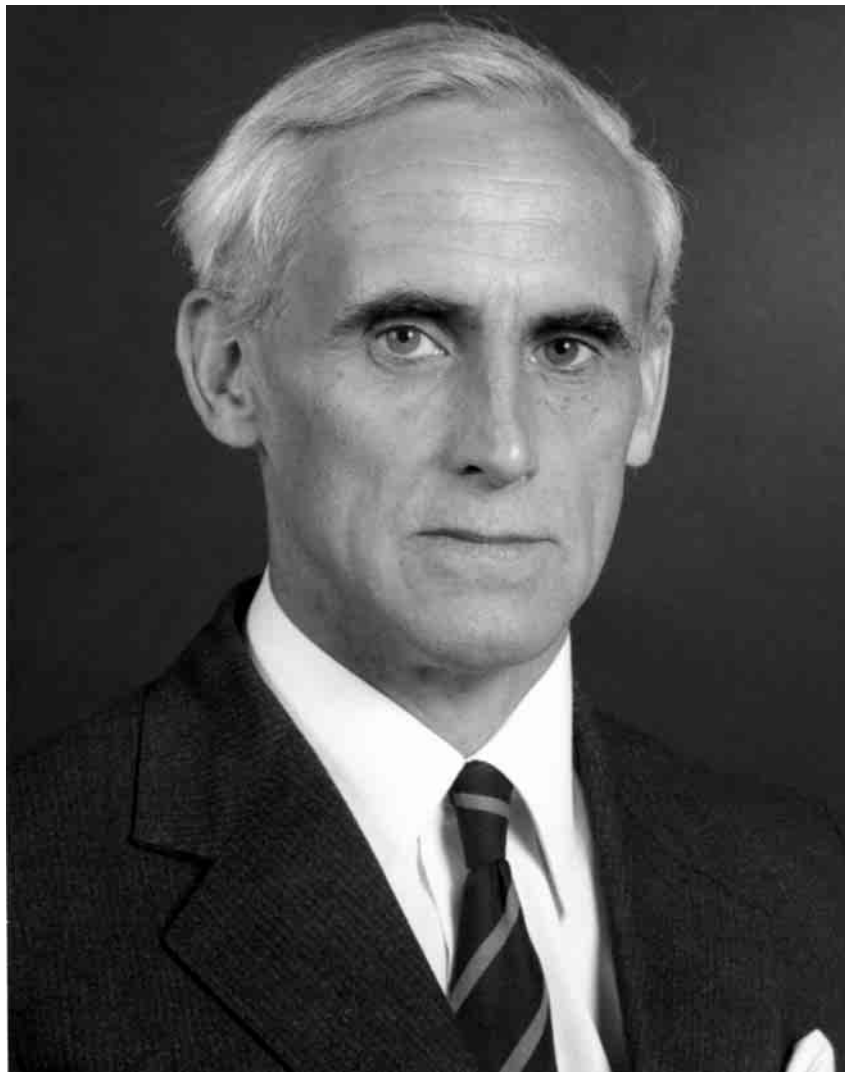

SIR JOHN SMITH

John Cyril Smith
1922–2003

JOHN CYRIL SMITH, Emeritus Professor of Law at the University of Nottingham, Fellow of the Academy since 1973 and chairman of the Law section in the early 1990s, was born on 15 January 1922. The second son of Bernard and Madeline Smith, he spent his early years in County Durham, where his father had an engineering business, and John went into the family business on leaving St Mary's Grammar School at Darlington. He worked as a civil engineer until joining the Royal Artillery to fight in the war. It was during his military service, in which he rose to the rank of captain, that he attended a lecture on law, and that sparked the interest that he went on to pursue to such outstanding effect in Cambridge. He took a First at Downing after the war, progressed to the LL B, and then went straight into teaching at Nottingham. He was made Head of the Department of Law in 1956 and promoted to Professor in 1957, and he led the Department for thirty years almost without a break until his retirement in 1987. In 1957 he married Shirley Anne Walters, who died in 2000. They are survived by their two sons and a daughter.

