

**Conversation with Professor Anthony Terry Hanmer (Tony) Smith
Part 2**

by
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This is the eleventh interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science.

Professor Tony Smith is Professor of Law at Victoria University, Wellington.

This interview was recorded, and the audio version is available on this website. 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 and topics are in bold type**
Professor Smith's answers are in normal type.
Comments added by LD, *in italics*.
All footnotes added by LD.

96. Professor Smith, this is our second interview. The first was on 19th January when we spoke of your life and your career and your first term in the Goodhart Chair. Today could we concentrate on your scholarly works?

But before we do that, spend a short time rounding up some aspects of the Goodhart tenure, namely, your teaching and your research activities. So turning to these, I wonder if we could just summarise your teaching activities during Lent and Easter, the courses you did, and how things went?

Yes. Well, I was involved in the public law course which is a seminar course and that meant in the first term the students selected what it was they were going to write about and then had a fair amount of instruction in how to go about writing a dissertation. And then in the second term they came and individually presented their papers and that was very interesting. All kinds of very different insights that were brought. Quite a number of students were Australian, but there was a Swiss person, and an Irish person and they brought various aspects of comparative public law to bear on what they were doing and it was all very interesting, yes.

97. In your first interview you mentioned that apropos the research that you hoped to conduct, you hopefully were going to look at Arthur Goodhart³ himself. I wonder whether you managed to pursue this and, if so, whether you are able to share some of your findings with us?

Up to a point. What I did discover was that there is quite a large archive in the Bodleian in Oxford of his papers, and I think if anybody were going to be doing any serious work on him then some time looking at those might be a way forward and, in fact, I hope to

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³ Professor Sir Arthur Lehman Goodhart, (1891-1978). American-born British academic jurist and lawyer, Professor of jurisprudence, University of Oxford (1931–51). Annual post of Arthur Goodhart Visiting Professor of Legal Science at Cambridge, is named after him.



be able to do that myself. I am going to be in Oxford for three or four days in September and I was going to look up some of the things, some of the matters that he was interested in.

I think he was a slightly unusual man in the sense that he was very good at nurturing friendships with senior judges and in various ways he was quite an influential figure and nice to follow up on that a bit. One of his sons⁴ wrote an excellent appreciation of him which was delivered at a lecture at the London School of Economics and I think he then wrote that lecture up a bit, so it was quite a good account of his life and why... he was an American, of course, and so the question arose as to why he chose to spend all his life pretty well in the United Kingdom rather than America.

Yes, and his son does give some insights into that. Not necessarily to the advantage of his family, if I could put it like that.

So there was that aspect of it. The other thing I wanted to do was to see if we could get some degree of continuity between the outgoing professors, if you like, and the incoming ones and I have certainly been in touch with Sir John Laws⁵ who is my successor and spoken to him about what I think the role entails and what he might like to bring to it. He will have his own ideas, being who he is, but yes.

98. Any other research opportunities that may have arisen?

Well, yes, up to a point. I gave a paper at one of the public law seminars – I haven't had time to write that up – and the teaching was quite time consuming, particularly the legislation course which I was doing with David Feldman⁶. David, I am very pleased to say, is going to present it again next year. It was a new initiative for Cambridge to do this course and he and I both did quite a lot of work on it and I am pleased that he is actually following it through. I am pleased that he has not wasted his time. Well, not wasted but not made quite as constructive a use of all the work that he has done, so that I am very pleased about.

99. That's very interesting. So that's a new course in the Tripos?

No, it's an LLM.

100. I shall be interested to see how that is presented on the LLM website.

Yes. I think quite a lot of the members of the class actually came to your presentation on research methods and the library and so forth. Quite a lot of the same students who were in the legislation class were also in the public law class and so I hope they all got a lot out of that particular session, the session you did with them.

101. Thank you very much. Professor Smith, that brings us into the main part of this conversation and that is your scholarly work and you, of course, had a very long illustrious communication record...

Well, it's long, yes.

102 ...going back to the 1970s during your time at Christchurch when you were an assistant lecturer. But, of course, time being finite, we are only going to concentrate on your four major textbooks this morning and then two articles which have strong links to the themes which seem to have occupied your mind. So as a background, I wonder just to put this in context, it would be fascinating for us to know, if you could just

⁴ Lord Goodhart, William, b. 1933. Created 1997 (Life Peer) of Youlbury in the co. of Oxfordshire. See his appreciation of his father https://www.lse.ac.uk/collections/law/wps/WPS2010-01_Goodhart.pdf

⁵ Sir John Grant McKenzie Laws, (1945-), The Rt Hon. Lord Justice Laws, a Lord Justice of Appeal since 1999.

⁶ Rouse Ball Professor of English Law (2004-).



outline your interest in criminality and how your ideas and your attitudes on the subject have evolved over the years?

I think what's happened over the years... I was always interested in the criminal law context and the relationship between the individual and the state and, of course, in criminal law the individual is at most risk, most peril of being imprisoned or... when I started there was the death penalty and so it had very serious consequences. What has evolved I think in my thinking is that I want or have seen or tried to make more explicit the relationship between criminal law and the criminal justice process and the constitutional context in which it finds itself. So increasingly I have seen criminal law as being a branch of public law. Now, that was certainly not a perception when I started teaching in 1970, I think. We had criminal law here and we had public law and constitutional law over here and there was no crossover between the two.

Now, the Americans did have a crossover between the two because aspects of their criminal justice process were actually in their constitution; so proof against self-incrimination, for example, there it is in the constitution. Britain and the United Kingdom, certainly the United Kingdom and New Zealand, don't have an articulated constitution of that kind, but you see the crossover between constitutional public law and criminal law. So when I was here in a previous incarnation my title was actually the Professor of Criminal and Public Laws. So that's the great development, I would have said. "Great" is probably the wrong word to use to describe it, but that is the focus and that's been an evolving focus of it.

There were articles, for example, on judicial law-making and the criminal law, the extent to which judges were free to develop the criminal law. I was always very cautious about that and so, again, quite a lot of my thinking had been about a case for a criminal code, having it all written down in advance and not having the judges making it up as they go along. So most common law countries, including New Zealand and much of Australia and the United States, they all have criminal codes. This country still doesn't and so one of my major articles, I think, was the case for a code. To a certain extent you get it in those works too, in the public, but the public order book and in the theft book and even more explicitly in the contempt book, because contempt is a common law wrong, not in statutory form.

So the judges do continue to develop it. For example, quite recently, by saying that jurors who contrary to their instructions go online to look at the cases they are about to try, they are interfering with the administration of justice and committing a criminal offence. I find that problematic because it's not laid down in advance that that is something they are not supposed to do, other than in very general terms, and not long after the judges did that, Parliament enacted legislation, as it were, confirming that's what they thought was an appropriate way of dealing with the problems that we have had, but I didn't like the fact that it's the judges who made the decision in the first place. Although, obviously, they are custodians of the justice process, I suppose, and when they see what they believe to be people interfering with it, and it's perfectly true to say that the notion of contempt involves interfering with the administration of justice and that crystallises out into a specific criminal offence. I suppose there is no great harm done, but I think constitutionally it's not the best way of dealing with it.

