



BARRY NICHOLAS

John Kieran Barry Moylan Nicholas 1919–2002

THE OXFORD LAW FACULTY flourished as never before in the second half of the twentieth century. Although his was not the most famous name, Barry Nicholas was the unobtrusive rock on which that success was largely founded. He also embodied the spirit in that time of Brasenose College, of which he became Principal. Even before the Second World War Brasenose could claim to be the strongest law college in the University. As tutor, professor, and ultimately Principal, he developed that strength and ensured that the College produced lawyers who took their study and their calling seriously.

The calendar of Oxbridge scholarship examinations in 1936–7 allowed Barry three attempts to get into one or other of the two universities.¹ His first two tries yielded only exhibitions. He was compelled to decline. He had to win a major scholarship. His mother, who to that point had battled to ensure that he got the education he deserved, could not otherwise bridge the funding gap. At his third try he won the top scholarship to Brasenose College. He need not have worried. His destiny could not have worked itself out if either of the first two attempts elsewhere had been

¹ For the period from the 1970s I have been able to rely to a certain extent on my own personal knowledge, but I am extremely grateful for very kind help from Barry's widow, Mrs Rosalind Nicholas. In particular she allowed me access to an autobiographical note which he wrote in his retirement for his son and daughter, without which my knowledge of the earlier years would have remained very sketchy. I have also been helped a great deal by Fellows and Emeritus Fellows of Brasenose, especially John Davies, Harry Judge, and Vernon Bogdanor. Arianna Pretto, one of the three Law Fellows, did invaluable research in the archives, with the help of the Archivist, Elizabeth Boardman, and the Librarian, Elizabeth Kay.

other than disappointing near-misses. After the war he competed for and won a place in the civil service and had to steel himself to decline it in order to accept election to a fellowship at Brasenose. And later still, when he had established an international reputation in the law as a Romanist and comparatist and had become Oxford's Professor of Comparative Law, that chair being attached to Brasenose, he was invited to accept election as President of Corpus Christi in succession to the legal historian Derek Hall. He trembled on the brink. More than one loyalty held him back. He managed to say no. Again that had to be. Just three years later he became Principal of Brasenose, in which office he succeeded another great lawyer, Herbert Hart. It is an extraordinary fact, although, as he himself said, not an important one, that he thus became the first Catholic Head of House since the Reformation. For Brasenose, which between the wars Principal Stallybrass had made the strongest law college in Oxford, and for the law faculty, and, more widely, for the academic study of law, it was immensely important that he was never distracted, not in 1937, not in 1946, and not in 1974.

By the time of his retirement as Principal of Brasenose in 1989 he had served the College and University for 42 years—or 52 if one counts from his first going up. He then reassumed the role of tutor. He taught the Brasenose undergraduates in Roman law into his eightieth year. Great scholar as he was, he would also want to be remembered as a teacher. These two aspects of an academic career were for him indissoluble. In the post-Nicholas world irresistible forces constantly drive scholars towards 'buy-outs' which relieve them from their distracting teaching duties. The separation of research and teaching is almost complete. He did not think that that was good for either, and he was right. The third strand of academic life is administration. He took that for granted and did far more than his share, brilliantly and invisibly. In a note written in 1988 Herbert Hart, his predecessor as Principal, spoke of his superb gifts in this respect and remarked that he had 'a kind of genius for cooperative work'.² One key was unfailing mastery of the brief and its background, another was his indifference to personal glory. He had no idea of a life that was not service to others. Rewards for self had no priority.

Among his pupils are numbered many who are now judges or professors. There is remarkable unanimity amongst them in their memories of their experience of Barry. All agree that he influenced them profoundly and, so to say, stayed with them through their lives. Three observations

² *Brazen Nose*, 23 (1988), 30–1.

recur. First, you were not told what to think. He never set out to push the Nicholas line. He did not preach. His technique was to show you where your railway lines were leading and to point to reading which might throw doubt on the attractiveness of your destination. Secondly, you learned not to hide an unsolved problem in imprecise or evasive language and, which is part of the same turn of mind, not to expect applause for inspired guesses for which you could offer no hard evidence. Thirdly, and most important, and most difficult, you should not anyhow be seeking to impress. Good work was good work. There was nothing to gain by showing off, just a serious job to be done as well as possible. A fourth report is of constant kindness and practical help to students in difficulty or trouble.

I. Before the Second World War

Scholarships had been necessary all along, as well as help from kind friends and relations. Barry was born on 6 July 1919 in Sydenham in South East London. Soon afterwards the family moved to Folkestone, but when he was about seven years old his parents' marriage broke up and his father went to live in Liverpool, where he had obtained the post of Chief Immigration Officer. There followed the legal separation and an order for meagre financial provision. Although contact was not completely broken, the father played next to no role in Barry's life. His mother was left to bring up the children. There were two sisters, Gwyneth older and Rachel younger than Barry.

The father was Welsh. He went from grammar school in Aberavon to Christ's College Cambridge and then began a career as a teacher. He fought in the Great War, having been commissioned into the Royal Welsh Fusiliers. Invalided home, he abandoned teaching for the immigration service and in due course made his move to Liverpool. The mother came from a vigorous, well-educated Irish family. Her paternal grandfather had been Lord Mayor of Dublin. He married a sister of the Irish QC who became the Law Lord, Lord Fitzgerald. Her father was educated at Trinity College Dublin before joining the Colonial Legal Service. He married into a family with sugar interests in the West Indies. She was the second of the five children of that marriage who survived into adult life. In the early days of university education for women she read modern languages at Bedford College London and studied for a while in France before becoming a teacher.

