

## Law, Law-Consciousness and Lawyers as Constitutive of Early Modern England

Christopher W. Brooks's Singular Journey

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During the last half-century, Christopher W. Brooks (1948–2014) established himself as the foremost historian of law in early modern English society. Through his scholarship, his teaching and the generations of students he advised and supervised, and as a friend and colleague, Brooks exercised, from the early 1990s onwards, an increasingly significant influence on writing about early modern English history. He was the leading exponent of a history of early modern England that transcended the boundaries of social, political and legal history, and which placed law and lawyers centre stage. In doing so, he challenged major premises of the dominant vision of law-in-history in writing about English history. This chapter brings a critical, if friendly, eye to Brooks's work, focusing on how Brooks beat his own path through the methodological thickets to create a distinctive vision of law in history, and on the strengths and weaknesses of that vision.

### From Princeton to *Pettyfoggers* (1967–1986)

Born in Maryland, Brooks grew up in 1950s and 1960s America during the advancement of civil rights.<sup>1</sup> This 'rights revolution' owed much to the democratization of access to the courts, the vitality of the support systems for rights litigation, liberal judicial activism and the large

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<sup>1</sup> Christopher W. Brooks, *Lawyers, Litigation and English Society since 1450* (London, 1998), p. 2.

numbers of lawyers scrambling for business.<sup>2</sup> The centrality of law and lawyers in American society had long been noted. Tocqueville famously observed that '[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question'.<sup>3</sup> Indeed, Americans appeared to be quite conscious of their rights, and many viewed going to court as a respectable and viable way of engaging in disputes.<sup>4</sup> Brooks brought this awareness of the centrality of law and lawyers in society and the popular imagination to bear on the history of early modern England.

As an undergraduate at Princeton, Brooks was inspired by Lawrence Stone, who remained a key influence throughout his life. It was Stone who first taught Brooks the value of adopting the *longue durée* in social and cultural history; that historians can be both expansive *and* focused; that they should address big questions, postulate bold ideas and strive to address the diverse facets of society – intellectual, economic, moral, cultural and social – as a totality; that they should be prepared to inform their work with concepts derived from other disciplines; that they should open up fresh territories and new bodies of evidence; and that history should be interesting and exciting.<sup>5</sup> That Brooks identified himself, first and foremost, as a social historian of early modern England and made social history his vocation was probably in no small measure due to Stone.

Following Princeton, Brooks began postgraduate study at Johns Hopkins,<sup>6</sup> where several historians were undertaking pioneering work on the history of the professions – notably, law – which transcended the confines of institutional history, combining quantitative and qualitative analyses to produce histories that were both institutional *and* social.<sup>7</sup> In his first PhD supervisor, Wilfrid Prest, Brooks found a lifelong mentor,

<sup>2</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago and London, 1998), pp. 1–70.

<sup>3</sup> Alexis de Tocqueville, *Democracy in America*, ed. and trans. Harvey C. Mansfield and Delba Winthrop (Chicago and London, 2000 [1835]), p. 257.

<sup>4</sup> Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven, 1997); cf. David M. Engel, *The Myth of the Litigious Society* (Chicago, 2016).

<sup>5</sup> Brooks acknowledged that Stone stimulated his interest in English social history: A. L. Beier, David Cannadine and James M. Rosenheim (eds), *The First Modern Society: Essays in English History in Honour of Lawrence Stone* (Cambridge, 1989), p. xvi.

<sup>6</sup> Brooks entered the History programme at Johns Hopkins University in September 1970.

<sup>7</sup> Leonard R. Berlanstein, *The Barristers of Toulouse in the Eighteenth Century, 1740–1793* (Baltimore, 1975); R. L. Kagan, *Lawsuits and Litigants in Castile, 1500–1700* (Chapel Hill, 1981); Daniel Duman, *The Judicial Bench in England 1727–1875: The Reshaping of a Professional Elite* (London, 1982); Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (London, 1983).

friend and interlocutor. Prest's research on barristers was a vital role model.<sup>8</sup> It suggested that barristers and their institutional home, the Inns of Court, were more important than historians had often assumed. Prest argued that the history of the Inns of Court (and, by implication, lawyers) needed to be saved from 'the domain of antiquaries and domestic chroniclers'.<sup>9</sup> Rather than treating lawyers and the Inns of Court as 'isolated from society at large', Prest placed them '... firmly in their historical context, based on a thorough examination of the surviving evidence', over a sufficiently lengthy period of time so as to challenge the conventional wisdom that the history of the Inns (and, by implication, the profession) was essentially one of continuity, thereby producing '... a telescoped view of their later development'.<sup>10</sup>

Prest subsequently critiqued the functionalist assumptions of much historical and sociological writing on the professions – notably, that the history of the profession did not really begin until the Industrial Revolution. Pointing to the paucity of historical research on the professions in medieval and early modern England, Prest argued that the Bar assumed many of the characteristics of a profession, and was so regarded, prior to industrialization.<sup>11</sup> Brooks's research would subsequently demonstrate that, in the case of the lower branch of the profession, Prest was right.<sup>12</sup>

Several of the hallmarks associated with Brooks's scholarship gelled early in his career (although this is perhaps more apparent with the benefit of hindsight, rather than indicative of Brooks's self-consciousness at the time). Certainly, his impressive first-year graduate paper, 'The Common Lawyers in the House of Commons of 1621',<sup>13</sup> presages it:

<sup>8</sup> See, e.g., Wilfrid R. Prest (ed.), *Lawyers in Early Modern Europe and America* (New York, 1981); Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar* (Oxford, 1986).

<sup>9</sup> Wilfred R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (London, 1972), p. vii.

<sup>10</sup> *Ibid.*, p. 4.

<sup>11</sup> Wilfrid R. Prest, 'Why the history of the professions is not written', in G. R. Rubin and D. Sugarman (eds), *Law, Economy and Society: Essays in the History of English Law, 1750–1914* (Abingdon, 1984), pp. 300–320.

<sup>12</sup> Christopher W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge, 1986); Brooks, *Lawyers*, p. 181.

<sup>13</sup> Christopher W. Brooks, 'The common lawyers in the House of Commons of 1621', First-year graduate paper, Johns Hopkins University, 14 April 1971. My thanks to Wilfrid Prest for sharing this paper with me.

This essay . . . will study the role of lawyers in one House of Commons – that of 1621 – asking . . . were the lawyers leaders in the House, and for which side did they speak? Secondly, how and when did the lawyers use the law? That is, did they uphold it dispassionately or did they conscientiously distort its meaning to suit their own and the Commons' ends? The inquiry will begin with a statistical analysis of the lawyers' leadership, and a presentation of various educational and social facts which might account for their behavior. The last part of the paper will consist of a close evaluation of the most important events in the Parliament and the lawyers' place in them.

