STEPHEN CRETNEY

Stephen Michael Cretney

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elected Fellow of the British Academy 1985

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Stephen Michael Cretney, QC (Hon.), FBA, is in many ways the 'father' of modern English family law. His magnificent textbook *Principles of Family Law* (1974) put critical analysis of family law on the undergraduate table. His academic work influenced the judiciary's approach to family law and his service on the Law Commission from 1978 to 1983 directly influenced the direction of legislative reform in family law. His towering achievement is *Family Law in the Twentieth Century: a History* (2003)—a truly remarkable work in terms of its scope, ambition and insight.

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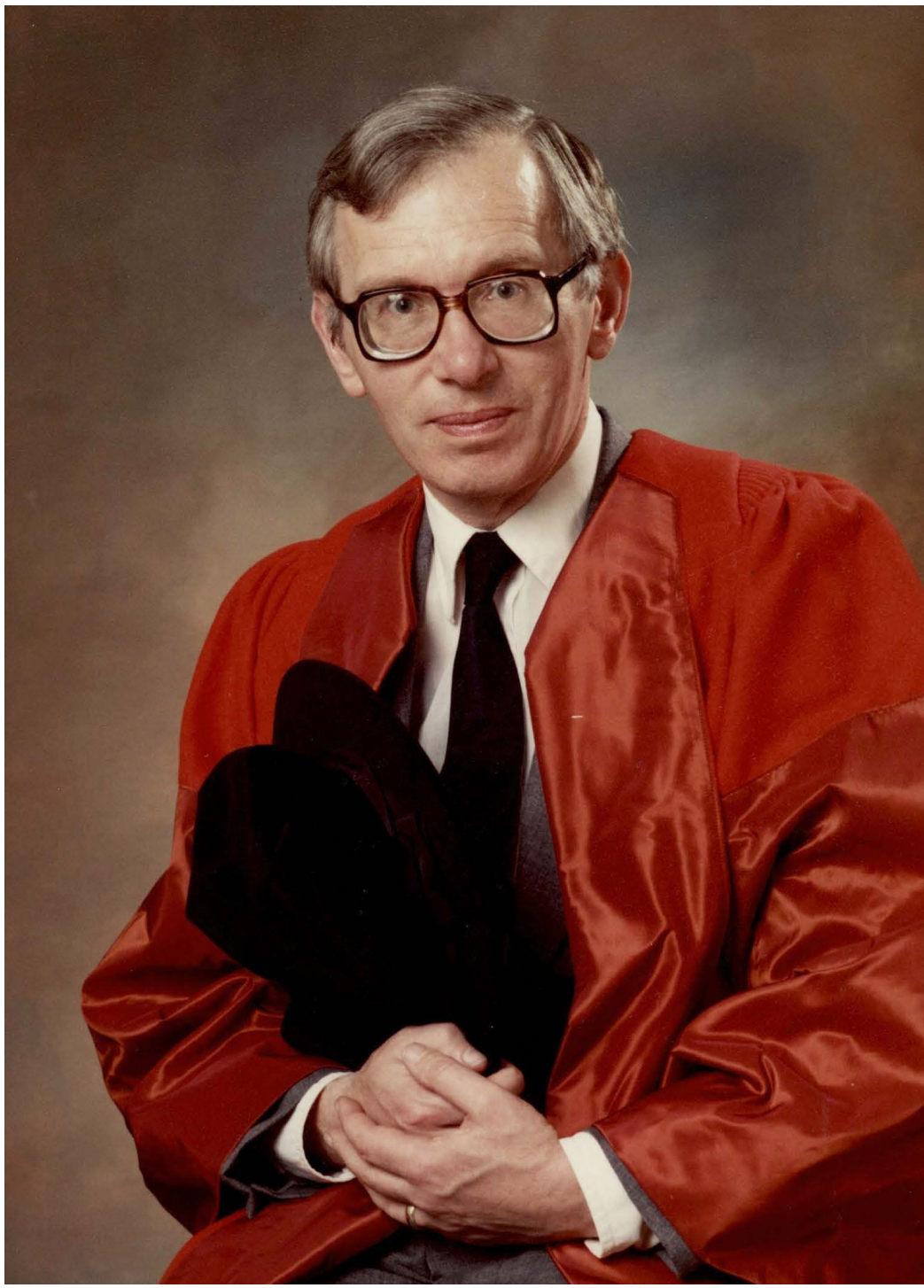

STEPHEN CRETNEY

Stephen Michael Cretney was born on 25 February 1936 at Witney, Oxfordshire, the younger son of Fred and Winifred, née Rowlands. Stephen's older brother (Frederick) David had been born in 1933. Their parents had both been born in 1902. Fred, who had worked his way up from a post as a junior clerk and obtained qualifications at night school, was a qualified Certified Accountant and Company Secretary. Winifred was a typist. They had recently moved from Manchester on Fred's appointment as Manager of the Witney Blanket Company. Within a few months, however, it became clear that the move was not working out well, and the family returned to Manchester, taking a house in Cheadle Hulme where Stephen grew up. Fred took a position with Oxendale & Co, a mail order business. He remained with the company for thirty-two years, retiring as its Managing Director. Winifred suffered severely with bipolar disorder (as her condition would be known today), leading to her being confined in mental hospitals for a large part of Stephen's childhood. This put a strain on the family. Lacking funds to hire assistance round the house, Fred juggled housekeeping and employment responsibilities, and worried constantly about providing for Winifred's care and the boys' upbringing. In later life, Stephen greatly appreciated the efforts Fred had made to hold the family together and had great respect for his father's self-sacrifice and fortitude in coping with the trials of his marriage.

In his Autobiographical Note, Stephen described himself as having been a solitary child. He shared few interests with his older brother. While there were occasional outings with his father, including memorable trips by coastal steamer round the British coast which he remembered with pleasure, Stephen was often left to his own devices. David was keen on science and engineering, becoming a test pilot with the RAF and subsequently flying with British Airways. Stephen, by contrast, inclined towards the arts. Having no interest in sport, his tended to be cerebral. He had enough ingenuity to build a crystal wireless set, and the determination and spirit of adventure to cycle alone to concerts given by the Hallé Orchestra under its conductor Sir John Barbirolli, make frequent visits to second-hand bookshops, join the Manchester branch of the Esperanto Association, visit libraries (including Stockport Reference Library and Manchester Central Reference Library where he carried out research for his schoolwork), and even to ride alone to London in 1951 to visit the Festival of Britain.

As a pupil at Cheadle Hulme School, a direct grant grammar school, Stephen developed keen interests in history, music and philosophy. He became particularly friendly with the children (daughter Andrée and son Jean) of Belgian theoretical nuclear physicist Professor Léon Rosenfeld (a collaborator of Niels Bohr) and his wife Yvonne, one of the first women to obtain a PhD in Physics from a European university. Léon Rosenfeld was highly cultured and well travelled, a Jewish atheist and socialist who spoke five languages fluently and several others adequately. The Rosenfelds introduced Stephen to Russian cinema, took him to socialist meetings

(which left him preferring understatement to flights of rhetoric as a way of persuading doubters), and gave him the chance to experience French *cuisine bourgeoise* of which Yvonne Rosenfeld was an accomplished practitioner. They opened his mind to a cosmopolitan mix of intellectual, political and artistic ideas and sensibilities. The household was very different from Stephen's somewhat dour home life, and revealed new, exciting worlds.

Stephen relished opportunities for contact with foreign cultures. Through his school, he was able to spend a short time as an exchange boarder at Collège Cévenol at Chambon-sur-Lignon in France, which impressed on him the importance of linguistic accuracy and logical structure. Then, aged 17, he spent five weeks with the Rosenfelds' son Jean touring Belgium and the Netherlands by bicycle, absorbing the rich culture of North European architecture and art, and experiencing different social traditions. Stephen's expanding view of the world nurtured exciting aspirations.

At school, Mr Stafford Foster, an excellent History teacher, encouraged him to believe that he had the ability to read History at Oxford. His father Fred, ever concerned for Stephen's long-term security, opposed this, both on financial grounds (he disapproved of his son's tendency to acquire 'champagne tastes on a beer income', and continued to be concerned about the need to save enough money to care for Stephen's mother) and because Fred thought that History was an unpromising basis for a career with a secure income. But Stephen's Headmaster, the charismatic T. T. R. Lockwood, persuaded Fred to let him apply, and Stephen was awarded a Demyship (Major Open Scholarship) at Magdalen College, Oxford.

Before taking it up, he had to undergo National Service from 1954 to 1956, serving initially in the Cheshire Regiment before transferring to a Russian linguist course. There he encountered a number of graduates who had studied Modern Languages but found themselves without job opportunities. He was determined not to fall into the same trap, and decided to give up the idea of reading History and instead to read Jurisprudence at Oxford, as Law seemed to offer better career prospects. One might have expected his father to approve, but Fred had a low opinion of professional people, whom he regarded as giving themselves airs and graces at the expense of productive businessmen.

