

Conversations with Emeritus Professor John Rason Spencer
Part 3: Scholarly Works

by
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This is an interview with the thirty-third entrant in the Eminent Scholars Archive. John Spencer was Lecturer and Professor in Law at Selwyn College from 1973 to 2013. He is Hon QC, CBE, and was Faculty Chairman 1995-97. The interview was recorded online from Professor Spencer's home in Norfolk.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are in **bold type**.
Professor Spencer's answers are in normal type.
Comments added by LD, [*in italics*]. Footnotes added by LD.

107. Professor Spencer, this is our third interview and today we'll talk about some of your published work. You've had a prodigious output and, in retrospect, I can see that your publishing history reflects the two main strands of research that we identified in your second interview, that is to say an initial phase of endeavour that dwelt on the law of evidence in criminal proceedings and specifically on issues relating to children. Then, around 1990 and your sabbatical in Paris, a second major stream of research developed, namely your interest in comparison between common law and various strands of civil law, i.e. European criminal proceedings and the law of fraud in the EU machinery.

Could we start with the major book written during your time as a university lecturer (1976 to 1991): that is your first edition of 'The Evidence of Children' with Rhona Flin³, now Professor Flin? This book appeared in the same year as the Faculty collection of papers from the Conference in Cambridge which I assume you organised with Rhona Flin in 1990, *Children's Evidence in Legal Proceedings – an International Perspective*⁴. I wonder if you could say something about how your book and this conference were related?

Yes. The conference came first and the idea of the book grew out of the conference. The conference papers should have been published well before the book and there was a firm of publishers that were going to publish it but, unfortunately, they resiled from it for no clear reason. We ended up publishing it as a DIY exercise and distributing it through the Faculty office as cheaply as we could. We sold a lot of copies that way. We spread the word but it was confusing because it appeared after the book instead of before it, as it should have been.

108. In the Preface you said that the book is to explain legal rules for the evidence of children for both lawyers and other disciplines and also it's designed for both English and Scottish lawyers. I wonder what convinced you that there was a need for such a

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⁴ Blackstone Press 362pp. 1st Edit



book?

There was much discussion about it in the media and among social workers, paediatricians, child psychiatrists and every other group of professionals connected with the welfare of children. I thought their growing interest, as well as the interest of lawyers, meant that there would be an interest in the book. There was indeed an interest in the book. Blackstone Press published it and sold a lot of copies.

109. You claim that the book highlights shortcomings in the then present law and hoped it would contribute to proposed changes to be taken in the next few months. That would have been in 1990 by the Pigot⁵ Home Office Advisory Group on Video Evidence and the Scottish Law Commission. Did it have any influence?

I think so. The conference influenced the Pigot Committee because the members of the Pigot Committee attended the conference. You can see from the report of the Pigot Committee how they were influenced by some of the things they heard there. I think the book may then have helped to make acceptable the ideas the Pigot Committee put forward.

110. Coming to the actual book itself. Chapters 1 and 2 were very interesting, introducing the subject, and chapter 3 was specifically on evidence. So just a few questions from chapter 3. Here you cite, on page 33, Judge Fallon⁶ QC proposed the radical suggestion that in the case of suspicious silence, if both parents remain silent both should be considered guilty. It seems you didn't think this was a good idea.

I thought then, and I still think that you shouldn't convict somebody simply on the basis of their refusal to answer questions. But if there's a body of evidence against them you should be able to take their failure to explain it into account together with the other evidence. The particular problem, when there are two people, either of whom might have done it on their own, is that you need some evidence actually pointing to the one other than the failure to answer. This was a problem which was eventually the subject of a study by the Law Commission and a report. The NSPCC was involved in it and there was a change in the law to attempt to deal specifically with the problem of the young child who was killed and one or other or both parents were involved. There was an important statutory change which created a special offence to cover this situation. The NSPCC held a conference in Cambridge took place about that issue, I'm now reminded.

111. On pages 37 to 43 I found the section on exclusionary rules very interesting. Some of the quotes from Bentham, page 38, and then 41 to 42, are very apt and, of course, amusing, like the one about a lawyer not living his family life in the same way as he did his business in the court. When in your career did you become an admirer of Jeremy Bentham?

When I fell under the influence of Glanville Williams, he pointed me in that direction.

112. In Chapter 14, the Conclusion, there are some proposals for reform. You mention that the UK was likely to sign the UN Rights of the Child Convention to put into effect the provisions, but that it would have to reform its law of evidence. Was the UK domestic law actually altered to accommodate the Treaty?

UK law was altered greatly in the years that followed the conference and the publication of the book but I'm afraid I don't know whether the changes were explicitly made

⁵ His Honour Thomas Herbert Pigot, (1931-2008), Common Serjeant City of London (1984-1990). Head, advisory committee on child evidence in 1988 - Pigot Report (1989)

⁶ His Honour Peter Fallon, (1931-2016), Circuit Judge (1979-96), Senior Circuit Judge, (1980-96)



with a view to complying with the Convention.

113. I looked at a review of your first edition by Katharine Grevling⁷, published in the *Criminal Law Review*⁸, and she said at page 655 of her review that it was, “A timely and welcome contribution. A useful introduction to the topic,” and she praises the emphasis on non-English speaking countries. She said you, “Identify that many assumptions on the treatment of children are unfounded and the trial process is badly suited to their needs as witnesses.” So you argued, Professor Spencer, that out of court statements should be admissible. How has this approach changed in the intervening 30 years?

In two ways. First the law on hearsay evidence was significantly reformed by the Criminal Justice Act of 2003, which made it easier for the courts to hear other people recount what a young child had said had happened. Secondly, a series of statutes in 1991 and 1999 permitted interviews with vulnerable witnesses to be recorded and played as evidence at the trial. Eventually this was extended further to enable even the cross-examination of a vulnerable witness to be conducted ahead of trial.

114. On page 656 she said that you argued that, “The evidence of a very young child is worth presenting,” but she cautioned that this “Ignores the danger of prejudice to the accused.” Did she have a valid point?

Yes, she did, but the point she makes is a reason for treating the evidence with caution, not for just shutting the eyes and the ears of the jury to it all together, which is what the law used to do.

115. Three years later, in 1993, you produced a second edition, also with Blackstone Press. In the meantime there had been the Criminal Justice Act of 1991, very soon after the Children Act of 1989. Presumably the second edition was to accommodate the changes therein?

Yes, that’s right, particularly to accommodate changes that had been made as a result of the Government’s partial acceptance of the Pigot Report and also some changes made to Scots law as a result of proposals by the Scottish Law Commission.

116. There are 362 pages in the first book and 463 in the second book, so there were 101 pages added to the second edition. I wonder if you could just briefly say some of the major changes that appeared in the second edition, which contains 15 chapters instead of 14.

Unfortunately my copy of the book is in Cambridge and I’m now in Norfolk. I haven’t looked at it for a long time and I’m sorry but I can’t remember, so I think I’ll have to pass on that one.