I hope to demonstrate that the lawyers were leaders both to the opposition and court parties, but that whether they spoke for or against the Crown seems to make little difference in their very strict constructionist use of the law.<sup>14</sup>

Brooks's analysis of the quantitative and qualitative evidence challenged the historical orthodoxy. Confidently, but carefully, he disputed the claims of Christopher Hill, Eric Ives and Lawrence Stone.<sup>15</sup> According to Brooks, the lawyers in the House were not an undifferentiated bloc, either defenders of the common law against Stuart absolutism or self-interested opportunists bent on royal preferment and therefore hostile to reform (especially that which might affect their purses). Rather:

As the statistics demonstrate . . . the [legal] profession divid[ed] between support for the Crown and for the 'country' or 'popular' party. However, both the opposition and Court factions were characterized by their self-conscious role of professional upholders of the law of the land.<sup>16</sup> . . . The lawyers opinions were [distinguished] by legal baggage such as precedents, which had a significant effect on the way they saw and handled a problem.<sup>17</sup>

Brooks concluded that '[t]he lawyers were leaders in the House of Commons of 1621',<sup>18</sup> that they wielded 'great' influence<sup>19</sup> and that they

<sup>14</sup> Ibid., ff. 1–2.

<sup>15</sup> Ibid., f. 71, challenging views disparaging the role of lawyers (citing Christopher Hill, *The Century of Revolution, 1603–1714*, New York, 1966, pp. 62–66); *ibid.*, ff. 14–15, repudiating Ives' suggestion that, for some lawyers, self-interest was a motive for opposition (E. W. Ives, *The English Revolution, 1600–1660*, London, 1968, p. 122); *ibid.*, f. 12, n. 23a, rejecting ' . . . the commonly made error of using the opposition of Sir Edward Coke as an example of the entire legal profession' (exemplified by Lawrence Stone, 'The English Revolution', in Robert Forster and Jack P. Greene (eds), *Preconditions for Revolution in Early Modern Europe* (Baltimore, 1971), pp. 55–108).

<sup>16</sup> Ibid., f. 69.

<sup>17</sup> Ibid., f. 20.

<sup>18</sup> Ibid., f. 69.

<sup>19</sup> Ibid., f. 70.

‘contributed greatly to the general development of the Commons’.<sup>20</sup> Brooks’s emphasis on the importance of lawyers and the inner world of the law, including how it mediated the agency of lawyers and helped to explain their power and influence, was unusual for the times. Equally striking are the means with which he addressed these issues. This paper heralded what would become Brooks’s abiding interests: the role of law and legal ideas in the seventeenth century – the political ideas expressed by lawyers, and the political significance of law, legal ideas and lawyers.<sup>21</sup> It shows how Brooks made significant strides in forging his own vision of law in history prior to his move to England.

With Prest’s encouragement, Brooks transferred to Oxford, where his doctoral supervisor was J. P. Cooper, who became another important formative influence, shaping Brooks’s conception of the vocation of the historian, with its careful attention to archival sources, its emphasis on precision and presenting the right evidence, its erudition and its breadth of interests.<sup>22</sup> As Brooks recalled: ‘Since I was interested in the political ideas expressed by lawyers, an examination of lawyers and what lawyers did seemed a logical place to start. What began as a digression became an ongoing preoccupation.’<sup>23</sup> His newfound love of archival research was facilitated by a junior research fellowship at Brasenose College, Oxford. He deepened his knowledge of early modern English history, and he began to develop friendships with several leading historians of English law, including John Baker, and to acquire a detailed knowledge of the law, its institutions and the sources for researching them.

Fortunately for Brooks, English legal history was at a turning point, in terms of both the numbers of people involved and the range of subjects and approaches adopted. Brooks was in at its beginning, testing and refining his work through participation in the first conferences of what would become the bi-annual British Legal History Conference (BLHC), the stimulation and advice that he received, and the contacts he developed.<sup>24</sup> C. A. F. Meekings guided Brooks on how best to locate

<sup>20</sup> Ibid.

<sup>21</sup> Brooks, *Lawyers*, p. ix.

<sup>22</sup> Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008) was dedicated to J. P. Cooper (see *ibid.*, p. viii). On Cooper, see G. E. Aylmer, ‘J. P. Cooper as a scholar’, in J. P. Cooper, *Land, Men and Beliefs: Studies in Early-Modern History*, ed. G. E. Aylmer and J. S. Morrill (London, 1983), pp. ix–xiii, at p. ix.

<sup>23</sup> Brooks, *Lawyers*, p. ix.

<sup>24</sup> Brooks attended the inaugural Legal History Conference, Aberystwyth, July 1972, and attended fairly regularly until the early 1990s.

the King's Bench files.<sup>25</sup> Another BLHC attendee, J. S. Cockburn, then undertaking pioneering work applying quantitative and qualitative methods to the history of crime, shared his experience of the possibilities and pitfalls of counting cases.<sup>26</sup> It was at the inaugural conference that John Baker issued a clarion call to join him in the enterprise of illuminating 'the dark age of English legal history' (the legal history of Tudor and Stuart England), one of the most important periods in the history of the common law.<sup>27</sup> And it was three years later, at the BLHC of 1975, that Brooks presented a paper that would mark an important milestone both in his career and for the history of early modern England.<sup>28</sup> Based on the research conducted for his Oxford PhD thesis, Brooks's statistical and descriptive analysis outlined several of the key insights with which he is most associated. Litigation in the courts of King's Bench and Common Pleas began to soar from 1560. By 1640, there was three times more litigation than in 1580 – perhaps fifteen times more than there had been in the 1490s.<sup>29</sup> If the increase in population is allowed for, the data 'implies that there was more litigation per head of population under Elizabeth I and the early Stuarts than there was in the early nineteenth century ... Thus, it is very likely that the late sixteenth and early seventeenth centuries were the most litigious periods in English history.'<sup>30</sup> Brooks claimed that the early modern common law courts were not the sole preserve of the landed classes; rather, they were surprisingly cheap and accessible. That there were more lawyers than ever before, 'made the law a weapon which could be put into the hands of ordinary men'.<sup>31</sup>

These findings challenged those historians – notably, Christopher Hill – and some contemporary puritan and other seventeenth-century literature critical of the common law, which saw English law as an

<sup>25</sup> On Meekings, see David Crook, 'Introduction', in C. A. F. Meekings, *Studies in 13th Century Justice and Administration* (London, 1981), pp. ix–xix, at p. ix.

<sup>26</sup> Brooks, *Pettyfoggers and Vipers*, p. xi.

<sup>27</sup> J. H. Baker, 'The dark age of English legal history, 1500–1700', in Dafydd Jenkins (ed.), *Legal History Studies 1972* (Cardiff, 1975), pp. 1–27.

<sup>28</sup> Brooks's paper was delivered at the Cambridge legal history conference, July 1975, and published as Christopher W. Brooks, 'Litigants and attorneys in the King's Bench and Common Pleas, 1560–1640', in J. H. Baker (ed.), *Legal Records and the Historian* (London, 1978), pp. 41–59.

<sup>29</sup> Brooks, 'Litigants and attorneys', p. 43. Much of this great rise in cases comprised actions of debt and suits for breach of contract.

<sup>30</sup> *Ibid.*, p. 44.