Matriculating at Magdalen in the autumn of 1956, Stephen was introduced to the study of law by a stellar group of Law Fellows. John Morris, Rupert Cross and Guenter Treitel were all giants in their respective fields, each in due course being elected to Fellowship of the British Academy and Cross and Treitel being knighted.[1]

[1] Peter North, 'John Humphrey Carlile Morris, 1910–1984', *Proceedings of the British Academy*, 74 (1988), pp. 443–82; H. L. A. Hart, 'Arthur Rupert Neale Cross, 1912–1980', *Proceedings of the British Academy*, 70 (1984), pp. 405–37; Francis Reynolds, 'Guenter Treitel, 1928–2019', *Biographical Memoirs of Fellows of the British Academy*, XIX, pp. 129–48.

Morris and Cross were not entirely comfortable tutors, as Stephen's fellow Law student Frederic (Freddy) Reynold later recalled:

> Morris could at times be rather boorish and schoolmasterly, although capable of great kindness; Cross, who was blind (since the age of four), tended on occasions to be irascible: both conspicuously lacked what we now call inter-personal skills, and both were at times guilty of a degree of insensitivity which would now, quite rightly, be regarded as completely unacceptable.[2]

Nevertheless, 'Both Morris and Cross excelled in ensuring that their students got a firm grasp of relevant principles.'[3] Cross was in due course to help Stephen find Articles with a firm of solicitors, and Morris would offer support and guidance in the early stages of Stephen's academic career. But Treitel was a more engaging tutor. Much younger than the others, he

> assumed (perhaps just a little naively) that his students already had a firm grasp of relevant principles; and excelled in demonstrating and exploring the subtleties of whatever happened to be under discussion. He was always scrupulously polite and considerate, and happily continues to be held in affection by generations of law students.[4]

It would have been hard to find a more authoritative group of tutors or a more impressive intellectual and legal powerhouse in one College, especially as the Oxford Law Faculty at the time was not of uniformly high quality,[5] although a serious attempt was being made to raise the academic standards of its undergraduates.

At Magdalen, Stephen made enduring friendships with fellow undergraduates, several of whom were, like him, politically active and left-leaning, and, also like him, rather outside the upper-middle class, public-school mainstream of 1950s undergraduate society in College. Lewis Rudd was a keen student journalist who edited *The Isis*, one of the student newspapers, and went on to a career in journalism before becoming a successful producer of children's television programmes. He and Stephen developed a shared interest in horse-racing, and they later enjoyed frequent visits together to Newbury Racecourse. Freddy Reynold was News Editor and later Features Editor of *The Isis*, and was active in the Oxford Union. He went on to be a very successful barrister who specialised in employment and trade union law during a tumultuous period, lasting several decades, for industrial relations, as well as undertaking a broad

[2] Frederic Reynold QC, *Chance, Cheek and Some Heroics* (London: Wildy, Simmonds & Hill, 2018), pp. 30–1.
[3] Ibid., p. 30.
[4] Ibid., p. 31.
[5] For a particularly jaundiced view, see A. W. Brian Simpson, *Reflections on* The Concept of Law (Oxford: Oxford University Press, 2011), pp. 52–5, 59–61, 64–7.

range of other types of legal work. Martin Gilbert, the historian and later member of the Chilcot Inquiry into the Iraq War, matriculated a year after Stephen and became a very good friend. Encouraged by Lewis Rudd and Freddy Reynold, Stephen wrote his first two published articles, both for *The Isis*, on the need to reform the law of abortion and on the system of courts martial, showing an interest in law reform that foreshadowed his later work as a Law Commissioner. Stephen, Freddy and Lewis were politically aware and active; they campaigned against the invasion of Egypt during the Suez crisis in 1956, and in favour of nuclear disarmament thereafter. Stephen was later 'a little ashamed' also to have 'contributed a few items' to a satirical magazine called *Parson's Pleasure*, which 'consisted in large part of maliciously humorous comments on other undergraduates', with his identity 'at least partially concealed under a pseudonym'.[6] He enjoyed well-informed gossip. Other newly discovered enthusiasms included a deep love of opera, and enjoyment of Choral Evensong in the College Chapel, where he took pleasure in reading from the King James' Bible. It is not clear whether this attraction was principally spiritual, aesthetic, cultural or a combination of all of them. In later years Stephen dated the prefaces to his books by reference to the relevant saint's day, a practice described by his widow Antonia as reflecting 'unspoken faith with a tiny ironic tinge'.[7]

Recalling the social scene among Oxford undergraduates in the late 1950s, Stephen and Freddy Reynold both recalled the significance of class and class consciousness.[8] Stephen felt, as a Grammar School boy, that he lacked the polish and to some extent the intellectual and cultural hinterland of public school contemporaries.[9] Yet Freddy recalls seeing him differently:

> He was quietly spoken, had a dry sense of humour, and prone to understatement. What appealed to me instantly was the range of his interests: it seemed to me that for his age he was astonishingly well-read; he had a deep knowledge and appreciation of classical music; and he seemed to me to be an astute but detached observer of the social scene.[10]

There was, at any rate, no doubt about Stephen's intellectual strength. He claimed to be surprised, but was no doubt gratified, at the academic success that he achieved: Distinction in the Law Moderations examination after two terms, and a 'congratulatory' First Class Honours in 'Schools' at the end of his third year. He then had to make a living. At Magdalen Stephen had planned to go to the Bar. On graduating in

[6] Autobiographical Note, p. 26.
[7] Email from the Revd Antonia Cretney to David Feldman (hereafter DF), 12 June 2020.
[8] Reynold, *Chance, Cheek and Some Heroics*, pp. 31–2.
[9] Autobiographical Note, pp. 22–3.
[10] Reynold, *Chance, Cheek and Some Heroics*, p. 32.

1959, however, he felt compelled to give up this plan. The expense of a pupillage and poor prospects at the Bar at the time made it less attractive and accessible to someone of his background than becoming a solicitor. Thanks to Rupert Cross's contacts, he obtained a position as an articled clerk with the firm of Neish Howell and Haldane, which later became Macfarlanes, specialists in private-client work. Unusually for an articled clerk he was offered a small salary, which he supplemented with some support from his father for three years, part-time Law teaching at Holborn College of Law, Languages and Commerce, and 'week-ending' as a tutor for Oxford colleges.

At Macfarlanes he came to specialise in advising rich clients on their tax and inheritance problems, a fruitful source of business at a time of very high rates of taxation.[11] Stephen built up expertise in the highly technical fields of revenue law and property law, and found them intellectually interesting. His success led to rapid promotion: he became a salaried partner of the firm in 1964, only two years after qualifying as a solicitor, and two years after that, at the age of just 30, was offered a full, equity partnership. This could have provided him with a secure, financially rewarding position for the rest of his working life. But two factors made him hesitate. First, the task of reducing the tax liability of high-wealth clients was hardly fulfilling for a young man with socialist sympathies; he never felt confident that any scheme he devised could (or perhaps should) be legally unassailable.

Secondly, Stephen felt that at a personal level he lacked the social skills needed to bring in new private clients, an expectation of equity partners. His manner could be disconcerting until one became used to it. Not by nature extrovert, he could seem diffident, although in reality he had intellectual self-confidence and firm views. In conversation he tended to avoid looking directly at the other party; his speech was precise, quiet and usually understated, relying on strength of argument rather than force of personality. This does not mean that he was anti-social. In the company of people with whom he felt at ease, he relaxed and enjoyed good quality gossip and banter, food and drink.[12] But social activities with unfamiliar people to drum up business and glad-handing potential clients did not come naturally to him.

The offer of an equity partnership therefore caused him to pause to reassess his future career, and paradoxically pushed him into life as a full-time academic lawyer. Refusing the partnership would have precluded further career development as a

[11] It is easy to forget that during the 1960s and 1970s the basic rate of income tax hovered around 35%, with surtax or higher-rate tax rising steeply to a marginal rate of 83%. On investment income there was a further surcharge of 15%, making the top marginal rate of tax 98 pence in the pound. In these conditions, tax planning advice was at a premium.

[12] Frederic Reynold QC, email to DF, 16 June 2020. He relates that Stephen was 'an active and enthusiastic member of the Trogiron Club: an informal group comprising old Oxford friends'. For a photograph of one of their dinners, see Reynold, *Chance, Cheek and Some Heroics*, p. 143.

solicitor, both at Macfarlanes and in other firms to which he might try to move to seek more fulfilling legal work. Looking for an alternative he saw an advertisement for a two-year lectureship at the Kenya School of Law in Nairobi. He had, as already noted, acquired some teaching experience, and had been struck when teaching at Holborn College by the large number of African students who came to England because there was little opportunity to study law in their home countries. At the time of Kenya's independence in 1963 there had been only one black lawyer in practice in the country, and the Kenya Law School had been established to train more. Driven by a combination of idealism and need, he applied successfully for the post, and arrived in Nairobi to be told, at forty-eight hours' notice, that he had to teach, among other things, family law, a subject about which he knew very little (and nothing as it applied in Kenya). It was to be the start of a path that would lead him to becoming one of the most distinguished family lawyers of his generation.