117. Chapter 13 introduced the idea of stress. Presumably this was to accommodate aspects that had been overlooked in the first edition. You illustrate the problems that children still faced, for example mothers not being allowed to be with the child. Could one not extend the concept of child witnesses being stressed to perhaps how the whole legal system could be improved to accommodate stress experienced by adults in criminal proceedings?

Yes. And to a large extent that has already happened. The Youth Justice and

⁷ Katharine D Grevling, LL.B. (Tasmania), MA, BCL, D.Phil. (Oxford), Associate Professor, Magdalen College, Brunel Uni (in 1997)

⁸ *Criminal Law Review*, 1991, Aug. 655-656



Criminal Evidence Act 1999 replaced the child-specific measures in the earlier legislation with equivalent and improved measures designed to protect vulnerable witnesses more generally, including adults. Bit by bit this has been implemented and the point that you make has indeed been taken account of.

118. Chapter 15 dealt with proposals, and on page 415 you said that what has happened is in part, “Vexing and frustrating,” and that the Government is like “a fussy child confronted with an elaborate dish his mother has laboured to prepare”. This is colourful language and the narrative is very effective and arresting, Professor Spencer. It’s also unconventional. What made you write in this manner?

I’d forgotten that I said that till you reminded me! But I do remember I was very irritated with the failure, as I saw it, of the Government or its legal advisers to put forward changes in the law that were straightforward and written in comprehensible language. I’m glad to say that a few years afterwards there were some further changes in the Youth Justice and Criminal Evidence Act 1999 which did rectify some of the worst deficiencies in the statutes I expressed anger about in the second edition.

119. You comment (page 414) that Parliament did not pass an essential part of the Pigot Committee’s scheme which was to make it possible for the whole of a child’s evidence to be taken in advance of trial, apparently on the insistence of the Home Office. Consequently, England still insists on a child undergoing a live cross-examination in contrast to Scotland. What do you think the basic reason was that Parliament balked at this kind of change?

A genuine fear was that after the initial out-of-court cross-examination, further evidence would come to light which the defence would need to put to the child in cross-examination, so the child would then need a second cross-examination actually at the trial. The position of the child would be worse than before, because the child would have two cross-examinations instead of one; one before the trial and one at it.

This was all tied up with the existing rules about disclosure of evidence by the prosecution. We thought, I and others, that the problems could be circumvented if there was some firm management of these cases at an early stage to ensure that all the relevant evidence was disclosed to the defence in time for them to put it to the child in an out-of-court cross-examination. A few years later, in 2011, I organised with another psychologist, Michael Lamb⁹, this time a psychologist in Cambridge, where we brought together, once again, people from different parts of the world to tell us about how they had introduced pre-trial cross-examination for child witnesses and how it had actually worked and didn’t cause the problems that people here were worried about. I think that conference was influential because a fairly short time after the Government made a Commencement Order bringing into force s.28 of the Youth Justice and Criminal Evidence Act 1999 which permitted this, and which had been lying in the corner unimplemented since 1999. It was a change of opinion among judges, I believe, that helped the Government to nerve itself actually to bring the provision into force.

120. I found two reviews of the 1993 2nd Edition. The first was by Professor Jenny

⁹ Michael E. Lamb, Emeritus Professor Department of Social and Developmental Psychology, University of Cambridge. Born Zambia, University of Natal (1972), Yale University (PhD, The relationships between infants and their mothers and fathers, 1976)



McEwan¹⁰ then at Keele University. On page 620 of her review in *Criminal Law Review*¹¹, she praised your book for its thoroughness of coverage. She said it was highly readable in its informal style; historical analysis and tendency to venture into lively digressions. Also the seamless way the legal and the psychological material was fitted together. This must have been very satisfying to you, Professor Spencer. How did you manage to achieve the last item?

By continuously discussing with Rhona Flin the legal aspects when I was writing the legal chapters and by her continuously discussing with me the psychological aspects when she was writing the psychological chapters. It was all before email and so forth, so it had to be done by writing a hard copy letter and posting it or by conversations on the phone; but it was our aim to try and tell a tale which took account of both points of view at once.

121. As you say, quite a feat given that there was no email in those days. I hadn't even thought of that.

Well, life was more complicated then, but you took it for granted and worked around it.

122. You dealt well with the criticisms of the new, i.e. post-1991, video tape interview provisions except that Professor Jenny McEwan felt that you were too optimistic that victims will receive counselling post-interview. Do you have any reports as to whether this was in fact a fair comment?

I'm afraid I don't. I can't really help on that.

123. A second review was by Roger Leng¹², who is now at Warwick, previously at Birmingham, and in his *Civil Justice Quarterly Review*¹³ he wrote that the first function of the law of evidence is to limit the court's scrutiny to relevant issues. He makes no mention of getting at the truth. Do you agree with him, Professor Spencer?

I do, yes. You don't get to the truth unless you can limit the discussion to what is relevant to the truth. I'd be at one with Roger Leng about that.

124. A propos the book, he said that it failed to disclose in the title that it's a campaigning book and said that it has a reformist mission. Do you look upon yourself as a campaigner for such a mission?

Absolutely. I'd become the tame lawyer of a group of people in disciplines to do with the welfare of children who thought the law was very bad. They were pleased to find a lawyer who agreed with them and was prepared to articulate their criticisms of the law in a way which lawyers could understand and make sense of. Yes, it was certainly meant to be a campaigning book and one of the reasons why there were no further editions after the second was that many of the changes we campaigned for in the first two editions had actually happened. So a different book would then have been required and the original book had done its job.

125. He concluded his review by saying that despite the serious topic it's an enjoyable

¹⁰ Jenny McEwan, Lecturer Manchester University (1975-1987), Professor of Criminal Law Keele,(1987-99) Professor of Criminal Law Exeter Law School (1999-?)

¹¹ *Criminal Law Review*, 1991, Aug. 655-656

¹² Roger Leng, Professor of Law, Warwick, sometime Lecturer University of Birmingham, Consultant to the Law Reform Commission of Canada and the Royal Commission on Criminal Justice

¹³ *Civil Justice Quarterly Review*, 1991, 10 (Oct) 367-368



read due to, I quote, “The clarity and the power of your arguments.”

Well, that’s very kind of him.

126. Just as a final comment. There hasn’t been a third edition and I didn’t have a chance to look at your 2012 book, edited with Michael Lamb, ‘*Children and Cross-Examination*’ published by Hart, which I assume contains articles that deal with some new issues. Could you summarise any areas that have improved since 1993?

Yes. The 2012 book was essentially the papers at the conference in 2011 that I had organised with Michael Lamb specifically to attempt to answer the objections to pre-trial cross-examinations of vulnerable witnesses. As I mentioned earlier, the law was changed to permit this by s.28 of the Youth Justice and Criminal Evidence Act 1999, which after the conference was belatedly brought into force. So, yes, there were big changes in consequence.