<sup>31</sup> *Ibid.*, p. 59.

oppressive tool of the ruling elite.<sup>32</sup> But there was a degree of commonality too: Hill and Brooks (at least during the latter's Oxford period, up to and including *Pettyfoggers and Vipers*) tended, like other historians, to regard legal history as excessively concerned with the internal development of law. Under this optic, the history of law and legal institutions was separate from, but connected to, social history. Brooks sought to transcend what he termed legal history's preoccupation with 'tracing the genealogies of doctrine';<sup>33</sup> rather, he gave law and its institutions a social context, and explored law's place within the socio-political firmament.

Brooks's concern to address the social context of law paralleled contemporary American scholarship and the contextual turns in English legal education and legal history that gained fresh impetus from about the mid-1960s.<sup>34</sup> Law, legal history and history were all turning outward. The boundaries separating 'social' and 'legal' history, and the 'social' and the 'legal', were blurring, although the long-standing tendency to treat them as distinct, and the abiding competition between them, remained. Occasional references to the new contextualist literature on lawyers and legal services in England appear in Brooks's work.<sup>35</sup> In a limited sense, then, Brooks was probably influenced by the changing nature of legal-historical scholarship in law faculties.

Brooks's first book, *Pettyfoggers and Vipers of the Commonwealth*, both developed his 1975 lecture and reached out into new areas. It examined

<sup>32</sup> See, e.g., Brooks, *Lawyers*, pp. 5–6. Sadly, Hill never altered his views about the role of seventeenth-century law and lawyers by taking account of Brooks and allied research: see Christopher Hill, *Liberty against the Law: Some Seventeenth-Century Controversies* (London, 1996).

<sup>33</sup> Brooks, *Pettyfoggers and Vipers*, p. 9.

<sup>34</sup> Bryant Garth and Joyce Stirling, 'From legal realism to law and society: reshaping law for the last stages of the social activist state', *Law and Society Review* 32 (1998), 409–471; William Twining, *Blackstone's Tower: The English Law School* (London, 1994), ch. 2. Much of the contextual turn in legal history concerned civil law, lawyers and the civil justice system: Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (London, 1967); P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979); A. W. B. Simpson, 'Legal liability for bursting reservoirs: the historical context of *Rylands v. Fletcher*', *Journal of Legal Studies* 13 (1984), 209–264; G. R. Rubin and D. Sugarman (eds), *Law, Economy and Society: Essays in the History of English Law, 1750–1914* (Abingdon, 1984); K. J. M. Smith and J. P. S. McLaren, 'History's living legacy: an outline of "modern" historiography of common law', *Legal Studies* 21 (2001), 251–324.

<sup>35</sup> For example, Brooks, *Pettyfoggers and Vipers*, pp. 28, n. 69, 107, n. 179, 191, n. 43, 264, n. 3 and 341, n. 65. Abel-Smith and Stevens, *Lawyers and the Courts*, probably played an early and important role in shaping Brooks's view of law, lawyers, access to justice and legal culture in England, 1750–1965.



the social history of the lower branch of the legal profession – attorneys, solicitors and minor legal officials – who were much larger in number and spread more widely around the country than their more prestigious counterparts. Reconstructing their lives was a formidable undertaking. It is hard now to recapture the experimental nature of this research, for which there was then no training and scant expertise. Its vision of law in history brought together the social history of lawyers, the interplay between civil litigation and society, the social context of civil litigation and the history of ideas. Most notably, perhaps, it addressed a key issue that social historians had only begun to consider and which would continue to be at the heart of Brooks's subsequent work – namely, the ways in which the law and its institutions affected and were used by ordinary people. It was argued that the vast majority (up to 70–80 per cent) of plaintiffs and defendants in the common law courts were neither very rich nor very poor and that early modern England 'was deeply imbued with the importance of the idea of the rule of law'.<sup>36</sup> *Pettyfoggers* exhibited the scholarship, professionalism and high standards for which Brooks's work became a byword. As Geoffrey Elton observed, 'Dr Brooks ... has done so much ... patiently wearisome work as any man [*sic*] can be asked to do. One can only feel admiration for the way in which he avoided inflicting the tedium of research upon the reader.'<sup>37</sup>

In sum, through his work on his Oxford doctoral dissertation and its progression to a book, Brooks had already found his way into law and legal history. The vision of law in history that he forged was constituted against:

- the pure intellectual history of Pocock, and the presentation of the common law mind in oversimplified terms and in isolation from other modes of political discourse;<sup>38</sup>
- Hill's depiction of the common law and its practitioners as mere tools of the ruling elite that had nothing to offer to the bottom 80 per cent of

<sup>36</sup> Brooks, *Pettyfoggers and Vipers*, p. 265.

<sup>37</sup> G. R. Elton, 'Book review of *Pettyfoggers and Vipers*', *Historical Journal* 30 (1987), 239–246, p. 241.

<sup>38</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Constitutional Thought in the Seventeenth Century* (Cambridge, 1987) – a criticism Pocock acknowledged: *ibid.*, p. xi. See further Christopher W. Brooks and Kevin Sharpe, 'History, English law and the Renaissance: a comment', *Past and Present* 72 (1976), 133–146; Brooks, *Lawyers*, pp. 6, 188 and ch. 8.



- the population, and of legal institutions as frequently corrupt and subject to lax standards;<sup>39</sup>
- the reductionist interpretation of the law as class rule, of the rule of law as purely fictional, of the social structure of early modern England as exclusively based on deference and hierarchy, and of a two-class (patrician/plebeian) model;<sup>40</sup>
  - the dominant tradition within social theory, the sociology of professions and modern history that assumed that the professions were a modern phenomenon and that professionalization, and the growth and importance of the professions, was associated with the Industrial Revolution, and with the needs of the aristocracy and gentry, or capitalism or professional self-interest;<sup>41</sup> and
  - a legal history that treats law as a biologically closed system, detaching law and legal institutions from their wider context, and over-representing the experiences of the wealthier sections of society.

In important respects, Brook's vision of law in history was framed by the new thinking about social history that emerged in the 1960s and 1970s.<sup>42</sup> He shared assumptions implicit and sometimes explicit in much social history – that 'the answers to the big questions could be found only in empirical historical research, much of it closely focused'<sup>43</sup> – and that archival mastery and more rigorous processes of verification were essential, as well as that quantification, allied to systematic research across multiple archival sources, was necessary for reconstructing the past. This approach also entailed a concentration on the lived experience of the people, rather than the ruling elite; a preoccupation with agency over structure; an engagement with a much wider range of subjects,

<sup>39</sup> While echoing Hill's emphasis on the power of ideas, rather than brute economics.

<sup>40</sup> An interpretation associated with some forms of social history, including elements within the new histories of crime, criminal law, policing and punishment. See Gareth Stedman Jones, 'Class expression versus social control?' *History Workshop Journal* 4 (1977), 162–170; Michael Ignatieff, 'State, civil society and total institutions: a critique of recent social histories of punishment', in David Sugarman (ed.), *Legality, Ideology and the State* (London, 1983), pp. 183–211; David Phillips, 'A just measure of crime, authority, hunters and blue locusts', in S. Cohen and A. Scull (eds), *Social Control and the State* (Oxford, 1983), pp. 50–74.

