1970 TURNER MEMORIAL LECTURE

'J. V. Barry: A Memoir'

delivered by

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I am very pleased to be invited to deliver this Turner Lecture. It has become one of the honoured lectureships in Law, and that is so because of the standing of those who have been Turner lecturers. For that reason, alone, it is a notable distinction to be invited to deliver it. In my case, there is more, for I suppose that I have had more to do with the Law School of the University of Tasmania than most of the non-Tasmanians who have preceded me in this lectureship. I first came here in 1951 when my old friend Bob Baker was Dean. My mission was important, though not exalted. I was the young and recently appointed Dean of the Melbourne Law School and I was the bearer of scarlet raiment. The University of Tasmania had resolved to confer on the then Chief Justice of India, Sir Harilal Kania, an early arrival to the Jubilee Law Convention of 1951, the honorary degree of Doctor of Laws. It was then discovered, or believed, that no robes apt to the occasion were available in Tasmania. An urgent request was made to the University of Melbourne for the loan of Melbourne LL.D. robes, under some extended application, it may be, of the *cy près* doctrine, or more likely, as a practical application of *tabula in naufragio*. The Vice-Chancellor of the University of Melbourne, Sir George Paton, a distinguished jurist, saw at last some use for his green Dean of Law and despatched me to Hobart as master of the wardrobe. Sir George, with a rare showing of unkindness, but with an unerring practical judgment, told me that while my return was a matter of indifference to him or to the advance of legal scholarship and education in Victoria, it was of prime importance that the robes should come back, and that unless I made it clear to the Indian Chief Justice that while the degree was his forever, the outward trappings were not, I might just as well stay out of Victoria for ever. Knowing that I was no prize to anyone, I made it unpleasantly clear to Sir Harilal Kania that he was but a short term bailee of his ceremonial raiment.

On that occasion I established many friendships in Tasmania, in the law and in the University. Since then I have returned many times,

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to give occasional lectures, to advise on academic appointments, and even in one year to help with the administration of the Law School. It is always pleasing to come back, and while I can no longer appear in the guise of a member of the Australian academic legal community, I accept with great pleasure the invitation to give this, the Turner Lecture for 1970.

II

Those of you who know something of my interests in legal writing in recent years, will perhaps know that I have become increasingly interested in legal biography. In 1965 I gave the Macrossan Lectures in the University of Queensland on Sir John Latham, and in 1967 I published a life of Sir Isaac Isaacs. Tonight I have chosen to speak on the life and work of another Judge, the late Sir John Barry, and I have entitled this lecture *J. V. Barry: A Memoir.* Jack Barry died only a few months ago, in November 1969, and I fear that I am doing once again what I expressed doubts about the wisdom of doing when I wrote and spoke about Latham in 1965; that is writing about a man so very soon after his death and without the benefit of a longer and larger perspective. I saw Latham often during the years of his very active retirement, but I was too young to know him during his working life, though I imagine that the shade of Latham would recoil in indignation at the suggestion that those years of so-called retirement were not working years. I knew Jack Barry through almost two decades of his working life, from 1951 until his death. In company with hundreds of others I was the recipient of many letters and cards—for the most part in his strong handwriting—on a wide variety of subjects which included comments on particular cases and issues, on books including my own books, and various personal matters.

The last letter was by the hand of an *amanuensis*—his judge's associate of more than twenty years, Mr J. H. Edwards. I was then delivering the Boyer Lectures for 1969 on *The Private Man*, a subject which had actively engaged Barry's voice and pen over a long period. One of the two papers which he had submitted for the Bachelor of Laws Degree of Melbourne University in 1963 was entitled *An End to Privacy* and it concluded with the question: 'Can Australia . . . learn in time from the frightening story of American experience, and devise effective measures to preserve individual privacy from irresponsible intrusion?' Mr Edwards wrote in October 1969 to say that Barry who was then gravely ill had asked him to write for roneoed texts of the Boyer Lectures which were then being broadcast. He said that while he knew that the lectures would be printed, 'to be frank with you, Sir John is so ill that he could well die before the printed lectures could reach him. The malignancy which rendered necessary surgery in September 1968 has reasserted itself and is in a very advanced stage. I think it is accurate to write that he is dying and is aware of the fact. He sends you his warmest regards.'

I was much upset and made haste to send the texts. Mr Edwards, wrote again a week later to say that they had arrived. 'I did not see him,' he wrote, 'as he had just dropped off to sleep, but his son to whom I gave them said, good, he told me he was awaiting them as he was most anxious to read them.' I doubt whether in the few remaining days of life, Jack Barry found it possible to read the lectures, but it was very much in character that this brave and committed man should want to know even at such a time, what another had said on issues which had concerned him so deeply. It is not good, I suppose, to intrude on privacy by recounting such matters, but I think that they give a rather special insight into Barry's character.

III

John Vincent William Barry was born in Albury, New South Wales on June 13, 1903. His father was a painter and decorator of Irish antecedents who came from Beechworth, Victoria. Jack Barry was sent to a convent school in Albury and went from there with a bursary to St Patrick's College, Goulburn as a boarder. In 1921 he came to Melbourne to qualify as a lawyer by way of the articled clerk's course. He was articled to Luke Murphy and his academic record shows passes in the required subjects between 1921 and 1923. While still an articled clerk, Barry, as clerk to Murphy, briefed Eugene Gorman as counsel for Angus Murray who was convicted and hanged for murder though he had not fired the shot. Sir Eugene Gorman told me that the Murray case left an indelible impression on the young Barry, and that it fixed him in his lifelong and unshakeable opposition to capital punishment. In 1926 Barry was admitted to the Victorian Bar, and he rapidly built up a wide and successful practice as a barrister. He established an extensive common law practice, and he was an able and persuasive advocate before criminal and civil juries. He was a learned and hard-working lawyer and Gorman, with whom he appeared on many occasions in the pre-war period, stresses the quality and extent of his learning. Barry wrote a number of law journal articles in these years at the Bar which covered many fields. At times they were the product of a current interest arising from one of his cases, as for example when he wrote on the *Child En Ventre Sa Mère* in 1941. This was a discussion of a miscellany of cases and points relating to the legal status of the child.