Barry's mother appears to have ceased teaching when she married. But in her reduced circumstances after the separation she remained resourceful and determined. With the help of a friend, a retired headmistress, she was able to keep Barry at a good preparatory school in Folkestone called Seabrook Lodge. Thence, the help continuing, he obtained scholarships to more than one public school and was sent to Downside.

Downside evidently suited him perfectly. For the rest of his life he reflected both the secure faith of the Benedictine monks and their clear-headed, tolerant rationality. His mother had taken care to bring him up able to speak French fluently. The monks of Downside kept up the French and took his Latin and Greek to a spectacular standard. On these foundations he won his Brasenose scholarship and went up in Michaelmas Term 1937 to read Classics. He took a First in Honour Mods in 1939 and then, starting in the Trinity Term, made the change to law.

Trips to the Continent played an important part at this time, usually cycling and youth-hostelling with friends or his sisters. The outbreak of war almost caught them on the wrong side of the North Sea. Cycling in Scandinavia they picked up a hint of the imminent invasion of Poland. In Copenhagen they waited for a ship for England and managed to get home only three or four days before Neville Chamberlain's grim announcement of the declaration of war on Germany on 3 September 1939.

II. The Second World War

A few days after the declaration he reported to the Oxford recruitment centre to join up but, having revealed a trivial knee injury suffered in the Downside gym, he was rejected as unfit. He then went to London to try again, this time making no mention of the knee. As a man whose head had been filled with Latin and Greek, and no science whatever, he was assigned to Signals and told to wait to be called for training. He fitted in one more term at Oxford, his second reading law. Brasenose had almost immediately been taken over as the place to which the Royal Courts would if necessary be evacuated. For Michaelmas Term 1939 the Brasenose men were accommodated in Christ Church.

At the end of the year the call came that he should report for training, first in Prestatyn and then at Catterick in North Yorkshire. A mixture of square-bashing and instruction in the mysteries of wireless and telephone brought him to his commission at the end of 1940. In January 1941 Second Lieutenant Nicholas sailed from the Clyde for what was to be an

absence of four and a half years spent in every theatre of the war in the countries of the Eastern Mediterranean. As an officer in an Air Formation Signals Unit his job was to supervise the provision of communications facilities, chiefly telephone networks, usually for RAF bases. On account of U-boat activity, his outward journey to Suez followed a zig-zag route, from the Clyde to Canada, to Freetown in Sierra Leone, to Durban, and finally up the East Coast of Africa to the Red Sea. It took nine weeks. From Suez he was sent to Greece, but he arrived only shortly before the evacuation of British troops in the face of overwhelming German force. His ship was bombed—he was taking a much needed bath and did not bother to get out—but finally reached Crete safely, whence, as valuable technical personnel, he was withdrawn to Alexandria.

After a period in Egypt, he was sent to Palestine and thence to Beirut. He was in Lebanon for eight months, before being sent to Basra in Iraq. He had been promoted to Captain. His duties took him at times to Bahrein in the Persian Gulf, which he reached by Imperial Airways flying-boat. From Basra he was called back to Jerusalem and thence across the Sinai desert to Ismailia on the Suez Canal. At this time Rommel was threatening to break through at El Alamein. He was thrown into the preparations for what would be one of the decisive battles of the war. When the battle broke out on 23 October 1942 he heard the action but did not see it. His Signals unit was held back a mile behind the line. And for him and his men Montgomery's victorious advance went no further than Benghazi. They had to take care of the provision of communications for the big airbase there. After some months, now Major Nicholas, he and his commanding officer were moved to RAF HQ for the Eastern Mediterranean in Cairo, where in November 1943 he was involved in the security and communications aspect of the meeting between Roosevelt, Churchill, and Chiang Kai-Chek. He was now twenty-four years old.

In 1944 he was moved to Cyprus, then to Lebanon and finally to Palestine, where he was to prepare for an invasion of Greece which in the event never happened. When it became obvious that the war in Europe was coming to an end, he was sent on a mission to prepare to reinforce the troops still fighting in the East. Travelling once again by flying-boat he was to visit the usable airfields in East Africa and on islands in the Indian Ocean to assess the extent to which their communications systems would need upgrading for a major movement of troops by air. He completed his report and handed it in to the HQ in Cairo. In fact the war in the East was brought to its abrupt end before any troops from the West were relocated. After this mission he was assigned to the HQ staff

at the Benghazi airbase. It was there that he heard of the surrender of Germany.

He found himself sent home to England with remarkable alacrity. His last posting was to Cheltenham, to the secret unit which later became known as GCHQ. A month or so later, when the war with Japan also ended, he was demobbed. He had the benefit of two priorities. Those whose university courses had been interrupted were to be allowed to resume them as soon as possible and, having signed up almost immediately after the declaration of war, he also had the benefit of what lawyers often refer to as the rule in *Clayton's Case*, 'first in, first out'. Coming back from the war unscathed, with the rank of Major and three medals, he later wrote that he had had too easy a time of it. He suffered the feelings of guilt which are said to affect the survivors of accidents in which many have died.

III. Post-war Oxford

By Trinity Term 1945 nearly six years had passed since he had signed up with the Signals. The habit of serious study was difficult to recapture. He was upset by the loneliness of studying in his Walton Street digs or in the library. He toyed with leaving. It was tempting to accept the degree which the special regulations allowed him to have without further examination. But he pulled himself together and decided instead to complete the full Final Honour School in Jurisprudence in four terms, taking advantage of the University's decision to increase its through-put by examining twice a year. He would take his final exams in Michaelmas 1946.