<sup>41</sup> Brooks, *Pettyfoggers and Vipers*, pp. 263–264.

<sup>42</sup> Steve Hindle, Alexandra Sheppard and John Walter, 'The making and remaking of early modern English social history', in *Remaking English Society: Social Relations and Social Change in Early Modern England* (Woodbridge, 2013), pp. 1–27.

<sup>43</sup> *Ibid.*, p. 19.

many of which traversed conventional disciplinary boundaries; and demythologization.

And yet Brooks's vision of law in history deviated from the mainstream of social history. Its originality resulted partly from the ways in which he deployed legal history, social history, and law and society scholarship to pursue his distinctive agenda and to challenge conventional wisdom. Underlying his vision was the belief that not only the poor and inarticulate needed rescuing from the enormous condescension of posterity; lawyers – particularly those practitioners of the lower branch who were, in comparison with the likes of Coke, 'very largely uncelebrated and unknown', and those middling groups in society to which professions such as the lower branch belong – also warranted rescuing.<sup>44</sup> This was underpinned by the notion that lawyers, and the middling sort, were pivotal in early modern society and in ways that had not been fully appreciated. According to Brooks, 'even rather obscure lawyers such as country attorneys made important contributions to local administration, politics and society'.<sup>45</sup>

Studies of civil litigation, and of the criminal justice system, were usually limited by county, region or a specific field of litigation.<sup>46</sup> *Pettyfoggers and Vipers* quantified civil litigation on a scale that was unprecedented.<sup>47</sup> A part of its audacity lay in its claim to be a national study and in the considerable ingenuity with which it sought to rebuff potential concerns that the construction of judicial statistics distorted, concealed or omitted relevant detail to the analysis, as well as the serious problems of definition and methodology arising from sampling. Moreover, its counterintuitive findings challenged conventional conceptions of early modern England and modernity.

Of course, those findings built upon the work of other scholars.<sup>48</sup> In addition to the authors and sources already mentioned, Brooks

<sup>44</sup> Brooks, *Pettyfoggers and Vipers*, p. 2.

<sup>45</sup> *Ibid.*, p. 3.

<sup>46</sup> For example, Joel Samanha, *Law and Order in Historical Perspective: The Case of Elizabethan Essex* (London, 1974); J. A. Sharpe, *Crime in Seventeenth-Century England: A County Study* (Cambridge, 1983).

<sup>47</sup> Cf. J. A. Sharpe, *Crime in Early Modern England, 1550–1750* (London, 1984), p. 19: 'Early modern records do not permit the type of analysis of national trends which some historians have attempted for the nineteenth and early twentieth centuries. Both the current state of research and the sheer problem of record survival would make such analysis impossible for our period.'

<sup>48</sup> Marjorie Blatcher, *The Court of King's Bench, 1450–1550* (London, 1978); W. J. Jones, *The Elizabethan Court of Chancery* (Oxford, 1967); Ronald A. Marchant, *The Church*

acknowledged, for example, the work of law and society scholars on the measurement of court usage, and its potential for enlarging our understanding of law in society and, in particular, his reliance on legal historians.<sup>49</sup> *Pettyfoggers and Vipers* is also telling for what is omitted: nothing is said about criminal proceedings, which, while they clearly do not belong within the category it defined as litigation, nevertheless affected the amount of business handled by the courts. The new social history, including the history of crime and criminal law, had a brief, but critical, mention possibly reflecting the distance Brooks then perceived between this work and his own.<sup>50</sup>

Given the amount of time already devoted to the research that culminated in *Pettyfoggers*, it was probably unrealistic to expect the book to include anything more than a brief discussion of the relationship between civil and criminal proceedings or, perhaps, the relevance of the new history of crime. But this neglect of the criminal justice system and the new history of crime had consequences. The new history of crime raised important questions about the relationship between law, power, domination, exclusion, structure, totality and society, and the way in which the legal system can be routinely manipulated to serve those privileged by property and position, problematizing the nature and extent of popular belief in the rule of law – issues that Brooks tended to de-emphasize.<sup>51</sup>

*under the Law: Justice, Administration and Discipline in the Diocese of York, 1560–1640* (Cambridge, 1969); Ralph Houlbrooke, *Church Courts and the People During the English Reformation, 1520–1570* (Oxford, 1979); J. A. Sharpe, *Defamation and Sexual Slander in Early Modern England* (York, 1980). The most frequently referenced author was probably John Baker. Other frequently referenced authors include J. S. Cockburn, Eric Ives, Lawrence Stone and Wilfrid Prest.

<sup>49</sup> 'Special issue on litigation and dispute processing: part one', *Law and Society Review* 9 (1974), 1–160; 'Special issue on litigation and dispute processing: part two', *Law and Society Review* 9 (1975), 163–391.

<sup>50</sup> Brooks, *Pettyfoggers and Vipers*, pp. 279–280. The new social history of crime, criminal law, punishment and policing (hereafter, the 'new history of crime') that emerged and quickly established itself as a distinct branch of social history in the 1970s and early 1980s reflected the growing recognition within social history that the exploitation of court records offered a vital window on the history of society: J. A. Sharpe, 'The history of crime in late medieval and early modern England: a review of the field', *Social History* 7 (1982), 187–203; Victor Bailey (ed.), *Policing and Punishment in Nineteenth-Century Britain* (London, 1981), Ignatieff, 'State, civil society and total institutions'.

<sup>51</sup> Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow, *Albion's Fatal Tree; Crime and Society in Eighteenth Century England* (London, 1975); Douglas Hay, 'War, dearth and theft in the eighteenth century: the record of the English courts', *Past and Present* 95 (1982), 117–160; E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London, 1975); John Brewer and John A. Styles, *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth*

While some historians overlooked or minimized the agency of middling and ordinary people, and the use they made of the law, social historians were increasingly challenging the reductionist interpretation of the law as class rule and, in several respects, adopting a similar view of the justice system and the juridical as that advanced by Brooks.<sup>52</sup>

### From Law and Litigation in Context to Law and the Constitution of Society, 1987–2014

Brooks subsequently reconfigured his vision of law in history by deepening his treatment of a number of topics addressed previously, extending the range of subjects that he tackled, the sources that underpinned them and the period that he traversed.<sup>53</sup> He was encouraged to persist with his

*Centuries* (London, 1980); J. S. Cockburn (ed.), *Crime in England, 1550–1800* (Princeton, 1977); V. A. C. Gatrell, Bruce Lenman and Geoffrey Parker (eds), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (London, 1980).