Like many early-career law teachers before and since, Stephen applied himself to the task of learning the subject and teaching it more or less simultaneously. The Law School was for training practitioners, and did not award degrees, unlike the University of East Africa, based in Tanzania, where many young law teachers who were to achieve prominence in the UK and abroad were helping to develop post-colonial law and legal education for newly independent African nations. Nevertheless, Stephen's students were in the main very intelligent and determined, despite being short of formal qualifications, and Stephen became extremely interested in the special problems of formulating 'family law' in a setting where people's family relationships depended on whether they were 'European' (governed by a somewhat out-of-date version of English law), Hindu or Muslim (governed by a codified version of their respective systems of personal law), or 'Native Africans', to whom 'African Law' (a form of customary law) might apply.

He wrote his first three law journal articles on these issues during this period, conducting research in the library of the Attorney General's Department in Nairobi to compensate for the deficiencies of the law library at his own institution. Three characteristic qualities of Stephen's writing were immediately apparent in these early works: his command of legal, including constitutional, technicality; his ability to contextualise it by researching the social and political history underpinning colonial law and the social changes making the old law unsuitable for modern conditions; and his willingness to criticise the law and propose reforms. In 'Jurisdiction in matrimonial causes in Kenya',[13] he analysed the private international law of Kenya relating to divorce and nullity, identified social problems flowing from it in the context of Kenya, and showed that the common assumption that the law of Kenya was the same as that

[13] (1966) 2 *East African Law Journal* 72–83.

of England and Wales was an over-simplification. Apart from differences between the legislation applicable in the two countries, the common law was not necessarily identical. In accordance with rules of constitutional and international law regulating the application of the law of a colonising power in a colonised state, English law was received in Kenya in 1897. Any rule established in England before that date was binding in Kenya unless changed by legislation. Common-law rules developed in England after that date, by contrast (which entailed rejecting the 'atavistic' idea that judges never make, but only declare, the law), were persuasive only, and judges in Kenya could decide not to follow them, although they would represent the law until that was done.

He was becoming a devotee of long footnotes carrying a good deal of narrative substance. In 'Some problems in the marriage laws of Kenya',[14] he grappled with some of the implications of the multiple ways of marrying in Kenya: under the Marriage (Amendment) Act 1966 of Kenya before a registrar for a citizen of Kenya; under African customary law; under Kenya's African Christian Marriage and Divorce Act; or in an embassy or consulate, besides the possibility of having a marriage celebrated outside Kenya recognised by the law of Kenya. The main text ran to just under eighteen pages, with a little over eight pages of endnotes (in smaller font). One endnote alone (note 52, on the recognition of potentially polygamous marriages) occupied nearly four pages with detailed analysis and critique of case law, and would have significantly disrupted the text had the journal used footnotes rather than endnotes. Another, note 63, while only half a page long, canvassed two additional scenarios to those discussed in the main text. In only his second law journal article, he was using notes to run parallel discussions to those in the text, allowing the main text to be kept relatively straightforward without compromising depth of analysis or obscuring complexity.

In these works, and in 'The application of equitable doctrines by the courts of East Africa' (researched and written in Kenya, but published after his return to England),[15] Stephen was showing how rigorous legal analysis examining the impact of interlocking legal orders on particular social problems relating to families in post-colonial Africa could reveal ways of alleviating difficulties through the common law or, where that would not suffice, by legislative change. It contributed, as he wrote in the article on equitable doctrines, to laying foundations for a distinctively Kenyan law of property and family which could be adapted to the social conditions and socialist goals of states in East Africa.[16] This was important work, and Stephen could justifiably feel that his time in Kenya had been truly valuable.

[14] (1967) 3 *East African Law Journal* 1–26.
[15] (1968) 12 *Journal of African Law* 119–45.
[16] Ibid., at pp. 119–20.

Coming towards the end of his contract in Nairobi, Stephen had to decide what to do next. Interesting and fulfilling as his time in Nairobi had been, he wanted to work in a university rather than a law school geared to educating people for the legal profession. He thought of applying for a position at the University of East Africa, but his former tutor John Morris discouraged him from continuing to teach in Africa, so instead he applied for and was offered a lectureship at the University of Southampton. He stayed there for only one academic year, but in some respects it seems to have had a formative influence on the development of his scholarship. The dean at the time, Professor R. F. V. Heuston (subsequently appointed Honorary QC and elected FBA), was a noted legal historian and biographer with a keen eye for telling details in histories and personal stories, interests which Stephen shared. He benefited from collaborating on research in property law with Professor Gerald Dworkin, including an edition of *Theobald on Wills*[17] and an article based on empirical research concerning the system for compensating people for losses caused by errors on the register of title to land.[18] Stephen later credited Dworkin with encouraging him to do 'serious' research in property law, resulting in the publication of an article showing, by exploring the historical development of a rule about trustees' obligations from a 1726 judgment concerning the obligation of trustees not to profit from their positions, that there was no justification for treating the decision as creating a special rule for cases where the trust property includes a lease.[19] But the approach in this article is far more historical than in that jointly authored with Dworkin; it includes in one footnote a delightfully acidic discussion of the abilities of Lord King, the Lord Chancellor who had decided *Keech v Sandford* in 1726,[20] as an equity lawyer and judge, with a quotation from Campbell's *Lives of the Lord Chancellors*.[21]

Stephen enjoyed his time at Southampton and found it academically stimulating, but after only a year he was elected to a Quarrell Fellowship in Law and Tutorship at Exeter College, Oxford. The College was looking for someone to teach, among other subjects, family law, which was being made available as an optional course in a revised and modernised Law curriculum. The senior Law Fellow in College was Richard Buxton, an incisive analytical thinker, inspiring tutor and impressive lecturer, and a good colleague and friend who in due course became godfather to Stephen's younger

[17] Stephen Cretney and Gerald Dworkin, *Theobald on Wills* 13th edn (London: Sweet & Maxwell, 1971).
[18] Stephen Cretney and Gerald Dworkin, 'Rectification and indemnity: illusion and reality' (1968) 84 *Law Quarterly Review* 528–56.
[19] Stephen Cretney, 'The rationale of *Keech v. Sandford*' (1969) 33 *Conveyancer (New Series)* 161–78.
[20] (1726) *Select Cases in Chancery Tempore King* 61.
[21] 'The rationale of *Keech v. Sandford*', n. 19 above, at pp. 162–3, fn. 10. It is interesting, though perhaps coincidental, that Stephen's Dean, Professor Heuston, was an afficionado of Campbell's *Lives*, and had written a volume extending their coverage to the period 1885–1940: R. F. V. Heuston, *Lives of the Lord Chancellors, 1885–1940* (Oxford: Clarendon Press, 1964).

son, Edward. Richard resigned his Fellowship in 1972 to go to the Bar, although he continued to teach in Oxford for a time as a 'week-ender'. He later became a Law Commissioner, and in due course was appointed a High Court judge and Lord Justice of Appeal. Stephen found College life congenial.

Stephen had to teach a range of subjects in addition to family law, and particularly enjoyed offering tutorials in Constitutional Law and Tort. He was deeply committed to the importance of teaching in the life of university scholars. He was a meticulous and supportive tutor, whose guidance, clarity of thought and encouragement helped many of his undergraduate pupils to surpass their expectations of themselves in getting to grips with the intricacies of the law. Largely undemonstrative, quietly spoken and with his disconcerting habit of rarely looking directly at the person he was addressing, he could nevertheless communicate engagingly, and memorably and effectively rebuked people whose preparation had been deficient ('I commend this subject to your further attention' was one such comment taken to heart by its recipient). As a lecturer, he was completely in control of his audience. He spoke with evident authority, analytical precision and dry humour that held people's attention without any need for histrionics. His lectures on registered land (not on its face the most riveting subject on the law curriculum) were strangely gripping, bringing out both the technically interesting points of statutory interpretation and the policy background to the legislation. Lectures were timed to perfection. He once explained the secret of giving talks as being that, whatever happened, one jumped to one's final page with five minutes to go; if one has been given only five minutes, start on the last page.