The Law of Contract

After a couple of years of teaching at Nottingham J. C. Smith was awarded a Commonwealth Fund Fellowship at Harvard University in 1952–3. He became impressed by the casebook method of teaching, common in the United States but little known in this country. Its essence is

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that students prepare for a class by reading reports of assigned cases, and then during the class they are asked questions about the cases and about their views of the judge's reasoning, which they have to defend in front of all the others. J. C. Smith not only encouraged colleagues at Nottingham to adopt this interactive approach, but set out (with J. A. C. Thomas) to construct a casebook for use in his own Contract course. The result was *A Casebook on Contract*, a book composed of extracts from case reports, pertinent questions and linking text. The book has now gone into eleven editions,[1] and was tremendously influential in the 1950s and 1960s in encouraging law teachers to experiment with more interactive methods of instruction.

Evidence and procedure

When he retired from his chair in 1987, Sir John said that the only subject he had taught every year throughout his career was Evidence. His deep understanding of the law was apparent in his case commentaries on the subject for the *Criminal Law Review*, although by the mid-1980s he was handing over many Evidence cases to his colleague and former student Diane Birch for commentary—a good example of his supportive treatment of able young lecturers. However, there were several issues in Evidence that continued to intrigue him. Perhaps it was his first career as an engineer that led him to be fascinated by the operation of computers: certainly he wrote effectively on the subject of computer-generated materials as evidence,[2] and the subsequent development of the law owed much to his demystification of the processes at work and their relevance to evidentiary concepts. Sir John was a strong advocate of the presumption of innocence, in the form of the principle, advocated by the Criminal Law Revision Committee in its notorious report on Evidence,[3] that the only burden that should be imposed on defendants in criminal cases is an evidential burden (i.e. the burden of producing sufficient evidence to raise the issue, which the prosecution must then disprove), and that the burden of proving an issue to

[1] (London), 1st edn., 1955, 11th edn., 2000.

[2] Most influential was 'The Admissibility of Statements by Computer', [1981] Criminal Law Review, 387.

[3] Criminal Law Revision Committee, 11th Report, *Evidence (General)*, Cmnd 4771 (London, HMSO, 1972)—notorious because of the recommendation that adverse inferences from silence be permitted, and the furious reaction to this from many parts of the legal profession. Sir John was not a member of the CLRC at this time.

the court should never be imposed on the defendant. He was therefore a critic of the many statutory provisions that appeared to ignore the principle, and also of the decision of the House of Lords in *Hunt*,[4] which drew from him a learned and much-cited article on 'The Presumption of Innocence'.[5] He also made telling contributions over the years to the development of criminal procedure, a subject much neglected by academic lawyers. A fine example is his article on 'Satisfying the Jury',[6] teasing out the procedural issues where the members of the jury are agreed on some issues in a case but not others. Another example would be his writings on the bill that became the Criminal Appeal Act 1995, where he pointed out the problems that would be created by the reduction of the grounds for allowing an appeal against a conviction to the single and unembellished word 'unsafe'—and, of course, he was right about this.[7]

Criminal law

It is chiefly for his work on the substantive criminal law that Sir John Smith will be long remembered. When the *Criminal Law Review* was founded in 1954, J. C. Smith was among the first contributors, with several articles in the first few years. Most of these articles concerned the law of larceny, and his tremendous command of the authorities on this subject led the Criminal Law Revision Committee to co-opt him to the subcommittee formed to propose 'a simpler and more effective' law of theft. The Committee's report on the subject acknowledges his assistance,[8] and he went on to write a monograph, *The Law of Theft*,[9] that ran into eight editions and was much cited in the courts. Sir John was sharply critical of many judicial decisions on the interpretation and application of the Theft Acts, reserving his strongest condemnation for the reasoning of the House of Lords in three leading cases.[10]