<sup>52</sup> In addition to the works by Cockburn, *Crime in England*, and Brewer and Styles, *An Ungovernable People*, see David Phillips, *Crime and Authority in Victorian England: the Black Country, 1835–1860* (London, 1977); J. A. Sharpe, ‘Enforcing the law in a seventeenth-century English village’, in V. A. C. Gatrell, Bruce Lenman and Geoffrey Parker (eds), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (London, 1980), pp. 97–119; J. A. Sharpe, ‘The people and the law’, in Barry Rea (ed.), *Popular Culture in Seventeenth-Century England* (London, 1985), pp. 244–270; Cynthia B. Herrup, ‘Law and morality in seventeenth-century England’, *Past and Present* 106 (1985), 102–123; Peter King, ‘Decision makers and decision making in the English criminal law, 1750–1800’, *Historical Journal* 27 (1984), 25–58. The absence of any reference to the work of E. P. Thompson – especially his conclusion to *Whigs and Hunters*, which contains several key arguments subsequently advanced and developed by Brooks – is striking. As will be seen in the next section, Brooks would later acknowledge the importance of Thompson’s influence. I suspect that Brooks came to appreciate Thompson’s significance for his own work subsequent to the completion of *Pettyfoggers*. Compare David Sugarman, ‘Promoting dialogue between history and socio-legal studies: the contribution of Christopher W. Brooks and the “legal turn” in early modern English history’, *Journal of Law and Society* 44 (2017), S44, which erred in claiming that Brooks’s doctoral research was influenced by Thompson.

<sup>53</sup> He deepened his work on the lower branch, examining the relationships between notaries and scribes, and between notaries and solicitors (Christopher W. Brooks, Richard H. Helmholz and Peter G. Stein, *Notaries Public in England since the Reformation*, London, 1991), comparing the professional history of barristers and solicitors, 1750–1850 (Brooks, *Lawyers*, ch. 5), and apprenticeship and legal education, 1700–1860 (Christopher W. Brooks and Michael Lobban, ‘Apprenticeship or academy? The idea of a law university 1820–1860’, in Jonathan A. Bush and Alain A. Wijffels (eds), *Learning the Law* (London, 1999), pp. 353–382), while tackling new subjects, such as feudalism, and attitudes thereto in sixteenth- and seventeenth-century England (Christopher W. Brooks, ‘Contemporary views of “feudal” social and political relationships in sixteenth- and early seventeenth-century England’, in Natalie Fryde and Pierre Monnet (eds), *Die Gegenwart*

own research by the small, but growing, number of historians who were researching early modern litigation, and the relationship between law and agency (some inspired by him), and whose studies confirmed the importance of going to court for ordinary men and women, a considerable renaissance in legal history, and signs of improved communication between social and legal history.<sup>54</sup> Contemporary developments in social history and the study of law in society, Brooks's deepening association with the legal history community and his collaboration with legal historian Michael Lobban also proved important.

Brooks's second book, *Lawyers, Litigation and English Society since 1450*, is a collection of larger and smaller-scale work, juxtaposed with historiographical and programmatic reflections. For example, Brooks extended his survey of rates of litigation and their likely impact on the social and political history of the country to cover seven-and-a-half centuries.<sup>55</sup> This prodigious research was sustained by legal, socio-legal, law and society, and legal history scholarship, social, political and economic history, and a smattering of social theory. Brooks considered both immediate causal factors and the *longue durée*, conjecturing that the legal

*des Feudalismus – Présence du féodalisme et présent de la féodalité – The Presence of Feudalism* (Göttingen, 2002), pp. 109–135).

<sup>54</sup> Brooks, *Lawyers*, pp. ix–x, 189–198. For example, Amy Louise Erickson, *Women and Property in Early Modern England* (London, 1993); Laura Gowing, *Domestic Dangers* (Oxford, 1996); Henry Horwitz and Patrick Polden, 'Continuity or change in the court of Chancery in the seventeenth and eighteenth centuries?', *Journal of British Studies* 35 (1996), 24–57; W. A. Champion, 'Recourse to law and the meaning of the great litigation decline, 1650–1750', in Christopher W. Brooks and Michael Lobban (eds), *Communities and Courts in Britain 1150–1900* (London, 1997) pp. 179–198; Craig Muldrew, *The Economy of Obligation* (Basingstoke, 1998). Others whose scholarship offered similar encouragements included David Lemmings, Wilfrid Prest and Tim Stretton. See further the material in fn. 86.

<sup>55</sup> Brooks, *Lawyers*, ch. 4, which builds on and much expands the material contained in Brooks, 'Litigants and attorneys', and Christopher W. Brooks, 'Interpersonal conflict and social tension: civil litigation in England, 1640–1830', in A. L. Beier, David Cannadine and James M. Rosenheim (eds), *The First Modern Society: Essays in English History in Honour of Lawrence Stone* (Cambridge, 1989), pp. 357–399. Wilfrid Prest pointed to some problems with the nature of Brooks's statistics and the conclusions drawn from them: Wilfrid Prest, 'Law tricks', *Journal of British Studies* 39 (2000), 372–382, p. 375; Wilfrid Prest, 'The experience of litigation in eighteenth-century England', in David Lemmings (ed.), *The British and Their Laws in the Eighteenth Century* (Woodbridge, 2005), pp. 135–144; cf. Christopher W. Brooks, 'Litigation, participation and agency in seventeenth- and eighteenth-century England', in David Lemmings (ed.), *The British and Their Laws in the Eighteenth Century* (Woodbridge, 2005), pp. 151–181; Christopher W. Brooks, 'The longitudinal study of civil litigation in England 1200–1996', in Wilfrid Prest and Sharyn R. Anleu (eds), *Litigation: Past and Present* (Sydney, 2004), pp. 24–42.

culture of early modern England was more inclusive and vibrant, and that the institutional participation of laypersons in the legal system, access to the law, and political and social participation in civil society through the law, locally and nationally, were much greater than has been seen since. He concluded that ordinary people subsequently became more isolated from the legal system, and that 'legal culture was arguably less significant in eighteenth- and nineteenth-century England than it had been before 1700'.<sup>56</sup> Under this optic, the divide between early modern and modern England was great indeed – but not necessarily in the ways that modern historians and social theorists had assumed.

The key to understanding Brooks's scholarly agenda and the development of his vision of law in history is a manifesto lying at the heart of *Lawyers*. This twenty-page call-to-arms argued that the promise of 'socio-legal history' was largely unfulfilled, that much remained to be done to turn that promise into a reality, and that conventional treatments of some of the core concerns of early modern England were, and would continue to be, flawed until law, legal institutions and legal history are taken more seriously and actively integrated within social history. Brooks proposed a number of measures, which amounted to a long-term plan of collective action that, if implemented, could significantly enrich our historical understanding of England, 1500–1800.

Specifically, Brooks claimed that whilst much had been achieved in the history of crime and criminal law, and the history of those who serviced legal institutions:

... there are also grounds for concern about the apparent failure of these branches ... either to communicate much with each other or to make a significant impact on the general social and political history of England between 1500 and 1800. The root of the problem is that we still lack an analytical perspective capable of doing justice to the complex and multi-faceted role of law in society.<sup>57</sup>

<sup>56</sup> Brooks, *Lawyers*, p. 109. This was, in part, a consequence of the deprofessionalization experienced by the legal profession throughout the eighteenth century: Brooks, *Lawyers*, pp. 29–62 and ch. 5; Brooks, 'Litigation, participation and agency', pp. 160–168. See also David Lemmings, *Gentlemen and Barristers* (Oxford, 1990); David Lemmings, *Professors of the Law* (Oxford, 2000); David Lemmings, *Law and Government in England during the Long Eighteenth Century: From Consent to Command* (Basingstoke, 2011).