The real difficulty was to find tutors. Many Fellows had not yet returned. He found one, a Rhodes Scholar and later a Governor-General of Australia, who was little use to him. He talked all the way through the tutorials and only of his own opinions. In Roman Law he ended up with two, 'one of whom knew what the questions were but could not remember the "answers"', while the other had forgotten the questions, but knew where to look for the answers'. The one was Stallybrass, the other De Zulueta, the Regius Professor of Civil Law at All Souls. In effect his first pupil was himself. He taught himself well. In Michaelmas Term 1946 his was the only First.

By this time his destiny had turned another page. In 1946 he had added to his burden the Civil Service examinations and the house-party assessments which followed for those who survived. He passed into the

Service. He would have been a great civil servant. It was not to be. The impression which he had made on Stallybrass contemporaneously resulted, even before his Finals, in his election as Official Fellow and Tutor in Law at Brasenose. He turned away the Civil Service. His duties as Fellow and Tutor would begin in the bitter weather of Hilary Term 1947.

Oxford was full to over-flowing, and Principal Stallybrass had made Brasenose the strongest law college in the university.³ Barry's distinguished senior colleague, Humphrey Waldo, did not return from his war service to his Brasenose law fellowship. He accepted the Chichele Chair of Public International Law which was attached to All Souls. Ronald Maudsley was elected to succeed him but did not come at once. Barry therefore had eighty-four undergraduate lawyers to look after. Even after Maudsley arrived, he was teaching six hours every weekday, four in the morning and two, after games, before dinner, and four hours on Saturday mornings. He had some help from weekenders, but he himself covered all three undergraduate Roman Law courses, Contract, Legal History, Jurisprudence and sometimes International Law. To this has to be added the burden of regular University lectures. He was made All Souls Reader in Roman Law in 1948. The Readership was held concurrently with his Fellowship at Brasenose. Its effect was to raise his salary, at the cost of a considerably larger burden of lectures. If that were not enough, Stallybrass thought it not respectable to teach law without a professional qualification. Somehow Barry therefore found time to take the Bar exams and be called. He never practised, but later, in 1984, he was made an Honorary Bencher of his Inn, the Inner Temple.

To this picture of unremitting toil must be added the almost total absence of secretarial assistance and technology that did not go beyond typewriter and stencil. Moreover, colleges make demands which go far beyond teaching. They expect administrative and pastoral work to be done with no flaws and no fuss, and at this time they still insisted that Fellows dine in Hall and stay on to dessert. Nobody ever heard Barry complain of this load, even in retrospect. Nobody ever heard him complain of anything that concerned himself.

In the immediate post-war days a bachelor could just about cope with the burdens and reap some sense of satisfaction by way of reward. But

³ Barry wrote a fascinating and typically balanced account of the Stallybrass days: *Brazen Nose*, 31 (1997), 22–9. At p. 24 he recalled that the residue of his estate was left for the advancement of the study of law in Brasenose and 'for the purpose of bringing to the College men who are likely to prove leaders in College life and to add to the prestige of the College'.

from 1948 Barry was not a bachelor. During the war he had met and fallen in love with a New Zealander, Margaret Heller, who was working as a nurse. Through postings and re-postings they had somehow managed to maintain their relationship for several years. But that relationship came to an end; the return to normality caused them to drift apart. It was therefore as a bachelor that he re-entered Oxford and took up the duties of his Fellowship. But by the time he began to teach he had already met his future wife. In the winter of 1947 they began to see each other regularly, and in May 1948 they announced their engagement. They were married on 9 July that year in the Franciscan church in the Iffley Road. She was not a Catholic but moved one step nearer by becoming an Anglican. All her life she resented the rigour of the meanness of the Catholic hierarchy's attitude to mixed marriages and shared worship. In those days one forfeited one's Fellowship if one married without the Principal's consent. Stallybrass had given his consent but, as Barry recorded, not with a good grace. He thought the College was entitled to at least ten years' undistracted service.

His wife was Hildegart Cloos, the daughter of Germany's leading geologist, Hans Cloos, a professor at Bonn. Her family were strongly opposed to the Nazis. In 1939 Hildegart had come to England to see how Germany looked from the outside. She refused to go back. She was spared internment, and she managed to get a job with the Oxford City Architect. In Munich she had studied design and was sensitive to visual art. Later in life she was admired for her own mosaics. By the time of her marriage she had become a British citizen by naturalisation. Throughout his time at Brasenose Barry was able to rely on her support. She was fiercely loyal to him, and in later life anxious, as he was not, that his merits should be more publicly recognised. In 1951 their daughter Frances was born, and in 1955 their son Peter. In the unregenerate fifties colleges were not considerate of families. She was dutiful, as he was, and knew how to buckle under, but she never fully accepted that a college should have the lion's share of its Fellows' lives. 'Barry is married to the College', she said tartly to one Fellow, 'I am no more than his mistress.' Many marriages broke under that kind of strain. This one did not.