127. Thank you. That brings us to your second book, Professor Spencer, which was your 2002 “*European Criminal Procedures*”¹⁴ published by CUP and co-edited with Professor Delmas-Marty¹⁵. You mention that this is an English version, not just a translation of a 1995 French volume, and the result of a study group that met regularly between 1990 and 1994. So it was quite an effort and I wonder if you could summarise the background and the circumstances of its writing.

Yes. Mireille Delmas-Marty was a very dynamic French law professor with a reformist agenda and immensely energetic. Her nickname among the French was *la locomotive*, the driving force. She set up a European Study Group, because she was interested in finding out more about how criminal procedure and evidence worked in countries other than France and I was made a member of this group. The French version of the book grew out of the meetings of this group. Either she or I or both of us then had the idea of publishing a version of it in English. There had already appeared translations of the book into Italian and into Spanish. I thought an English version of it needed more than a straight translation; it needed a lot more explanation to begin with, and I wrote a long introduction to the English language version which did, indeed, involve a lot of effort. I also either translated or supervised the translation of the chapters that were originally written in French. Since time elapsed since the original French edition they all had to be updated. So it was a work which occupied much of my time and energy over several years. [LMD *see comments at the end, Q177-78*].

128. It had 13 chapters, five on national systems. You wrote the English chapter that was 76 pages and the second part deals with specific areas where you wrote the evidence chapter. So, in total there were 203 pages from 717 from you, Professor Spencer, in other words over a quarter of the book written by yourself.

It’s a long time since I’ve looked at that book too, but I think you’re right. Much of it was, material that I myself had written.

129. The Introduction, from page 1 to 13, is very informative and has an entertaining section on the history of criminal justice in Europe and the UK. On pages 25 to 26, I

¹⁴ M Delmas-Marty & Spencer J R (Eds). *European Criminal Procedures*. CUP. 775pp

¹⁵ Mireille Delmas-Marty (b. 1941-). Professor, Collège de France Paris, Member of the Academy of Moral and Political Sciences; Coordinator Committee of Experts, EU project "Corpus Juris"; Chairman, Supervisory Committee, European Anti-Fraud Office. CV: Law Faculty of Paris (1967-1970), universities of Lille-II (1970-1977), Paris-XI (1977-1990) and Paris-I (1990-2002). Member of the Institut Universitaire de France (1992-2002)



was interested in your general point that courts on the continent are active in seeking the truth, whereas English courts are passive and merely judging the evidence placed before it. If this is a true representation of your view, then on face value at least, English justice could be based largely on contingency - whatever evidence the prosecution managed to dig up. Is this true, would you say?

Unfortunately it is. A frequent complaint about criminal proceedings in England is that sometimes very guilty people are prosecuted for, or convicted of, only a part of their misdeeds. A further criticism is sometimes that courts reach conclusions on guilt without the whole story being put before them. The idea of giving the court a positive duty to attempt to seek the truth means that the court can be active in encouraging the production of further evidence on points that it considers to be important.

130. On page 28, is it still the case that the guilty plea is unknown on the continent, such that there are no plea bargains and reduced sentences except perhaps in Italy from 1988?

That's no longer true. Certainly France has now introduced its own version of guilty pleas. It may be that other countries have as well. It's the pressure of business that requires a short-cut to enable the courts to get through the work.

131. On page 37 you pose the theory that with the European Convention we were, or are, moving towards a common approach and, on page 38, you mention especially Articles 5 and 6, which deal specifically with criminal matters. Do you see this being continued with Brexit?

It's difficult to say. We know that the most fervent Brexiteers have an agenda for a Brexit 2: following the "liberation" of our legal system from the Luxembourg court system they would like the "liberation" of our legal system from Strasbourg, which probably carries with it condemnation of the European Convention on Human Rights. This has been seriously put forward. Before the Brexit referendum Theresa May¹⁶, at that point Home Secretary, made a public speech saying that she liked the European Union because of all the repressive measures in criminal justice that it had, but saw little sense in the European Convention on Human Rights.

For the moment it's unlikely that even the present Brexit-minded Government and Parliament will go down that route because the criminal justice cooperation divisions of the Trade and Cooperation Agreement are specifically made contingent on the UK's continuing to adhere to the European Convention on Human Rights. So I don't think, for the moment, the influence of Strasbourg and the European Court of Human Rights is going to disappear.

132. You wrote the chapter on the English system, and on page 42 summarised the essential differences with the continental system. You said that ours has, I quote, "Evolved bit by bit over the course of the centuries without ever being consciously planned," whereas all the others, I quote again, "Originate from some conscious decision to create a new structure conceived by its architects as something complete in itself." I wonder if you could comment on that, Professor Spencer?

Yes. When France acquired a criminal procedure code and a code of criminal law, it was downstream of the French Revolution. All sorts of changes were introduced experimentally, some of which had worked and some of which had not. There was a feeling that with the new order the rules needed to be written down. If you look at the history of

¹⁶ Theresa Mary, Lady, May, (b. 1956-). UK Prime Minister (2016-19), Home Secretary (2010-16)



codification of criminal procedure in other countries, the important codifications usually come downstream of some major political event. So the German code of criminal procedure was a construction for the unified Germany after German unification following the Franco-Prussian war, and so on. We haven't had an equivalent event in this country and hence we've just patched and mended and changed individual things, often without really noticing that we have changed them.

133. Mention is made on pages 142-43 of the 2002 Royal Commission under Sir Robin Auld¹⁷. This was a comprehensive enquiry, the Review of Criminal Courts of England and Wales, where he made 328 recommendations for the Labour Government under Tony Blair¹⁸. You mentioned the Auld Review in your second interview. I wonder whether the report failed to consider any points that you'd like to have seen addressed.

The report considered all the points that I thought needed to be addressed. Unfortunately the Government did not then accept all Sir Robin Auld's recommendations. It just cherry picked the ones it found attractive and it forgot the others. I think that's a shame. (By the way, it wasn't a Royal Commission. It was conducted at the request of the Lord Chancellor, the Home Secretary and the Attorney-General.)

134. You also wrote the evidence chapter, chapter 11. The topic that caught my eye was a propos bad character and the court or the jury not being told of previous convictions. On the issue of considering all the evidence, the German method is to allow hearsay but to handle it with caution. This was page 619. I wonder if you could comment upon that.

Yes. There were two parts in your question there and I'll deal with the second one, which is about hearsay and the German approach to hearsay.

The approach of English law to hearsay evidence has been to just exclude it all together, even if it's relevant, but then to make specific exceptions. The scheme of exceptions got more and more complicated and eventually the Law Commission looked at it – I was initially a consultant to the Law Commission study on it – and it produced a new scheme which was more or less accepted by the Government some years later and is the present statutory basis for the law on hearsay.

I thought, and a number of senior judges thought, that it was a mistake to attempt to codify our existing system of exceptions. We thought it was a much better idea to allow, in principle, hearsay evidence to be admitted, but to impose on the court a duty to seek the original source of the evidence, if available, which is essentially the German system. The German system also has a safeguard in that there are inhibitions on actually convicting people on hearsay evidence without some corroboration from other sources. Sir Robin Auld was taken by that approach and essentially that's what he advocated in the Auld Review, to which I was one of the consultants, as I expect you know. Unfortunately, the Government, in the end, listened to the Law Commission instead of to Sir Robin Auld. It made a few token gestures towards what Robin Auld had recommended. I remember one writer on evidence described the Criminal Justice Act 2003 provisions on hearsay as "serving up the Law Commission's traditional dish with a dose of Auld sauce on the top."

