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Greetings,

Law Moderations 2025

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We will be doing Roman law together this coming academic year. I am a retired Law Fellow of Wadham and a College Lecturer at Wadham and St Anne’s. First of all, this is to offer my welcome to the Oxford community and to hope that you will enjoy Roman law as much as your predecessors have.

This subject is on the syllabus as an introduction to modern private law since its principal ideas have been adopted (rightly or wrongly) more or less wholesale by both Common law and Civilian jurisdictions. Roman law is no more immune from error than the Common law, but when you have completed the course you should at least have an insight into the way private law is structured in both jurisdictions.

The book which set out those patterns is a mid-6th century first-year law student textbook, the Institutes of the Emperor Justinian. It is the ‘second edition’ of a similar book of the mid-2nd century by the jurist Gaius. The Justinianic edition can make some claim to being amongst the most influential secular book written in the Western tradition.

Extracts from them, in translation, are set texts in your exam and you will be given copies of them when you arrive. You will need not a word of Latin since everything is translated, though by the time you have finished you may well have picked up a few words and you will have realised, if you have not already, just how much of the English language is really Latin with funny endings.

I have never been a great fan of preliminary, pre-arrival reading. Law is a very distinctive discipline. One of the greatest benefits you should hope to pick up in Oxford is how to think like a lawyer, whatever the particular subject you are studying. The way you approach the materials will change very substantially over the first month, as you begin to get the hang, and extensive pre-term notes may prove not just to have been a bit of a waste of time, but positively unhelpful for you.

But for some of you, possibly all of you, the barbarism known as Roman ‘civilisation’ may be something of a closed book, and getting some familiarity with the people who ran the show and how they set about ordering society will make your first few weeks in Oxford more enjoyable.

There is one book you should be looking at every week, and you should buy a copy. The book is **An Introduction to Roman Law** by Barry Nicholas. Nicholas was a great scholar who also taught the modern private law and he is good at helping us understand what the law is about as well as what it is. Perhaps this is a good first time for me to say you are not joining the Ancient History Faculty. Our colleagues there are looking for different things and have quite different skills: we are looking at what we might call Roman juristic thought. I am a comparative lawyer, with time not space as the comparative medium. You will never regret browse-reading Nicholas, Part I: *History and Sources of the Law,* Part III: *The Law of Property* and Part IV *The Law of Obligations.* The editing of the Table of Contents is very poor, so just to be clear, don’t bother with Persons or Succession or Actions.

The other book you will need from week to week is **Borkowski and Du Plessis** *Textbook of Roman Law****.*** The latest edition is the 6th and although I did not recommend buying the 5th, I think that this time you will benefit significantly from having the latest one. If the College Library buys one copy for each of you to borrow, that is two reasons for not splashing out on it now. Another larger book which your predecessors have found stimulating and helpful (possibly invaluable) is **J A C Thomas,** *Roman Law.* It will often cast light on problems which smaller books tend to assume you have understood. If you can acquire a copy from your college parent or a second hand seller now, you can guarantee finding a willing buyer in the autumn of 2025…

By way of postscript you will find below a text of talk I gave a few years ago to the Principal and Fellows of Brasenose and their guests at a pre-dinner symposium to celebrate the contribution of Barry Nicholas to legal scholarship. He had been a Tutorial Fellow in Law there and was later its Principal. I append it because it gives you some sense of the intellectual context into which you are now venturing and, ngl, you can’t praise Barry Nicholas too often.

See you soon,

Jeffrey Hackney

# An Introduction to Roman Law: Putting the Preface into Perspective:

As many of you know, I am not a Roman lawyer and those who do not yet know it, soon will. So I can say little of interest on Roman law. I am here because I am a lecturer at BNC and am obeying a command from the Principal to turn up and talk. I may say however that I might have been tempted to spill blood if that invitation had gone to someone else.