<sup>57</sup> Brooks, *Lawyers*, pp. 179–180. Henceforth, Brooks began to address the relationship between civil and criminal justice: see, e.g., Brooks, 'Litigation, participation and agency', pp. 160–181.

Brooks now focused on law as discourses that inscribed social, political and economic relationships, and which constituted a formal set of values.<sup>58</sup> This opened the door to a consideration of lawyers as ‘a diverse group of people who are at the centre of the creation and exchange of one of the major social discourses of the day: the set of norms, practices and ideologies known collectively as “the law”’.<sup>59</sup> This was a perspective that was increasingly adopted within the sociology of law, law and society, and critical legal scholarship, legal anthropology and the study of lawyers in society.<sup>60</sup> Brooks noted that while this proposition may seem novel when applied to lawyers, it had long been a commonplace in the study of theology and the clerical profession. The implication was clear: what was good for religion was also good for law. Concerning the diverse influences driving legal discourse, Brooks sought to transcend those approaches that treated legal discourse as exclusively or largely the product of top-down (elite, the state) or professional influences; rather, he emphasized the need to investigate the biggest customers of the law – that is, the middling 70 per cent of the population – and the role of lawyers and legal discourse in facilitating and legitimating their concerns, as well as the extent to which the middling sort were a dynamic force shaping legal ideas and values.<sup>61</sup>

Brooks conceded that the sources for investigating the new possibilities opened up by a legal discourse perspective were mainly those produced by lawyers. This largely unexamined lawyerly material (such as readings and law lectures at the Inns of Court) was uncongenial, being mostly in manuscript, ‘written in barbarous law French and sometimes diabolically obscure’ – but, ‘... with a little digging’, he said, it could ‘produce gems’.<sup>62</sup>

Brooks continued:

This list of material could be expanded to include printed law texts, speeches in parliament or at state trials, unpublished treatises, and the addresses which were regularly used to preface charges delivered to quarter sessions and assizes – public utterances which often dilated on

<sup>58</sup> *Ibid.*, pp. 180–181, 189, 198.

<sup>59</sup> *Ibid.*, p. 186.

<sup>60</sup> For example, Maureen Cain, ‘The general practice lawyer and client’, *International Journal of the Sociology of Law* 7 (1979), 331–354.

<sup>61</sup> See further Jonathan Barry and Christopher W. Brooks (eds), *The Middling Sort of People* (Basingstoke, 1994), which owed something to Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA, 1989).

<sup>62</sup> Brooks, *Lawyers*, p. 188.



the role of law in society. Sources such as these enable us to broaden the scope of legal ideology beyond the rather narrow and precedent ridden ‘common law mind’ formulated by Professor Pocock.<sup>63</sup> They illustrate the ways in which it was exchanged with the wider public. They offer the prospect of a history of generalised legal ideas about the state and society which can be traced over time and compared with that of other strands of thought.<sup>64</sup>

Brooks encouraged social historians to study systematically the case law of civil courts to establish what they might tell us about ‘whole categories of social relationships: economic transactions; husband-and-wife; landlord and tenant; judge and defendant; urban oligarch and freeman; community and person ... [Legal] discourse always includes assumptions about the nature of the person, social relations and knowledge.’<sup>65</sup> Brooks outlined how the development of juristic ideas and substantive law can offer new perspectives, while also contributing to areas already addressed in the study of early modern social history, such as the relationship between law and the community, and between class power, discretion and deference.<sup>66</sup> And he briefly highlighted the importance of juristic thought – notably, the rule of law – for ideas about the state, obedience to authority and its promised protection against the oppression of the individual.<sup>67</sup> To this, he added that the relationship between law and religion had not received a systematic treatment on anything like the scale it deserved.<sup>68</sup> Elsewhere, Brooks threw down the gauntlet on the relative significance of criminal and civil law: ‘[T]he civil law is even more important than the criminal law in maintaining the social and economic relationships in any society.’<sup>69</sup>

Again, Brooks noted that the abiding problem was ‘[o]ur continuing ignorance of the details of legal thought, and of its interaction with the

<sup>63</sup> By taking insufficient allowance for the impact of juristic humanism on English legal thinking and the common currency of Aristotelian and natural-law modes of thought: Brooks, *Lawyers*, pp. 6–7, and ch. 8; Brooks, *Law, Politics and Society*, pp. 11–29, 41, 58, 67, 81.

<sup>64</sup> Brooks, *Lawyers*, p. 188.

<sup>65</sup> *Ibid.*, p. 189, citing at n. 46 Sally Humphreys, ‘Law as discourse’, *History and Anthropology* 1 (1985), 239–264, p. 252.

<sup>66</sup> Brooks, *Lawyers*, pp. 191–193.

<sup>67</sup> *Ibid.*, pp. 193–195.

<sup>68</sup> *Ibid.*, p. 197.

<sup>69</sup> *Ibid.*, p. 28, reiterating J. H. Langbein, ‘Albion’s fatal flaws’, *Past and Present* 98 (1983), 96–120, p. 118.

population at large'.<sup>70</sup> In his final book, *Law, Politics and Society*, Brooks set out to dispel this ignorance, to test his belief in the centrality of the law and generally to put his manifesto into practice. He undertook a large-scale investigation of the nature and extent of law-consciousness, and of the inscription of law in politics and society, within England, Scotland, Wales and Ireland, from the later Middle Ages until the outbreak of the English civil war.<sup>71</sup> Drawing on a host of sources, including those championed in his manifesto, Brooks concluded that law permeated almost all levels of society and that, like religion, it was a principal discourse through which the English understood their world. Indeed, he aimed to 'reintegrate the history of law, legal institutions and the legal professions within the general political and social history of the period'.<sup>72</sup> Brooks also set out to persuade early modern historians that they should take the social history of law itself more seriously and to show how they might do so. Brooks delineated the constitutive and penetrative character of law throughout society by mapping the creation, transmission and reception of legal thought. He lavished particular attention on the thousands of local courts whose trials involved the presentation of oral testimony in a public forum. Brooks found that these local courts impacted on legal thinking in the central courts sustained by a legal world with 'an enduring tendency to privilege customary practices'.<sup>73</sup> He investigated both elite and popular law-consciousness on an almost unparalleled scale, adopting top-down and bottom-up approaches that revealed the trickle-up, as well as trickle-down, diffusion of legal ideas.

This daunting project gained traction in light of the cultural turn in history and cognate developments in the treatment of law in society. While historians and lawyers have long anchored English exceptionalism in the rule of law and legal institutions, they have tended to treat 'law' and 'society' as separate spheres, each independent of the other, although related through various mechanisms of causal linkage.<sup>74</sup> For historians, 'economy' or 'society' are the primary realms of experience, and the 'law' and its institutions are secondary phenomena that merely channel or

<sup>70</sup> Christopher W. Brooks, 'Review: Pocock, *The Ancient Constitution and the Feudal Law*', *English Historical Review* 105 (1990), 733–735, p. 734.