[4] [1987] Appeal Cases 352.
[5] (1987) 38, *Northern Ireland Legal Quarterly*, 223.
[6] [1988] Criminal Law Review, 335.
[7] See, for example, 'The Criminal Appeal Act 1995: (1) Appeals against Conviction', [1995] Criminal Law Review, 920, and his commentary on *Mullen* [1999] Criminal Law Review, 561.
[8] Criminal Law Revision Committee, 8th Report, *Theft and Related Offences*, Cmnd 2977 (London, HMSO, 1966); see particularly para. 2.
[9] (London), 1st edn., 1968; 8th edn., 1997.
[10] *Morris* [1984] Appeal Cases, 320, commentary at [1983] Criminal Law Review, 813; *Gomez* [1993] Appeal Cases, 442, commentary at [1993] Criminal Law Review, 304; *Hinks* [2001] 2 Appeal Cases 241, commentary at [2001] Criminal Law Review, 162 ('At least the House of Lords got the question right . . . Pity about the answer').

Much of Sir John's groundwork on the law of larceny was accomplished in the late 1950s and early 1960s, when he began work on a new textbook on criminal law. At that time only Kenny's *Outlines of the Criminal Law* served as a student text, and that was beginning to show its age, having had its first edition as long ago as 1902. The demands of modern university learning pointed to the need for a more rigorous, detailed and up-to-date text. In the early 1960s J. C. Smith invited his colleague at Nottingham, Brian Hogan, to join him in the project on which he had already embarked, and the result was the publication in 1965 of the first edition of Smith and Hogan's *Criminal Law*. This immediately became the leading textbook in the field, being both widely used in university law schools and greatly relied upon throughout the legal profession and in the courts. Those parts of the text dealing with larceny had to be extensively rewritten for the second edition, in the light of the Theft Act 1968. Since then the book has grown considerably in size, partly in response to the needs of practitioners, and (after the untimely death of Brian Hogan in 1996) Sir John completed the last two editions on his own. After the publication of the tenth edition in 2002,[11] Sir John decided to place future editions of the work in the hands of Professor David Ormerod of Leeds, whom he had nurtured as a junior colleague at Nottingham in the 1990s.

Why has 'Smith and Hogan' been so successful? Its initial success probably derived from the close attention to detail, the clarity of its analysis of the law, a willingness to encourage critical reflection on the development of the law, and its reference to (and interaction with) scholarly writings on the criminal law. In later years Sir John admitted to a lack of sympathy for much modern writing on the criminal law—he was not impressed by the increasingly philosophical analysis of fundamental concepts, and had no time for 'critical legal studies' approaches—and the book's engagement with current scholarship fell away. But it has retained its own critical tone in respect of many legal developments, and remains the first port of call for teachers, students and practitioners who want an authoritative statement of the law on a certain point. It is much used in the universities, often in conjunction with Smith and Hogan's *Criminal Law: Cases and Materials*.[12]

From what perspectives did Sir John criticise the criminal law? His position was that of the old-fashioned liberal, and this committed him to a strong strain of subjectivism. But by no means all his criticisms of

[11] (London), 10th edn., 2002, by Sir John Smith.
[12] (London), 8th edn., 2002, by Sir John Smith.

statute and case law stemmed from this source: he was a fierce defender of consistency and logic in legal propositions, often in the face of judicial decisions that found it convenient to dispense with such values when it was a matter of upholding the conviction of a villain, and his great respect for the historical development of the criminal law led him to criticise decisions that ignored the purpose behind certain legislative provisions. One characteristic critique of this kind is to be found in his commentary on the decision of the House of Lords to the effect that, despite the enactment of the Criminal Attempts Act 1981, impossibility could still afford a defence to a charge of criminal attempt: 'The House of Lords has done it again. Confusion and uncertainty have been substituted for the orderly and simple solution of this longstanding problem intended by Parliament.'[13]