His articles showed his keen interest in criminal law and evidence. On various occasions in 1936, in the Australian Law Journal, he wrote on the defence of insanity. The case of *Sodeman* moved him to argue the defence of irresistible impulse, and in one of these articles there appears a comment which recurred many times in his writings, his judgments, his letters and his talk. 'The attachment of the law to its formulae, that attachment being often a product of mental inertia is to be deplored, not encouraged.' In the following year, 1937, in an essay entitled *Crime and Justice*, Barry noting a book by Edwin

Borchard of Yale on miscarriages of criminal justice, wrote with some acerbity that 'to one accustomed to Australian traditions, it is strange that gentlemen of high academic qualifications and positions should risk coarsening the delicacy of their cerebral cortices by pondering on subjects of such obvious utility.' Barry was ambivalent in his relations with academe; he enjoyed and valued his association with the University of Melbourne as (foundation) chairman of the Department of Criminology from 1951, he valued academic recognition, he had many friends among academic lawyers and he contributed to University journals. Yet he could be very strong in his denunciations of academic remoteness. I remember a dinner party in the 1950's when he sailed into me with what seemed to me unnecessary vehemence, saying that it would do me and the likes of me a great deal of good if I involved myself in the hurly burly of Petty Sessions.

His success in practice was recognised by the grant of silk in 1942. Early in that year he was appointed to assist Mr Justice Lowe, of the Victorian Supreme Court, who had been appointed as Royal Commissioner to enquire into the circumstances of the Japanese air raid on Darwin on February 19, 1942. Hearings were held in Darwin early in March and concluded in Melbourne later that month. I was in Darwin with the Navy at that time, but I had nothing to do with the Commissioner and his distinguished counsel.

I first saw Barry as counsel in 1944, while I was still in the Navy when he appeared in a case in which, as I recall, the Navy had some interest involving the detention of merchant seamen under National Security Regulations. During the war Barry was himself appointed a commissioner to enquire into and report on the cessation of civil administration in Papua, New Guinea. That enquiry was conducted under National Security Regulations and his report has not been made public. It has been said the report would surely be a valuable historic document, bearing on the conflict of civil and military power in a serious emergency when the Japanese threat to Australia was at its height after the fall of Rabaul. Barry was also appointed a commissioner to enquire into R.A.A.F. affairs at Morotai. He was linked with another wartime *cause célèbre* when he appeared for E. J. Ward in the Brisbane Line enquiry in 1943.

In the same year, in two articles in the Australian Law Journal, he discussed the trial and punishment of Axis war criminals and the Moscow Declaration on War Crimes. He strongly advocated the taking of steps in advance of the termination of hostilities to establish an effective body which would 'have power to ensure that those rules of international law which are designed to maintain standards of human decency shall be more than mere pious aspirations. Only in that way can those rules take on the reality which they now lack because there is no effective sanction for their breach.' He argued for the constitution of an international criminal court to try war

criminals; despite the difficulties in such an undertaking, 'the influence it would have upon the maintenance of civilized standards and the promotion of the happiness of civilized standards would be so immense that these difficulties must be resolved.' It was characteristic that in the midst of a very busy professional life, in which his services were very much in demand and he was travelling extensively, he was reading, widely, in many fields and that he was concerned to argue the importance of extending the reach of law into this area.

At a later time he expressed serious doubts about the Nuremberg tribunal and judgment, and he was very critical of the proceedings which led to the conviction and execution of the Japanese General Yamashita. I remember, early in the 1950's that he gave me as required reading Frank Reel's *'The Case of General Yamashita'* which was a powerful and persuasive attack on those proceedings. The war trials generally, and the Nuremberg proceedings in particular, he discussed briefly in an essay *'Treason, Passports and the Ideal of Fair Trial'* which was originally delivered as an address at Cornell University in 1955 and published in the following year in Australia. In that paper, Barry, in company with many other lawyers, was sharply critical of the decision of the English Courts which resulted in the conviction for treason and execution of William Joyce, well though not favourably remembered by an earlier generation as Lord Haw Haw. Barry argued forcefully, and in my view persuasively, that the doctrines stated in that case were unsound, not to say outrageous. In the course of his argument Barry discussed in general terms the concept of fair trial and this led him to make brief reference, almost a decade after the event, to the Nuremberg proceedings and judgment and to other war crimes trials.

> The ad hoc tribunals which were used for the trial of some war criminals drawn from the vanquished nations—he wrote—were fundamentally political and it is this circumstance which troubled a great many lawyers who, while holding the conduct of those criminals in deepest abhorrence and recognising that punishment was deserved, were nevertheless, in the years of retribution after the war, very uneasy about the proceedings of some tribunals and have grown no happier about them now that the passing of the years has given opportunity for cogitation and calmer reflection.

His criticisms were the familiar ones: retrospective laws, violation of the maxim *nulla poena* and dressed up retribution meted out by victor to vanquished. There are, to be sure, many disturbing aspects of the war crimes trials and judgments—though it is not altogether fair to lump the *Yamashita* and the *Nuremberg* proceedings together—but I cannot think—as Barry's earlier writings suggested—that the decision to proceed in this way was altogether ignoble and unwise. The problems to which he adverted a decade after the events, were apparent to a clear minded lawyer in 1943, and Barry was not one to be caught

up in the passions of war. It is true that in 1943 he argued for the constitution of an *international* criminal tribunal but I am sorry that he did not link up his pre and post-war writings on these matters, and spell out more fully and precisely what he regarded, on reflection, as the appropriate course to pursue.