It must have been in the first years of his Fellowship that he got to know the emigré German jurists Schulz and Pringsheim.⁴ It is clear that he was very fond of Schulz with whom he took tea quite frequently. He spoke of Schulz's copy of the *Digest* as 'used almost to destruction'. In

⁴ On whom now see R. Zimmermann and J. Beatson, *Uprooted Jurists* (Cambridge, 2004), where Schulz's life is written by Ernst and Pringsheim's by Honoré, who was his pupil.

later years he had in his possession a copy of a letter written home by Schulz soon after the war in which he said, with a note of triumph, that the evil intentions of the Nazis had been thwarted since the harm they had hoped to do him had only brought it about that he had been the better able to write his *Classical Roman Law*.⁵

IV. The fifties and sixties

The inflated numbers subsided within a few years as the returning servicemen passed through. Nevertheless his teaching load in the fifties and sixties remained high by modern standards. He rarely taught less than fifteen hours a week in college, on top of his university lecturing stint. Ronald Maudsley, who was the other Law Fellow, had not quite the same dedication to teaching. By contrast John Davies, who succeeded Maudsley in 1966 when he resigned to take up a Chair at King's College London, was very much in Barry's own image and can claim a huge share of the credit for the continuing strength of Brasenose law all the way through to his retirement in 2000.⁶

Although Barry always stood out against publication for publication's sake, the burden of his teaching did not prevent his writing some superb articles even in his first decade as a Law Fellow. As early as 1953 he wrote what many people still accept as the definitive study of the Roman formal contract of stipulation.⁷ And in 1958 he destroyed a heresy relating to liability for animals in Roman Law with surgical brevity.⁸ There were other articles in the same period.⁹ By the end of the fifties he had worked flat

⁵ F. Schulz, *Classical Roman Law* (Oxford, 1951, reprinted Scientia Verlag Aalen, 1992, with a new preface by Wolfgang Ernst).

⁶ J. W. Davies matriculated at Brasenose in 1954, already a graduate of Birmingham, and took a First in the BCL in 1956, winning the Vinerian scholarship. He then went to Chicago as a Bigelow Fellow, returning to an appointment as Lecturer in Law at Brasenose in October 1959 and Junior Research Fellow in April 1961. In 1963 he took up a lectureship in Birmingham University but returned in 1966 as Official Fellow and Tutor in Law. His lectures regularly, and uniquely, ended in prolonged applause. He was said to be one of the best tutors in Oxford and produced a long series of Brasenose Firsts. He retired in 2000.

⁷ 'The Form of Stipulation in Roman Law', *Law Quarterly Review*, 69 (1953), 63–79 and 233–52.

⁸ 'Liability for Animals in Roman Law', *Acta Juridica* [1958], 185–90.

⁹ Notably 'Dicta Promissave' in D. Daube (ed.), *Studies in the Roman Law of Sale in Memory of Francis De Zulueta* (Oxford, 1959), pp. 91–101, and with his lifelong friend Peter Fraser, 'The Funerary Garden of Mousa', *Journal of Roman Studies*, 48 (1958), 117–29, with further thoughts in *Journal of Roman Studies*, 52 (1962), 156–9; 'Videbimus' in *Syntheleia Vincenzo Arangio-Ruiz*, 1 (Naples, 1964), 150–4, followed later by 'Videbimus II' in *Studi in Onore di Edoardo Volterra*, 2 (Milan, 1971), 577–604.

out for thirteen years without ever drawing on his sabbatical entitlement. He was entitled to leave every seventh term or seventh year, at his option. Harry Lawson, then still Professor of Comparative Law, and Hildegart seem to have worked on him to make him take a break. The sixties thus opened with a long trip to the United States and Canada.

Through Harry Lawson he had received an invitation to the law school of Tulane University in New Orleans for the Spring Semester of 1960. The whole family went, travelling by sea to save money and then by train. In New Orleans they bought an old Ford Mercury. At the end of the semester Barry drove it all the way to Vancouver, where the family settled again for three months before crossing Canada by rail to be home for the Michaelmas Term.

Tulane was an ideal place for a comparatist, Louisiana being the one civilian jurisdiction in the United States, albeit somewhat 'mixed' by reason of the overwhelming proximity of the common law. His principal duty in the law school was to teach a course in Unjust Enrichment. He also took a class on legal writing and was astonished to discover that the students, whom he liked very much and found bright and keen, lacked the vocabulary with which to discuss the structure of a sentence. The same is now true in England too.

It is no exaggeration to say that he found the domestic materials on unjust enrichment in total disarray. Nothing serious had been written to keep the cases in order, and nobody had kept an eye on the state of the French law, which would have provided suitable scaffolding. The history of Louisiana is more Spanish than French but its civil code belongs to its French period. This neglect made things difficult for him, but it also provided an opportunity. Almost all of Barry's published work was first hammered out and tested in his teaching. That partly explains its astonishing durability. In this case we can see that his course reordered the Louisiana cases with the aid of the French template. This appears from two very successful articles which later emerged in the *Tulane Law Review*.¹⁰ Everyone who studies unjust enrichment seriously still reads

¹⁰ 'Unjustified Enrichment in the Civil Law and the Louisiana Law', *Tulane Law Review*, 36 (1962), 605–46 and *Tulane Law Review*, 37, 39–66. In the same journal he later published 'Rules and Terms: Civil Law and Common Law', *Tulane Law Review*, 48 (1973–4), 946–72. It has been suggested that he constructed his articles on unjust enrichment with the deliberate intent of catching the eye of the courts: B. Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford, 2003), p. 98, discussed and doubted in the review by Sir Jack Beatson in *Law Quarterly Review*, 120 (2004), 175, 178. Beatson's doubts are more than justified, for nothing could be less like him, and in fact the memoir referred to in n. 1 above shows that his only immediate concern was

these pieces. In Louisiana they achieved a remarkable coup in that they were absorbed into the case law and are recurrently cited by the judges. 'More often cited than read' was the author's dry comment on this achievement.

During the summer months in Canada he worked on the book which many regard as his masterpiece, his *Introduction to Roman Law*, which came out two years later in the Clarendon Law Series.¹¹ Shortly before his death we were talking of bringing out a new edition. That discussion was commercially motivated. If truth be told, it needs no second edition. It is perfect as it stands. It does its job as well today as it did forty years ago. It has sold more than 50,000 copies, not counting sales in Spanish and in Mandarin. The author professed to be mystified by the book's success. He could not see where it found its market.