135. What flows from this, as you point out, Professor Spencer, is that if the accused retains a clean criminal record by such means, his defence always makes a great play on his apparent good character to get off the next charge. I wonder how the legal system

¹⁷ Sir Robin Ernest Auld, (1937-) Lord Justice of Appeal, England and Wales (1995-2007)

¹⁸ Anthony Charles Lynton Blair (b. 1953-), UK (1997-2007)



can justify this paradox?

Yes. We've moved on now from hearsay to bad character evidence. It certainly used to be the case that defence lawyers would adopt this tactic. The Criminal Justice Act 2003 actually makes evidence of previous convictions and other bad character by defendants much more readily admissible than it did, so you get more cases than you did in the past where the defendant's bad character is put in evidence. Should the defence be able to make a huge song and dance about the defendant's good character when, actually, it simply means he hasn't any criminal convictions? I doubt it. I can see the virtue in allowing the defence to make use of evidence of positive good character by the defendant, but it seems to me it's not highly relevant that he's simply avoided criminal convictions in the past. The cleverest of criminals do manage to avoid convictions for a long time and it's the stupid ones who get convicted, of course.

136. On the subject of whose job it is to look for pre-trial evidence in the English system, the judge is passive and you've mentioned the proposition of a Public Defender who's charged with conducting the defence, as you have in the United States and some Australian¹⁹ courts. Have there been any recent moves in this direction here?

Not very recent. A very limited Public Defender service was set up experimentally back in 2001 and it still exists, but on a very small scale in a few cases.

To deal with the particular problem about the search for pre-trial evidence, it used to be a serious problem that traditionally it was up to the prosecution to look for evidence of guilt and the defence had to look for evidence of innocence. The prosecution had to dig up evidence of guilt, and the defence had to dig up evidence of innocence, but in practical terms it's only the prosecution and the police who have any spades. Only the prosecution had access to legal powers to search for evidence and very often only the police and the prosecution had the financial resources to do it.

In the years that I've been involved in criminal justice there's been a major change by the courts deciding that the prosecution have a duty to disclose to the defence everything they've found out, not merely the pieces of information that favour the prosecution case. There's a big law of disclosure now: all created downstream of revelations of some of the worst miscarriages of justice stemming from the situation where the police and the prosecution had evidence pointing to innocence, but basically failed to share it and suppressed it. It is theoretically the case in our system that the court does have a power to call witnesses that neither side have called and there are cases saying that court should exercise this power if they think some key piece of evidence of use to the defence has not been brought before the court, but it's rarely used. And it doesn't seem to be on anyone's current agenda to equip the court with any power positively to look for evidence.

137. Eighteen years on from this book, would you say that there has been any noteworthy coming together?

In the opening chapter of the book I describe how, over the centuries, the continental systems have borrowed key ideas from the common law, and how the common law has, consciously or otherwise, adopted similar solutions to many adopted in continental Europe. Has this process continued beyond 2002 when the English version of this book appeared? To some small extent, in as much as parts of continental Europe have moved towards having guilty pleas, which they used not to have, and in this country, with relaxation of the rules banning hearsay evidence and relaxation of the rules banning evidence of bad character,

¹⁹ Victoria, NSW, Queensland



which are now much more readily admissible in evidence than they were, all of which makes our system a bit more like the way they do things in continental Europe. So the answer to your question is yes, to some extent.

138. Then, finally, as an aside on criminality, this is a fairly important, topical issue, do you believe, Professor Spencer, that not paying the BBC tax licence fee is worthy of being a criminal offence?

I don't think so. I think it's a bad thing for the criminal justice system to be used for, in effect, the enforcement of debt. Remember that there were scandals when Charles Dickens wrote about debtors' prisons and, in effect, criminal sanctions being used to enforce the payment of civil debts. We have the same issue, it seems to me, though on a smaller and less scandalous scale, with things like failing to pay TV licences being a criminal offence. Not an appropriate use for the criminal courts, I think.

139. I looked at two reviews of your book. The review by Michael Bohlander²⁰ in the *European Law Review*²¹ was very praising, particularly of the perceptive introductory chapter which he said gave a valuable overview of the main differences of the various systems as well as their histories. But a more forensic review was provided by Joëlle Godard²² and she, in the *Edinburgh Law Review*²³, praised the book's detailed index which made it easy to read and said that it is an excellent and useful book. On page 487 she comments that reforms of criminal procedure over the EU are gathering pace, encouraged by increased crime and terrorism, this was in 2005. My question is, did the increase in crime continue and lead to further reforms on the European scale?

Happily, we're in a time when crime is not rising at the speed it used to rise. However, increased crime and fears of terrorism and fears of crime have certainly led to Europe-wide changes in some aspects of the law. Some were at the insistence of the European Union, introducing measures requiring member states to deal with a certain level of severity with certain kinds of thing, like bribery and, obviously, terrorism. Also by Europe-wide measures making it easier for the different Member States' criminal justice systems to collaborate with one another in catching transborder crime or crimes where somebody has fled across a national border to escape justice. So, yes, the increase in crime and certainly the fear of crime has indeed led to further changes.

140. On page 490 she points to your mentions of proceedings taking years on the continent, in contrast to things being rushed here and then being overturned on appeal. She says this is a serious defect in England re the pre-trial process. She suggests that features of the inquisitorial method need to be introduced into English law. Do you agree with that, Professor Spencer?

Yes. Our worst miscarriages of justice typically stem from inadequate pre-trial procedures and cases coming to court on the basis of incomplete evidence. I think we have improved the position a lot, thanks to the Police and Criminal Evidence Act 1984 creating firm rules about how certain offences can be investigated and codifying the powers of the

²⁰ Michael Bohlander, Professor of Law, Durham (2004-)

²¹ 2006, 31(4); 592-593

²² Joëlle Godard, (1956-2008). Lecturer in Comparative criminal procedure, and French comparative law, University of Edinburgh; Former president of the Franco-British Lawyers Society in Scotland. Born to French settlers in Algeria. There was a Joëlle Godard Memorial Lecture in her honour (2013) given by EU Advocate General Eleanor Sharpston QC "Making the Court of Justice of the European Union More Productive"

²³ 2005, 9(3) 487-491



police. I think we have been further helped by the courts elaborating a law on disclosure and obligations of the prosecution to share with the defence the information they have discovered and, on a more limited scale, obligations on the defence to give advance notice to the prosecution of the evidence that they have too. So I think our system has moved more in the direction of the continental system over many years. If you look at the first edition of *Archbold Criminal Pleading and Practice*²⁴ you will see it jumps right in, basically, at the build-up to the trial. If you look at serious criminal procedure books now, you'll find there are sections and sections about what's supposed to happen between the investigation and finally sending the case for trial. We are much more thorough now in this country in the preparation of at least the most serious cases for trial. We still have a problem in setting aside convictions which were factually unreliable. I think the position has been much improved by the creation of the Criminal Cases Review Commission in the mid-1990s, but we still have, basically, a very ungenerous system of appeals compared with the Continental countries.