This particular example brings us back to the theme of subjectivism—the principle that a person should only be liable to conviction of a criminal offence if he or she intended or knowingly risked causing the prohibited harm, and that a person should be entitled to be judged on the facts as he or she believed them to be. Sir John had embraced this principle in the context of the law of attempts in one of his earliest and best-known articles, 'Two Problems in Criminal Attempts', published in the *Harvard Law Review*.[14] There he developed a normative argument in favour of allowing recklessness to be a sufficient fault element for a criminal attempt, contrary to the prevailing orthodoxy that limited the fault to intention alone in the context of attempted crimes. He also argued in favour of convicting a person of an attempt even though the acts done could not, on the facts as they were, have led to the commission of the full offence—such as trying to pick a pocket by putting a hand into a pocket that turned out to be empty. (This line of argument was accepted by Parliament in the Criminal Attempts Act 1981, and explains Sir John's blunt condemnation of the House of Lords when they interpreted the Act otherwise.)[15] The same normative arguments were advanced in a more general context in his 'The Element of Chance in Criminal Liability'.[16]

This vigorous subjectivism led Sir John to oppose not only strict liability in the criminal law (i.e. those offences for which a person may be

[13] [1985] Criminal Law Review, 504.

[14] (1957) 70 *Harvard Law Review*, 422; a few years later he revisited the topic and focused on the precise points of disagreement with Glanville Williams: 'Two Problems of Criminal Attempts Re-Examined' [1962] Criminal Law Review, 135 and 212.

[15] See the text at n. 13 above.

[16] [1971] Criminal Law Review, 63.

convicted without proof of fault) but also any requirement that a mistaken belief should have been held on 'reasonable grounds'. He was therefore a great supporter of the decision in *Director of Public Prosecutions v. Morgan*,[17] which held that a man should not be convicted of rape if he mistakenly believed that the victim was consenting, and that there should be no requirement of reasonable grounds for such a belief. That decision, combining the subjective principle with what Lord Hailsham described as 'inexorable logic', stands as a fine example of the approach that Sir John had been advocating for years. On the other hand, a few years later came a decision of the House of Lords that embodied just the approach that Sir John thought unacceptable: in *Caldwell*[18] the House held that a person may be held to be 'reckless' not only by knowingly risking the prohibited consequence but also by unwittingly risking it, if it was a risk that should have been obvious. Sir John criticised this decision because it introduced an objective standard and allowed the conviction of someone who was unaware of a particular risk, and also because it failed to follow the intention of Parliament (and of the Law Commission) on the matter. Shortly after his death, the House of Lords overruled its decision in *Caldwell*,[19] accepting the criticisms that Sir John and others had made at the outset.

Quite apart from his general writings on the criminal law, Sir John devoted scholarly attention to the history and future development of some particular topics. His pre-eminence in the law of theft has already been mentioned. He wrote two original and searching papers on the law of complicity,[20] and his concern for the intellectual development of complicity was evident in his powerful response to the Law Commission's proposals on the subject.[21] In the late 1980s he delivered the Hamlyn Lectures on the subject of defences to criminal liability, and the resulting monograph is a treasury of careful analysis and thoughtful criticism,[22] although without engagement in the debate about the concepts of justification and excuse that was enthusing many scholars at the time.

[17] [1976] Appeal Cases, 182.
[18] [1982] Appeal Cases, 341.
[19] *R. v. G.* [2003] 3, Weekly Law Reports, p. 1060.
[20] 'Aid, Abet, Counsel or Procure', in P. R. Glazebrook (ed.), *Reshaping the Criminal Law* (London, 1978), p. 120; and 'Secondary Participation and Inchoate Offences', in C. F. H. Tapper (ed.), *Crime, Proof and Punishment* (London), p. 21.
[21] 'Criminal Liability of Accessories: Law and Law Reform', (1997) 113 *Law Quarterly Review*, 453.
[22] *Justification and Excuse in the Criminal Law* (London, 1989).