<sup>71</sup> Brooks, *Law, Politics and Society*. Brooks's acknowledgements included Paul Halliday, Cynthia Herrup, Henry Horwitz, James Oldham, Tim Stretton and Keith Wrightson, as well as those whom he had acknowledged in his previous work: *ibid.*, pp. vii–viii.

<sup>72</sup> *Ibid.*, p. 10.

<sup>73</sup> *Ibid.*, p. 425.

<sup>74</sup> Robert W. Gordon, 'Critical legal histories', *Stanford Law Review* 36 (1984), 57–125.

facilitate social relations. ‘Law’ served as evidence for social and economic history;<sup>75</sup> it was merely a means by which ‘economy’ and ‘society’ might be illuminated.<sup>76</sup>

But change was under way. While traditional Marxist and other leftist work had largely focused on the coercive and hypocritical character of the law, new strands within criminology, legal anthropology, social history, the sociology of law, the socio-legal studies movement, feminist legal studies and American critical legal studies (CLS) progressively investigated and elevated law’s non-coercive legitimating functions.<sup>77</sup> This turn to ‘law as ideology’ led to legal ideas being taken more seriously, paralleling earlier and concurrent developments in the history of ideas, and the ‘cultural turn’.<sup>78</sup> Importantly, this intellectual and political movement – a movement that was both interdisciplinary and transnational – challenged the separation of ‘law’ and ‘society’ and the one-directional causality that frequently accompanied such notions. According to this new paradigm, law not only classified, simplified and specified, but also played a significant role in constituting social relations, identity formation,<sup>79</sup> and the minds and practices of individuals.<sup>80</sup>

The social historian who best articulated this new understanding of law-in-society was E. P. Thompson, who concluded that law was:

... deeply imbricated within the very basis of productive relations, which would have been inoperable without this law ... The rules and categories of law penetrate every level of society, effect ... and contribute to ... [an individual’s] sense of identity. Productive relations themselves are, in part,

<sup>75</sup> Brooks, *Law, Politics and Society*, p. 2.

<sup>76</sup> Although this is usually associated with the base/superstructure model of Marxism, it is equally evident in much law-in-history writing of a conservative, liberal and leftist hue, albeit that it is rarely articulated so explicitly: see Gordon, ‘Critical legal histories’.

<sup>77</sup> See, e.g., Ian Taylor, Paul Walton and Jock Young (eds), *Critical Criminology* (London, 1975); Humphreys, ‘Law as discourse’; Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA, 1987), pp. 242–268. On constitutive approaches to law, see Roger Cotterrell, ‘Law as constitutive’, in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam, 2001), vol. 12, pp. 84–97.

<sup>78</sup> Geoff Eley, *A Crooked Line: From Cultural History to the History of Society* (Ann Arbor, 2005).

<sup>79</sup> For example, gender, race, class and ethnicity.

<sup>80</sup> For example, Clifford Geertz, ‘Local knowledge’, in *Local Knowledge* (New York, 1983), pp. 167–234, at pp. 232–233; Pierre Bourdieu, ‘The force of law’, *Hastings Law Journal* 38 (1987), 805–853, pp. 838–839; Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA, 1996).

only meaningful in terms of their definitions at law: the serf, the free labourer; the cottager with common rights, the inhabitant without . . .<sup>81</sup>

Thompson emphasized that the law could sometimes be appropriated and used by the politically and economically dispossessed; that socio-economic relations in early modern England were not simply the product of the decisions of the elite, but involved an ongoing process of negotiation in which a broad cross-section of the population participated; and, controversially, that the rule of law was an unqualified human good.<sup>82</sup> In the hands of Robert W. Gordon, a leading American historian of legal ideas and advocate of CLS, Thompson's notion of law's imbrication in society was allied to the idea of law as constitutive of consciousness: '[In] practice, it is just about impossible to describe any set of "basic" social practices without describing the legal relations among the people involved – legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship.'<sup>83</sup> While many social historians were influenced by Thompson's revisionism, his impact on Brooks was distinctive.<sup>84</sup> In the first place, Brooks was the only social historian of England of whom I am aware whose internalization of Thompson was mediated and intensified by allied work in legal and cultural anthropology and CLS – notably, Gordon's critique of evolutionary teleologies and the law/society divide, as well as his claim that law was constitutive of consciousness.<sup>85</sup> In the second, while most of the historical work triggered by Thompson's new thinking was concerned with crime and

<sup>81</sup> Thompson, *Whigs and Hunters*, pp. 261 and 267; see also E. P. Thompson, *The Poverty of Theory* (London, 1978), p. 288.

<sup>82</sup> Thompson, *Whigs and Hunters*, pp. 259–269; E. P. Thompson, *Customs in Common* (London, 1993), pp. 97–351.

<sup>83</sup> Gordon, 'Critical legal histories', p. 103.

<sup>84</sup> Brooks wrote that he found Thompson's final chapter of *Whigs and Hunters* 'particularly thought-provoking' (Brooks, *Lawyers*, p. 5, n. 16) and that it 'partly' inspired his attempt to 'reintegrate the history of law, legal institutions and the legal profession with . . . general political and social history . . .' (Brooks, *Law, Politics and Society*, p. 1). Brooks described Thompson's *Customs in Common* as 'magisterial' and 'brilliant' (Brooks, 'Litigation, participation and agency', pp. 173 and 178, respectively).

<sup>85</sup> Brooks singled out 'Critical legal histories' as a key work that helped to shape his views about law, lawyers and the social history of England (Brooks, *Lawyers*, p. 186, n. 33), and he quoted an extract in which Gordon elaborated the constitutive role of law (Brooks, *Law, Politics and Society*, p. 5). Although it was not cited extensively, Brooks referenced other works, mostly on the anthropology of law, that also advanced the notion that law was constitutive of consciousness (see, e.g., Brooks, *Lawyers*, p. 186, n. 33, p. 189, n. 43, and p. 189, n. 46). In short, the claim that law constitutes society increasingly pervades Brooks's post-*Pettyfoggers* work – in particular, Brooks, *Law, Politics and Society*.

criminal justice, Brooks's explored the wide-ranging impact of legal discourse and the civil side of the legal system.<sup>86</sup>

Brooks challenged that vein of social history which juxtaposed law (being the law of the elite and of the state) against the community (the easier-going neighbourly relations typical of customary village life):

[There] is much that is convincing in this formulation, but it . . . does not confront the question of when, if ever, lawyers and the law were not so intimately involved in village life that social relations might be discussed without reference to them . . . Even a casual glance at the [manorial court] records . . . reveals village life to have been anything but ideally peaceful and devoid of contention . . . The significance of the manorial courts is that they throw into bold relief, indeed problematize . . . the relationship between custom and the generalised values of local communities versus the formal legal ideas on processes, such as those which were enshrined in Parliamentary statutes or enforced by the courts (a classic example of our obsession with the distinction between elite and popular culture).<sup>87</sup>

The point was not that knowing something about manorial courts would solve the problem of defining popular justice, but that it would be misleading to talk about local communities, custom and justice without considering the ways in which they were constituted by the law.<sup>88</sup>