140 (a) I'm so pleased to have had this opportunity to have looked at your work, which I otherwise wouldn't have done, to be truthful. I've enjoyed and been hugely interested in particularly your European criminal procedures book. The introductory chapters were absolutely riveting and I'm only sorry that it's not possible to acquire a copy because it's out of print and it costs hundreds of pounds. I think when I had a look, it was about six or seven, or maybe more, hundred pounds and just not available. I'm going to make a photocopy of the first chapter when I get back to the library.

I had a bad experience with Cambridge University Press with that book. When they agreed to publish it they sent me a questionnaire about the likely market and how it should be published. In my reply I told them that the original French edition was in paperback and sold at the equivalent of £20, and likewise the Italian edition, which had gone through two editions. Thinking that far more people would want to read an English language version I advised CUP to publish it in paperback and sell it cheaply.

Ignoring that, they then published it in hardback only; and having advertised it at £75, the price-tag when it finally "hit the shelves" was £100! I made a fuss and when, contrary to what they seem to have expected, the hard copies sold out quickly they did produce a paperback. That was also expensive compared with other soft-back books, but despite that it quickly sold out too. After which the book was out of print, and has remained so ever after.

The University Press, I fear, tends to assume that authors will feel so honoured to have them publish their book that they will be indifferent to whether anyone will ever read it. So to save themselves the trouble of marketing a book seriously they print a few in hardback only, which are sold at exorbitant prices to few the libraries able to afford them: a process which brings in sufficient revenue to cover the costs of publication. So if a writer wants to spread the word about something, they should avoid the University Press and go to a less exalted publisher who is hoping to extend its reputation by marketing its author's books. That's why, many years ago, I went to Blackstone Press with *The Evidence of Children*.

141. Thank you. The third book I looked at is your *Evidence of Bad Character*²⁵ published in 2006 by Hart. In the Preface, page five, you say that the Judicial Studies Board organised some seminars to familiarise people into what the Criminal Justice Act of 2003 entailed. This book springs from the notes that you made for these seminars.

²⁴ First published 1822

²⁵ 2006 Hart, 254pp



What were the circumstances of your selection for this board?

I don't know for sure, but I had been lecturing for the Judicial Studies Board on and off for many years on various different topics. So I was somebody that they knew and I think they turned to me for that reason and also because I was known as a writer about criminal justice matters.

142. I noticed that Dr Roderick Munday²⁶ also participated in these seminars. Did you collaborate with him?

They needed extra hands in order to train all the judges over a short period and they asked me to suggest somebody else who could do some of the work. I suggested him as a colleague and a friend who would do a good job for them, as I believe he did.

143. Thank you. On page seven of the Preface, you described how the Labour Government under Tony Blair brought the bad character part of the Act into operation in December 2004, before initially intended, which was April 2005. As a result judges had to handle cases before you had time to give your course. I wondered why this was done?

As far as we can see it was simply in the hope of getting a favourable headline in the right-wing newspapers, "Government tough on crime." Irresponsible.

144. Page seven, describes that relaxing the bad character rule was, and I quote, "Done to increase the proportion of convictions." Is that your surmise, or was that a stated policy which succeeded?

Everybody assumes that that was the motivating factor. There's no clear statistical evidence that it did actually increase the number of convictions, though I suspect it has in certain types of case. I can certainly think of individual cases in which it was obviously much more likely the defendant would be convicted given that the trial court had knowledge of the defendant's convictions for similar offences, which it would not have had previously.

145. Also on page seven you listed the apocalyptic predictions this was supposed to produce, the "reign of terror". Although you favoured the provisions, did you, in reality, have any such qualms and did any of these come true?

I didn't have any such qualms and I think I was right not to have them because the terrifying prospect predicted, particularly by some legal speakers in the House of Lords, didn't happen. I think the reason that it didn't happen is mainly that the judges glossed the statutory provisions by inventing a rule that bad character evidence should not be adduced to bolster a weak case; it should only be used where there was a body of solid evidence pointing the finger of guilt to the defendant. The Government, and Parliament, failed to put a provision to that effect into the Act, but the first important judgment in the Court of Appeal invented this qualification. I had suggested that in the notes I wrote, and I suggested it in the bad character evidence book. But I can't claim the idea is completely original because I remember reading it as a suggestion in an article by Professor Bill Elliott²⁷ many years before on the subject of bad character evidence.

146. In the Introduction on page 18, I was interested in your comment that said there was, in fact, enough leeway in the wording of the new bill to allow the old law to be

²⁶ Roderick Munday, Reader in Law, Fellow & College Director of Studies in Law, Peterhouse

²⁷ Professor Derek William (Bill) Elliott, 1924-2004, Professor of Law at Newcastle



applied much as before and bar any bad character evidence that would have been barred in the past. You argued that this is the wrong way to look at things because Parliament meant to change the law and the courts have a constitutional duty to respect the legislators' will. One agrees with you here, but to pick up on this point, which has wider constitutional implications, is it always so obvious what the legislators' wishes are? Is it the court's or Parliament's role to sharpen the blurred edges around true intent?

That's a difficult question. When legislation is ambiguous what really was the intention of Parliament? Different members of Parliament will have voted for it with different understandings about what it was meant to achieve. Where there's a Government statement made when the legislation is introduced, explaining what it was meant to do, then I think the courts should surely assume that Parliament voted the legislation through with that in mind and try to interpret the legislation to achieve that effect.

147. On page 98 and a propos applying the provisions in a practical sense, I notice that you mention that police forces and courts in various areas keep their own records, and you muse about checking up on defendants' pasts. "How is somebody under investigation in Cambridge to be tagged with a conviction in Carlisle, a caution in Cardiff, or a police investigation in Canterbury that led to trial and acquittal?" You say that the police national computer has certain types of information on it, but that other factors weren't logged. Have things improved since you wrote that, or is it still hit and miss?

Things have very much improved. The scandal about the Soham murders²⁸ back in 2002 led to an important inquiry, the Bichard Inquiry²⁹, as a result of which there were important reforms to the way that police keep and their willingness to share with other police forces information about criminal offences. So, happily, things have improved since I wrote the first edition of that book.

148. Now just some specific questions from a fellow expert in the field, Professor Peter Mirfield³⁰, Emeritus Professor of Evidence at Jesus College, Oxford. In the *Law Quarterly Review*³¹, his review on page 328 says that he expects practitioners and judges will welcome the book as a useful support and academics will have ample food for thought. He said the book was well constructed, thought provoking and clearly expressed and he liked the style, but I suspect that you and Professor Mirfield have fundamental differences on the issue of revelation of bad character data in evidence. I wonder whether you and he have clashed over the years in friendly academic jousts.