In 1943, in addition to all these activities, Barry, who was an active member of the Australian Labour Party, stood in the interests of that party for the federal seat of Balaclava. He polled well, but the task was really a hopeless one, and he was defeated. I do not think that he was unduly disappointed at his defeat, though I think he might have relished a parliamentary podium for his many causes. He appeared on many platforms at that time. Late in 1943, he recounts in one essay, he spoke at a public meeting in Melbourne to protest against the policies of the British Government over Palestine and did so despite the personal intervention of the aged Sir Isaac Isaacs who attempted to persuade him to take no part in the meeting. In 1944 he gave public support to the Labour Government's proposals for amendment to the Commonwealth Constitution by vesting in the Commonwealth Parliament substantial additional powers for a period of five years after the termination of hostilities.

Barry in a speech which appeared as a pamphlet *Wider Powers For Greater Freedom* strongly supported the proposals. It was, so far as I know, his only writing on the Constitution (save as incidental to other matters) and it was simple and general. He personally would have gone further than these proposals. 'In my view,' he wrote 'the States, as sovereign bodies are anachronisms, and their continued existence as such is inimical to the development of a national outlook . . . The lesson of contemporary history is written plain for all to see, however, that the only Parliament which can direct the laying of the foundations and erection of the structure of the better social order for which the people fight is the Parliament which is representative of the nation.' That, I think, remained his general constitutional position, not that in his correspondence and talk he revealed himself as an ardent admirer of those who exercised central political authority in Australia. Though he did not write much on Australian constitutional law and problems, he read with keen interest and commented on much that was written by others. I can remember very well his thoughtful letter to me after my book on *Federal Jurisdiction in Australia* was published. He was very well informed on these and on other matters of Australian constitutional law and doctrine and was critical, as I was, of the way in which the intricacies of federal jurisdiction could delay and complicate the administration of justice. In 1965 he wrote to me of the unsatisfactory workings of the Judiciary Act section 40A under which the raising of an *inter se* question could long delay decision in a case.

> '. . . there may,' he wrote, 'be grave practical problems if *inter se* questions are raised by obstructive parties. Presumably the

> trial Judge must be satisfied there is a genuine and arguable question of constitutional competency. If he is, the plight of the party seeking relief may be dolorous. In (one case, the judge) decided on 3 October 1962 that section 40A of the Judiciary Act applied. That matter came before the High Court on 12 May 1964, and judgment was given on 30 July 1964 remitting it for trial to (the Judge). In a jurisdiction concerned with the daily living of human beings, such delays are intolerable to the parties and discreditable to the law, and often they enable a party to escape responsibility for an appreciable time. Having this approach, I had no enthusiasm for applying section 40A of the Judiciary Act.'

I think that Barry would have enjoyed grappling as a judge with major constitutional issues, an opportunity which was not afforded to him on the Supreme Court. In the 1940's, before he was appointed to the Supreme Court, there was some talk of his appointment to a vacant seat on the High Court of Australia. I think he hoped for that appointment which in the event went to Sir William Webb. Had he gone to the High Court, I believe that he would have made a distinctive contribution to that Bench. He would have brought to it a capacity and a taste for legal learning and more besides; a prodigious breadth of reading, an awareness of the social context within which the law operates, and a broad though disciplined approach to the very important constitutional tasks of the High Court.

Barry was active in the cause of civil liberties and in 1946 became president of the Australian Council for Civil Liberties. His appointment to the Supreme Court of Victoria in 1947, while still in his early forties, meant his withdrawal from direct political and kindred bodies, though it did not mean the end of his association with activities which, as he saw it, were compatible with the holding of judicial office.

In 1948-49 he was President of the Medico-Legal Society of Victoria, and from 1951, as I have already said, he was Foundation Chairman of the Department of Criminology in the University of Melbourne. I knew him well in this capacity for I too was a member of that Board for many years. Barry showed a keen interest in the work of the Department which in the early years, was directed by his friend the energetic and talented Norval Morris. Barry as Chairman worked hard to get the Department going; he helped with the establishment of the course for the Diploma, and he encouraged research and interest in criminology. At a later date when the Department found itself in internal difficulties, with deep and persisting quarrels, Barry, though at times baffled and vexed—as others, including me, also were—carried on with good humour and was able to keep things running reasonably smoothly until the various problems were at length settled. My former colleague, Peter Brett wrote fittingly in a personal note that 'it is clear that he did a sterling job in this area in the University'.

In 1955 he took leave and went abroad for the first time. He had a grant, as Chairman of the Department of Criminology, from the Carnegie Corporation of New York to investigate developments in criminology and penology in the United States and Europe. He also led the Australian delegation to the United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in Geneva in that year. He also led the delegation to the second Congress which was held in London in 1960, and served on that occasion as chairman of the Congress Section which dealt with short term imprisonment.

He travelled to Japan in 1964, which was an uncomfortable year in which he suffered a serious kidney illness. In Japan he lectured at the recently established UNAFEI, which was then under the direction of Norval Morris. He was to have gone abroad in 1968 to lecture on legal themes in New Zealand, but the malignancy which finally caused his death was discovered in that year, and he was unable to go. He hoped to be well enough to go in the following year, but that was impossible, and after his death, the lectures which he was to have delivered in New Zealand were published by the New Zealand Government under the title of *'The Courts and Criminal Punishments'* with a generous and fitting foreword by Dr J. L. Robson, then Secretary for Justice.