From 1970 Stephen put his expertise as a tax specialist to practical use: he sat as a General Commissioner for Income Tax, hearing appeals by taxpayers against decisions of the Inland Revenue Commissioners (later merged with the Commissioners of Customs and Excise to became Her Majesty's Revenue and Customs). In 1972, this became part of his teaching load as well when he was appointed to a University Lectureship to take over a course on Personal Taxation on the BCL degree. Stephen's seminars and lectures in Personal Taxation were outstandingly clear and stimulating. Besides introducing the graduate students from many different jurisdictions to the intricacies of the UK law of taxation, he also taught them how to find their way round statutes, a vitally important source of law but one that was often undervalued in comparison to case law in Oxford's syllabuses. He also undertook a good deal of research on tax law across the Commonwealth, writing chapters on taxation for the *Annual Survey of Commonwealth Law* from 1971 to 1977, by which time he felt that it was impossible to do significantly worthwhile research on that subject without making it his primary, if not sole, area of academic interest.[22]

[22] The *Annual Survey* was produced by members of the Law Faculty at Oxford and published by

By this time, Stephen was already committed to making family law his main field of research. He was not alone. He and John Eekelaar, another family law scholar and Fellow of Pembroke College, Oxford, were soon joined by others who taught the subject. Ruth (now Baroness) Deech, who became a Fellow of St Anne's College, Oxford, in 1970 (and later its Principal) never having taught family law before, remembers her good fortune that 'these two outstanding family lawyers put me on the path'.[23] Stephen's help to less experienced academics was to be one of his characteristic contributions to the future health of the profession of university law teaching, and the academic study of family law in particular. He was a great supporter of other people's academic careers, but he had a particularly beneficial effect on the careers of women in family law. As Ruth Deech notes, this was done 'not by expressing ambitions about gender equality, but by practical assistance'.[24] Professor Rebecca Probert remembers how, having reviewed (and rejected) an article she had submitted to a journal as a very junior lecturer at Aberystwyth, Stephen asked the editor to pass on his contact details to her and invited her to contact him so that he could draw her attention to some unpublished sources that he was aware of. She describes him as having 'a knack of offering support and advice in a way that was so subtle and delicate that none of us would ever have thought that he was offering support because we were women!'[25] And that was, indeed, not the reason; he recognised emerging talent and supported it regardless of gender, but he helped women scholars at a time when their path was strewn with more hurdles than it was later.

Stephen's support extended to helping people whose abilities he respected to develop their careers. He was impressed by Brenda Hoggett (now Baroness Hale) when she was a lecturer at the University of Manchester where he was an external examiner, and persuaded her to apply to succeed him as a Law Commissioner even after the deadline for applications had passed.[26] He encouraged the appointment of Ruth Deech as Principal of St Anne's College, and vouched for her academic credentials to the Governing Body. As she points out, he 'took seriously the evolution in independence and in the career position of women', and this was reflected in much of

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Butterworths. Stephen's time in Africa seems to have made him somewhat sceptical about the value of the exercise. He commented much later, in his Autobiographical Note, that it 'was an exercise in comparative law based on the belief that the Commonwealth had a common legal heritage. It absorbed much of the research capacity of members of the Oxford Law Faculty, even as the belief which had inspired its creation was being eroded.' Autobiographical Note, p. 39, n. 48.

[23] Email from Baroness Deech to DF, 30 June 2020.

[24] Ibid.

[25] Email from Professor Probert to DF, 28 June 2020.

[26] Remarks by Baroness Hale at the presentation of a Festschrift to Stephen, 20 April 2012. We are grateful to Baroness Deech for this information.

his scholarship, which showed 'passion for reform and non-discrimination', and the work he was to do at the Law Commission.[27]

Stephen's first major publication on English family law was in 1970 when he subjected the reformed law on post-divorce maintenance (then called 'ancillary provision') introduced by the Matrimonial Proceedings and Property Act 1970 to rigorous criticism.[28] In particular, he criticised the introduction, in statutory form, of what later came to be known as the 'minimal loss principle', according to which the overall goal was to keep the divorcing parties in the position they would have been had the marriage not broken down, and denounced, even more strongly, the subjection of this principle to broad-brush considerations of conduct. In this, Stephen indicated the reservations he was to express many times later to excessive judicial discretion in these matters. His conclusions that 'the basis for support obligations should be that the existence of a marriage by itself only gives a wife the right to a modest but adequate support until she can again become self-supporting, coupled with a division of any property acquired as family assets' and that '[i]f the marriage has lasted for so long that it has been, in fact, the wife's career (and a fortiori if there are children of whom she has custody) there is a stronger case for applying the existing rule' anticipate later changes in the law, in which he was to play an important part in his later role as Law Commissioner.

This was but a foretaste of what was to become a remarkable corpus of works, mostly, but not only, in family law. In the early 1970s he planned to write a book on family law for general readers, but as his engagement in research into and teaching of the subject grew he changed his project to writing a book aimed more particularly at lawyers and law students, but going beyond a technical analysis of legal rules and principles by discussing the historical development of the law, analysing factors influencing it, and aiming 'to stimulate discussion of its effectiveness as an instrument of social policy'.[29] This was a tall order and required a large canvas. His publishers, Sweet & Maxwell (now part of Thomson Reuters), were initially reluctant to risk commissioning a very ambitious, somewhat multidisciplinary work from a relatively young, largely untried author on a topic which was not a compulsory subject in the curriculum of any British law school. They imposed restrictions which resulted in a relatively slim book (the text occupied 369 pages) called *Principles of Family Law* (rather than simply *Family Law*), first published in 1974. Even in the first edition, the concern with principle demonstrated in the 1970 article was carried across the wide canvas of family law. The book was intended to provide a distinct alternative to the then

[27] Email from Baroness Deech, 20 June 2020.
[28] 'The Maintenance Quagmire' (1970) 33 *Modern Law Review* 662–83.
[29] See the prefaces to successive editions of *Principles of Family Law*.

traditional approach, exemplified in particular by Bromley's *Family Law*.[30] But, as in the article, there is equal concentration on detail, both with regard to legislation and practice (the 1970 article for example deals extensively with the practical entanglements created by the concurrency of different systems with respect to maintenance in the High Court and magistrates' courts). The *Principles* initially received some criticism for insufficient analysis of the case law—Stephen would cite a principle and the supporting case or cases without necessarily dissecting the judgments—but in doing this he was carrying out his purpose of enlightening students rather than providing a 'practitioner's manual'. Stephen was able to expand the book considerably in subsequent editions until it more or less reflected his original conception. By the fourth edition of *Principles*, published in 1984, the last which he prepared alone,[31] the text had expanded to 1,018 pages and he felt that he had established that balance between legal analysis and historical and social context for which he had hoped from the beginning.

The preparation of the first edition brought Stephen a transformative though incidental personal benefit, an opportunity for personal enrichment and happiness that was to benefit him for the rest of his life. Antonia Vanrenen, a graduate in English from the University of York, was the College Secretary at Exeter College, with an office in Palmer's Tower, the oldest surviving part of the College's buildings, in which Stephen, too, had rooms. Stephen's handwriting was always seriously difficult to interpret unless one knew or could guess in advance what he meant, and the typescript of *Principles of Family Law*, heavily amended in his almost illegible hand, needed to be put into a shape which publishers could use. Antonia took the matter in hand, and their wedding followed the submission of the typescript in 1973. With a lively, intellectually penetrating mind, keen sense of humour, wide range of interests and positive outlook, cheerful and practical, Antonia provided him with a counterweight to his tendency towards depression and, despite his achievements, feelings of being undervalued or misunderstood. They had two sons, Matthew and Edward, born in 1975 and 1979, respectively. Antonia later worked as a socio-legal researcher in family law in her own right at the University of Bristol, before becoming one of the early women priests to enter the ministry of the Church of England, being ordained Deacon in 1994 and Priest in 1995. For forty-six years she brightened Stephen's world.

[30] See Simon Rowbotham, 'In the matter of *Cretney v Bromley* (1974): Stephen Cretney's principles of Family Law', in Rebecca Probert and Chris Barton (eds.), *Fifty Years in Family Law: Essays for Stephen Cretney* (Cambridge: Intersentia, 2012).

[31] For the fifth and subsequent editions Cretney was joined as co-editor by Professor Judith Masson, and the team was enlarged by the addition of Professor Rebecca Bailey-Harris from the seventh edition and Professor Rebecca Probert for the eighth edition. The seventh (2003) was the last for which Stephen himself took responsibility: see 'Valedictory Note by Stephen Cretney', in J. M. Masson, R. Bailey-Harris and R. J. Probert, *Cretney Principles of Family Law* 8th edn (London: Sweet & Maxwell, 2008), p. ix.

Stephen enjoyed family life. He, Antonia, Matthew and Edward took a variety of types of holidays. Much later, as University Orator presenting Stephen for an honorary degree at the University of Bristol in 2007, Professor Malcolm Evans would speak of the pleasure Stephen's Bristol colleagues in the 1980s and early 1990s derived from 'accounts of motor cycling escapes, family holidays at Butlins and visits to the Superbowl', which seemed slightly incongruous to those who saw him only in his academic persona.[32] And in later years he was to share with Matthew and Edward a love of *The West Wing*, an American political drama serial; they enjoyed watching the programmes with him, and 'appreciated his additional commentary on the constitutional differences between the American system and our own'.[33]

Alongside his other activities, Stephen was addressing the legal profession through a profusion of shorter pieces in publications such as the *Solicitors Journal* and the *New Law Journal* as well as continuing to use his earlier expertise in taxation and conveyancing law by writing the chapters on taxation in the *Annual Survey of Commonwealth Law*, mentioned above, and describing English conveyancing practice for The American University, published as part of a study of real estate transfer costs prepared for the US Department of Housing and Urban Development.