I know that Peter Mirfield and I have a different philosophical approach to the law of evidence and he's much more traditional in his approach than I am, but I don't think we have

²⁸ See https://en.wikipedia.org/wiki/Soham_murders

²⁹ Michael George Bichard, Baron Bichard, KCB, (b.1947-), Director of the Institute for Government, Chaired inquiry into the "Soham murders" (2004). The key features were: A registration scheme for all wishing to work with children or vulnerable people; Introduction of a national police intelligence system for England and Wales; Clear code of practice for all police forces for record keeping and sharing data; Training for head teachers and governors on how to interview, ensuring that people are employed according to safeguarding rules; Guidance for Social Services on when they should refer cases involving under-age sex to the police; Introduction of Disclosure and Barring Service (DBS) checks

³⁰ Peter Mirfield, Professor Law of Evidence (2014-17), Sir David Lewis Fellow and Tutor in Law, Jesus College Oxford: Lecturer, Leeds (1976-81). Visiting Professor, Santa Clara University, 1997, 2000, 2006, 2010, 2012

³¹ *LQR*, 2007, 123(April), 325-328



clashed really. I think we know where we stand and we get on perfectly well as human beings, so I think a friendly agreement to differ is the best way to describe it.

149. As a general observation, how have things evolved on the presentation of evidence of bad character since you wrote this book? I wonder if you could sum up the state of play in 2021, bearing in mind your 2016 third edition.

I think the law has settled down. All the key doubts arising from the obscurer passages of text in the relevant provisions of the 2003 Act have been dealt with by the courts and the answers the courts decided are sensible ones and they're known to the legal professionals. So they know what the rules are. I think also the big fears that many members of the Criminal Bar genuinely had when the legislation was introduced have been dispelled quite largely as a result of the courts deciding that evidence of bad character must not be admitted in the case where the rest of the evidence is weak. So I think, broadly speaking, everybody now knows what the rules are and most people accept that the current set of rules is sensible rather than outrageous.

150. That brings us to the next book in chronological order and that is your "*Hearsay Evidence in Criminal Proceedings*"³², also published by Hart, in 2008. In format and style it's a companion volume to your 2006 book on bad character, and it was the last book before you retired in 2013. You state in the Preface, page five, that your involvement started in 1994 with your being made a consultant to the Law Commission on their consideration of the hearsay rules. How did this involvement come about?

I suppose, as with my involvement with the Auld Review, I was known as a writer and a lecturer on criminal procedure and criminal evidence matters and they thought I would be useful.

I'm afraid I parted company with them quite early because I found myself in profound disagreement with the approach that I knew the relevant Law Commissioner wanted to take. He was somebody with whom I got on personally well, but his view of the way the law should go and mine were so different that we simply couldn't usefully continue to collaborate. So I did a lot of research for the Law Commission initially but I didn't have any part in formulating their proposals for reform.

151. Your place was taken by Professor Birch³³ from Nottingham.

Yes, that's right.

152. You say that courts can make exceptions to the exclusionary rules if, and I quote, "The interests of justice so require." What form could these interests take?

Well, in brief, where the evidence is clearly relevant to a disputed issue in the case and there is no particular reason to doubt the veracity of that evidence. There's a provision in the Criminal Justice Act 2003, often known as the safety valve, in Section 114(1)(d) which gives the court an overriding power to admit hearsay evidence that would not be admissible under the complicated scheme which is now set out in the other provisions of the Act on hearsay. The interests of justice are spelt out in Section 114(2), the list of factors the court has to weigh up, and it's a useful and sensible list of factors. Many people have said, "Why do we need all the complicated apparatus of rigid rules if the court has an overriding discretion to admit hearsay evidence when the interests of justice require it and the statute

³² *Hearsay Evidence in Criminal Proceedings*, 2008, Hart, 341pp

³³ Diane Birch, OBE, JC Smith Professor of Law, Faculty of Social Sciences, University Nottingham



spells out what those interests are? Couldn't we just dispense with the rest of it?" I've had law students ask me that question and I think they have a point.

153. We come then to the Introduction, which is substantial, nearly 40 pages. On page nine, item 1.22, on the general point a propos the danger of hearsay, it is said that the veracity of oral evidence is guarded by the oath, cross-examination and demeanour of witnesses. I wondered whether the court genuinely believes that the oath means anything these days?

Historically if people took an oath they were making a conditional self-curse upon themselves; they were inviting God to send them to hell if they didn't tell the truth. When people really believed that the oath would have that consequence, that made many of them very carefully. Few people, even the religiously devout, would believe that that mechanism works today. But I think taking the oath does have the effect of reminding people that if they tell lies, from that point onwards it's a criminal offence and they can be prosecuted, as they sometimes can be, when of course other people who lie, like politicians, can't generally be.

154. On page 21 you imply that Glanville Williams³⁴ was a "Bentham man"³⁵ re hearsay evidence. I wonder whether his teachings influenced your thinking on this matter?

Well, certainly. His and Bentham's influence most certainly made me think that we ought to generally admit hearsay evidence when we haven't got anything better.

155. Professor Spencer, the *Myers*³⁶ case, which is mentioned on page 26, was a tipping point. Hearsay evidence from engine constructors was deemed inadmissible despite being perfectly sensible because individual engine makers couldn't possibly be witnesses. Presumably, if they had persisted with this attitude, all computer data would now be inadmissible?

Yes. If the data in the computer was information that had been fed into it by human beings who couldn't be identified then it couldn't be used if *Myers* still represented the law; happily it doesn't.

156. Coming then to the Conclusions in your book. On pages 34 to 37, where you gave a provisional assessment of the reforms, at the bottom of page 35 and page 36 you had two criticisms of the old law that were not addressed in the new Act. Firstly, the law is arbitrary and, secondly, it makes it hard for witnesses to give their evidence. Re the second criticism, where you counter the Law Commission saying that any sensible judge would let a witness do this or that, with "[but] not all judges or magistrates are sensible and much less some advocates." I wonder if you could enlarge upon that?

What I meant to say is that it's no justification for a bad legal rule that a good judge or magistrate will disregard it if they don't like it. It's much more sensible to have a good legal rule which they can follow. You can't expect an advocate for one or other side to agree to waive the benefit of a bad rule if the bad rule favours the side that he or she is paid to represent.

157. You followed this with the comment that, "It's not a good law if a sensible judge has to bend the law to allow it to function properly". How has this worked out over 12

³⁴ Glanville Llewelyn Williams (1911-97). Quain Professor of Jurisprudence at University College London (1945-55), Rouse Ball Professor of English Law, Cambridge (1968-78)

³⁵ Jeremy Bentham (1748-1832), Legal and moral philosopher

³⁶ *Myers v DPP* [1965] AC 1001, [1964] 2 All ER 881, [1964] 3 WLR 145 England and Wales



years?