103. That is very interesting indeed, thank you. Which then brings us to your first major book which is *The Offences Against Public Order*⁷ dealing with the Public Order Act published the year after you became Professor at Reading in 1986. I wonder if you

⁷ 1987 Offences Against Public Order, Including the Public Order Act 1986, Sweet & Maxwell, Police Review Publishing Company, 326pp.



could just outline the development of your ideas on this topic, which must have begun while you were in Durham in the early 80s?

I had an interest in public order for quite a long time. In New Zealand we had legislation which criminalised disorderly conduct and that was used against the protestors in the Vietnam demonstrations in New Zealand in the late 60s. New Zealand having been a military participant in that war, and it always used to offend me that the way in which the judges dealt with it at that stage was merely to say, “Well, disorderly means disorderly and we can't paraphrase it, but what you did was disorderly and therefore that's a criminal offence,” without explaining why, or having any kind of apparatus with which to balance the aspirations of the protestors, their right to freedom of speech. Those kinds of things weren't part of the mix at all.

They just more or less said, “Well, Parliament says it's an offence to behave in a way that is disorderly. This was disorderly, that must be a criminal offence. The end,” and people who tried to lecture the judges on the right to freedom of speech got very, very short shrift. A lot of the judges had been fighting in the Second World War and they didn't want young barristers giving them lectures on the rights to freedom of speech, thank you very much.

I always thought that was a very unsatisfactory framework in which we were trying to work out the balances you have to get between the conflicting interests that are stake when you get public demonstrations and so forth, yes. So it had been an interest of mine for quite a long time, yes.

104. You didn't think it necessary to write a second edition?

The trouble with second editions is that they are extremely boring to write. The interesting thing is to do it the first time round and then very often all you are doing subsequently is looking at cases and possibly legislation that has been generated since and it's just not as much fun. You are not having to rethink a framework which... or think a framework which is what that, I mean, that book, required.

To a certain extent the Public Order Act did create a framework of its own which I could work around, but there is a great deal more to the Act than just the criminal law. Quite a lot of it is to do with police powers in relation to processions and assemblies and so forth. Funnily enough, I came to this country to work with Glanville Williams⁸, and Glanville had been contracted to do by the publishers a four volume series of books and the first one was ‘Criminal Law: The General Part’ which he wrote in 1953/4 and then he did do a second edition of that and then he was always going to write one on property offences and one on public order and one on offences against the person, that was his grand plan. So when I first met him he said, “Well, why don't you write a book with me?” Which is how that one came to be generated really.

105. Perhaps sowed the seed in your mind for a book on public order?

Yes, as well, that's right, because it was clear that he wasn't going to do it. He had got more and more preoccupied with the enactment of the criminal code. That was one of his great missions and funnily enough I had correspondence just in the last week or so with Sir Richard Buxton⁹ whom had been at the Law Commission when Glanville was working on this and he told me that Glanville actually had written a whole code. Richard had a copy of it, but he has lost it.

⁸ Professor Glanville Llewelyn Williams (1911-1997), Rouse Ball Professor of English Law (1968-78).

⁹ Sir Richard Joseph Buxton (b. 1938). Judge and former Lord Justice of Appeal (1997-2008).



The other great change, I think, was that Glanville was one of the first people that I know to start using a computer and so when we first started that book it was very frustrating because I would write a draft of a chapter and give it to him. He was often so busy he didn't have time to look at it and then three months later we would have a meeting and he would have chopped my work up into bits and pieces and of course I couldn't remember what the thing looked like in the first place. So having computers made that a great deal easier subsequently.

106. With the passage of the Act, the Public Order Act, it obviously exercised the minds of quite a few academics and there were in fact four books that came out [more or less simultaneously].

Four books, that's right, there were, yes.

107. Just for the benefit of the listeners: by Card¹⁰, Marston¹¹, yourself and Thornton¹². Two of the reviewers considered these books together in one review - Bonner¹³ and Edwards considered that yours was the best. Bonner was particularly praising. He said it was "tour de force" and that will be a bible. This must have been incredibly gratifying at that point of your career?

Yes. Actually Sir David Williams¹⁴ wrote a review of it too in the *Cambridge Law Journal* which is a very kind review and of course that was very much his field. Peter Thornton is now the nation's Chief Coroner, but he was quite active in the National Council for Civil Liberties and he wrote from that perspective. I know him reasonably well too.

108. I will have to dig out that review by David Williams. In the previous interview you mentioned you collaborated with P A J Waddington¹⁵ who had been an ex-policeman.

Yes. Peter is his real name, but he was known as "Tank" Waddington. He was six foot six.

109. Do you think this could have given you a bit of an edge, having had that...?

Oh yes, yes, yes. Not only was he an ex-policeman, but his work was on the sociology of policing and he was very interested in the control of demonstrations. His other... where he had had a major influence was on police use of firearms. He was the first person in this country to say we should have specially trained firearms squads, and specially trained officers to control them, because what tended to happen is, when we had a firearms incident, the people who were being trained as experts were often constables and sergeants and so forth, and they would go to an incident and a much more senior policeman would turn up and start telling them what to do. Well, they didn't know what to do. The people who knew what to do were the sergeants and the constables and so he said, "We really need to coordinate that sort of training," and that's what they ultimately did.

One of his friends, who is a man called Peter Imbert, Sir Peter Imbert¹⁶ as he became, I think he is now Lord Imbert, who was the Metropolitan Police Commissioner, and Tank

¹⁰ Professor Richard Card, Emeritus Professor of Law De Montfort University, Leicester.

¹¹ John Marston, *Public Order: Guide to the 1986 Public Order Act*, Fourmat Publishing (1987).

¹² Peter Thornton, QC, Senior Circuit Judge. 1987 *Public order law: including the Public Order Act 1986*, Financial Training.

¹³ David Bonner, Emeritus Professor University of Leicester.

¹⁴ Sir David Glyndwr Tudor Williams (1930-2009), Rouse Ball Professor of English Law (1983-92).

¹⁵ Professor P A J Waddington, Professor of Social Policy University of Wolverhampton (2005-).

¹⁶ Sir Peter Michael Imbert, Baron Imbert Kt (b. 1933). Commissioner of the Metropolitan Police Service (1987-93), Chief Constable of Thames Valley Police (1979 - 85).



managed to persuade him to allow Tank to go to the planning meetings which the police had to start implementing this Public Order Act and so he went to every single major meeting that they had on how to do it. I think he was giving a certain amount of advice to them as to how the policing role should be coordinated and, yes, it was very, very, very useful to be able to talk to him, what the police fears were.

Actually, some of the most frightening things the police had to coordinate were events like New Year's Eve in Trafalgar Square. Absolutely terrifying for the police because crowds can be extremely dangerous entities and of course people are just having fun and probably a certain amount of alcohol around the place and it terrified them, one of these days something was going to go very badly wrong.

Yes, with Hillsborough¹⁷ and things like that, you see how dangerous crowds can be.

So yes, it was extremely useful to be able to talk to him about how all of this was going to work and how it ultimately did work.

110. Which brings us to a few specific points and on page 10 in this book, *Offences Against Public Order* on the right to demonstrate, the common law doesn't protect rights but the Act, of course, protected public order. That was the case when your book appeared. Do you think that the Convention and the Human Rights Act¹⁸ have perhaps levelled the playing field as regard to free speech?