As successive editions of *Principles* expanded not only in size but in reach, Stephen explicitly sought to influence the direction the law should take. But Stephen had the opportunity to influence the direction of reform directly when he was appointed to the Law Commission in 1978. The Commission is a statutory body, established by statute in 1965 to keep English law under review and make recommendations for reform and codification. While intended to be independent of the government, the Commission depends on government support, both for approval of its programmes and for implementation of its recommendations for reform. When Stephen joined the Commission the positive relationship with government which had characterised its early years was hitting political difficulties, and the time did not seem right to pursue large-scale reform of this socially and politically sensitive field. The government tended to be sceptical about the Commission, and parts of the press regarded it as little more than a left-wing pressure group. Suspicion was deepest when the Commission reviewed fields of law touching on socially or morally sensitive areas (as to which the Conservative Government was generally conservative) and made recommendations supported by social-scientific evidence, often regarded by the press as trendy and politically driven. There were differences of opinion among the Commissioners as to the best way to ensure that recommendations in its reports would have a good chance

[32] The oration is available at https://www.bristol.ac.uk/graduation/honorary-degrees/hondeg07/cretney.html

[33] Email from Matthew Cretney to DF, 22 June 2020.

of being implemented legislatively.[34] He had to work to persuade his colleagues and then the government that there was any need for further reviews in the field of family law. Some took the view that the Law Commission should stick to 'lawyers' law' and avoid fields raising delicate and contested social or moral issues. Stephen disagreed with this, but, recognising the many factors limiting the enthusiasm of ministers and civil servants for legislating on sensitive areas and the need to compete for legislative time in order to secure legislation to implement recommendations for reform, he favoured carefully selected, focused and limited topics for review. When he succeeded in persuading colleagues of this, he headed the team responsible for those reviews. While Stephen continued to work on his *Principles*, taking the book to its 4th edition in 1984, the last for which he was solely responsible, as a Law Commissioner he was able to move the law forward from how he found it when he wrote 'The Maintenance Quagmire' in 1970. In 1980, the Commission produced a discussion paper on the financial consequences of divorce, which eventually led to the repeal of the 'minimal loss' principle by the Matrimonial and Family Proceedings Act 1984, and the introduction of what was widely seen as the 'clean break' as an objective when courts dealt with financial matters after divorce. However, discretion remained,[35] but the repeal of the former 'minimal loss' principle led to the emergence through case law of a very different approach closer to Stephen's preferences expressed in his 1970 article.[36] Nevertheless, the debate over the extent of discretion that should be allowed to courts in this area remains very alive at time of writing (2020).[37]

Stephen was also a member of the Commission's Working Party that considered the law relating to illegitimate children, which in 1979 tentatively favoured abolition of the status of illegitimacy (which would result in the complete assimilation of those children with their 'legitimate' counterparts),[38] although in 1982 (when Stephen was still a Commissioner) it did not go quite that far,[39] a position accepted in the Family Law Reform Act 1987. Unlike some critics, Stephen did not resent the legislative compromises that sometimes watered down or reduced the effectiveness of the Law

[34] For a hint in Cretney's published work of the tensions behind the scenes, see 'The Law Commission: true dawns and false dawns', in Stephen Cretney, *Law, Law Reform and the Family* (Oxford: Clarendon Press, 1998), pp. 1–23, especially the discussion of 'unsolved problems' at pp. 26–32.

[35] See Gillian Douglas, 'Simple quarrels? Autonomy v vulnerability', in Probert and Barton (eds.), *Fifty Years in Family Law*, n. 30.

[36] See Brenda Hale, 'Collective responsibility: law reform at the Law Commission', in Probert and Barton (eds.), *Fifty Years in Family Law*, n. 30.

[37] See Emma Hutchings and Joanna Miles, 'Rules versus Discretion in Financial Remedies on Divorce' (2019) 33 *Int. J. Law, Policy & Family* 24–50.

[38] Law Commission, *Family Law: Illegitimacy*, Working Paper No. 74 (HMSO, 1979).

[39] Law Commission, *Family Law: Illegitimacy*, Law Com No 118 (HMSO, 1982). See Andrew Bainham, 'The illegitimacy saga', in Probert and Barton (eds.), *Fifty Years in Family Law*, n. 30.

Commission's recommendations; he understood that compromise is of the essence of practical politics, and that, where primary legislation was needed to implement recommendations, some give and take was a necessary price to pay for achieving any reform.

During his time at the Law Commission, Stephen's published output was understandably restricted, the most interesting pieces being related to the work of the Commission itself. His 1981 Chorley Lecture explored the possible meaning of codification, and difficulties in the path of the Law Commission's goal of achieving codification of family law.[40] The lecture is packed with insights into the law reform process, including the nature and problems of consolidation, and touches on profoundly important issues concerning the place of law in people's intimate lives. The year after he left the Commission, he lectured on his experience as a Law Commissioner.[41] But the lecture is by no means simply an account of his diary over that period: as in his 1981 lecture, it recognises the tension between an independent 'law reforming' body and parliamentary accountability, and confronts the question of the proper scope of legal changes generated through processes like judicial decisions and Law Commission recommendations. Can these extend to matters of public interest, or are they to be confined to what might be called 'lawyers' law'? Stephen pointed out that the device according to which the Lord Chancellor needed to approve Law Commission programmes partly maintained control in the Executive, but could still leave a wide remit with the Commission. Could this explain the apparent recent extent of failures to implement the Commission's recommendations? Giving examples well beyond family law, Stephen pointed out that even apparently 'technical' topics contained a 'political' dimension which could be unwelcome to the current executive. The Law Commission's practice of inviting representations through consultation simply revealed the extent to which opinions could be divided. While sympathetic to some suggestions which could mitigate differential approaches between government departments, for example, the greater use of Select Committees, Stephen's overall view was that the role of lawyers, qua lawyers, was properly a limited one since the process of law-making was a complex institutional and social process.

This lecture might therefore indicate the roots of Stephen's acute awareness of the part the intricacies of the political process plays in the creation of the law. But he already had experience of the practical application of law as a General Commissioner of Income Tax from 1970 until 1978.

It would have been open to Stephen to renew his position as a Commissioner for a further five years, but he decided that, in his late forties with a young family, he

[40] 'The codification of family law' (1981) 44 *Modern Law Review* 1–20.

[41] 'The politics of law reform: a view from the inside' (1985) 48 *Modern Law Review* 493–517.

needed more security than that would offer. He had no academic post to which to return, and did not wish to re-enter practice as a solicitor. He therefore applied for a Chair at the University of Bristol. Unfortunately, immediately after applying he suffered a heart attack, but he was offered the post and accepted it in the hope that it would involve little stress and offer intellectual stimulation. The moment of his return to academic life in 1984 was triply unfortunate. First, it was a time when the Conservative Government was pushing public bodies to behave like private corporations, with the attendant rise of managerialism and financial incentives to take a growing number of students from overseas instead of well-qualified young people from the UK. Secondly, despite the push towards commercialism, the government expected universities to be increasingly accountable as public bodies for the quality of their research and teaching, involving new systems for external assessment with financial consequences and very demanding bureaucratic procedures. Thirdly, he was immediately required to become Dean of the Faculty of Law, with responsibilities for all of this and for personnel management, which he found increasingly uncongenial. He held the deanship for four years. While he found many of the duties unpleasant, he enjoyed additional opportunities to help the careers of less experienced scholars; women particularly benefited. Professor Gillian Douglas, then a lecturer in the Bristol Law Faculty and another family lawyer, recalled that he was understanding and supportive in easing her transition back to work after she had children, and he invited her to join him in writing case commentaries in the journal *Family Law*, which she found was a 'fantastic opportunity'.[42]

During his time at Bristol, Stephen received a number of accolades recognising his outstanding scholarship and his position as a leading figure in legal academia and in family law particularly. He was elected FBA in 1985, and in the same year the University of Oxford admitted him to the degree of Doctor of Civil Law (a higher doctorate, awarded on the basis of publications constituting a significant contribution to the study of law or politics).[43] He was appointed Honorary QC in 1992.[44] His eminence and ability led to his being co-opted, alongside his heavy workload in the university, into a remarkable range of public commitments. These included being a member of the Departmental Committee on the Prison Disciplinary System in 1984–5, an experience that made a great impression on him: as he later wrote, he saw 'the

[42] Remarks at presentation of a Festschrift to Stephen on 20 April 2012, transcribed and contributed by Baroness Deech, email to DF, 30 June 2020.

[43] Stephen self-deprecatingly said that the list of people who had been awarded this degree was a good deal less distinguished than that of people who had been turned down for it.

[44] QC was a status conferred by the Queen on the advice of the Lord Chancellor, in turn advised by a committee of practitioners and academics, to people who have made a significant contribution to the development of English law outside the courts.

probably inevitable awfulness (indeed cruelty) of incarceration', driving him to the belief that 'perhaps imprisonment is a necessary evil, but evil (and extraordinarily expensive evil) it unquestionably is'.[45]

He extended his connections with and influence among the judiciary with his appointment as a member of the Judicial Studies Board, Civil and Family Committee from 1985 until 1990. In 2012, at the presentation of a Festschrift to him, Baroness Butler-Sloss, who as Mrs Justice Butler-Sloss had chaired the Family Committee, described how she had fought a battle with the Lord Chief Justice to overcome the perception that only judges could teach other judges. She invited Stephen to give training courses for the judiciary, and 'it was Stephen who broke the ice. He was a real success, as you would expect; in fact he was so successful that we could then move on and ask people like Nigel Lowe, psychologists and doctors to assist.' He made especially notable contributions to the Judicial Studies Board's 'road-shows' for judges on the Children Act 1989.[46] This made Stephen a formative influence (with Baroness Butler-Sloss) in establishing mutual respect between judges and academic lawyers, beginning a relationship that has steadily grown.