There is no single answer to his question. The book is first and foremost an elegant account of Roman law. Beyond that it is the best introduction to law that has ever been written. Lord Mansfield used to advise those toying with law to read Justinian's *Institutes*. The modern equivalent is 'Read Nicholas' *Introduction to Roman Law*.' Then again there is the unarguable fact that if you want to understand the modern law in any depth you do need to know the Roman story. In a world in which Latin has faded from the school curriculum, the self-serving fashion has been to deny this. But it cannot be denied. Even the young common lawyer has a real need for Justinian's *Institutes* if he is to understand the shape of his own law and the articulation of its parts. The *Introduction* satisfies that need. It is beautifully written and consequently easy to read, and it rewards the reader. There are lots of other introductory books on Roman law. By comparison they are all dogmatic, boring and locked in the ancient world. It is a great book. Nowadays it is becoming more difficult to persuade students that a book forty years old is still the best and most useful thing that they can read. For that reason alone it is a shame that he did not have time to touch it here and there, to allow it a 2002 date.

In 1964 Harry Lawson had to decline a visiting professorship in Rome and persuaded Professor Gino Gorla to invite Barry instead, and Barry to accept. His classical education and his catholicism called him. He went without the family, for just three months. He immersed himself in the city. In partnership with Gorla, and with Professor Giovanni Pugliese also

to give his students good value by providing them with as well-ordered as possible an understanding of the subject. The published articles were spin-offs from the pursuit of that primary goal.

¹¹ *Introduction to Roman Law* (Oxford, 1962).

choosing to attend, he gave a seminar at the Sapienza which even he described with only slight hesitation as a success. The subject was sale, studied comparatively on the basis of Italian, Roman and English law. He had already taught and written on the Roman law. The Oxford course required close comparison with the English law. He now 'got up' the Italian law. Unknown to him this was important preparation for his later work for UNCITRAL, to which we which we will return.¹²

It was at this time that he began to rise to positions of leadership outside the College. He did not seek power and influence, but he acquired them. He was the master of the facts, present and past, of every issue, and, although he was not given to long speeches, his judgement as to what should be done invariably seemed right. Colleagues came to depend on him, and he never let them down. In a period of exciting development his hand was accordingly everywhere.

He first became a member of the Board of the Faculty of Law in 1958, and he remained on the Board for thirty-three years, until he resigned shortly after becoming Principal of Brasenose. During the sixties he was also the Law Board's representative on the General Board of Faculties. Although the decade ended in student revolution, this was a time, indeed the very last time, when it could be said that universities were well-funded and flourishing. The General Board was accordingly intensely busy but in good spirits, and the Faculty of Law was in good heart, as never before. Posts multiplied. There were no Research Assessment Exercises in those days, no supposedly quantitative measures of success, but the sense of strength and success crept up on the Faculty nonetheless. Rupert Cross, Bill Wade, John Morris, David Daube, Herbert Hart, Humphrey Waldock —these stars were all in one place, and others could easily be spotted rising in the next generation.

One indication of the widespread optimism was the new St Cross Building built largely but not exclusively for the Law Faculty, with the Bodleian Law Library at its centre. Peter Carter of Wadham and Barry were the law representatives on the building committee. The architect was Leslie Martin. St Catherine's College, just down the road, was built by Jacobson at the same time. Forty years later these two buildings have some claim to be the best that modern architecture has been able to offer Oxford. The good relationship between the lawyers and the architect ensured that the law library would not only be aesthetically pleasing but would work well. The one criticism on that front might be that the admin-

¹² See n. 18 below.

istration and information desk should have been sealed off from the reading area. The flat rooves have been recurrently troublesome, but by and large the building's sweeping horizontal lines have stood the test of time in a mostly vertical Oxford. Aesthetically it now discharges the further task of masking the inferior social science buildings which have sprung up against its eastern elevation, on the old territorial army site between it and St Catherine's.

As if his hands were not already full, he found a great deal of time to devote to the Catholic Chaplaincy, of which he was first trustee and then managing trustee. The story of his service there is long. It has to suffice here to say that as managing trustee he raised substantial funds for the Chaplaincy, restructured its operation, renewed its existing buildings and added new ones. His praise for Leslie Martin in relation to the new law library contrasts with his memories of battles fought with the architect chosen for the Chaplaincy, battles which he did not feel that he had won.

V. Professor of Comparative Law

He was elected to the Chair of Comparative Law in 1971, having served nearly twenty-five years as a tutorial fellow. The chair is attached to Brasenose. There was no need for him to move. He succeeded Sir Otto Kahn-Freund and, before him, Harry Lawson, whose memoir he wrote in these *Proceedings*.¹³ Comparative law now occupies a strong and prominent position in Oxford and is at last beginning to slip into courses which do not formally bear the label. The Chair was founded to get that process started. Lawson was the first holder (1948–64), and by common consent it was the first four holders—the fourth was Bernard Rudden—who made its place secure. The teaching syllabus long committed the chair to an emphasis on French law. More recently it has broadened, to give the same priority to German law.

By publication date the first fruit of his tenure was work painstakingly done in his previous incarnation as a tutor, the third edition of Jolowicz's *Historical Introduction to the Study of Roman Law*, which very properly became 'Jolowicz & Nicholas'.¹⁴ It means no disrespect to the original author to say that the third edition absolutely transformed the work. It

¹³ *Proceedings of the British Academy*, 76 (1990), 473–85.