Well, to some extent the Act has improved the position because it's given the judge this overriding power to admit what is technically hearsay evidence, even though it doesn't go through any of the specific provisions making the evidence formally admissible. This does give the courts some flexibility they previously didn't have. It allows a witness to tell the whole story in the course of which they incidentally mention matters which the witness has been told by other people. So some slight improvement, I guess.

158. I read one review by Thomas Worthen³⁷, who had been at Lincoln College, Oxford, and on page 128 to 129 of the *Criminal Law Review*³⁸ he writes that he was very impressed with your book. He found it, and I quote, "Insightful and thought provoking." He said the text was clear and well organised and contains penetrating comments. He says it is a fine piece of scholarship and that you have deep knowledge of the law; it is thoroughly recommended. I imagine you must have found these comments satisfying, Professor Spencer?

Well, I would if I'd read them at the time. In fact, I was unaware of that review till you just put it to me!

159. He criticised your provisional assessment, on page 38, that the Act is a good deal better than it was and he asks why you were keen to appear fair in your opening chapter. Do you think, in retrospect, he was vindicated in this comment?

I wrote the book for use by practitioners and judges to try and explain the law to them and enable them to make it work. If I had started off by saying, "This statutory reform is terrible and I wish we didn't have it," that would obviously have discouraged people from attempting to make it work. Also, although I disagreed with the people in the Law Commission who formulated the reform, I did respect them, and did not wish to offend them needlessly.

160. Unlike Professor Mirfield with the bad character book, who said that he didn't find them useful, Thomas Worthen liked your inclusion of various appendices. As an early career lawyer taking his first tentative steps, he found them very helpful, even suggesting they might encourage students to read a few cases. This implies that students were or are not inclined to do so. Was that your experience as well, Professor Spencer?

Sometimes it's difficult to persuade students to read cases. It takes time to read cases and it's always simpler to read the half sentence about the case in a text book than actually to look at the case and see what the court decided. The problem for students is one of time; there are so many reported cases. We've moved into a new era with the internet and the availability of perhaps ten times as much case law compared with how it was when I started, when the only cases that you ever heard about were the ones that made it into the printed series of reports. We're overwhelmed by them and, of course, our poor students still only have the same number of hours in a day. So it's a problem. In criminal justice things are perhaps a little easier than they are in civil justice because our Court of Appeal is so pressed for time. So it usually has to be concise in what it says and it doesn't luxuriate like the Supreme Court, which does not operate under the same pressure of time.

³⁷ Thomas (Tom) Worthen, (b.? - 2019), Lincoln College Cambridge, Pallant Chambers

³⁸ *Crim Law Rev* 2009, 2, 128-129



161. Thank you. Just a few points about the edited volume, the 2019 “*Criminal Law: Theory and Doctrine*” with G R Sullivan, A P Simester, S Stark, and G J Virgo, published by Hart in its 7th edition. How did you first become involved with revising this Simester/Sullivan book? You began your involvement in 2010 with the 4th edition.

I can’t claim any credit for the concept of that book; it was the brainchild of Andrew Simester³⁹ and Bob Sullivan⁴⁰. They wrote a very successful textbook which was adopted in Cambridge and then found themselves of the treadmill of having to produce new editions which took up a lot of their time. They wanted to spread the load and get some other people to help them. So they asked me to join them and edit some of the chapters. I was honoured to be asked because it was a well-known book. I’ve continued to be involved with it since, but I can’t claim any credit really except for updating the chapters that were allocated to me to look after.

162. In the Preface, at the bottom of page five, it said that “Systematic reform via a criminal code is a lost cause in England and Wales,” and I wonder if you could comment upon that?

Well, unfortunately, that does seem to be the case. Legislative time is limited; politicians want to use it for making legal changes which will answer public complaints about the criminal law. So unless some aspect of the criminal law is publicly criticised, either as enabling obviously blameworthy people to escape deserved punishment, or as punishing morally innocent people wrongly, then the law does not get changed. Changes that merely make the law rational and easy for students to learn and easy for the courts to apply just don’t appeal to politicians. Hence schemes for systematic reform don’t attract their attention.

163. Thank you. I couldn’t find a review of this particular edition, so I relied upon one for the 5th edition and there’s just one little interesting point that I’ll raise here. The reviewer was John Taggart⁴¹ of the Bar Library in Belfast and he wrote in the *Criminal Law Review*⁴². He mentioned that this book is cited in appellate courts worldwide and I just wondered if you knew, even though he’s referring to the common law, whether it has been translated at all?

As far as I know, it hasn’t. It’s a common law book and I think anybody in continental Europe who wanted to know about the English law would have enough English to get hold of the book and read it in the original language.

164. Professor Spencer, this brings us to your 2014 volume. It’s out of sequence but in many ways it’s a suitable publication with which to end this brief survey of your scholarly work because it emphasises John Spencer in retrospect and introduces us to one of your hobbies. This is your “*Noted, but not Invariably Approved*”, published by Hart, 268 pages.

It is a collection of case notes that you published on a variety of legal topics in the *Cambridge Law Journal* from 1970 to 2013, i.e. over 43 years and this was assembled to mark your retirement from the Faculty in December 2013. Presumably it was

³⁹ Andrew Simester, Edmund-Davies Professor in Criminal Law, King’s College London (2015-)

⁴⁰ Bob Sullivan, Professor, Institutional Research Information Service Faculty of Laws UCL (2007-), previously Professor of Law at Birmingham and Durham

⁴¹ John Taggart, BL, practising barrister, completed his pupillage in the Bar Library in Belfast. Experience in law chambers in England and legal practice in New York. Queen’s University, Belfast (LL.B, First Class Honours)

⁴² *Crim Law Rev.* 2014, 8, 623-625



conceived to show the other side of you, from a criminal lawyer, both from a legal aspect but also purposely including your hobbies. You said it was Catherine Barnard's⁴³ idea but from your perspective, what lay behind this project?

Catherine was somebody I had collaborated with on a lot of matters in the Faculty: the Erasmus programme, the Double M^aîtrise and then CELS [*Centre for European Legal Studies*: LD]. She, and others, had the idea of putting together a Festschrift when I retired. I wasn't enthusiastic about that idea. Those invited to contribute to a Festschrift feel obliged to write, even if they have nothing of interest to say, and I didn't want to impose that burden on colleagues. When Tony Weir⁴⁴ died, Catherine Barnard had arranged for Hart to publish a collection of his case notes *in memoriam*. I much enjoyed that book, and said that to mark my retirement I'd like the Faculty to publish a collection of my case notes. I'd put a lot of work into them over many years. I'd enjoyed writing them. I thought they were a significant part of my output and I'd like to have them put together as a book. She took that idea up and organised it and I'm most grateful to her for doing so.

165. Whose idea was it to have Mr Punch on the front cover?

I'm not sure, but I think it was Catherine's. I think she'd seen me do a Punch and Judy show at a garden party and was unaware of that aspect of my personality at the time. She thought that that would be an amusing thing to put on the cover.