Stephen was also a part-time chairman of the Social Security Appeal Tribunals from 1985 to 1996, chairman of the Committee of Heads of University Law Schools from 1986 to 1988, a member of the Lord Chancellor's Advisory Committee on Legal Education in 1987–8, chairman of NACRO (the National Association for the Care and Resettlement of Offenders) Working Party on the Operation of s.53 of the Children and Young Persons Act 1933 (dealing with young people convicted of grave crimes), part-time chairman of the Medical Appeal Tribunals, member of the Judicial Studies Board Working Party and Steering Group on Training the Judiciary for the Children Act 1989 and part-time chairman of the Disability Appeal Tribunals. Nearer to home, he was trustee of the Bristol Family Courts Conciliation Service, and (as mentioned above) was responsible for the monthly case analysis of the journal *Family Law*, published by Jordans in Bristol.

While all this limited the time available for opportunities for scholarship, it did not entirely prevent his participation in the vibrant environment for family law research in Bristol. Colleagues in the Law Faculty included Nigel Lowe and Gillian Douglas, both of whom were already respected family law scholars and became increasingly distinguished, and Stephen was also able to conduct socio-legal research on the family with Gwynn Davis, among others. This centred on interviews with solicitors and

[45] Autobiographical Note, pp. 52–3.

[46] Email from Baroness Deech to DF, 30 June 2020. Nigel Lowe was a colleague of Stephen in the Law Faculty at the University of Bristol, before becoming Professor of Law at Cardiff Law School in 1991, retiring in 2014. He writes on family law, especially the law of children, and Contempt of Court, among other subjects.

clients, and courtroom observation, involving eighty cases from the point when application to the court was made to resolution of the issue. Published in 1994, it added new evidence to the growing body of research into family law practice.[47] Stephen also wrote a new textbook. Increasing depth and breadth of coverage in successive editions of *Principles of Family Law* left an opening for an introductory text for students. Stephen therefore wrote, and Sweet & Maxwell published, a smaller, expository volume, *Elements of Family Law*,[48] 'to serve the needs of those students who seek a clear and concise guide to the basic principles or central core of English family law and who are prepared to accept that such a guide can only be provided at the cost of some sacrifices both in range and depth of coverage'.[49] Stephen took immense care over the choice of relevant illustrations for the covers of his books. It is typical of his meticulous approach that, even for a book with such apparently limited scholarly aims as the *Elements*, he chose for the cover a photograph of the painting 'Prince James Francis Edward Stuart (1688–1766) and his sister Louisa Maria Theresa (1692–1712)' by Nicolas de Largillière, from the National Portrait Gallery, London, and took the trouble to explain in the Preface that, in the light of the then recent passage of the Human Fertilisation and Embryology Act 1990 containing provisions which identify for legal purposes the parents of children, it

> seemed not inappropriate to choose for the cover illustration the subject of the most celebrated maternity dispute in English History. The birth of a son to the wife of King James II—one of the principal events precipitating what generations of schoolboys were taught to call the Glorious Revolution—took place in the presence of some 30 witnesses (including the Lord Chancellor, the Lord President and Lord Privy Seal) but this did not suffice to quell rumours that the lawful heir to the throne was a supposititious child smuggled into the Royal bed in a warming-pan. All lawyers know that truth may be elusive; but the reader of this text will perhaps find in it other illustrations—albeit less constitutionally important—of the reality that law making is essentially a political process depending more on the tides of fashion and on what people wish to believe rather than on objective truth—if indeed there be such a thing.[50]

[47] See, e.g., Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Dispute on Divorce* (Oxford: Oxford University Press, 1994). Antonia also conducted socio-legal research on the family: Antonia Cretney and Gwynn Davis, *Punishing Violence* (London: Routledge, 1995).

[48] First edition (London: Sweet & Maxwell, 1987). As edition followed edition, Stephen was joined by Professor Rebecca Probert as a joint author, and changed its name to *Cretney's Family Law*; by the sixth edition in 2006 Professor Probert had full responsibility for it. The latest (10th) edition, published in 2018, is Rebecca Probert and Maeve Harding, *Cretney and Probert's Family Law* (London: Sweet & Maxwell, 2018), and runs to 566 pages.

[49] *Elements of Family Law* 2nd edn (London: Sweet & Maxwell, 1992), p. vii.

[50] Ibid., p. viii.

Stephen also wrote practical and expository works such as *The Enduring Power of Attorney: a Practitioners' Guide* (1st edn 1986; 2nd edn 1989; 3rd edn 1991), 'Privatizing the family: the case of the Children Act 1989',[51] the section in *Halsbury's Laws of England*, vol. 5(2), title *Children and Young Persons* in 1993, and annual reviews of family law for the *All England Law Reports Annual Review* from 1985 until 1996. But his critical concerns based on issues of principle appear in his 1986 review in the *Oxford Journal of Legal Studies* of a new edition of a book on Family Provision, where he highlighted the growth of judicial discretion, this time in the matter of succession law,[52] a topic to which he returned in depth in 1995.[53]

The intense pressure of this workload, and the frustration flowing from feeling that much of his managerial work was of little or no value, affected his health and that in turn affected his outlook on life. In 1991 he suffered further heart trouble and underwent major surgery. He was conscious of advancing age, felt increasingly undervalued in the university and feared that his remaining years of productive scholarship were limited. His equilibrium was further disturbed by another illness, Lyme's disease, contracted during a holiday in Germany and not diagnosed for some time. When an opportunity to apply for a Senior Research Fellowship at All Souls College, Oxford, presented itself, he seized on it as offering time and facilities to pursue his research without unwanted distractions. In the view of Baroness Butler-Sloss, then a judge of the Family Division of the High Court, his election to All Souls enhanced respect for family law in Oxford and also among judges of the High Court outside the Family Division, who had perhaps not previously regarded it as a very intellectually demanding field of law: 'the other Divisions, the Chancery Division etc., said: If All Souls sees it, so should we'.[54]

Stephen held the Senior Research Fellowship from October 1993 until he reached retirement age in 2001, when he was elected an Emeritus Fellow of All Souls. The intellectual environment of All Souls was ideal for him: he was freed from managerial, teaching and examining responsibilities and allowed to pursue his major research project unhindered. The move imposed upheavals on his family, as Antonia was serving as a curate in Bristol and Matthew and Edward were reluctant to move from their school, so Stephen spent most weekdays in Oxford and returned at weekends to

[51] (1989) 4 *Denning Law Journal* 15–26.

[52] 'Succession – discretion or whim, freedom of choice or caprice' (1986) 6 *Oxford Journal of Legal Studies* 299–303.

[53] 'Reform of intestacy: the best we can do?' (1995) 111 *Law Quarterly Review* 77–99, which was referred to by a number of speakers in the debate on the Law Reform (Succession) Bill, *Official Report* (HL) 13 February 1995, vol. 561, col. 502.

[54] Remarks at the presentation of a Festschrift to Stephen, 20 April 2012, communicated by Baroness Deech, email to DF, 30 June 2020.

Bristol. Only in 1997, when his children had finished school and Antonia became Rector of a benefice in Berkshire, did Stephen and Antonia move together into the Rectory at Peasemore, while purchasing a house in south Oxford where Stephen spent part of the week.

During his time at All Souls Stephen remained one of the country's leading family lawyers. When Professor Peter Birks masterminded the creation of a principled, concise, authoritative account of substantially the whole of English law, deriving its structure from Gaius's *Institutes* to provide a coherent road-map of the law for English lawyers faced with problems in unfamiliar fields, other lawyers seeking to understand English law for comparative purposes and non-lawyers wanting an introductory guide to particular matters, he turned to Stephen to write the chapter on family law.[55] But the research project that had formed the basis for Stephen's application for the Senior Research Fellowship was a history of family law in the twentieth century, treating the subject dynamically and excavating from many archives, parliamentary papers, *Hansard*, biographies, autobiographies and memoirs the interweaving of social, political, economic and legal strands that had transformed the legal treatment of the family in the course of the century. It was a hugely ambitious project, especially when pursued with the scholarly attention to detail that was one of the hallmarks of Stephen's work. Early stages in the project produced some impressive publications. Papers such as his analysis of the origins of the Guardianship of Infants Act 1925,[56] and of the place of conciliation in family procedures, demonstrated a commanding use of historical sources in understanding the current law.[57] The most significant work of the 1980s and 1990s was collected together and published as ten chapters in 1998 as *Law, Law Reform and the Family*.[58]

All this, it turned out, was laying the ground for his masterpiece, published in 2003, *Family Law in the Twentieth Century: a History*.[59] At 950 pages, it is not a book easily to be read as a whole, and probably most family law scholars use it as an indispensable resource to be mined when engaging with particular topics. But some scholars will read it through, one, Rebecca Probert, having done so three times, commenting

[55] Peter Birks (ed.), *English Private Law* (Oxford: Oxford University Press, 2000), 2 vols; vol. 1, ch. 2; 2nd edn, ed. Andrew Burrows, 2007, ch. 2.