In 1957, Barry was appointed Chairman of the Victorian Parole Board which was constituted by statute in that year. The work of the Board absorbed him; he attended to it regularly and with great devotion, and his judicial work for years after 1957 was largely confined to divorce to allow him to develop what was an entirely new concept of parole and to establish it on a sound footing. The importance and the first class quality of his work in this area cannot be overstressed and it is widely acknowledged by judges, scholars and practitioners in the field. It was in no small measure due to the success of his administration of the parole system that it was copied in essentials in other Australian jurisdictions. In the course of his lectures prepared for delivery in New Zealand, Barry spoke of parole during sentence as an element in an enlightened or at least 'a less repressive and draconian approach to the subject of imprisonment'. The Victorian legislation leaves the responsibility for sentencing with judges, but requires that except in very short sentences, the judge shall (in the case of shorter sentences may) fix a minimum term which must be served in imprisonment. For the balance of his term, the offender may be released on parole by a Parole Board. The Chairman of the Board must be a Supreme Court Judge and there are four other members. In deciding whether to grant parole, the Board has before it all relevant evidence and case histories and during parole the offender is under the supervision and direction of a professionally-trained officer who is a member of the parole service. Parole may be cancelled by the Board and is automatically cancelled on conviction

during the parole period. At the termination of the parole period, the offender is regarded as having completed his term of imprisonment.

Barry's pioneering work as Chairman of the Parole Board was notable; his achievement in laying the groundwork has made it possible for the system to run smoothly, almost on a routine basis. Barry himself viewed this work with some pride and with justification. He called the system a compromise, because, as he wrote—

> 'it goes some distance towards satisfying the views of critics who contend that the sentencing process should properly be regarded as an administrative one. It leaves the imposition of the possible maximum period of confinement where I believe it should be, with the traditional courts, but it enables an administrative body to direct the release of an adult offender after he has served the period which the judge regards as essential to satisfy the punitive requirements of the law . . . It is by such methods as these rather than by the abandonment of traditional social institutions which still enjoy the confidence of the community, that advances should be made in the correctional system. I do not claim the Australian parole system is the complete answer, but it is one that has met with acceptance, and even approval, both from the judiciary and the community generally.'

I think that there would be substantial agreement with Barry's estimate.

Barry was also charged with the preparation of a report on Juvenile Delinquency which was published in 1956. It was a sound and helpful report, which, while it did not establish new principles, reminded State officials of the existence of well tried and understood principles and techniques and urged their use and application for the future.

Throughout these years Barry read voraciously; he contributed articles and book reviews to many journals and periodicals, and not only to legal publications. He was a contributor to *Meanjin* and presided at its twenty-first anniversary dinner in 1961. Two articles, one on the *William Joyce Case*, entitled *'Treason, Passports and the Ideal of Fair Trial'* (1956) and *'An End to Privacy'* (1960) were submitted by him for the award of the degree of LL.B. by thesis by Melbourne University in 1963. He was a collaborator with Sir George Paton and Professor Geoffrey Sawer in *'The Introduction to the Criminal Law in Australia'* (1948). His two major books were *'Alexander Maconochie of Norfolk Island'* (O.U.P. Australia) published in 1958, and *'The Life and Death of John Price'* (M.U.P. 1964) and they attracted wide and favourable notice. I shall speak about them in more detail later, but they, and especially *Maconochie* to which he referred many times, gave him much pleasure. *Price* shared the Harbison-Higinbotham Research Scholarship in 1965, while *Maconochie* was his submission for the degree of Doctor of Laws of Melbourne University in 1968. The award of this degree gave him very great pleasure. While he may have had some ambivalence about academics and their

activities, he valued very highly this recognition by the University that his work merited the award of a senior and distinguished degree. I wrote to him to congratulate him on the award. His reply from his beach house where he was resting, ill and tired, in January 1969 was in character—

> "As you once remarked to me, 'The LL.D. is a nice degree' and I am happy the examiners unanimously recommended it. My daughter Joan . . . has been plugging away at a B.A. degree while working as a teacher in the Education Department and she completed it at last year's exams. We hope that she and I will receive our degrees at the same conferment ceremony."

And so it worked out. At a ceremony at the end of March 1969 they took their degrees and Barry was invited to give the Occasional Address. He was ill, but the address in style and content bore the impress of the man. He spoke of social cohesion, of the problems of permissiveness and the values in tradition. Then, briefly, he spoke of conservation and pollution, and of the threat to the Australian environment.

> 'In Australia, most of the virgin rain forest has already gone. Around the cities and towns the real estate developer has stripped the foothills and will soon denude the mountains. No readily accessible river or stream has gone unpolluted. Our natural assets, plant and beast, have been ruthlessly exploited or destroyed or are threatened with exploitation . . . the nightmare thought recurs that Australia may become a vast disused quarry surrounded by a malodorous and lethal oil slick.'

This is no longer novel, and multitudes are marching under the banners of conservation, anti-pollution and the preservation of an ecological balance. But the multitudes were not yet marching when Jack Barry spoke of these things not much more than a year and a half ago, and his words captured the national headlines.

I have spoken of the range and variety of his writings. He contributed several pieces to the Australian Dictionary of Biography, and a number of his subjects there were either the principal or associated performers in *Maconochie* and *Price*. Peter Ryan in a sensitive obituary notice justly said of these contributions—and writing within the iron framework of short Dictionary articles is no literary pleasure—that 'they are all vivid, balanced and readable articles and he took as much trouble over them as he would upon the preparation of a judgment in an important court case'. One of the articles, at least, is intriguing in its conciseness. Of the difficult John Walpole Willis, first resident judge of the judicial district of Port Phillip we read 'Willis attended Rugby and Charterhouse, from which he was expelled in 1809'. We are not told why, but it set the pattern for a series of later expellings!

He wrote an extended introduction to Morris and Hughes '*Studies in Criminal Law*' (1964). Of this I shall say more when I speak of Barry and the criminal law, but I want now to say a word about Barry and biography, and in particular judicial biography. His two major works *Maconochie* and *Price* were in form biographies, and reviewers have praised them as biographies as well as for their broader social and historical content. I agree with Colin Howard who in a most perceptive review of *Price* says that in that book as in *Maconochie,* Barry has presented the central figure in the context of a theme or idea; in the one case the basic principles of enlightened penology, in the other, *Price,* in the context of the theme of cruelty. I do not find in either book that the *man* Maconochie or Price comes through very clearly as a person. I think, however, that Barry in some of his lesser writings, had the capacity to illuminate a personality, particularly when he himself knew the person.