¹⁴ H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn. (Cambridge, 1972).

was not merely updated but embedded more securely in the twentieth-century literature. It became a reference book which every Romanist has on his desk and every classicist uses when he wants to dip safely into Roman law. It also shows how seriously Barry took his teaching. It is manifest from every page that, for the sake of his lectures, he had been reading and reflecting on the new literature across the whole range of Roman law. It would have been impossible to achieve the success of 'Jolowicz & Nicholas' if that had not been his habit all along.

In much the same way his lectures as Professor of Comparative Law provided the foundations of another immensely successful book, namely his *French Law of Contract*, which did not actually come out until 1982, when he was already Principal of Brasenose.¹⁵ Professor Sir Guenter Treitel's comment on the first edition cannot be improved upon:

Perhaps the greatest difficulty facing a comparative lawyer is that of writing about one legal system in terms that will be intelligible to readers trained in another. Such a task requires not only legal bilingualism (which is relatively easy to attain) but a high degree of interpretative skill; or, in other words, the power to describe rules and institutions of one system with an eye on the categories of another, and to do so without distortion of either system. One of the merits of *French Law of Contract* is that it performs this task superbly. That it does so without apparent effort is another matter; it is good to see that even legal scholars are capable of the art that conceals art.¹⁶

The same high praise was paid to his work on the public law side of French law, especially his studies of French judicial review.¹⁷ Although he was by nature sceptical of all forms of congratulation or public recognition, it must have pleased him that the French themselves recognised his learning in their law, in the form of an honorary doctorate awarded by the University of Paris, bestowed in 1987.

From 1972 Barry was the UK member on UNCITRAL (the United Nations Committee on International Trade Law). This met for two weeks every year, usually in New York but sometimes in Geneva or Vienna. The final text of the Convention on International Sales is known as the Vienna Convention, because it was signed in the Austrian capital (1980). He wrote important articles explaining the Convention.¹⁸ Typically they

¹⁵ Barry Nicholas, *French Law of Contract* (London, 1982).

¹⁶ G. H. Treitel in P. Birks (eds.), *New Perspectives on the Law of Property: Essays for Barry Nicholas* (Oxford, 1989) p. 2.

¹⁷ 'Fundamental Rights and Judicial Review in France', *Public Law* [1978], 82–101 and 155–77; cf. 'Loi, règlement and Judicial Review in the Fifth Republic', *Public Law* [1970], 251–76.

¹⁸ 'The Vienna Convention on International Sales Law', *Law Quarterly Review*, 105 (1989), 201–43; cf. *American Journal of Comparative Law*, 27 (1979), 231. There are a number of

fail to reveal his own pivotal role in the process. It is easy to see how he came to play such an important part. The text had to reconcile different legal traditions, different political perspectives, and different economic interests. He not only had the great comparative lawyer's capacity to see how different systems would perceive a problem but was also a uniquely subtle draftsman, ingenious in finding and expressing solutions acceptable to several points of view. Much more important in such a context, with national pride always near the surface, his indifference to personal glory made him the master of the art of giving others the impression that it was they who had hit upon his solution or had inspired the felicitous form of words to which all could assent. The fact that the Convention came very close to English law and had been largely made by their own delegate did not persuade the British Government to ratify it, preferring to maintain the position of English law itself as a rival vehicle of international trade. Opinions to this day are strongly divided as to whether ratification would or would not diminish the volume of legal business done in London.¹⁹

It was during his tenure of the chair that his reputation for wisdom, courage and moderation imposed on him a very heavy burden. The student revolution of the late sixties never reached the ferocity in Oxford that it mustered on the Continent. However, it flared up ominously in the early seventies in the outward form of a demand for a Central Students' Union. Students at Oxford had more and better social and leisure facilities than anywhere, but this one thing, a central union building, they did not have. In Hilary Term 1974 the campaign took an ugly turn when a hundred and fifty or so students occupied the university offices in the Indian Institute on the corner of Holywell and Cattle Street. This incident led to charges against some sixteen students. The charges had to be tried by the University Disciplinary Court.

The University and the accused were legally represented. In very British style the University agreed to fund the defence. The chosen President of the Court was Barry. The proceedings were marked not exactly by violence

commentaries on the convention to two of which he was a contributor: *C. M. Bianca*/*M. J. Bonell* and *N. M. Galston*/*H. Smit*. The masterly *Law Quarterly Review* article stirred up debate and provoked a reply from Sir John Hobhouse (later Lord Hobhouse) *Law Quarterly Review*, 106 (1990), 530. See further, n. 13 above.

¹⁹ The pros and cons of ratification were reviewed at a symposium held at All Souls on 1 May 1993, chaired by Barry himself. This was attended by practitioners, judges, and academics and engendered a vigorous debate. The lead papers (Steyn, Reynolds, Schlechtriem) were published in P. Birks (ed.), *The Frontiers of Liability*, Vol. 2 (Oxford, 1994), pp. 9–46.

but by the constant threat of violence and by violent language. There were raucous demonstrations outside and constant disruption and abuse inside, against which the President had no weapon other than repeated adjournment and a threat of last recourse to conduct the trial in private and in the absence of the defendants. The Court could not commit for contempt. The behaviour inside and outside the court was disgusting by any rational standard and extremely hurtful to dons who believed in a deep and unbreakable consensus that both teacher and taught were engaged in a single-minded search for truth through reason. The students were busy renouncing reason and anxious as it seemed to repudiate the notion that truth had some value.