Yes, I do, and I think it's given the judges and the courts a framework within which they can have a look at the various interests, just as I was talking about earlier when I said in New Zealand we didn't have any kind of framework to enable this analysis to take place. Yes, these days, you do and it's quite clear that the right to freedom of expression, the right to assembly are both guaranteed. Of course, they are still not absolute but at least these days you get a sense that the judges are much more alive to the civil liberty implications of stopping people from saying what they want to say. Yes, much more, and people like Stephen Sedley, Lord Justice Sedley¹⁹ saying, "Freedom to speak, only inoffensively is not really freedom of speech at all and you ought to be allowed to say things that other people don't like very much"²⁰. They [LD: *the police*] don't always get it right, but yes.

111. Do you think, Professor Smith, that with Brexit²¹ there could be further modifications?

I don't know. I mean, I don't know to what extent... the European Convention, of course, has got nothing to do with Brexit or European... so far as I am aware that would continue to have a major influence on the way in which matters are litigated in this country so it shouldn't make any real difference, no.

¹⁷ Hillsborough disaster: human crush at Sheffield Wednesday football stadium 15 April 1989; 96 dead and 766 injured. The worst disaster in British sporting history.

¹⁸ 1998.

¹⁹ Sir Stephen Sedley, (b.1939), judge of the Court of Appeal of England and Wales (1999-2011), visiting professor at Oxford.

²⁰ *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733, Queen's Bench Division of the High Court regarding freedom of speech and breach of the peace. The decision upheld the freedom to express lawful matters in a way which other people might take great exception to; that the right to free speech, enshrined in Article 10 of the European Convention of Human Rights, includes the right to be offensive; and a police officer has no right to call upon a citizen to desist from lawful conduct. That others might react unlawfully does not itself render the actions of the speaker unlawful.

²¹ Re. the referendum 23rd June 2016.



112. Another point on page 15, “As things stood in 1987 you could act lawfully but still be arrested for not stopping if the audience takes to violence or threatens to,” that’s *Duncan v Jones* in 1936, and the Act didn’t change that. One could see this as perhaps a licence to opposing groups to stifle free speech? And you say, “It gives the police an enormous amount of discretion. Do you think the situation has changed since your book, with the Humans Rights Act?”

Ever so slightly perhaps. I think that the police are aware that if they do force people to desist from speaking, that does confer what is known as a “heckler’s veto” on the other protestors. So I think the police will do as much as they can to allow the conflicting views to be aired, but there have been occasions where... I mean, the police have no power to stop people as such from demonstrating - there is no licence to hold a demonstration as there is in Hong Kong or Singapore, quite a lot of these other places.

So I think there is a much greater awareness of the issues that are at stake, put it that way, when the policing of demonstrations happens. Again, they don't always get it right. I mean, the protests in... it wasn't May Day, it was the Oxford Circus protests when the police used the so-called “kettling” powers. I mean, just of holding absolutely everybody in one place and then releasing them only bit-by-bit. Well, that was held to be in breach of the European Convention, what they were doing on that particular occasion. So no, they don't always get it right.

As I say, I think often they are frightened or terribly worried that people are going to get killed in these demonstrations and what happened on that occasion was that the demonstration was advertised by Twitter and so forth and it was suggested that people should converge on Oxford Circus from four different directions and so the police were having to control a demonstration that was coming to what was going to be a focal point and a huge number stuck in Oxford Circus with those kinds of forces coming at it.

It was something I think they found pretty terrifying, so that was what they did. They threw a cordon round Oxford Circus. Anybody who was in it, they just kept them there and let them disperse bit-by-bit-by-bit-by-bit and took about eight hours about to disperse.

113. And that was the article that you wrote in 2008 ²², so revisiting this some 21 years later, it seemed to me that article to some extent represented a distillation of your observations, if you like, of the application of that Act over that period.

Yes, that’s probably right.

114. Still on the subject of this book, there is just one other point. You said on page 20 that, “There is a danger that the law will generate oppressive policing,” and that was in regard to the change to the Act which allowed the police to operate on perceptions rather than hard facts. For example, they could impose in advance conditions on marches to prevent serious disruption to the life of the community. Do you think that your prediction has manifested itself?

No, I don't think so. I think that they don't do that. What Waddington’s early experience showed was that they didn't want to use those powers. The way in which they actually did it was much more clever. They would negotiate with the organisers of these meetings and processions and assemblies and very often what they would say is, “Well, you can do what you propose to do but we could make it a great deal easier for you if you just do this and just do this.” In other words, they are controlling the ground, that’s really what they are doing and they were just saying, “Look, you people yourselves will have stewards

²² 2008. A T H Smith, *Cambridge Law Journal*, 67(1), 10-12. “May day, may day: Policing protest”.



controlling the demonstrations. It will be much easier for them if you do it our way and we can put you in this space and we can allow you to do this and we will block off half of the road.” So that was the work that Waddington was doing.

115. Very interesting. I think that this problem exercised the mind of Boris Johnson²³ when he was the Mayor of London and he considered introducing measures which seemed on the surface fairly draconian but when you consider the problems.

Three million pounds on new water cannons, wasn't it?

116. That's right, yes.

Of course, the Home Secretary is the one who ultimately says whether or not those measures can be used.

We had the same thing in Newcastle when the Home Office wanted to start using plastic bullets as a way of controlling crowds and the councils... well, in Newcastle and I think some of the other northern local authorities, did not want that and it went to the courts and the question was whether or not the view of the Home Secretary, who after all was providing the funding for these control measures, or the view of the local authority was to prevail, and the courts had no difficulty in saying, “It's the Home Secretary,” which put control of public order in the hands of the police again rather than the local perceptions of it.

117. Professor Smith, that brings us to your second book. You were back at Cambridge and you produced *Property Offences: The Protection of Property Through the Criminal Law*²⁴ and in the preface it comments on the very complicated stages that this book went through in the writing and I wonder if you could just tell us about that? It started off as a joint venture with Glanville Williams.

Yes, that's right. Funnily enough, I had originally come to Cambridge to work with Glanville and I wasn't terribly clear which area I was going to work in but I did start on contempt of court as a possible PhD. About six months after I started working on that we learnt that Lord Borrie²⁵ was writing a book on it and so I moved away from it and Glanville said at that stage, well, the Theft Act is a quite recent enactment. It was 1972, the Theft Act was '68. There was one book on it, well, two books on it, but we were going to much wider than the Theft Act. We were going to do property offences completely and so that gave us quite a lot of scope to write a different sort of book and for a while Glanville was involved in it, but then ultimately, again, [there was] his preoccupation with the code and his work with the Law Commission and so forth, he was very explicit about it. He said, “That has to be my highest priority,” and he had a feeling, I think, that his time was getting short and he really wanted to get this measure off the ground and actually onto the statute book - it didn't happen. So eventually he said “Why don't you finish it yourself?” which I did and by that time computers were an everyday event and it just made life and producing of that just so much simpler to finish.

118. Nevertheless, did you find it quite difficult to maintain your momentum, given that it spanned such a considerable period?

²³ Alexander Boris de Pfeffel Johnson, (b. 1964), Conservative MP, Mayor of London (2008-2016).

²⁴ *Property Offences: The protection of property through the criminal law*, Sweet & Maxwell 1994, 1037pp.