[56] '"What will the women want next?" The struggle for power within the family, 1925–1975' (1996) 112 *Law Quarterly Review* 110–37.

[57] 'Tell me the old, old story – the Denning Report fifty years on' (1995) 7 *Child and Family Law Quarterly* 163–179; 'Marriage saving and the early days of conciliation: the role of Claud Mullins' (1998) 10 *Child and Family Law Quarterly* 161–78.

[58] Oxford: Clarendon Press, 1998.

[59] Oxford: Clarendon Press, 2003. In 2004 it was one of six titles shortlisted for the British Academy Book Prize, awarded for books in the humanities and social sciences judged to be not only 'academically outstanding' but also 'appealing to the general reader'.

that 'the meticulous research, fascinating insights and sheer detail make it an engrossing and rewarding read as well as an outstanding scholarly contribution'.[60] The whole shape and organising principles of family law changed during that century, and, as Probert points out, in order to understand its present condition, it is necessary to see how it was made. But the book does not only do that. It is in itself a repository of hard information: as Probert puts it, it is remarkably generous to future scholars in that respect, 'with mini-biographies of the characters involved in shaping family law, and detailed footnotes within which those characters' own words may be read, enlivened by the occasional wry comment from the author'. This is not a book primarily about the social causes or effects of 'family law', but about its making (or reform), and in particular the dynamics of the processes (including the role of individuals), which might be described as 'haphazard',[61] that led it to take the eventual forms it took. This enterprise requires a detailed understanding of the legislative process, for example, of Private Members' Bills, and, no doubt drawing on his own experience, Stephen shows mastery in use of archive material.

Stephen had always enjoyed unearthing hidden or forgotten connections between people and events; he understood from personal experience how law reform worked, and so had a good sense of where he might find revealing information; appreciated the interplay of practical politics, bureaucratic processes and reforming zeal of dedicated individuals; and had a carefully honed talent for storytelling. His technique for bringing together the various strands in his writing was to write a clear, broadly chronological account of developments in the text, while providing illustrative detail, sometimes lengthy quotations, statistical details and short biographical details of leading players in footnotes as they became relevant. This gives his published writing a very distinctive appearance: on any page, at least as much space may be occupied by footnotes as by text, despite the smaller font used for footnotes; and one can spend hours happily reading some of the notes as self-contained stories almost without reference to the main text. To give a flavour of the effect, one sentence taken at random from a book chapter on division of property on death, an aside in parenthesis about how ministers decided when and by how much to raise various inheritance thresholds for distribution on intestacy, runs as follows: '(Lord Chancellor Gardiner's answer to a question about the machinery necessary to inform decisions on these matters had the merit of candour but little else.)'[62] This sentence included three footnotes, one providing a *Hansard* reference, one a quotation from an Annual Report by the Law Commission

[60] Rebecca Probert, 'A history of 20th-century family law' (2005) 25 *Oxford Journal of Legal Studies* 169–81, at 169.

[61] Ibid., at p. 176.

[62] Stephen Cretney, *Law, Law Reform and the Family* (Oxford: Clarendon Press, 1998), pp. 265–6, footnotes omitted.

and the third quoting the Lord Chancellor answer to the Written Parliamentary Question. He wrote of this technique that his work was

> more extensively footnoted than is today the fashion… But in a book which I hope will also be of interest to non-lawyers it seemed to be best to deal with the more abstruse legal technicalities in notes which can be consulted by those who wish to do so but can be ignored by others. Many of the footnotes reflect my belief that a writer's own words—particularly the words of such masters of the English language as were (in their different ways) Lord Denning and Sir Claud Schuster—give a far more vivid impression than could be conveyed in any other way. Perhaps readers should treat the footnotes as an 'extra', to be consulted according to personal taste and interest, separately from the text to which they are attached.[63]

This slightly self-deprecating comment underplays the structural role of his footnotes in allowing different strands in the story to march alongside one another without interfering with the flow of the story. Stephen's treatment of his subjects, exhaustive but never irrelevant and nearly always fascinating, made demands of Stephen's readers but offered great riches and often entertainment in exchange.

An important part of the history of family law in the twentieth century concerned the law relating to the solemnisation of marriage, a law so intricate and, indeed, bizarre, that only the (often chance) factors of the legislative process can explain it. It was his meticulous grasp of these details that led Stephen to brief public notoriety when he pointed out, in a BBC *Panorama* programme in 2005, that the idea that the Prince of Wales should marry Camilla Parker-Bowles in a civil ceremony was not free from difficulty. There was the elementary point that such a ceremony had to take place in a place 'approved' for the purpose, which the proposed venue (Windsor Castle) was not. So the venue was changed, but the potentially greater difficulty arose that the Marriage Act 1836, which established such civil marriages, specifically excluded members of the Royal family from their use. The government eventually, through Lord Falconer, the Lord Chancellor, sought to overcome this argument by noting that the 1836 Act had been wholly repealed by the Marriage Act 1949, and this did not retain the exclusion. But, as Stephen pointed out,[64] the Act provided (s 79(5)) that nothing in it should affect any 'law or custom relating to marriages of members of the Royal Family'. He also noted that the 1949 Marriage Act was the first Act enacted under the provisions of the Consolidation of Enactments (Procedure) Act 1949, which allows only 'corrections and minor improvements' to be made by future consolidation Acts provided that a Joint Committee of the two Houses of Parliament had first

[63] Stephen Cretney, Preface to *Family Law in the Twentieth Century: a History* (Oxford: Oxford University Press, 2003), p. viii.

[64] 'Royal marriages: the law in a nutshell' (2005) 35 *Family Law* 317–21.

considered what was proposed. Furthermore, in 1955 it was considered at the highest levels of government that it was not open to Princess Margaret to marry a divorced man in a civil ceremony. While he considered it possible that the Human Rights Act 1998 might affect the way the Marriage Act 1949 might be interpreted, Stephen felt it right to raise the issue as a precautionary measure, which could have been put beyond doubt by a simple one-clause Act of Parliament, and not because he was opposed to the marriage, although he suffered media criticism on that score. He returned to the subject of royal marriages in great detail in 2008 in an article that referred not only to that issue, but examined the effect of the Royal Marriages Act 1772 which required the marriages of the descendants of George II first to receive the consent of the monarch, a provision that turns out to be so extraordinarily complex that government officials baulked at engaging with the implications.[65]

In a 2003 paper, Stephen delved deeply into the heart of the marriage relationship.[66] Taking William Blackstone as his starting point, Stephen traced, in exquisite detail, the controls exercised, or sought to be exercised, by judges over marital behaviour, conceived as it was as a status determined by law. This was by way of introduction to a critique of the modern law governing financial and property division upon divorce, a law which, as we have seen, Stephen played a part in fashioning. Explaining how economic and social developments had led to an extension of the courts' powers to order redistribution of capital assets, the burden of his critique again fell on the scope of discretion it allowed to judges in that event, and in particular the decision of the Court of Appeal in *Lambert v Lambert*,[67] which Stephen described as 'in effect' introducing 'deferred community of property' into our law.[68] Although subsequent case law may have indicated judicial resistance to this idea, Stephen's concern was a much wider one: the propriety of the judiciary modifying the legal implications of the marital status in directions which, as he demonstrated from parliamentary sources, the legislature was unwilling to go. But Stephen went even further and argued that, if marriage was indeed a contract, why should the parties not be able to set its terms contractually, subject only to compliance with formalities? 'Husband and wife are stuck with equality no matter how inappropriate they may both agree it to be.'[69] In fact, seven years later, in *Granatino v Radmacher (formerly Granatino)*,[70] the Supreme Court moved in the direction Stephen was pointing with respect to ante-nuptial

[65] 'Royal marriages: some legal and constitutional issues' (2008) 124 *Law Quarterly Review* 218–52.
[66] 'The family and the law – status or contract?' (2003) 15 *Child and Family Law Quarterly* 403–16.
[67] [2002] 2 EWCA Civ 1685, [2003] Fam. 103, CA.
[68] See also Stephen Cretney, 'Community of property imposed by judicial decision' (2003) 119 *Law Quarterly Review* 349–52.
[69] (2003) 15 *Child and Family Law Quarterly* 403 at 413.
[70] [2010] UKSC 42, [2011] 1 A.C. 534, SC.

agreements, but clung to its power to depart from an agreement if it was 'unfair'.[71] However, when Stephen wrote that agreements should be upheld subject 'possibly' to 'some special regime of protective formality—for example, that the contract should be in writing and that it be executed in the presence of a lawyer required to certify whether appropriate advice had been given to the parties', he was foreshadowing almost exactly the requirements for obtaining a divorce by consent introduced in France in 2017.[72]