Public service

In addition to his three decades as Head of the Law Department at the University of Nottingham, and all his academic writings, John Smith gave considerable time to official committees and other public service work. He was appointed as a member of the Criminal Law Revision Committee in the late 1970s, having already served as a co-opted member on at least three references since the early 1960s. After his 'retirement' he was appointed Special Adviser to the House of Lords Select Committee on Murder and Life Imprisonment (1988–9), and subsequently an assessor to Sir John May's inquiry (1989–92) into the Maguire case, otherwise known as the case of the Guildford bombing. At the request of the Royal Commission on Criminal Justice (1991–3) he prepared a simplified exposition of the laws of evidence, which was subsequently turned into an excellent introductory text.[23]

Undoubtedly Sir John's greatest contribution to the public service, and probably the single piece of work for which he would most wish to be remembered, is his chairmanship of the small group of academic lawyers that produced the first draft of the criminal code. English law is unusual in having an uncodified criminal law, differing in this respect not only from most other European legal systems but also from most of the Commonwealth and United States systems that are based on English law. The code team was constituted in 1981, and produced a report and a draft Criminal Code Bill which the Law Commission published for consultation in 1985.[24] It was slightly modified as a result of consultation with the profession, and then issued as a Law Commission report in 1989[25] after further discussions with Sir John and his team. The code team had to perform a far more extensive exercise than perhaps even they anticipated. English criminal law was and is difficult to restate, not merely because of a proliferation of statutory provisions enacted at different times in differing contexts, but also because much of the general part and some specific offences remain undefined and exist only at common law. There were committee recommendations for the reform of some parts of the law, such as offences against the person and sexual offences, but in other areas the code team decided that the common law was simply too chaotic and contradictory to restate, and therefore resolved to incorporate their own

[23] *Understanding the Law of Evidence* (London, 1994).
[24] Law Com. No. 143, *Codification of the Criminal Law: a Report to the Law Commission*, H.C. 270 (London, HMSO, 1995).
[25] Law Com. No. 177, *A Criminal Code for England and Wales*, 2 vols. (1989).

recommendations. Thus the draft code produced by the team had a significant normative content, about which debate was inevitable. The code was also innovative in its style of drafting. The code team did not have parliamentary counsel to assist them, and they resolved to adopt a far less complex approach to drafting than is customary. 'We have adopted, so far as possible, a simple relatively spare style, avoiding redundant expressions. Statements should not be longer than they have to be; and even when unavoidably long, they should be easy to read.'[26] The difference in style is striking, and the team's efforts are much to be commended.

The problem, however, has not been the drafting. It has been a dire absence of political will. In the early 1990s the government showed little or no enthusiasm for codification. There was a suggestion that the draft code would be too large for Parliament to deal with—a statement that was unconvincing at the time, and which has been falsified by Parliament's handling of several mammoth bills since then. The Law Commission responded in 1993 by producing a draft bill on offences against the person, with a view to prompting the enactment of the code part by part, but this was received with no official enthusiasm at all. In the meantime Sir John Smith was working tirelessly to promote the draft criminal code, referring to it in his case commentaries in order to illustrate the respects in which the law and its administration would be improved by its enactment. The change of government in 1997 led to some optimism, and the Home Office swiftly published a further draft bill on offences against the person. But, again, nothing actually happened. Recent years have seen some strong official statements about the need for a criminal code,[27] but Sir John was becoming weary about the widening gap between aspirational statements and real progress.

Sir John Smith died on 14 February 2003, at the age of 81. He had been President of the Society of Public Teachers of Law in 1979–80, was knighted in 1993 and was awarded honorary Doctorates of Laws by Sheffield, Nottingham, Villanova and De Montfort universities. He was always a modest man, and ever courteous in his dealings with others, particularly students and young colleagues. He was one of the giants of academic law in the second half of the last century, and without his out-

[26] Law Com. No. 143 (see above, n. 24), para. 2.20.

[27] e.g. Home Office, *Criminal Justice: the Way Ahead*, Cm 5074 (London, The Stationery Office, 2001), para. 3.59; Lord Justice Auld, *Review of the Criminal Courts in England and Wales* (London, The Stationery Office, 2001), pp. 20–2.

standing application and advocacy the project of codifying the criminal law of England and Wales would be much further from fruition. As it is, the epitaph that the enactment of the Criminal Code would provide cannot yet be written.

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