166. It's a beautiful cover and I have my own copy now which I'm very pleased about. Hopefully I'll have more time to read more of your case notes in due course. Professor Barnard lists subjects taught by you over the years, tort, contract, crime, medical law, criminal procedure and evidence, while the book consists of 68 short case notes, plus the long, *L'Estrange v Graucob* upon which you've already commented in your first interview, because it was your first paper. It's an impressive catalogue of commentaries and a wide variety of cases and I wondered how, at the time of writing them, you chose cases upon which to comment?

Sometimes the *Cambridge Law Journal* Case Committee would contact me and say, "Somebody thinks we need a note on this case, would you write it?" Sometimes I'd take the initiative and, having seen a case I thought was interesting, would suggest a case note. So it was from both directions.

167. In retrospect, can you detect, over 43 years, any evolutionary developments in your method of analysis, your legal attitudes and your opinions on subjects?

I think I've changed my views sometimes about cases that I've written about. Have I changed my method of approach? No, not particularly, nor my style of writing. I still aim to do what I did when I started: to write clearly and write only when I actually had something to say. Happily my career started before the days of "publish or perish". It's now a luxury to be able to choose whether to write, or not, if you're in academic life.

168. In the Foreward you used the analogy, written by yourself, with Somerset Maugham⁴⁵ for the early cases and, I quote, "When you were a foolish young man", are there any examples of cases that you would fundamentally rewrite now?

The book isn't a complete collection of all the ones I wrote; we discreetly omitted some of the ones which, in retrospect, I thought were misguided or ill-expressed.

⁴³ Catherine Sarah Barnard, Professor of European Union and Employment Law (2008-)

⁴⁴ J. A (Tony) Weir (1936-2011), Reader in Law, Trinity College

⁴⁵ William Somerset Maugham, (1874-1965), English playwright and novelist



169. I looked at the last short case article which is, presumably, your swan song in the *Cambridge Law Journal* cases, written in 2013 and about incest in Germany and the resultant human rights case⁴⁶. Why did you choose one on this subject on which to draw a curtain on your faculty career? Do you think perhaps this needs to be looked at more seriously?

I didn't choose that case to write about as a parting word. I think I wrote one or two *Cambridge Law Journal* case notes after that. I wrote about that particular case because it raised the issue of whether the criminal law should punish behaviour which is not obviously damaging to others, if it's a consensual act between the parties. This was about a prosecution in Germany for acts of incest between a brother and a sister, long separated, and whether this should or should not be criminally punishable. On what basis should the criminal law punish behaviour which everybody finds shocking, but about which it's difficult to point to any particular practical harm?

170. Of the 60-odd case notes most were presented in a very personal style that strikes a fine combination of erudite authority and pithy humour. Which of these mini masterpieces is your favourite and would you choose to epitomise your distinctive style of scholarship?

Well, it's kind of you to praise them so thoroughly as that, Lesley! I don't think I have any particular favourites. But if somebody wanted a typical example, perhaps the note in which I wrote about the need for a criminal appeal court to have a power to order retrial⁴⁷, is a good example. I'm glad to say that in the subsequent years a power to order a retrial was indeed created. Perhaps one of my personal favourites is the case note I wrote about civil liability in a farmer for killing off his neighbour's bees by needlessly putting insecticide on his crop of oil seed rape⁴⁸. I thought the decision was right. I thought the facts were entertaining. That's one of my favourites, I think.

171. Because of the cover picture I read a bit about the fascinating history of the Punch and Judy tradition, which seems to have arisen in post-Cromwellian England in the 1600s and was imported, apparently, from Italian marionette shows.

I believe that's so. Yes.

172. Professor Spencer, I wondered how your interest arose. Was it on a Dorset beach that you first made your acquaintance?

Yes. I remember watching a Punch and Judy show when I was a very small boy on the beach at Weymouth and finding it was fascinating, as indeed my grandchildren now find Punch and Judy fascinating today. I then got into doing them myself because my mother was interested in handicraft and, for some reason or other, got a pattern for making Punch and Judy puppets and made some. Then, after her death, we found them and I took them over.

Then there was a party for children of the Faculty and children of the college staff at Christmas in Selwyn College one year. We were asked to think up things we could do to amuse the children and I thought I'll try a Punch and Judy show. I found I could do it and I've continued to do it ever since. The high point in my Punch and Judy show performances was when I actually managed to do one in Latin as entertainment after the annual Praelectors' Dinner in 2016. I needed help from a Classics don at Murray Edwards to translate, "That's

⁴⁶ Incest and Article 8 of the European Convention on Human Rights. *Stubing v Germany* CLJ, 2013, 72(1), 5-7

⁴⁷ Retrials, Reason and the House of Lords. *R. v Rose*, CLJ, 1983, 42(1), 18-2

⁴⁸ A Duty of Common Humanity to Bees. *Tutton v A.D. Walter Ltd*, CLJ, 1986, 45(1), 5-17



the way to do it,” into Latin. The phrase sounds quite good in Latin: “*Hoc modo agendum est!*”

173. Do you know if that’s been recorded?

I don’t think so. It would have been very bad Latin but nevertheless it made the praelectors laugh loudly when they saw it.

174. So, on a quasi-legal issue a propos your Punch and Judy activities, I wonder what your comments are to the decision of Barry Island Town Council in 2016 to ban traditional Punch and Judy shows on the beach because it promoted domestic violence⁴⁹?

I think that’s stupid. Everybody can see that it’s not meant to be taken seriously and Mr Punch is just a comic reversal of normal values. It’s just meant to be light-hearted.

175. Professor Spencer, coming then to the conclusion of this conversation, you grew up in a rural setting and you’ve retired to a similar milieu, is there anything that we can conclude from this about where you’re most comfortable with life?

I spent many years in Cambridge and was comfortable there. We still have a house in Cambridge to which we return from time to time and we do enjoy being there. Being brought up in a village and then a small town in Dorset many years ago, at least I understand how things function in villages and am aware of the advantages and disadvantages. I think that makes me feel more comfortable here than if I’d lived my whole life in a town.

176. Looking back over your long and illustrious career, where do you think you’ve made your most fundamental contribution to legal scholarship and teaching, and for which would you most wish to be remembered?

Hard to say really, but I suppose improving the rules of procedure and evidence in relation to children and vulnerable witnesses. It was in that area that what I wrote and said produced the most obvious practical changes and it was the reason that the Queen was kind enough to award me a CBE. So I think that must be the thing I’m mainly remembered for.

But it’s been a wonderful privilege to spend my working life in Cambridge University and I count myself most fortunate to have been allowed to do so.

177. Thank you, Professor Spencer, and for these wonderful interviews. They’ll be very interesting and valuable as a contribution to the archive and particularly as you are, thus far, the only scholar in the archive who has spent a career writing, thinking, and teaching criminal law, for which you rightly received recognition with your CBE. It’s been a great privilege to speak to you and I thank you very much indeed. Thank you.

Thank you, Lesley, for the time and trouble that you’ve put into this. I’m most grateful.

⁴⁹ See, e.g. <https://www.telegraph.co.uk/news/2016/05/13/council-bans-punch-and-judy-show-over-domestic-violence-fears>