In 2005 Stephen delivered the prestigious Clarendon Lectures, the text of which appeared in 2006 as *Same Sex Relationships, From 'Odious Crime' to 'Gay Marriage'*.[73] The occasion for this exploration was the passage of the Civil Partnership Act 2004, which created a status very similar to marriage for same-sex partners. The first chapter surveyed the history of the development of the law about gay relationships, familiar ground, but relayed with Stephen's usual eye for detail, not only regarding the construction and application of the law, but also of social practices. It shows Stephen's awareness of the impact of practical politics and parliamentary procedure on the success or failure of law reform, making it a contribution to understanding of the politics of law reform and constitutional law as well as family law. He points out, for example, that one reason for the success of Leo Abse MP in piloting his Sexual Offences Bill for the decriminalisation of homosexual activity between consenting adults in private, introduced under the ten-minute rule, through the House of Commons, was his command of procedure and willingness to compromise: 'Abse was prepared to out-manoeuvre opponents by not opposing what may have been "wrecking" amendments.'[74]

The second chapter analyses the Civil Partnership Act, in particular its relationship to marriage. This has since been somewhat superseded by the enactment of the Marriage (Same Sex Couples) Act 2013 in the UK and the 2015 decision in *Obergefell v Hodges* in the US.[75] However, in his third chapter Stephen returns to his theme of judicial discretion, placing it within the context of the Human Rights Act 1998 and the Constitutional Reform Act 2005, which replaced the judicial arm of the House of Lords with the Supreme Court of the United Kingdom. Stephen noted that, despite its name, the new court was not given equivalent powers to those of the US Supreme Court, although carrying the name 'Supreme Court' might encourage the justices to act more boldly, and here he referenced the cases in US states which presaged the US

[71] See Jens M. Scherpe, in Probert and Barton, *Fifty Years in Family Law*, n. 30.
[72] Law No. 2016-1547, 18 November 2016, Article 50, supplementing Code Civil, Art. 229.
[73] Oxford: Oxford University Press, 2006.
[74] Cretney, *Same Sex Relationships*, n. 73 above, ch. 1, at p. 9 (a bonus for those reading the book rather than listening to the lecture).
[75] 135 S. Ct. 2584, 2600–01 (2015).

Supreme Court's holding in *Obergefell* that same-sex marriage was a constitutional right. Ever sensitive to the tension between the roles of judges and the legislature, Stephen highlighted the implications of such judicial activism on the process of appointments to the judiciary and on politics more widely in the US.

The fundamental question, as Stephen saw it, was how far decisions which are 'essentially issues of social policy—issues, such as abortion or same sex relationships' should be entrusted to 'an unelected and unaccountable group of men and women', which he saw as 'profoundly undemocratic'. It was no answer to say that under the Constitutional Reform Act appointments to the Supreme Court 'must be on merit' for such assessments involve matters of value.[76] Stephen's clear preference was that law-making should be left to Parliament, save in 'truly exceptional cases'.

It might seem surprising that Stephen should take this view so strongly given the frequently capricious nature of the legislative process revealed so vividly by his own research, but he had his eye on the bigger picture. Judgments involving values depended not on technical ability but on moral sense (as to which judges, like other people, have different views) and a capacity for compromise and accommodation. If compromises between judges' moral outlooks occur in judicial decision-making, they are usually hidden. In the political law-making process, compromises are usually visible and explicit, and politicians can be held to account for the way they use room for manoeuvre. The Civil Partnership Act was a compromise: it provided a means of legally recognising relationships between same-sex couples, without offering any solution for the problems of unmarried, heterosexual couples, which some thought would have undermined the sanctity of marriage. To that extent, the Act lacked principle, but 'compromise on issues on which views differ sharply helps to protect a healthy and above all peaceful society'.[77] There was scope for the public to bring pressure on Members of Parliament; there was 'almost always' scope for amendment of bills and, he might have added (because he has shown it often enough), government, or parliamentary procedures, can simply stop legal changes from happening. None of this operates with respect to 'activist' judicial lawmaking. There is scope for much discussion here, particularly regarding the way the law can develop on the basis of reasoning from principle, aided by human rights standards. Stephen's caution over excessive judicial freedom possibly reflects his response to the way it has been used historically in family law (as he described in 'The Maintenance Quagmire' in 1970 and many places subsequently) and a belief in gradualism and consensus which sees much merit in compromise (such as that which underlay the Civil Partnership Act).[78]

[76] Constitutional Reform Act 2005, s. 27(5).
[77] Ibid., p. 72.
[78] Above, n. 28.

Stephen returned to this theme in 2009, in a chapter on the contribution of the House of Lords to family law.[79] By this time, however, he had been concerned for some time that his major heart surgery in 1991 might have precipitated a decline of his intellectual sharpness. He was feeling that his capacity for sustained scholarly endeavour was not what it had previously been, and he felt somewhat out of touch with academic life. He made a conscious decision to withdraw from academic life, telling acquaintances that he would be publishing no more articles (news which was received with a mixture of incredulity and sadness). When the British Academy, of which he had been an active Fellow since 1985, introduced a category of Emeritus Fellowship for those Fellows aged 70 or over who no longer wished to participate, or felt unable to participate, actively in its business, he was among the first to avail himself of the new status. When the onset of dementia was diagnosed in 2011 he was saddened but not surprised. He had played a leading part in shaping the development of family law and legal scholarship, established himself as one of the great legal scholars of his time, commanded the respect of the judiciary and the practising professions as well as colleagues in universities and continued to enjoy the warmth, support and consolation of his marriage to Antonia and family life with Matthew and Edward. He had received many accolades: as well as appointment as Hon. QC and election to Fellowship of the British Academy, the Inner Temple elected him an Honorary Bencher in 2006,[80] showing the respect in which he was held by the Bar. While not especially relishing social aspects of the life of the Inn, he valued his involvement with the Library, and enjoyed helping to judge the Inn's annual book prizes for outstanding contributions to legal literature. He took equal pleasure from the award in 2007 of an Hon. LL.D. by the University of Bristol, to which he had made a major contribution, despite not having found his time there happy. In 2011 Freddy Reynold organised a dinner to mark his 75th birthday, hosted by Lady (Brenda) Hale, fellow family lawyer, his successor on the Law Commission, and Supreme Court Justice, at the Athenaeum. It was an affectionate gathering of friends, colleagues and former pupils, made poignant when he confided privately to some of them that he had been 'spending too much time with those members of the medical fraternity who ask such questions as "Do you know the date?" and "Who is the Prime Minister?"'—questions to which, as he wryly observed, any sensible person, knowing the nature of the impending interview, would take care to check the answers in the newspaper before setting off.

[79] Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds.), *The Judicial House of Lords 1876–2009* (Oxford: Oxford University Press, 2009), ch. 36.

[80] The Masters of the Bench (Benchers) are the Governing Body of the Honourable Society of the Inner Temple, one of the four Inns of Court responsible for calling new aspirants to the Bar and providing educational and other facilities to its members. Honorary Benchers have no responsibilities for governance, and are selected on account of their eminence and ability to contribute in other ways to the Inn.

In 2012, Stephen was moved when many of those whom he had taught, helped and worked with over his career gathered to present him with an edited volume in his honour, to which leading scholars of family law had contributed essays.[81] Friends and colleagues from academic life, the judiciary and policy-making bodies expressed their admiration for Stephen and their appreciation of the help he had given them in their lives and careers. It was clear that he was regarded not only as one of the outstanding scholars of family law in the twentieth century but also as a very nice man who quietly helped others, and made a special contribution to the careers of women in legal academia, many of whom became leaders in their fields.[82]

When Antonia retired from the full-time ministry she and Stephen moved to Wantage. The gradual decline in Stephen's health was painful; his death on 30 August 2019 released him. In a remembrance, Professor Sir Malcolm Evans, a distinguished scholar of international law whom Stephen, when Dean of the Bristol Law Faculty, had appointed to a Lectureship at the University of Bristol, while noting that Stephen left 'a legal legacy that stands comparison with the greatest of legal scholars' and remembering 'a man who at times could seem rather shy and retiring, but who also spoke with a piercing precision on issues which fell for discussion' in words which 'were carefully weighed and carried their weight with them', also recalled a generous and hospitable colleague who 'wore his formidable intellect lightly and enjoyed good conversation and diversion from the cares of the day'.[83] He had a sense of irony, wry humour and deep interest in people, including the many whom he helped and supported academically and otherwise.

A service of thanksgiving for Stephen's life was held at the Church of Saints Peter and Paul, Wantage, on 23 September 2019. Had Stephen remained a practising solicitor after 1966, he would have been materially better off but probably far less fulfilled. Antonia, Matthew and Edward survive him, as do his achievements—notably the inspiring body of his published scholarship—and the memory of a leading authority on family law, who helped to inspire researchers and teachers who followed him, an able, kind teacher and a generous friend.

[81] Probert and Barton (eds.), *Fifty Years in Family Law*. Several essays from the volume have been referred to above.

[82] Baroness Deech 'can think of few other academic lawyers who did more to help women colleagues and women's interests': email to DF, 30 June 2020.

[83] 'Dr. Stephen Michael Cretney, 1936–2019', https://www.bristol.ac.uk/law/news/2019/stephen-cretney-obituary.html (accessed 20 August 2020).

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