Before I come to illustrate this, let me say that Barry himself was much interested in judicial biography. In a review of a life of a somewhat unusual Colonial judge *Sir John Jeffcott* who had the dubious distinction of being the only person ever arraigned for murder while holding office as a British Chief Justice and was in Barry's judgment 'not an estimable character', he said that there was much valuable biographical work to be done on a number of Australian judges. Barry wrote about Willis in the Australian Dictionary of Biography and in *Price* he gave a short but effective picture of Mr Justice Redmond Barry who tried those charged with the murder of Price. That picture is one of cruelty and remorselessness.

I hope that I shall be forgiven if I say that I think that Barry's most perceptive and effective pieces of *biographical* writing appeared in long reviews of books of mine: *Sir John Latham and Other Papers* and *Isaac Isaacs.* Barry knew both Latham and Isaacs; in reviewing the books he dealt at some length with both men. His picture of Latham in his later years, is very good. 'In politics and on the Bench', he writes, 'Latham was considered to be aloof and without warmth, but in his long and active retirement, his tall spare figure and gleaming pince-nez became a familiar sight at social gatherings of the most diverse kind, and he was welcomed as a genial and affable companion, ever ready with a quip or pun, an eager conversationalist and an occasional listener.' His estimate of Latham that only in his rejection of dogmatic religion and his firm adherence to rationalism was there any failure to conform to conventional standards, that he was authoritarian, regarding the solution of problems political and legal through a rather arid logical method that took too little account of the frailties and inconsistencies of human nature, that he was vain and intensely ambitious and that his stepping down in favour of J. A. Lyons 'was a surrender to the inevitable rather than a genuine act of self abnegation'—all of these are perceptive judgments concisely and admirably written. His estimates of Latham as an administrator

of the High Court and his developing attitudes to judicial review are also very well stated.

After my life of Isaacs appeared, Barry—as he always did—wrote to me. It seemed that he read everything as it came off the press. He wrote in a kindly and generous way but he spoke also of the difficulty of unlocking Isaacs as a man, a difficulty of which I was acutely and frustratingly conscious. He in turn produced an extended review article in *Meanjin* entitled *'From Yackandandah to Yarralumla—The Enigma of Isaac Isaacs'* which I regard as an outstanding piece of writing.

It was written with utter candour about Isaacs and his contemporaries. Barry did not hesitate to say very harsh things 'An obnoxious element in his (Isaacs) complex character was his absolute and invincible conviction of the rightness of his opinions, and the stupidity, or worse, of those who disagreed with him.' There is a very good picture of the clash and conflict between Griffith and Isaacs: 'Each was skilled in intrigue and relentless in pursuing his viewpoint, but while Griffith was masculine and at times brutal in his forthrightness, there was an element of the feminine about Isaacs' approach and methods.' His concise judgments on the controversy over Isaacs' appointment as Governor-General and on Isaacs' performance in that office are admirable. When he looks at Isaacs' later life and activities he can write without unkindness that it was Isaacs' tragedy that his reputation would have been higher had he died when he retired as Governor-General. As Isaacs' biographer I found that true in part; yet what in a sense drew me to him was his enormous zest for life in those last years, even though, as both Barry and I think, he did some pretty bad things at that time. Barry's positive and favourable estimates of Isaacs are sound and very well stated, and the comments on the perfunctoriness of some of the formal tributes when he died, very perceptive indeed.

I turn to some personal matters. Barry was born a Catholic, but lived and died a sceptic and a rationalist. This rationalism he shared with Latham, but they were very different men. When Barry died the funeral service consisted of a passage from Ingersoll read by his colleague on the Victorian Supreme Court Bench, Esler Barber. Throughout his life, Barry was a radical in politics, and while he abandoned political activity on becoming a judge, his sympathies did not alter. Yet he accepted a knighthood in 1960, and this surprised some who knew him, his attitudes and beliefs. He said that he accepted the honour because it really belonged to the judicial office and acknowledged its standing in the community. One may however hazard a guess that there was human pleasure in the personal recognition for him and his family, and that he really was not displeased to be Sir John. Whatever the sceptical voice might say, he had a taste for panoply and ceremony, and a personal conservatism

that took pleasure in established forms of community recognition. The truth is that he was a human, domestic, kindly, orderly and thoughtful sort of man whose radical, questioning, sceptical utterance and outlook sat not too uneasily with a personal conservatism. He relished the honour that the University of Melbourne did him when it conferred on him the earned degree of LL.D. and invited him to deliver the occasional address. What he said then, was revealing.

> 'Healthy tradition is at once the mortar that holds the social structure together and the source of the spiritual strength of a community.
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> If it were not for tradition, this ceremony which we share today could not take place. The medieval garments which transform us males, ordinary—so depressingly drab, into resplendent creatures of polychromatic beauty, are themselves witnesses of sound tradition. Reaching back into the centuries, the garb we wear and the ceremony in which we take part, are the outward signs of fundamental civilized values. They symbolize the virtues without which the good society cannot exist, and the good life cannot be lived. They emphasize that no society is even tolerable unless it regards intellectual integrity as preeminent among desirable things, and unless it recognizes too that what distinguishes a true democracy from a closed society is the preservation of the free, critical, enquiring spirit which exists, always, that the pursuit of truth is mankind's noblest goal.'

I have no doubt that he believed that. The excesses and violence of the permissive society, the violent manifestations of student unrest, were deeply upsetting to him, and while he was acutely aware of social and economic injustice and abominated prejudice, he was an unswerving supporter of liberal values and orderly processes and deeply disapproved excesses of action and discourse. In his New Zealand lectures he wrote that—

> 'Neither in Australia nor in New Zealand has there yet been seen on a large scale the devastating and irrational violence that has occurred elsewhere first by students and then by the submerged elements of the community that are ever alert to take advantage of social chaos. But there are ominous signs that, much though we should hope that the tradition of restraint and common sense would prevail, it is by no means certain that our communities will be immune from the frenzies of violence and destruction that have occurred elsewhere. The various sectors, and in particular among those recently emerged from adolescence, there is a sceptism amounting almost to nihilism about traditional social controls and institutions. It is of the essence of a free society of course, that the right of free, critical and sceptical inquiry should not be abridged. But every right carries with it a duty and it is the obligation of the social critic to realise that

> organised violence is the first step towards chaos, and to recognise that the inflexible administration of the law is an essential pre-condition of a civilised system of social organisation, under which alone progress is possible.'