²⁵ Gordon Johnson Borrie, Baron Borrie QC (1931-) lawyer and Labour Party life peer. Professor of law and Dean of the Faculty of Law, Birmingham University.



Oh yes, yes. No, it would keep being put away and then got out again and... yes, and I can't remember whether I actually took leave to finish it or not. I don't think I did probably because, as you say, I finished it when I came back from Reading and was a lecturer and then reader and then professor. I don't think I had much leave to do it with.

119. You mention in the preface on the topic of the book's long gestation, you cite Hayek²⁶ on the rapidly decreasing returns. A really interesting quote...

It is.

120. ...for extra effort put into a work once it is completed, to quote him, "A tolerably finished product" and presumably this is how you felt? Eventually, you...

It's how you have to feel.

121. ...you took some comfort from that?

I think it's how you have to feel and it would always be my advice to young scholars too. Yes, you can tweak it and work with it and so forth, but you are probably not going to improve it a great deal, and any book is going to have flaws. You have got to eradicate them as best you can, but thinking it's worthwhile spending time rephrasing and so forth, it's not, I don't think.

122. Coming to some of the reviews, one in particular by Paul Roberts²⁷ at Nottingham in the *Law Quarterly Review*. He said that you argue for, "A thoroughgoing reappraisal of our basic scheme of property offences especially in view of the revolution in plastic money and cyberspace." Has this happened in the intervening years?

Yes, up to a point, I would say, but when it crucially mattered I don't think that the judges understood the change that had been made by the Theft Act. It's a technical question, but the law prior to the Theft Act, the law of larceny was based on the idea that criminal law protected the possession of a thing, not ownership. So although when somebody took something of yours, actually they were violating your rights of ownership, it was all done on the technicality that they are also taking your possession and the whole point of the Theft Act was to say, "We are going to move the basis of protection from possession to ownership," and that means that if I own something then it will be rare that I am guilty of stealing it if it's actually mine.

If I have actually lent it to somebody or let's say, pawned it, and given somebody a better right to possess it and I have got it for the time being, I may still commit an offence by interfering with that person's possession and because that is a greater right even than my rights of ownership in that sort of situation. But the issue went to the House of Lords on four different occasions, I think, whether you can appropriate property when it actually becomes yours in the course of the transaction and that is alleged to constitute theft.

Now, the framers of the Theft Act would have said, "It's not supposed to. The criminal law is there to protect ownership and if you have got ownership and the civil law says you have become the valid owner of it in the course of that transaction, then it shouldn't be theft," but the House of Lords disagreed and, as I say, I just don't think they ever really got their heads around this whole notion.

²⁶ Friedrich Hayek, CH, (1899-1992). Austrian and British economist and philosopher. LSE (1931-50), University of Chicago (1950-62) & University of Freiburg (1962-68). Best known for his defence of classical liberalism. Hayek shared the 1974 Nobel Memorial Prize in Economic Sciences.

²⁷ Professor of Criminal Jurisprudence, Faculty of Social Sciences, Nottingham University.



123. Interesting. Well, Roberts said he hoped that you would bring out new editions to cope with the Criminal Justice and Public Order Act but perhaps this wasn't a priority?

No, and again, it's the old problem. It's not as much fun doing a new edition, it really isn't.

124. No, I can imagine. Well, Professor Smith, that brings us then to your third work which we are going to talk about today which is your *Harm and Culpability*²⁸, and this coincided with your chair at Cambridge. It was an edited volume based on a series of seminars given in Cambridge in '94, Twelve authors, four of whom were at Cambridge, and I wonder if you could just outline the circumstances of this lecture series and at whom the book is primarily aimed?

Primarily aimed at other scholars, I would say. There had been very little thinking about wider questions about criminal responsibility that moved away from considering the case law. It wasn't part of the English tradition, if I could put it that way. I had always been interested in for quite a while criminal theory emanating from places like Germany, and Ashworth²⁹, who is one of the writers in that, and I, for example, went to a two-week seminar in Freiburg on Germans theorising about the criminal law. That was given a very significant shot in the arm by a man called George Fletcher³⁰, an American, who wrote a book called '*Rethinking Criminal Law*'³¹ and he was rethinking theories about criminal responsibility. I can remember when I was first arguing about it with Sir John Smith³² and Glanville Williams. They couldn't quite see the point of what it was that Fletcher was trying to do. For example, Fletcher reinvigorated thinking about the distinction between justification and excuse.

Now, the common law going back to Sir James Fitzjames Stephen³³ would just say, "Well, it doesn't matter whether it's a justification or an excuse because either way if the plea that it was justified or excuse succeeds then the person is not guilty and so who cares whether it's justification or excuse?" and Fletcher explained why you might care, all sorts of consequences that turn on... as the German theory had been doing for years and so justification and excuse became part of our way of looking at things too.

Here in Cambridge we had Andrew Simester³⁴ who was a research fellow at Caius at the time working on these problems of criminal responsibility and Andreas von Hirsch³⁵, a German, quite familiar with German theory, and so I suggested that, as you say, we had a series of seminars and just invited people we wanted to invite. So they came about once a fortnight and everybody else actually came to most of the seminars and then after all the papers had been delivered we had a two or three day conference here which all the papers were looked at again. A lot of the people who had presented their papers rewrote them in the

²⁸ *Harm and Culpability*, A P Simester & A T H Smith, 1996 Oxford Clarendon Press, 280pp.

²⁹ Andrew Ashworth (b. 1947). Edmund-Davies Professor of Criminal Law and Criminal Justice, King's College London (1988-97), Vinerian Professor of English Law, Oxford (1997-2013), Chairman of the Sentencing Advisory Panel before it was abolished in 2010.

³⁰ George P Fletcher, (b. 1939), Cardozo Professor of Jurisprudence at Columbia University School of Law.

³¹ Little, Brown, 1978.

³² Professor Sir John Cyril Smith, (1922 - 2003), University of Nottingham (1957-87), English criminal law and the philosophy of criminal liability, *Smith & Hogan's Criminal Law*.

³³ Sir James Fitzjames Stephen, 1st Baronet (1829-94), lawyer, High Court judge (1879-91) and writer.

³⁴ Andrew Simester, Edmund-Davies Chair in Criminal Law, King's College London (2015-), Provost's Chair in Law, National University of Singapore.

³⁵ Professor Andreas von Hirsch, Emeritus Honorary Professor of Penal Theory and Penal Law, Cambridge University, Honorary Professor of Penal Law, Faculty of Law, Goethe-University, Frankfurt, Director, Forschungsstelle für Strafrechtstheorie und Strafrechtsethik, Law Faculty, Goethe-University, Frankfurt, Director, Centre for Penal Theory & Penal Ethics, Institute of Criminology, Cambridge University.



light of comments that they had got at the seminar itself and they resubmitted their papers. Then we had, as I say, a two or three day seminar at which people went over it again and argued it again and that meant we had a coherent set of papers for a book and then Simester and I edited those and it's still cited a lot, quite often by people who wrote the papers, but anyway, it is cited quite a lot.

125. Your own participation in addition to the editing was the introductory chapter with Simester, "Criminalisation and the Role of Theory" and you say, "One cannot answer legal questions in a theoretical vacuum. One needs an understanding of the doctrines and principles which explain them." Was legal theory one of your research or teaching specialities at Cambridge?