I would like to talk about Barry’s book **An Introduction to Roman Law** from the viewpoint of a teacher and in particular about the book’s approach, which is set out in its excellent **Preface.** If the obscurities which follow encourage at least some of you who have not already read it, to do so, it will have been worth the effort. My title is **Putting the Preface into Perspective.** The burden of my song is that it augured a new kind of Roman Law book in England, which steered the teaching into new dimensions and without it, it is possible that many of us might not have supported and urged the retention of compulsory Roman Law in the first year Oxford law examinations. The book was a game changer here and it may have saved the Roman tradition in Oxford, since without the first year compulsory paper, takers for the second year and BCL options might simply have fallen by the wayside. This book has been my constant companion in my RL teaching and the one which I urge upon my students with the most enthusiasm.

# The Context

I came to Oxford in 1959 when Barry was 40 years old. It was a strange world and the part played by Roman law was even more strange. The Invention of Sex in 19631 was to make its position very vulnerable. Let me list a few points.

1. Roman law had been taught in Oxford since the earliest days, but the Common law had only been taught for some 200 years, almost to the day.
2. The University had since the Middle Ages held a franchise court in Oxford with jurisdiction over the townsfolk. It had taken a Westminster statute of 1854 to stop it applying Roman law to cases before it. When Barry was born, there were still people alive whose property had been directly affected by Justinian’s legislation.
3. In 1959 Latin was an entrance requirement for all subjects, and that meant all. This requirement was only removed later after an exceptionally tasteless and bad- tempered debate in Congregation. Only graduate entrants and Scholars had been exempted from this rule.
4. Each of the three university taught-Law courses contained a compulsory Roman law paper and each contained compulsory questions requiring translation from Latin.

1 Philip Larkin:

*Sexual intercourse began in nineteen sixty-three*

*(which was rather late for me) – between the end of the “Chatterley” ban and the Beatles’ first LP.*

In the case of the BCL this was as fine a piece of intellectual Philistinism as you could wish for, especially in the case of students whom we had been admitted knowing they had no Latin and would have no time to learn it.

1. The syllabus of the first-year compulsory paper could only have been defended on the basis that it did not significantly overlap with the compulsory paper in Schools.2
2. Roman law was a compulsory paper in the Bar Exams and its justification was delicately poised midway between farce and tragedy.
3. The student textbooks were of the ‘dry as dust’ tradition and gave only the most perfunctory nod (if any) towards justifying their role in university education. They reflected the tone of the Roman jurists who are quite amazingly morally non-self- critical by modern standards. In a (very, very) memorable letter which Barry wrote to me in 1999, he said that the books treated Roman Law as if they were dealing with something which ‘came from the mouth of God’ Quite something for a devout Roman Catholic to say, though after Vatican IV, that did not perhaps mean what it had previously meant. But they were very dry and very unengaging. I do remember saying to students in the past that I thought **Buckland’s Textbook of Roman Law** was like **Megarry and Wade’s Law of Real Property** but without the jokes. (You may find you weep over that remark when you do Land Law.)
4. First year lectures were delivered by David Daube and were some of the most exhilarating I ever attended. But David knew no more English law than I did at that stage, and the lectures were delivered on the basis that it was as natural to talk about Roman Law and its intricacies, as it was to expect the sun to come up every day. He was in this respect very much a Child of his Time. There is room for the view that this mode of teaching was well suited to the optional paper in Finals, and, apart from the Latin, also for the compulsory paper in the BCL, but (David Daube apart) its function in the first- year examinations was far more difficult to justify.

And the public justifications for all of this were very few and far between. Teaching Roman law could have been defended on the grounds that it was outward looking, and had much to teach the young about the foundations of law 22 miles away across the sea. There was little point picking any one Civilian jurisdiction to bridge the gap because they are all as different from each other as they are from the Common Law, and at least Roman law was their *alma mater.* But if so, very little indeed was made of that point. And don’t forget England did not join the soccer World Cup till 1950, twenty years into its history…

It could have been cultural history, but we had no business teaching that. The lawyers have no professional historical skills, though it is a matter of utmost regret that those who do have those skills have historically had a phobic resistance to black-letter Roman law. Maybe is it inevitable. And there was no compulsory paper (quite rightly) on the History of the Common Law in the Law syllabus, so the cultural justifications were perplexing.

2 Oxford language for ‘Finals’.

There are of course some horrid explanations for it all, based on the view that if we glorify these Roman barbarians as we did, dressing statues of our heroes as Roman generals for example, our own disgusting slavery record obviously can’t be something to be too ashamed of. We must not forget that much of the inherited wealth of the people who ruled us at that time came from the slave trade. Similar arguments might be made for the proliferation of ‘classical’ architecture in the Deep South, I guess. But we were where we were. This was not a world at all well prepared for the Invention of Sex.