That statement is very revealing of Barry's attitudes and outlook.

He married twice; in 1930, Ethel May Pryor, who died in 1943. There were two children of that marriage, John and Joan. In 1951 he married Nancy Hudson and they had one daughter, Susan Jane. As I knew him, he was very happy in his family life, though I am told by one close to him that he worried a great deal, particularly as his health declined, about the material security he could provide for his family. He seems to have had little expertness in the management of financial affairs and, I would expect, little real interest. He was not a man given to outdoor life or sports; his consuming interests were his books, his vast correspondence, his friends and his talk, and his security in his home and family. Both families—the children of his first marriage, his wife and daughter—were with him in his last illness.

His health had not been good for some time; in 1964 a kidney was removed. In 1968 he was unwell and cancer was discovered and he was operated on late in September. He returned to the Bench in November, but was very tired. A letter written by him came in January 1969, when he wrote from his summer cottage that he planned to preside in the Full Court in February. During the year, his strength failed and he died on Saturday, November 8th. By his direction his death was not announced until after the funeral which was attended by some of his judicial colleagues, by a few close friends and his family.

IV

This is a memoir of J. V. Barry and not a detailed estimate of his work. Some time before his death, a number of his friends planned a volume of essays in his honour and while this could not be ready before he died, it will contain estimates of various aspects of his life and work. I shall make only brief comments on his judicial work, on his two main books, *Maconochie* and *Price,* and on his views on the law, particularly the criminal law.

Barry was a judge for more than twenty years, and at the time of his death was the senior puisne Justice of the Supreme Court of Victoria. Over such a period a man can make a great reputation as a judge, and Barry had the abilities and the learning to do this. Yet it is not for his work as a judge that he will be particularly remembered; it is for writings, interests and activities, which while they were those of a working judge, extended far beyond his work on the Bench. For a considerable period, his weekly attention to the business of the Parole Board led him to confine his judicial activities to the divorce jurisdiction. He developed a great interest in that jurisdiction, particularly after the Commonwealth *Matrimonial Causes Act* came

into operation, and his contributions to its interpretation were valuable. He gave attention to the new concept of an *Australian* domicile and he was much concerned with the provision of the Act, Section 71, requiring satisfactory arrangements to be made for the children under sixteen of a marriage in process of dissolution before a decree absolute could be pronounced. He drew attention to difficulties which led to an amendment of section 72 in 1965. I had correspondence with him on a number of points arising under the Act. With Derek Mendes da Costa I had written a book on *Matrimonial Causes Jurisdiction* which appeared before there was any judicial interpretation of the Act, and I had also written elsewhere on a variety of matters relating to the matrimonial jurisdiction. Barry's work in this jurisdiction which ranged over many matters and led him to make critical comments on a variety of matters, was able, important and in the context of the Matrimonial Causes Act, trail blazing.

I agree with Geoffrey Sawer's estimate that 'when the history of the Commonwealth divorce jurisdiction comes to be written, Barry's name will rank very high among those state judges whose intelligent co-operation and hard work enabled the new system to be established with so little fuss, whose suggestions have caused it to be progressively improved and whose decisions have rapidly built up a rich body of vigorously argued precedent, invaluable for both teachers and practitioners.'

In his earlier years as a judge, he dealt, as the jurisdiction of the Supreme Court required, both at first instance and on appeal, with a variety of matters. It is not surprising that his judgments contained reference to a wide range of material outside the statute books and law reports, where that advanced the disposition of an issue, as for example in applying the principles governing the award of custody. In discussing issues like the admissibility of confessional evidence, he articulated clearly the various and competing social claims. As a member of the Full Court, he deprecated the survival of the common law action for damages for negligence for injury to person or property, and he argued for an insurance type system of compensation. He made this point also in an address to a convention of the Southern Tasmanian Bar Association in 1964 when he said that in these cases 'the conceptions which the law invokes are inadequate and outdated, and . . . the methods it uses to determine the questions that arise do no credit to judges and the legal profession'. He had, of course, read extensively in the literature on this subject and was conversant with legislation in other jurisdictions. In this address, he also dealt with the matter of compensation for victims of crimes of violence and discussed the provisions of a New Zealand Bill, the Criminal Injuries Compensation Bill, then under consideration.

In earlier years, Barry often took the criminal trial list in the Supreme Court. Professor Sawer notes that it seemed possible that

in the course of years he would build up a body of valuable reported addresses to juries, supported by initialled notes appended to the summing up, indicating the principal sources from which the direction on the law derived. That came to an end, however, when he gave up this work. Overall, however, his judicial contributions in the field of criminal law—his special field—were not substantial. But, as one of our ablest criminal law scholars says, they were marked by a profound understanding of criminal law and its roots in fundamental moral doctrines.

He was generally impatient of fine technical distinctions, though he was not unwilling to use them to achieve what he regarded as a desirable social objective. He was not a much talking judge or given to the writing of lengthy and elaborate judgments, for he did not see the role of judgment writing as exhaustive essay writing and in this I believe that he was right. As a judge, he also had a capacity for handling discretionary issues well and rationally.