Not at Cambridge. I did a paper in jurisprudence and legal theory for my Master's degree but I would not have written about it in the same way as some of these other people were writing about it. I had been interested in it, yes. As I say, that seminar in... actually, I did write a paper for that seminar in Germany, that's right, on mistake of law which is quite a widely cited paper and that's probably the closest I have got to spending a good amount of time on pure criminal law theory, if you like, yes.

126. There is an intriguing sentence, the last sentence on page 3, "To generate legal theory that is not grounded in the system we have, is to generate theory about someone else's legal system" and I wonder whether common law lawyers thinking about EU law would be an example of this?

I think so but, as I say, I was particularly influenced and, as I think were, Ashworth and von Hirsch, by the German legal system, rather than an EU system. Other people, I think John Spencer³⁶, for example, were very interested in the French way of looking at things but, again, both of these countries have got criminal codes. In France's case a Napoleonic code, and we never quite got round to it. It's just a very un-English way of looking at things.

127. Do you think, Professor Smith, that in light of Brexit there will be some changes?

I don't think so. There will be changes to the criminal justice system, because a lot of the relations with EU and criminal matters are a matter of quite highly developed inter-jurisdiction collaborations. In fact, I chaired a seminar in London about six weeks ago before the vote, and it was attended by a lot of the civil servants from the Home Office and the various agencies that do a lot of the nuts and bolts criminal detection and so forth, and they were horrified with the prospect. They said there were just not anything like enough of us to be able to cope if we leave, and what they are saying has absolutely been borne out.

It's not quite as bad as the problem with trade negotiations, but having to put in place different arrangements for what to do about extraditing and all that sort of thing.

128. It couldn't revert to the original common law. I mean, it simply couldn't.

I don't think so, no, but how that's going to be dealt with, is something that now people have started to turn their attention to, but it was quite clear that none of the implications of that seemed to be apparent to the politicians who were driving this desire to get out.

³⁶ John R. Spencer, Emeritus Professor of Law (Cambridge), President of the European Criminal Law Association.



129. You discuss the topic of the subjective/objective debate in criminal law, and say that it affects so many other areas of black letter criminal law, and that the objective view in 1996 carried the day. In the last 20 years has this remained the case?

Yes, I would say it has, yes. We switch between or have switched between a subjective view of accountability. That was the predominant academic way of looking at it, I think, particularly Glanville Williams and John Smith, and to a lesser extent Herbert Hart³⁷. The courts have been less willing to comply with that, although it's fair to say that the leading case pro objectivity was a case called *Caldwell* decided in 1982³⁸ and that was actually reversed by the House of Lords eventually, so to that extent I think possibly the courts did ultimately listen and that was Lord Bingham³⁹ who took the charge in a case called *L*, I think, just a single letter, but he said it has been subject to so much criticism it works unfairness when judges are confronted with having to treat people who weren't aware of what their conduct was likely to lead to, and they just don't like having to do it, we might as well just say it's wrong. So that would be certainly one very important... No, it's a case called *G*⁴⁰, that's right. *G*, I am certain it is.

Just *G*, it's just a single letter. It was obviously a young person, I think, of about 14 and he clearly... he or she, didn't understand the implications of what they were doing and the court order said, "Too bad, you have got to commit them anyway," and Bingham said, "Well, just can't do that," so yes.

130. It's a veritable thicket.

Yes, it is.

131. In a review, [the late] Barbara Hudson⁴¹, who at the time was a sociologist at Northumbria and [recently] Professor at Central Lancashire, she said that these essays could be seen, "As part of a trend to replace the case law tradition with a clearer enunciation of principles and their applicability. Part of the same trend to reduction of judicial discretion by the move towards mandatory sentencing." Was this the case, Professor Smith, and if yes, do you think this trend has continued?

Yes, I think so.

132. Do you think it's a good thing?

Yes. Simester and Sullivan⁴² in their book and, to a lesser extent, Ashworth in his book on criminal law, talk about principles, whereas prior to that, the leading books were very, very case-oriented. This is what the judges decided, this was the implications of what the judges decided, but without a wider view of a principled context in which to place it. Ashworth, just as an example of that, when we were at this conference in Freiburg we had the mornings free and he would go off to the swimming pool with a pad and a pencil and he would write his book on criminal law and I said, "Well, how do you do that when you haven't got the cases?" and he said, "Well, the trouble is the cases just confuse you, just get in the road, so take no notice of them."

³⁷ Herbert Lionel Adolphus Hart (1907-92), Professor of Jurisprudence Oxford University (1952-69).

³⁸ <https://webstroke.co.uk/law/cases/r-v-caldwell-1982>

MPC v Caldwell [1982] AC 341 House of Lords, <http://e-lawresources.co.uk/MPC-v-Caldwell.php>

³⁹ Thomas Henry Bingham, Baron Bingham of Cornhill, (1933-2010), Lord Chief Justice of England and Wales (1996-2000).

⁴⁰ <https://webstroke.co.uk/law/cases/r-v-g-2004>, *R v G and Another* [2004] UKHL 50.

⁴¹ Professor Barbara Hudson, (?-2013). Professor in Law, University of Central Lancashire.

⁴² *Simester and Sullivan's Criminal Law* - 4th Edition: Theory and Doctrine, Hart, 901pp.



133. Did he write in between lengths?

I don't know how he did, but yes. I know he would have a swim and then get up and write some more. His book '*Principles of Criminal Law*' is a major text these days, and it stands in contrast to the old works of Smith and Hogan⁴³ which are still very, very case based.

134. Very interesting. Which brings us to your final major work which is the *Arlidge, Eady & Smith 'On Contempt'*⁴⁴ in its fourth edition published in 2011 with two cumulative supplements. I wonder if you could outline the history of this work, and how you came to be involved therein?

Well, it's a quite interesting history really because again it goes back to Glanville. Arlidge⁴⁵ was a student at Cambridge but, in fact, both Arlidge and Eady⁴⁶ were, and Glanville Williams tried to persuade Tony Arlidge to write a book on contempt. So Arlidge started on it, then he became a very busy barrister and didn't have the time to devote to it, so Eady thinks that most of the work he did do was done in the back of a taxi on the way to or back from court. So it just sat there for a while. Then when the Contempt of Court Act was hoving into view, the publishers, I think, must have been speaking to Glanville and they said, "Well, Arlidge has written some of it. Why don't you get him to write it up?" and he got Eady involved - they were very good friends from the bar. They were both amateur theatricals and they did quite a lot of that, still does in Arlidge's case. So they put this thing together really rather quickly and brought it out in time for the publication, and it was panned by the reviewers, I am afraid.

Particularly a man called Graham Zellick⁴⁷ who wrote a review of it saying, "Don't these people realise that academics have actually written quite a lot about this because there was no reference to the "academic work," and so when they came to write the second edition they were casting around for an academic and they asked John Spencer if he would like to do it.

John and David Eady had sat together on a committee on privacy so they knew one another and that's why... but Spencer said he didn't have time, but he said that I might like to be involved, and I think he knew I had an old interest in contempt. I said I would, and so that's how I got involved in it and it's been a fruitful exercise really. Eady and I just wrote it together. Arlidge didn't contribute at all to the second edition. He came to Cambridge for one afternoon and that was it really. He decided that the decision in the House of Lords in the *Sunday Times*⁴⁸ case was *per incuriam*. Well, the House of Lords can't make a decision *per incuriam*, but I certainly didn't tell him that.