# Enter Barry Nicholas

In my second year, Barry lectured on the compulsory paper. This was a very different approach. It is true the paper required a contrast with English law, but these were lectures which put Roman law into a timeless context and students were introduced to problems as if they might have been happening today in the real world. This was no *Begriffshimmel3.* Concepts there were, but they were grounded in the life we lived and we were invited to think of the good and bad options open to us as well as to the intellectual classical constraints which any decent legal system will impose. As I said to Wolfgang Ernst the other day, this was a *Begriffserde.* [Almost certainly, no such word – concepts on earth is the message]. And Barry’s former student, Francis Reynolds had taken the point and had begun to lecture in a similar vein. I am disproportionately envious of Francis in this respect but remain grateful to this day for his having picked up the torch and run with it. (It is one of the Dark Holes at the centre of this paper that I have no knowledge of how F H Lawson lectured and taught but would be willing to hazard a guess that Barry was equally lucky to have had him as a colleague at Brasenose.)

Barry’s lectures were what some in Oxford called ‘bread and butter’ lectures as opposed to what one might call ‘high wire’. It is easy to misunderstand this. In my experience bread and butter lectures are extremely difficult to write. At their best they create confidence by setting out an architecture of the topic which may only come from the lecturer’s having, after all, done it before, but also to sow the seeds of enquiry by pointing the listener towards the exciting areas off the beaten track. And if they work, the listener is required themselves to make those enquiries, some of which might become quite frightening. But the lectures have created a ‘restoration point’, a sort of base camp to which the student can resort when the going gets tough,

3 A ‘heaven of concepts’. A phrase invented by a great German lawyer of the 19th century, Rudolf von Ihering. It was picked up by Professor Hart in his *Essays in Jurisprudence and philosophy*, 1983 ‘*The objects of Jhering's attack… were not practitioners but great academic expositors of the law. Only these were allowed into the Begriffshimmel and…nearly all of them were Germans. Savigny was nearly refused admission, but obtained entry on the strength of his work on* ***possession*** *because it showed a proper contempt for utility. So little do these theoreticians care for the actual practice of the law that they are prepared to ignore any actual decisions of judges which run counter to their own logical calculations in which they unfold the content of legal concepts. Practice in their view ‘spoils the law’ and is bad for this reason; just as someone might condemn war because it spoils the appearance of soldiers... So the theoretician if he is worthy of entry into the Begriffshimmel is perfectly prepared to condemn the decisions of practical lawyers as logical impossibilities, and, as in the case of Roman lawyers, to attribute their deviations from rigorous conceptual thought to their falling under the evil influence of considerations of utility.’* [*or, as you will see, the Greeks…*]

before making another attempt to push the frontiers of understanding. His lectures were a model of this species. (Brasenose was of course soon to acquire one of the headiest proponents of the ‘high wire’. Going to Herbert’s [Herbert Hart] lectures was not a good experience if you were having a periodic attack of lack of confidence, though if you had done the prep and were willing to listen to (and write down) every word, the pickings were very, very rich.)

But the general structure around Barry’s work remained. It is easy now to say so, but a reaction to this overkill was inevitable, and as I came later to see, intellectually dangerous. The pendulum as usual showed signs of swinging too far the other way. And this is where the book came in. The Fifth Cavalry if ever I saw it.

# An Introduction to Roman Law by Barry Nicholas.

The book which revealed Barry’s technique to the outside world was part of the Clarendon Law Series, founded in 1958 and edited by a former Chancery Barrister and philosophy don who had now taken up a job in the Law Faculty [Professor Hart again]. Its founding philosophy was that it was to be **‘***a general introduction to different fields of law and jurisprudence designed not only for the law student but for the student of history, philosophy or the social sciences, as well as for the general reader interested in some aspect of the law. The aim of the series is to provide not a substitute for legal textbooks but a general perspective of ideas and problems which will make their detailed study more rewarding’.*

The first volume was F H Lawson’s *Introduction to the Law of Property,* followed in the *annus mirabilis* of 1961 by books on Contract, Precedent, Administrative Law, and the Concept of Law by P S Atiyah, A R N Cross, H W R Wade and H L A Hart. **(**Quite how Herbert managed to smuggle Concept of Law into the series has always puzzled me. Perhaps he was on specially good terms with the General Editor; but that is another story.4)

But then in 1962 came our book. You knew it was going to be different even before you opened it. This was a man cursed with the longest set of initials of anyone outside the Royal family, but the cover just said **‘Barry Nicholas’:** an immediate approachability indicator.