The madhouse continued for one week, the President all along seemingly the unperturbed voice of tolerant rationality. The judgment, when it was delivered, was carefully devised to hurt but not to ruin the accused. They were all sent down, but with permission to come back a year later to complete their degrees if they gave certain undertakings. There was an appeal chaired by Sir Patrick Neill, QC. Since disruption could not help the appellants, they behaved more normally. All the same the appeals were dismissed, except in one case on medical grounds. The general judgement was that the University had come off well. Embodied for the duration in Barry Nicholas, it had shown that rationality, fairness and moderation could stand up to the voices of chaos and unfocused hatred. But for his habit of invariably suffering in silence we might have heard of the President's exhaustion and wounded disillusion. We heard nothing of that kind. But there is no doubt that the students' abnegation of reason was deeply wounding, made as it was of the same stuff as the Holocaust.

VII. Principal of Brasenose

Formally, he became Principal in 1978, after seven years as Professor of Comparative Law, and he held that office for eleven years. The underlying truth is rather different. His was already the guiding hand from the time of his return from Tulane in Michaelmas 1960. Sir Noel Hall was elected that year but could not immediately detach himself from his post as Head of the Administrative Staff College at Henley. The Vice-Principal, the philosopher McKie, then died and Barry was elected to that office for a three-year stint. For the year in which Sir Noel was disentangling himself from Henley, Barry thus did all the work of the Principal, and the truth was that for the remaining twelve years of Sir Noel's tenure all the work

which required detailed organisation and administration continued to fall on him. And no decision of importance was taken against his advice. For example, it was at this time that Brasenose became the first men's college to decide to admit women.²⁰ That took some people by surprise, for the image of Brasenose culture was macho. It would have surprised nobody who knew whose hand was at the helm. The supposedly momentous change was carried through without a ripple. By the time of the implementation, in 1974, Sir Noel Hall had retired and had been succeeded by Herbert Hart. He was an enthusiastic supporter of the change. Indeed the fact that the decision had been taken was a factor which attracted him to Brasenose.

Herbert Hart was Principal for five years. He was his own man but nevertheless welcomed a species of dyarchy with Barry, who, unlike himself, knew everything that there was to know about the College and had no aversion to the minutiae of administration. Herbert Hart spoke openly of the pleasure he took in working with Barry. There was, he said, no better member of a team. He leaned heavily on him and on his loyalty and restraint.

The dyarchy achieved an enormously important coup. The College finances depended to a large extent on the Hulme Trust, a charity the income of which it shared with a number of schools in and around Manchester. Mismanagement and a certain degree of ill-will threatened to attenuate the income from the trust. At the cost of enormous expense of time and labour and long, patient negotiation, a complete restructuring of the trust was achieved which made the College's share safe for the foreseeable future. This achievement made possible other developments. The days of 'digs' were over. The College needed more accommodation. The Frewin site opposite St Peter's College was completely remade. Barry was in charge of that from the beginning. The architect was not someone who could be allowed free rein. Constant vigilance was required. Even so, some mistakes were made. One brand new building is to this day not pleasant to live in.

²⁰ The first moves were taken in the setting up of a committee in November 1966 (Vice-Principal's Register, 23, 30 Nov. 1966). The real difficulty came not from inside the College but from the opposition of the then women's colleges (Vice-Principal's Register, 23, 1 May 1968). However, after four other men's colleges made common cause with Brasenose on this issue further negotiations took place and it was with the agreement of the Principals of the women's colleges that the final steps were taken. In June 1971, by a vote of 24:8, Brasenose agreed 'to alter Statute I by the deletion of Clause 2 and the renumbering of Clauses 3 and 4 as Clauses 2 and 3. Clause 2 of Statute I reads: 'No woman may become a member of the College' (Vice-Principal's Register, 25, 16 June 1971). The approval of the Queen in Council was reported to the Governing Body in January 1973 (Vice-Principal's Register, 26, 24 Jan. 1973).

When he finally became Principal in name in 1978, his tenure was marked by humane modernisation, efficient administration, and a high degree of unity and confidence among the Fellows. The Principal knew every member of the community, the staff and students no less than the Fellows. He was quick to help anyone in trouble. But he was against inefficiency or time-wasting, and he knew that the times were changing and that the central purposes of the College would be impeded if care was not taken to improve its financial base. The time spent in meetings was cut dramatically. With the assistance of a strong bursar in the person of Robert Gasser he carried through a number of changes which were almost certainly unwelcome to him. New sources of income were sought, in conferences and films; new methods of staffing the College began to be used, as for instance contract cleaners. The sense of community had to give a bit, in the interest of economic reality.

Brasenose owned a large piece of inner south Oxford in the form of the crumbling Oxford City Football Club premises in Grandpont. Decayed as the old football ground was, it took an immense and sustained effort by Bursar and Principal to release the very considerable wealth locked up in it. A section of the local community was vigorously opposed. In the end both Grandpont and the College benefited from the development. Where once an immense growth of Russian vine did its best year after year to pull down the crumbling walls and buildings around the football ground, and neighbours winced at the thought that triffid-like it might turn on them, there now stands a large up-market retirement complex and, in the north-west corner, new social facilities have been built for St Matthew's Church.

On the intellectual front, the macho image of Brasenose culture receded and there was a strengthening insistence on intellectual endeavour, less tolerance for those who were not trying to do good work. The Principal kept Law strong, but attended no less vigorously to other fields. He encouraged growth on the science side. The Principal led by example. Many heads of house find it impossible to continue their research. He gave part of every day for his own work. He would not otherwise have produced his *French Law of Contract* (1982) which was discussed above because it was in large measure the fruit of his tenure of the chair of comparative law. It came out in a second edition three years into his retirement. It was in the Lodgings that he also wrote his important contribution to the seemingly endless debate on the nature of the *actus reus* in Roman theft, pointing out that the many scholars who had attempted to settle the question had failed to take account of the Byzantine

materials and especially Theophilus' *Paraphrase*.²¹ Most of his writing on the Vienna Convention was done as Principal.²² Indeed his productivity seemed to increase with age, as he reaped the harvest of years of scholarship. We will come back to that in the final section.