Then Eady and I wrote it together more or less word-for-word. He would come over to Cambridge. He lived in Kent and would leave Kent at about half-five in the morning, get

⁴³ *Smith and Hogan's Criminal Law*, 14th Edit, by David Ormerod and Karl Laird, 2015, OUP, 1392pp.

⁴⁴ *Arlidge, Eady & Smith on Contempt*, 4th Edition, Sweet & Maxwell, 2011.

⁴⁵ Anthony Arlidge, QC, Red Lion Chambers.

⁴⁶ Sir David Eady, QC, (1943-). Retired High Court judge (Queen's Bench division) in England and Wales (1997-2013). Presided over many high-profile libel and privacy cases.

⁴⁷ Graham J. Zellick, CBE FRSA QC (1948 -) Vice-Chancellor of the University of London (1997–2003), Principal of Queen Mary and Westfield College, University of London (1991–98). Past Chairman of the Criminal Cases Review Commission, Master of the Bench of the Middle Temple, Honorary Fellow of Gonville & Caius College.

⁴⁸ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL), case on defamation law concerning qualified privilege for publication of defamatory statements in the public interest. Established the Reynolds defence to be raised where it was clear that the journalist had a duty to publish an allegation even if it turned out to be wrong.



over here and we would work all weekend on it, weekend-after-weekend really, and we would do it line-by-line and then we would do it over the phone and so forth. It was quite a major piece of work actually.

135. There were three editions in rapid succession.

Yes. I have got two chapters of our new edition to be working on right now and, again, it's not fun writing.

We have got other people working with us on it this time. The publishers made a very bad job of the last edition, so bad that Eady said he really didn't want to do it any more and we cajoled him into doing it. He is no longer on the bench, he was a High Court judge while we were doing all this. But it was a very fruitful collaboration between a practising barrister, then judge, and an academic. I told him things he didn't know and, of course, he knew quite a lot that I didn't, and the practicalities of how cases are likely to be handled in court and why they are likely to be handled in court in a certain way.

135. Very interesting to hear the background to that. I think, Professor Gareth Jones⁴⁹ had a similar relationship with Lord Goff⁵⁰.

He did, Robert Goff, that's right, yes.

136. He used to come up for weekends as well.

Yes, very fruitful partnership. Yes, it's curious that there was Glanville behind that one as well really. It's a fascinating subject because it's such a mixture of common law and practice and procedure and some theory.

137. Fascinating - it's so topical. I just have a few questions around the Preface in the 4th edition. On page five, mention is made of the trust between judge and jury, and that jurors mustn't know anything about prejudicial information not admitted at the trial. What do you think is the solution to that, Professor Smith?

Well, I think the courts have in the last five years, with the assistance of Parliament, more or less solved it, we think.

What was very unclear five years ago was what the judges ought to say to juries in their directions to them about the fact that there was prejudicial material available and a lot of judges took the view that it was least said soonest mended, best not to tell the jury anything about it. Then of course, if the jury did go and find it for themselves and the judge doesn't find out about it, that's a pretty unsatisfactory situation. So the courts eventually, in a series of cases, took the view that the best thing to do was to broach it with the jury and say, particularly in high profile cases, and explain to the jury why it was unfair to a defendant to take into account material that was not going to be actually discussed in the course of the case itself. That's the point about not being admissible. Then they would have to say, "Look, it's not admissible for very good reasons. You are not to take any notice of it. Your oath is to listen to the evidence that is put before you. It is simply unfair to the defendant to take into account material that may or may not be accurate, never been tested. You can't try him on the basis of that and you can only try on the basis of the evidence."

My judge friends say once you explain that to the jury they will do what they have sworn to do. We are reasonably confident that they will do that. In the European Court,

⁴⁹ Gareth Hywel Jones (1930-2016). Downing Professor of the Laws of England in Cambridge University (1975-98).

⁵⁰ Robert Lionel Archibald Goff, Baron Goff of Chieveley (1926-). Senior Law Lord. Co-author of Goff & Jones, *The Law of Restitution*.



there have been a number of cases that have gone to the European Court of Human Rights now and the stance that they take is, “Well, you have to look at the composition of the court and the court is the judge and the jury and if the jury are directed properly not to take into account material that is not before them, unless you have got evidence to show that they have done that, that they have taken it into account, you have to proceed on the basis that they haven't.” You can't proceed on the basis that there has been a lot of prejudicial information out there and the jury might have taken it into account unless there is some evidence they actually were aware of it and might have been acting on it.

138. I think you subsequently cite the case of *Abdulla Ali v United Kingdom*⁵¹ in that regard.

Yes, that would be right. That's one of the most recent ones. It has been quite fun actually. I went to Bologna and Padua this year and we had a lecture on contempt law. They have no such institution at all, and there are two aspects of contempt. There is that aspect of it, but the other aspect of it is that there is a mechanism that we use to ensure that court orders are complied with in civil cases, so it's relevant to family law disputes in particular and people... there are anti-molestation orders and things of that sort, so a breach of them is not just a breach of the order, it's actually a contempt of court. Of course, in Italy court orders are disobeyed routinely and they said, “Well, what do you do?” and we said, “We put people in prison.” We have got a very elaborate procedure, but a person in whose favour an order has been made can go to the court and say, “This person has been ordered to do X. He or she hasn't done X. I now want you to put them in prison,” and the courts will. They do it a lot, every day. You can see it on the net these days because until relatively recently a lot of these, particularly in family law cases, were not held in public and the current Chief Justice said he was very uncomfortable about that and he wanted litigants to alert the press, or the courts to alert the press, that an imprisonable contempt might have been committed and so the press is now more or less free to go along and see what's happening.

139. How do the courts in this country deal with Tweeting during a hearing?

That's okay. There are rules about it now. I think the situation is that if a judge wants to tell journalists not to, he has got ten minutes, I think that's the rule now, to say, “You are not to Tweet that, please,” and journalists wouldn't. They're told not to.

I think that's the position. Once it's been heard in an open court it's reportable, but I think because of the fact that it can be done so quickly now they do have a short limit. I think that's how it works.

140. Something else that's very interesting which you highlight, is the clash with jurisdictions re. parliamentary privilege used to name people in court and cases in the House of Commons which obviously doesn't fall under the province of the courts, that falls under the Privileges Committee. Do you see this as possibly becoming quite a serious issue?

No, I don't think so. I think that when persons have violated the rules by hiding themselves under the cloak of parliamentary privilege by identifying somebody in parliament when there is an order not to, I think that's taken very seriously by the Privileges Committee. I think it can be regarded, unless there were very, very good reasons for it, as a breach of parliamentary privilege. So I don't think it's a problem.

⁵¹ *Abdulla Ali v. United Kingdom* (application no. 30971/12), 2015, the European Court of Human Rights held, unanimously, that there had been: no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.



141. Coming then to one of the reviewers. John Laws⁵² in the *Law Quarterly Review*...

My successor, of course, as the Arthur Goodhart.

142. I didn't realise that.

Yes.

143. Well, he was very commending. He said the book has the highest standard of scholarship and he also said that it's a practitioner's textbook. Was it written as such?