But Barry, unlike The Great Conceptualiser5, stuck closely to his brief, by adhering loyally to its general policy. The Preface to the book makes this perfectly clear. It was most definitely not a textbook and Barry did not intend his book to replace the existing texts. The contrast with them could not have been more stark. There are no Digest references and this is deliberate. He was putting Roman law into a much more cosmopolitan context, just as his lectures had done. This was to be an evaluative

4 An in-joke for this audience. Hart, also later Principal of Brasenose, was the said General Editor)

5 Hart’s monumental work is *The Concept of Law*

introduction to Roman law, not simply a list of data. Temptations to go further litter the terrain, but the reader is never left fearing that they would lose sight of the path. It is certainly no hagiography of the jurists. Its size was itself an indicator, just 280 pages compared with the books then mainly in use, both of which were well into the 400s. Barry had no need of Churchill’s excuse for writing a long letter, that he had had not had time to write a short one.

He came under pressure towards the end of the century to produce a new edition and the pressure was to make it more like the textbooks. On reflection, I am sure he was right to resist that, though his fundamental politeness will have caused him to consider it for far too long. He may have been the last contributor to the Clarendon Series to have adhered to the original brief.

Although he had never practised the law, this was also written by a man whom you might have guessed had done just that. This marked him out from far too many Roman law writers who seemed to see the law simply as a philosophical system beset by wire puzzles. Barry saw that it was normative and that results mattered to people. It took Roman law out of ancient history and put it into the timeless world of people having problems which needed solutions acceptable to society at the time. Above all, within the tight constraints of his book, he demonstrated, time after time, the kind of judgment which should be the highest ambition of all lawyers. I have come across few, if any, who have surpassed him in that regard.

I first came across the book in 1963 when I was a BCL student doing the compulsory paper on Digest 41.1. and 41.2 **(**the Acquisition of Ownership of Things and the Acquisition and Loss of Possession). I remember reading this book first every week to give me a conceptual and practical framework within which to construct my own picture. I came in for some scorn from my fellow students who could not understand why I was reading an undergraduate book. I remember then telling them that the skills needed to write exposition at this level were worthy of much admiration, but it was not just that. It was a bread and butter book *par excellence* and it gave me extra courage when I ventured into the unknown. The *Introduction to Roman Law* was my Theseus’ thread in the cave of the Minotaur. I do remember likening it to Littleton’s Tenures of 1481, an even smaller book, which contained a phrase which struck me as being the essence of a good student book. Littleton told his reader, that he had sought to explain the *‘arguments and reasons’* of the law. There can be no higher ambition, and to do it in a short space ranks even higher in the way of achievement. Reading the book did not have the magic of being in the same room as this immensely clever and thoughtful man, watching for the smile or the puzzled raised eyebrow (or two) but it was the next best thing.

You may now understand why I, at least, am pleased there was no second edition. The academic world had need of this book and still does and I cannot be the only one who will have defended the compulsory first year paper with its wonderfully designed Honoré syllabus because of the inspiration I have received from it. So, taking my cue

from Bach’s *Magnificat*, I end as I began. No Barry Nicholas, no first year Roman law. No first year Roman law, little or no Roman law in the BA or the BCL. His input into keeping the study of Roman law alive in the second half of the twentieth century is very great indeed. He was the essential catalyst.

I know the Principal has forbidden me from talking about him as a man before dinner, but I have to say to this audience that Barry Nicholas was also one of the most respected and admired and liked of all the work colleagues I have ever had. He was also one of that rare group of lawyers for whom my wife had unqualified affection.

So, if this disobedience means I lose my supper, I will have to bear that with such fortitude as I can muster.