After his much admired handling of the Disciplinary Court his stock rose further in central University circles, and in 1975 he was elected to the Hebdomadal Council. Among the tasks which fell to him as a member of Council was one which in his own words was the worst he ever had, worse even than being President of the Disciplinary Court. This was the chairmanship of the Staff Committee, which met every week for about three hours. At first, he said, he used to have to retire to bed to get over these meetings. The business of the committee was the relationship between the University and its non-academic employees, represented by three different trade unions. The stress derived from the unions' determination to turn every issue into a confrontation. They ruled out reasonable cooperation, even in relation to seemingly non-controversial issues such as safety in laboratories. Although he learned to cope, he thoroughly disliked his weekly encounter with institutionalised hostility within the university community.

VIII. The final chapter

The beautiful portrait in the Hall which was painted on his retirement as Principal in 1989 shows the same man as had lectured there in the sixties.²³ He had changed incredibly little. Nor did his work stop. He continued to cycle in from Charlbury Road in North Oxford to tutor Brasenose undergraduates in Roman law, and was daily to be seen doing his research in the libraries. In 1990, unforgivably late, the British Academy elected him FBA. A new edition of *The French Law of Contract* came out in 1992.²⁴ In 1993 he chaired a vigorous symposium in All Souls, on the subject of the Vienna Convention on International Sales Law, where the forces in favour of ratification were evenly matched by those against, who preferred to maintain the international role of English commercial law.²⁵ He

²¹ 'Theophilus and *Contractatio*' in P. Stein and A. Lewis (eds.) *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* (London, 1983), pp. 118–24.

²² See n. 18 above.

²³ The artist was Mark Wickam.

²⁴ *The French Law of Contract*, 2nd edn. (Oxford, 1992).

²⁵ See n. 19, above.

did a great deal of work in the comparative law of unjust enrichment.²⁶ For the preparation of a comparative book of cases and other primary materials, which sadly did not appear until after his death, he assumed responsibility, not for the English law but for the French.²⁷

He seemed completely undiminished. But a blow fell six years into his retirement. Hildegart died in 1995. She had been troubled for a long time by angina, from which her father had also suffered, and long before she had survived breast cancer after an operation in the sixties. Barry was desolate, and his friends anxiously supposed that he must decline in the long loneliness of a widower.

They were delighted to be proved completely wrong. When the period of mourning had passed he was able to find real happiness in a second marriage with Rosalind Williams, the widow of Professor Alan Williams FRS. If there had been one deficit in his long life it was not warmth or humour but fun. It was suddenly evident that he was hugely enjoying life with Rosalind. She is Australian. They went on an arduous holiday to visit her relatives and on shorter ones to explore parts of England familiar in childhood. They entertained friends, and he found that he was rather a good cook who enjoyed cooking. Since he looked so well we forgot even to wish that this happiness might be granted at least ten or so more years. Sadly it was not to be. Still apparently in perfect health when he went out, he became seriously ill at Mass on Sunday 24 February 2002. His aorta had ruptured. He was taken to hospital. The rupture was too close to his heart to allow an operation. He lived for one more week, in complete control of his senses. He died on 3 March, with Rosalind at his bedside.

In his contribution to the nineteenth-century volume of the history of Oxford University,²⁸ he recalls the meeting in 1884 at which the *Law Quarterly Review* was born. It took place in the rooms of Sir William

²⁶ His contribution to E. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin, 1995), which was a team-written book, went a good deal deeper than would be suggested by the co-authored initial chapter. He was the one who maintained intellectual contact between the members of the team, none of whom had his comparative experience. See also n. 27.

²⁷ J. Beatson and E. Schrage (eds.), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford, 2003), in which each of six contributing jurisdictions had its own editor. Further evidence of his continuing mastery of the French law: 'Modern Developments in the French Law of Unjustified Enrichment' in P. W. L. Russell (ed.), *Unjustified Enrichment—A Comparative Study of the Law of Restitution* (Amsterdam, 1996), pp. 77–95.

²⁸ M. G. Brock and M. C. Curthoys (eds.), *The History of the University of Oxford*, Volume VII(2) (Oxford, 2000), ch. 15. Here he time and again acknowledges his debt to F. H. Lawson, *The Oxford Law School 1850–1965* (Oxford, 1968).

Markby in All Souls and was attended by Anson, Bryce, Holland, Pollock, and Markby himself.²⁹ That meeting serves to mark a new beginning for the serious study of law in England and in Oxford. Two dreadful wars later, after the dust had settled, the Oxford law school entered on a golden age. Its new building was a symbol of something more important. Had the volume on the twentieth century not inexplicably decided to make no mention of jurisprudence at all, it would have had to applaud that achievement and meet the challenge of naming another five jurists who could claim to have made it happen. Nobody who knew the man and his work would have omitted Barry Nicholas. If he had gone into practice at the Bar he would have been a Law Lord. If he had accepted the post which he had won in the civil service, he would have been a Permanent Secretary. His contribution to the academic study of law, both through his writing and his teaching, was and remains immeasurable.

PETER BIRKS

Fellow of the Academy

Note. Professor Peter Birks died before this memoir was published.

²⁹ *Ibid.*, p. 394.