Not quite, but I can see why he might have thought so and I think that's the combination of a practitioner like Sir David and an academic and so I would say its treatise rather than a textbook, however, a textbook has the connotation really of something for students. I mean, he might say it's for practitioners. I might say that he was in practice, the "treasury devil"⁵³ they are called, and he had done quite a lot of work on contempt and had written a very good article on contempt, so it was something he himself had an interest in, a real interest.

144. When the book appeared, the Human Rights Act was about to come into force, and Laws said that your treating subject was one of its strengths particularly with regard to the law of contempt. He hoped that judges would regard the Convention as symbiotic with the common law and not just an alien add-on. Do you think that this wish has been fulfilled?

Yes, absolutely. They take it into account on a routine basis, yes, and Brexit will make no difference to that. The Convention is completely different and comes from Strasbourg, that's where the court is. We became members of that in the 1950s. The first President was a member of the faculty here. Lord McNair⁵⁴ was the first President of the European Court of Human Rights. Yes. That was a long time ago, as I say, and it came out of the ashes of the Second World War, it really did.

145. That brings us to your *Supplement*⁵⁵. There have been two supplements to this work and these were produced as a result of reforms to the legislation following the Law Commission reports and this is summarised in the extended preface.

You mentioned in the second supplement that apropos televised court proceedings, there had been some cases in New Zealand where the experience hadn't been that good. Could you say how this might affect a discussion in this country?

There has actually been a review conducted at the behest of the Chief Justice as to how the televising of proceedings in New Zealand was working. I know a judge, one of my oldest friends, had to hear a case which was one of the highest profile cases New Zealand has ever had and he had huge trouble with the counsel, never mind witnesses, and he said it just stopped you from concentrating on what was important.

It was a very high profile retrial of a man who had been convicted of killing three members of his family. This conviction was quashed by the Privy Council, Lord Bingham, and there was a lot of controversy about it. The Solicitor General in New Zealand thought

⁵² See Q97.

⁵³ Treasury Devil: colloquial term for the First Junior Treasury Counsel, a private practitioner barrister who represents Her Majesty's Government in the civil courts. The current Treasury Devil (2016) is James Eadie QC.

⁵⁴ Lord, Professor Sir Arnold Duncan McNair (1885-1976). Whewell Professor of International Law (1935-37), Professor of Comparative Law (1945-46), President of ICJ (1952-55). President ECHR (1959-65).

⁵⁵ Londono, P., Smith, A T H, & Eady D. 2015. *Arlidge, Eady Smith on Contempt Second Supplement to Fourth Edition*, Sweet & Maxwell, 328pp.



that in quashing the conviction, the Privy Council directed that there should be a retrial. I can remember Lord Bingham came to New Zealand and I picked him up at the airport and as we were driving in he said, "What's happened to that *Bain*⁵⁶ case?" and I said, "Well, they are about to retry him," and he said, "Why?" and I said, "Because you told us to." He said, "No, I didn't. That's not what I meant at all."

So anyway, so it was full of those kinds of difficulties already. Now, the fact that you have then got a camera crew in there, it just made the job a great deal more difficult. Other judges I have spoken to, particularly if they are not cases of any great notoriety... what the press would tend to do, they are quite constrained as to what they can do. They can only film for the first ten minutes and so forth, but somehow they will manage to find a witness looking strained or a defendant looking remorseful or whatever, or the other thing, looking extremely cocky, and that's the pictures you will see in the press. So I think that the conclusion that they came to was that there were, I think, some bits and pieces that needed tidying up and a little bit of thinking to be done, but ultimately I don't think it will affect the debate here. As you probably know, the Supreme Court is now live-streamed.

You can just watch it as it occurs and I don't think there would be any difficulty about doing that in the Court of Appeal either. It's the cases where you have got jurors and witnesses and so forth that can be problematic.

146. I understand. There is also in the Preface a discussion about the possibility of judges being able to order taking down of websites during a trial to stop jurors knowing facts about the case. Do you have any comments on that, Professor Smith?

The recommendation wasn't carried forward and I think that that was because it looks too much like censorship by the courts and they really don't want to be placed in that situation. It would be enough with the strong directions that they could control any damage that prejudicial publicity might give rise to. I think that's the answer. But the judges have said in a number of contexts, "We are not censors. We don't want to be put in a position of censoring, certainly not in advance."

147. Right. One also might imagine such a situation in the United States, where there is more emphasis on the constitution rights.

Yes. There was something in the question you asked where the Americans do allow a great deal of highly prejudicial information but, of course, the penalty they pay for that is having a very, very complicated jury selection system. It can take weeks to empanel the jury because counsel are allowed to ask jurors questions about their approach to this particular trial, about their approach to the death penalty, all those kind of... books are written about how you go about empanelling a jury and I think that's a route that we are just not at all happy about, even thinking about going down.

148. Professor Smith, on the question of journalistic freedom of expression and the protection of journalistic sources, page 13, says that barristers have a freedom of expression even in cases in which they are instructed to act.

There has been a bit of a change there. The old rule was that barristers would not comment at all on cases in which they had been instructed and I think there was a Bar

⁵⁶ The Bain family murders refers to the deaths by gunshot of Robin and Margaret Bain and three of their four children in Dunedin, New Zealand on 20 June 1994. The oldest son David Cullen Bain was convicted on each of the five counts and sentenced to life in prison. Bain's case was taken up by Joe Karam, The Privy Council declared there had been a 'substantial miscarriage of justice'. The retrial in June 2009 ended with his acquittal on all charges.



Council rule to that effect. Now that has been weakened but you will very rarely find a barrister commenting on a case in which he or she is involved, very rare. Solicitors will do it rather more routinely, but not members of the bar. I am just trying to think of cases in which that might have been done under the new dispensation, but I can't think of any here.

149. In the summing up in the preface, you say that the most outstanding problems requiring attention of parliament are in relation to public funding available to all those who are alleged to be in contempt.

I think that has been addressed to a certain extent. Well, certainly there have been new measures to deal with it and I think that the situation has been clarified. I think our problem was that it was very difficult to tell when legal aid was or wasn't available. I think that was our real problem. I am not actually writing that bit in the book, someone else is, but I think the answer is that that has now been clarified.

150. Which brings us to a paper that was published last year in the *Criminal Law Review*, 'Repositioning the Law of Contempt: Criminal Justice and Courts Act 2015'⁵⁷ and here the whole question of juries having or not to give reason for verdicts in order to comply with Article 6 is highlighted. My question would be, surely the answer to, "Why did you find him guilty?" is, "We think we did it," but that is obviously not good enough?

Well, I think that what was at issue there was that a case in the European Court of Human Rights which was looking into the jury system which appeared at one stage to be moving in the direction of saying that it was a violation of, I think, Article 6, if reasons weren't given, but that the court never actually made that decision, so even now juries aren't expected to give any answer other than "Guilty" or "Not guilty."