No doubt his most famous case was the 'Whose Baby Case' (*R. v Jenkins, ex parte Morison* [1949] V.L.R. 277; 80 C.L.R. 626), the much publicised litigation in which the action arose out of the contention of a mother that two babies had been accidentally mixed up in a country hospital, and that she had been given the wrong child, and that her child—to which she now made claim—had been given to the other mother. Barry reached the conclusion that she was right and made an order in her favour. On appeal to the Full Court of the Supreme Court, his decision was reversed and the Full Court's decision was upheld by the High Court of Australia. Barry took great pains with the trial of this case, and he obviously felt very deeply about it. The best professional opinion is that Barry was right in his decision, and there is certainly no doubt that the reversal had a great effect on him. I have it both from professional and from lay sources that what happened in that case never left his mind, that he was discouraged by it, and that it permanently affected his views about judging and the worth of the judicial process. Barry certainly did not like being reversed. On various occasions he spoke to me with displeasure and acerbity of the way in which appellate courts had dealt with him, and he was in no doubt that they had, for one reason or another, got it wrong. In the *Whose Baby Case*, however there was more than a feeling of injured pride. The feeling went deeper than that to a belief that the judicial process had in a fundamental human way, gone badly wrong.

Barry could be very critical, very cranky about judicial performance, judicial blunders and judicial narrowness. He was critical in conversation and correspondence of legalism; he quoted from Lord Radcliffe's elegant lectures on 'The Law and Its Compass' that 'Law needs all the time a compass to steer by. I hope that I do not say anything impertinent if I say that it is not lawyers themselves who

are most conscious of this need. There is so much in the study or practice of the law to absorb the man of intellect, so much history, so much argument to engross the reason, so much of sheer professional expertise . . . What drives us back from time to time to search further; to question outright; what are our purposes; is the insistence of the layman, the man who is not versed in law, that it shall stand for something more, for some vindication of a sense of right and wrong, that is not merely provisional or just the product of a historical process.'

Yet Barry was also the defender of traditional judicial roles and processes. In his New Zealand lectures on *The Courts and Criminal Punishments*, he forcefully rejected arguments that sentencing should cease to be a judicial function. He viewed with apprehension the 'frightening state of affairs in which offenders are under the control of smooth men in white coats whose business it would be, like the "straighteners" in *Erewhon*, to adjust them to the desired degree of conformity.' In his discussion of the *Joyce* Case, he stated a view of the judicial process in these terms—

> 'The decision stands as an illustration of the wisdom of the warning against the unhappy practice, which has disfigured the judicial process down the centuries, of extending the law to meet particular mischiefs, instead of leaving the remedying of the mischief to the parliamentary body whose constitutional business it is to make the laws. The function of the judiciary, as Bacon observed is jus dicere and not 'jus dare' to expound the law, and not to make it; to administer the law as it is, and not to enlarge the meaning of a statute in order to satisfy a real or supposed popular clamour, for to do so is to violate the fundamental principle that there shall be no punishment except for conduct known to the laws as criminal when it is done.'

In *Joyce's* case Barry was angered and disturbed at the contrivance by which the law of treason was interpreted to support the conviction of Joyce, and I would agree. But the general principle which he states here—which goes far beyond the criminal law—is extravagant and would place Barry alongside judges whose jurisprudential and philosophical views he would have rejected. Barry simply did not believe that the role of the judge was *jus dicere* in the sense stated. He firmly held that the judge was not a lion under the throne or the voice of the people's court, but that is a very different thing.

In her obituary note on Barry, Lady Wootton spoke of Barry as a 'maverick judge'. He was, she said, a constant critic of the judicial process which he had to administer and was acutely sensitive to the relations of law and social conditions. Of his awareness of these relationships, there is no doubt, and of his readiness to import into his considerations and his reasons for judgment, matters outside the statute book and the law reports, there is abundant evidence. This,

however, makes him an imaginative judge among judges, not a maverick. Indeed as Professor Sawer says in his estimate of Barry as a judge, he was 'a judicial craftsman of the traditional sort. That is, he has always accepted the general existing structure of rules and procedures and worked within them, seeking to stretch or adapt only when the materials fairly clearly lent themselves to such processes'. I think that that estimate is right, and is well supported by the evidence.

V

I have made brief references to Barry's two books *Maconochie* and *Price*. Both books are prefaced by the same quotation from Bertrand Russell on *Power* (1938)

> 'There must be power, either that of governments, or that of anarchic adventurers. There must even be naked power so long as there are rebels against government, or even ordinary criminals. But if human life is to be, for the mass of mankind, anything better than a dull misery punctuated with moments of sharp horror, there must be as little naked power as possible'.

The convict transportation system which disfigured the early years of Australian history and settlement, subjected men in a horrifying way to the power of those who stood in authority over them.

The cruelties which are recorded in Barry's books are appalling; they were condoned and more than condoned by a society whose view of punishment was that propounded by the Reverend Sydney Smith in 1822 that prison should be 'a place of punishment, from which men recoil with horror—a place of real suffering, painful to the memory, terrible to the imagination . . . a place of sorrow and wailing which should be entered with horror and quitted with earnest resolution never to return to such misery; with that deep impression, in short, of the evil, which breaks out in perpetual warning and exhortation to others'. The convict settlement on Norfolk Island was hell on earth; Maconochie and Price as commandants had available to them unconfined power over the wretched and sometimes desperate convicts who were sent there. Price exercised that power most cruelly, whereas Maconochie set about putting into operation an enlightened programme of treatment of criminals based on the belief that the time a criminal spent in prison should be used to try to reform him by helping him to develop a sense of social responsibility. Maconochie believed, as he put it, that 'it should be the objective of a civilized and progressive society to confine the elements of vindictive retribution within the narrowest possible limits'. On Norfolk Island, Maconochie introduced the mark or task system by which the prisoner by good conduct and industry could redeem the number of marks charged against him. That is to say, he could by conduct and effort earn his release and redemption. That Maconochie failed in face of the prevailing beliefs is not surprising; as Barry says, in the context of Maconochie's later

dismissal from the Governorship of Birmingham Prison: 'reformation by elevating the moral nature of prisoners was (to his contemporaries) fantastic; punishment in their conception meant confinement, physical pain and the imposition of a degraded state.'

