>141</sup> At one level, it is an attempt to set out in some detail Brian's understanding of the historical and intellectual context in which *The Concept of Law*, first published in 1961, was written. Lacey had already laid bare much of Hart's life. Brian was able to describe the academic environment from his own experiences as a young don in the Oxford of the 1950s and 1960s. In *Reflections*, Brian also draws out in a more sustained way the diverse, if flawed, jurisprudential traditions that preceded Hart, and the range of intellectual sources that appear to have influenced Hart when he was writing *The Concept of Law*, providing an important supplement to Lacey's account. This is intellectual history of the most engaging kind, not least because it is peppered with classic examples of Brian's famous wit. There is much pleasure to be had from Brian's accounts of post-war Oxford life, irrespective of the background they present to Hart's work; indeed, it is the autobiographical aspects of the book that provide some of the most illuminating and funny moments.

At another level, *Reflections* is an extended critique of Hart's book, elaborating and extending the range of Brian's reservations about the methodology and substantive argument of *The Concept of Law*. From his earlier writings,<sup>142</sup> we know that Brian was critical of what he saw as Hart's

<sup>137</sup> (Oxford, 2004).

<sup>138</sup> A. W. B. Simpson, 'Stag hunter and mole', *Times Literary Supplement*, Feb. 11, 2005, 6–7.

<sup>139</sup> A. W. B. Simpson, 'Herbert Hart elucidated', *Michigan Law Review*, 104 (2006), 1437.

<sup>140</sup> (Oxford, 1961; 2nd edn., 1994; 3rd edn., 2012).

<sup>141</sup> This section draws on the author's Preface to *Reflections*.

<sup>142</sup> 'The common law and legal theory', in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd series) (Oxford, 1973), pp. 77–99.



lack of attention in *The Concept of Law* to the common law tradition. Hart's emphasis on law as a system of rules was, he thought, more appropriate for the analysis of Continental civil law systems. For Brian, the English common law system 'consists of a body of practices observed and ideas received by a caste of lawyers'.<sup>143</sup> Historically, cohesion was produced through institutional arrangements, such as the way the legal profession is organised, rather than by way of rules, which only developed when the previous consensus based on tradition or custom broke down. For Brian, legal history and legal anthropology were therefore central tools in coming to an understanding of what law is; he considered that, for Hart, they were irrelevant. This earlier critique is developed further in *Reflections*, leading to further criticisms of *The Concept of Law*. The formulation of the rule of recognition, the absence of comparative law analysis, the difficulties with Hart's approach to adjudication, and the book's omission of any sustained discussion of human rights, are all analysed and criticised.

At a third level, *Reflections* comes as close as Brian ever came to setting out his own 'anti-grand-theory' theory of legal scholarship. One of the noteworthy aspects of his scholarship was the determined way in which Brian avoided being drawn into any sustained discussion of abstract legal theory, preferring to allow his books' relevance for legal theory to be drawn out by readers themselves. We know that Brian had in mind a book-length treatment of the common law tradition, along the lines of Merryman's book on the civil law tradition,<sup>144</sup> and this might have addressed more directly his own theoretical views, but sadly it was not completed by the time of his death. In *Reflections*, however, in setting out his analysis of where he and Hart differ, we begin to get a clearer idea of Brian's own approach to legal theory. Agreeing with William Twining's description of Brian,<sup>145</sup> drawing on Isaiah Berlin's famous distinction,<sup>146</sup> as a fox rather than a hedgehog ('the fox knows many things, the hedgehog knows one big thing'), Brian makes clear that his approach to law is essentially fox-like. In

<sup>143</sup> 'The common law and legal theory', in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd series) (Oxford, 1973), p. 94.

<sup>144</sup> John Henry Merryman, *The Civil Law Tradition* (Stanford, CA, 3rd edn., 2007).

<sup>145</sup> William Twining, 'The *ratio decidendi* of the case of the prodigal son', in O'Donovan and Rubin, 149, 150.

<sup>146</sup> Isaiah Berlin, *The Hedgehog and the Fox: an Essay on Tolstoy's View of History* (London, 1953).

contrast, he regards Hart as an exemplar of a hedgehog's approach to law. For Brian, legal theorising should derive from detailed empirical analysis of what happens in actual legal practice. He was thus deeply sceptical of grand abstract theories that ignore the evidence of such practice. He considered that analytical jurisprudence should build from the practice of law, rather than seek to impose itself on such practice, and that those who espoused analytical jurisprudence had largely ignored the implications of his work in legal history and the challenges it posed for their work. In seeking to engage with *The Concept of Law, Reflections* not only pays Hart the ultimate compliment of treating him seriously, but also shines a clearer light than before on Brian's own intellectual development and scholarly approach.

### Teaching

Throughout his period in academic life, Brian not only wrote he also taught extensively. In Oxford, he taught a variety of subjects, including jurisprudence, legal history, property law, tort law, contract law and constitutional and administrative law. In Canada he taught jurisprudence. In Kent he taught legal philosophy, legal history, contract, tort and criminal law. For a summer programme run by the T. C. Williams School of Law he taught criminal law and comparative law. In Chicago he taught jurisprudence, property and contract, and on one occasion criminal law. In Michigan he continued to teach a variety of subjects. He taught the basic course in property law, and sometimes contract law as well. He also taught upper-level courses in English and American legal history, jurisprudence, and human rights law; and he offered advanced seminars on special topics, including the history of contract law, the history of tort law, the history of legal education, the history of international law (with Dino Kritsiotis), and (in his view most successfully) a seminar on the boundaries of the market. In general his teaching attracted students, and in Michigan he became something of a pet. Brian was a hugely popular teacher—challenging, helpful, immensely learned, and yet zany entertaining. His teaching was, indeed, legendary and his influence on those he taught long-lasting; few other academics have a Facebook fan club created by their students. And his teaching was not restricted to academic contexts. His involvement with the AIRE Centre involved teaching human rights to practitioners in Albania, the Balkans, and the Isle of Man.

## Conclusion

Brian's scepticism about his long-term scholarly influence only increased with time. History is likely to be kinder to Brian on this front than he was on himself. He is likely to continue to be recognised throughout the common law world as one of the greatest academic lawyers of his generation in the fields of the history of English private law and (more recently) the history of human rights. Long after it was published, his *Introduction to the History of the Land Law* was still considered the best introduction to the long sweep of English land law not just for law students but also for undergraduate and graduate historians; for many students of the common law it was their first insight into how interesting law is, and how good legal writing can be. For the period covered, *A History of the Common Law of Contract* was considered as the most comprehensive analysis of the evolution of legal doctrine in a particular field that had been published in the common law world. His scepticism of American legal writing that ignored inconvenient facts in support of a grand theory, particularly one driven by political ideology, and his impartiality in challenging leading exponents from the American Left and the Right, was an important reminder of the importance of scholarship and rigorous independence in the midst of ideological turmoil. *Human Rights and the End of Empire* represented the most comprehensive study attempted at that time into the genesis and early years of operation of a multilateral treaty. *Reflections* provided an important attempt to link the lessons of legal history with analytical jurisprudence. His use of archival material to study a (relatively) recent case, however, was probably his most significant scholarly contribution. His demonstration of the utility of such scholarship in *Cannibalism and the Common Law* and *In the Highest Degree Odious* contributed to changing modern British and American legal scholarship.

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