What has happened here, and in New Zealand, is that judges are now giving much, much more specific directions. I think it's called a "jury trail" or something like that. They actually say, "There are several issues that you have to decide. This is issue number one. If you decide it as (a) then this arises, if you decide it as (b) this arises," and then they will go through the trail for the juries that have got a trail to work through and I think that that's... In the old days with what was known as a "special verdict" and the judges would ask the jurors to come back with a finding on this issue, this issue, this issue, and this issue. This is a modified version of it, but the judges don't expect an answer on each of these questions because what they will eventually get to is, "And if you have done all of that, all of that, if the conclusion you have come to is X then it's guilty, if the conclusion you come to is Y then it's not guilty," and that's your part of the process completed.

151. Apropos a juror disclosing information after discharge from jury service, with these new regulations would it now be illegal for an ex-juror to ask to seek advice from a lawyer, given that he or she should go to the police or the trial judge in the first instance?

It probably would be dangerous and I think if they were to approach a lawyer, the lawyer would say, "You really must go to the court or...". It could be easily be done with the best of intentions, I would have thought. So it's something you have got to be careful about certainly.

⁵⁷ A T H Smith, [2015] *Criminal Law Review* 845-854.



152. Then finally, you conclude that the Criminal Justice and Courts Act does tackle the problem of what you call, “The unstoppable unregulated information flow on the internet,” and you say, “It does this with remarkable energy and surefootedness.” Should there not be a rethink about what should be classified as prohibited information in the criminal justice system rather than just how to stop it?

Well, that would take you into the law of evidence in a quite drastic way. You have got bad character evidence, you have got similar fact evidence, all of that sort of thing would need to be rethought. I think it’s enough for the juries’ purposes to know that there are particular facts about which they might be aware, but which cannot be used because it’s too prejudicial, it’s not probative enough. They don’t even need to know that. It’s just the law says, “We are not allowed to use it and so you mustn’t use it,” and that’s probably as far as you can take that argument, I would have thought.

153. Professor Smith, finally, your ‘*Learning the Law*’⁵⁸. The first edition with which you were involved was the 12th in 2002. How did you bring it up to date from the 11th edition in 1982, 20 years of change? Were there major alterations that you had to make?

Yes, there were, and one or two reviewers... no, actually, somebody was writing about it online and was very critical. There were I think two major changes. One was the masculine language in which the whole book was couched, it was aggressively masculine and it felt very strange to the modern ear at that time and, of course, the number of women studying law has gone up and up and up so I changed that tone completely. There were two other things. One was the availability of materials through computing and that was... when did I do the...?

154. The 12th in 2002 was the first that you were involved in. Then you brought it up to date from its 11th edition, that was in 1982.

That was Glanville’s last edition. That meant that I had to write about computer use in a way in which databases and so forth were going to change legal education quite significantly, so that had to be catered for. It still worries me how much of all of that to put in. Then a third element was the European dimension and I have put in a chapter Europe. Now, I am halfway through correcting the proofs of the new edition but because Brexit has rather made it a bit of a problem with that half of the European chapter. Half of it’s on the European Union, the other half is on the Convention. So the Convention stuff is fine, that stays effectively the same. But what I had to say in the Preface is “Look, what we don’t know is how long it’s going to take us to exit all this. Even after we have exited it may well be that you are going to need to know something about this because of the impact that it’s had on the common law,” and it has.

So that’s the way I have dealt with it. I am not very happy about doing that and I am going through the proofs at the moment because there are other places where Europe is mentioned. For example, in the chapter on the courts, where I say, “The European Court of Justice is in some ways, on matters of European law anyway, the supreme court in our jurisdiction. Now I need to put in that until Brexit takes place, that will be the case.”

But because of the availability of legal materials there is a very interesting case, a privacy case, held in the Supreme Court where a man wanted to publish a book about his own life including the fact that he had been abused as a small child, very, very badly abused. He wanted to write about it and his ex-wife got an injunction preventing him on the basis that it

⁵⁸ Sweet & Maxwell, now in 15th edition, 2013, 304pp.



would do damage to their child, who was only about ten, I think, but he had already had considerable mental health difficulties. The Court of Appeal found in favour of the ex-wife and he was not allowed to publish and the Supreme Court said, “Yes, you can publish,” taking into account Article 10 of the European Convention and so on and so forth.

So what I’ve actually done, and I don’t know whether it’s a good idea, is said, “Look, to have a look at this case all you have got to do is put this little citation into Google and you will have the text of the judgment in the Supreme Court. Why don’t we have a look at it? See if that sort of thing interests you.” So I am putting that in the Preface.

I am slightly worried about it because the language that Lady Brenda Hale⁵⁹ uses, which she has taken from the book, is very graphic and I thought, well, these kids who are going to encounter this. The reason I have done it is that in the chapter on *ratio decidendi*, Glanville had used a very old case, *Wilkinson v Downton*⁶⁰, and it was a case in which a man told a woman that her husband had been seriously injured. As a result of that, she suffered nervous shock and the case went in her favour, she won damages for nervous shock as a result of being told by this prankster that her husband had been hurt. Now, the Supreme Court actually relies on that decision in the case that I have just been mentioning, *Wilkinson v Downton*, so it sort of brings it up to date in a way. It shows that when they are looking at how you find the *ratio decidendi* of a case and seeing how it works through into later cases... here is another example of it.

155. Is this case pending, Professor Smith?

No, the Supreme Court has held in favour of the father, and allowed him to publish it. I think it has now been published. And it’s fair to say that although the parties were at loggerheads about it, they seem to have been reconciled about it in the sense that the mother was not claiming that he was doing it deliberately to hurt the boy, just that he was suffering from all kinds of mental difficulties, and she was worried it would exacerbate them. Helped, I think, by the fact that she was American and she had gone back to America with the boy so he might not have necessarily seen the book. But you had to look at the graphic language that’s used in it to see just why she would have been at all worried. So there is an example of the European Convention kicking in.

156. Well, Professor Smith, all that remains is for me to thank you very much indeed for yet another truly fascinating account. I am really looking forward to adding this to our archive. It’s going to be very valuable and greatly appreciated by your many friends and colleagues here in the Law Faculty and, indeed, worldwide. Thank you very, very much.

Well, thank you, yes. Thank you for all the work you have put into it, obviously, you have.

157. It’s been such a pleasure. I have so enjoyed talking to you and looking at some of the issues with which you have grappled over all these years.

Quite a long time, yes.

158. [As a postscript to Q109] I once in the 80s drove into Cape Town and encountered a march, a protest march from the townships and it was the most awful experience to be

⁵⁹ Brenda Marjorie Hale, Baroness Hale of Richmond DBE PC QC FBA (b. 1945), barrister, jurist and judge, Deputy President, Supreme Court of the United Kingdom (2013-).

⁶⁰ *Wilkinson v Downton* [1897] EWHC 1 (QB), [1897] 2 QB 57: decision in which the Common Law first recognised the tort of intentional infliction of mental shock.



in a car and know if anything went wrong, the police wouldn't know how best to handle it.

Well, I gave some advice to the Irish when they were doing a review of the law governing marching and parades in Northern Ireland. There was quite a major report on it, the North Report⁶¹, and they set up something called a "Parades Commission" which now regulates the holding of those marches and you don't hear anything like as much as you used to. They used to go marching into one another's territories and always finished up in jolly great riots. It happened every year. Apparently there were about 2,000 marches a year and they were just provocative.

⁶¹ <http://cain.ulst.ac.uk/issues/parade/north.htm#2>

The Report of the Independent Review of Parades and Marches - The North Report. 29th January 1997.