It is easy to see why Barry should have been moved to write *Maconochie.* It gave him the opportunity, as Colin Howard said in his excellent review, of the later book, *Price,* to use the life and achievements of a great practical humanitarian as a context in which to convey to the reader the importance of basic principles of enlightened penology. It also gave Barry the opportunity to redeem Maconochie not only from obscurity but also from what he regarded as most unjust treatment at the hands of other writers and historians.

Barry's concern with and interest in Maconochie is understandable, and his achievement in that book is considerable. It is an important book, though as I said earlier less successful as biography than as a history of a system and a statement of penological principles. Price is less important. It is interesting enough; it tells of a man who, as Colin Howard says, against stiff competition acquired an outstanding reputation for cruelty. Price is not the only cruel man who emerges from the pages of the book. Sir Redmond Barry's conduct of the trial of those charged with Price's murder, once again to quote Howard, was such that one can say only that John Price surely would have approved. The life of Price is used by Barry as a vehicle to show how the availability of virtually uncontrolled power to men over other men can give rise to appalling cruelty. Barry sets it out here—as in Maconochie—in dreadful detail.

Both books mark Barry as a substantial historical writer; both, though Maconochie to a much greater extent, establish him as an important contributor to the literature of criminology and to Australian history.

VI

Throughout his professional life, Barry wrote on themes concerned with the criminal law, criminology and penology. Two of his last major pieces of writing—apart from the two books I have discussed—were his very able and eloquent introduction to Morris and Howard, *Studies in Criminal Law* and the New Zealand lectures on *The Courts and Criminal Punishments.* We have reason to be grateful to the New Zealand Government for printing these undelivered lectures; they state in a balanced and mature way Barry's wise reflections on the problems of the criminal law and punishment. He warns us not to go too far; not to throw punishment overboard and not to give society over to 'the adjusters in the white coats'. His repudiation of the notion that decisions on punishment should be handed over to administrative officers and taken out of the hands of the judges is emphatic; he argues that the parole system which deals with punishment by co-operation between judges and experienced

administrative officers may represent a reasonable advance in an area in which, for all the words that have been written and spoken, we do not really know very much. He tells us that we do not know much about the element of deterrence in punishment, and that often retaliation masquerades in the guise of deterrence. In all these areas validated knowledge is hard to come by. He points out that one of the major problems with which we are faced is not that punishment is used as a mechanism of social control, but that the way in which the punishment awarded by the court is carried out is often unimaginative and is unnecessarily repressive. Even here it has to be remembered that many offenders are not the most hopeful material for moral and social regeneration and the emphasis on security—to prevent escape—and the community's reluctance to produce the money and staff to bring about dynamic penal reform are formidable barriers to progress.

These lectures are valuable because they reflect the wisdom of a man who worked, as an open minded judge and developed and administered a parole system over many years, and because they are the product of much experience, reading and thought.

They have a practical, balanced wisdom which commends them. They do not deny the significance of the human urge to inflict punishment for outrageous acts, they do not ignore the need to shut away for as long as necessary the dangerous offenders who have shown themselves beyond doubt to be a danger to society if they are left at large, and Barry reiterates that it must be the aim of an enlightened penology to send back to society as soon as is reasonably possible, the offenders who have responded to rehabilitative training and have shown they are not likely again to harm their fellow citizens.

Toward the end of his introduction to Morris and Howard's *Studies in Criminal Law,* Barry wrote with rare eloquence that

> "There is much evil in the world, and human beings are constantly guilty of wickedness which, always bringing in its wake unhappiness and suffering, is frequently appalling in its atrociousness. In a sense the criminal law is the final barrier against the triumph of evil. Even where the offence is less than homicide, a criminal case usually involves a calamity for the victim. But we should be careful not to allow the emotional surge of the retributive impulse to blind us to the reality that it is, too, a disaster for a defendant who is innocent, and a tragedy, in great or less degree, even for a guilty wrongdoer. The bad man may get satisfaction from his wretchedness but it is a warped and bitter satisfaction and it can hardly be doubted that were it possible he would wish to be other than he is. The agonising task of infusing a coercive process with the spirit of justice calls for great and unusual talents and a constant awareness of Micah's splendid admonition 'to do justly and to love mercy, and to walk humbly with thy God'."

The essay from which this passage is taken, as Lady Wootton justly says, is a remarkable contribution to the philosophy of the criminal law.

VII

I said at the beginning of all this that I knew Jack Barry for almost twenty years. I have talked and corresponded with others—for the most part, mutual friends—who knew him. What emerges from this, is a somewhat complex picture. Barry maintained a radical outlook and an ever fresh flow of ideas, yet he was conservative and abhorred the licence and the tumults of the permissive society. He was sceptical of human activities and prancings and posturings, and yet he was vain and took pleasure in the baubles his intellect would have questioned. That is not an uncommon failing and not a big one. He was a very kind man, ever ready with a note or a card to encourage and to stimulate, though he could be unpleasant and very irritating to a publisher who questioned copy or texts. A close friend wrote with much understanding "I miss Jack and his letters. By the standards I respect he was a great if sometimes growly man. He always argued, 'I have one last kick left in me'—his whole life was a kick for decency and humanity". A distinguished judge who knew him for many years and did not by any means share all his values said to me of him that he was a brave man, and that is surely right. He stood by his values; at the very end, stark as it must have appeared to him without the reassurance of orthodox faith, he went on reading and enquiring. Not long ago one—outside the law—who knew him wrote to me about him in these remarkable words—

> 'I must say that I found some of Barry's beliefs extreme and unacceptable, but at least they were extreme and unacceptable on the right side of the fence.
>
> He was vain but kind, pompous but kind, unreasonable where his amour-propre was concerned but kind—by which I mean that, as I knew the man anyway, kindliness was the driving and dominating force of his personality. Which makes him no little of a rarity.'

I say that he was a very considerable man, and many of us mourn his passing.