<sup>86</sup> Brooks's vision of law in history was further enriched by other research, concerning: the prominence of legal thought within early modern political culture, and the interplay between legal, religious and philosophical discourses (A. Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642*, Cambridge, 2006); how the law constituted and policed marriage and patriarchy, and how women attenuated and circumvented coverture using law and lawyers (see, e.g., Erickson, *Women and Property in Early Modern England*; Gowing, *Domestic Dangers*; Tim Stretton, *Women Waging Law in Elizabethan England*, Cambridge, 1998; Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800*, Cambridge, 2003; Garthine Walker, *Crime, Gender and Social Order in Early Modern England*, Cambridge, 2003; Tim Stretton and Krista J. Kesselring, *Married Women and the Law*, Montreal and London, 2013); the interplay between litigation, governance, state formation and the agency of subaltern groups (Steve Hindle, *The State and Social Change in Early Modern England*, Basingstoke, 2000; Michael J. Braddick, *State Formation in Early Modern England 1550–1700*, Cambridge, 2000; Michael J. Braddick and John Walter (eds), *Negotiating Power in Early Modern Society*, Woodbridge, 2001). Much of this research acknowledged its debt to Brooks's scholarship. Additionally, Brooks's frequent visits to the United States (perhaps not least his year-long fellowship at the National Humanities Center in the early 1990s) helped to keep him in touch with trans-Atlantic intellectual developments and scholarship on the law and history/society/culture interface, as did his membership of the editorial board of *Law and History Review*.

<sup>87</sup> Brooks, *Lawyers*, p. 191.

<sup>88</sup> *Ibid.*, pp. 191–192.

Similarly, the social and political pluralism that social historians had discerned in early modern society and, to some extent, counterposed against the law were, in important respects, connected to and sustained by legal pluralism.<sup>89</sup>

In sum, Brooks's intellectual development reveals a scholarly metamorphosis from the late 1990s onwards. From an 'externalist' (social and intellectual history) perspective on law, consciously complementing 'internalist' legal history's preoccupation with institutional and doctrinal evolution, he moved to embrace an approach that married 'externalist' and 'internalist' perspectives on law – integrating social and political history with the history of law, legal institutions and the legal professions.

Always careful and rigorous, Brooks acknowledged the pitfalls involved in deciphering court usage and law-mindedness. While conveying a strong sense of the complexity of the phenomena he investigated, the sweep and ambition of his scholarship raises challenging evidential and conceptual questions. Was litigation always a good thing, both as an ideal and in practice?<sup>90</sup> Was litigation equally good for all social groups in a society that was grossly unequal?<sup>91</sup> And how did the significant increase in litigation that extended from the 1580s until the 1670s (with occasional minor fluctuations) impact on personal relations and contemporary notions of 'neighbourliness'?<sup>92</sup>

Brooks's partiality for things 'legal' extended to lawyers, whom he usually held in high regard. He was especially smitten with Coke.<sup>93</sup> He rebutted, perhaps overenthusiastically, contemporary criticisms of attorneys (namely, that they cheated and exploited their clients, and that they were poorly regulated), the inequities of the legal system, the adequacy of

<sup>89</sup> Brooks, *Law, Politics and Society*, especially chs 2, 5, 6, 9 and 13. This emphasis on legal pluralism was echoed in contemporary legal anthropology and law-and-society scholarship.

<sup>90</sup> Brooks acknowledged that arbitration was a popular means of resolving disputes in the fifteenth and seventeenth centuries: Brooks, *Pettyfoggers*, p. 91.

<sup>91</sup> Research on contemporary America and elsewhere emphasizes that the 'haves' tend to come out ahead: Marc Galanter, 'Why the "haves" come out ahead', *Law and Society Review* 9 (1974), 95–160.

<sup>92</sup> Tim Stretton has suggested that litigation may have been one of the causes of the corrosion of personal relations in early modern England: Tim Stretton, 'Written obligations, litigation and neighbourliness, 1580–1680', in Steve Hindle, Alexandra Sheppard and John Walter, *Remaking English Society: Social Relations and Social Change in Early Modern England* (Woodbridge, 2013), pp. 189–210, at p. 189.

<sup>93</sup> Brooks, 'The common lawyers in the House of Commons of 1621', in *Pettyfoggers*, pp. 45, 94, 100, 120, 121, 128, 129, 131, 134, 146, 148, 150, 163, 177, 198–199, 204, 210, 218 and 219.

the Inns of Court's provision for professional regulation and education, and persistent demands for law reform.<sup>94</sup>

Brooks's claims that adherence to, and respect for, the rule of law was widespread, and that the law and law-consciousness penetrated, and in vital respects, constituted much of early modern England, run into the problem that apparent use and conformity with the law, or knowing the law, may obscure non-conformity and a lack of legitimacy.<sup>95</sup> That people justified their action by reference to the law does not in itself confirm the legitimacy of the rule of law. Individuals who appeal to the rule of law may do so differently in different contexts and times, and such appeals are as likely to be motivated by short-term or self-interested sentiment as by a belief in the legitimacy of the law.<sup>96</sup> It is also likely that the idea of the 'rule of law' meant different things to, say, landowners and the poor, and that these differences were compounded by the existence of overlapping and sometimes competing systems of governance. Indeed, the motives and beliefs of individuals when they appeal to legality are almost invariably mixed. It may not be possible to differentiate those motives and beliefs (such as pragmatism, Christian morality, a desire to protect one's family, possessions and livelihood, or acquiescence in law's power) – especially given the stark social and economic inequalities and disadvantages of the age – and to establish their relative importance.

Brooks recognized that the relationship between the legal ideas discussed in Parliament, or famous state trials, and the everyday legal life of the mass of the population was problematic; he acknowledged that 'it is not easy to measure the practical impact of law.'<sup>97</sup> But this sits uneasily with some aspects of his analytical framework – notably, that law was 'deeply imbricated' throughout society and supremely 'constitutive of consciousness'. These assumptions confirmed Brooks's long-standing belief that '[l]aw, and the sources of authority for lawmaking, were central features of seventeenth-century discourse' and an essential part of the mentality of most people of the age.<sup>98</sup> When taken too literally,

<sup>94</sup> Prest, 'The experience of litigation'; Paul Raffield, 'A discredited priesthood: the failings of common lawyers and their representation in seventeenth century satirical drama', *Law and Literature* 17 (2005), 365–395. Brooks was probably reacting to easy acceptance by historians of contemporary complaints about law and lawyers.

<sup>95</sup> However, individuals' legal consciousness may be framed by ideas about law even when they are actively resisting it.

<sup>96</sup> Brooks acknowledged that self-interest may have had a good deal to do with the acceptance of political authority: Brooks, *Lawyers*, p. 6.

<sup>97</sup> Brooks, *Law, Politics and Society*, pp. 61, 241, 383, 426 and 432.

<sup>98</sup> Brooks, 'Review: Pocock', p. 734.



however, these assumptions become trans-historical relational statements, rather than working hypotheses, akin to the reversal of the hitherto dominant base–superstructure polarities, switching one directionality and causality for another, rendering law wholly autonomous, and thereby exaggerating the range and depth of law-consciousness, and law’s legitimacy, and marginalizing ‘alternative’ discourses, such as anti-nomianism and popular constitutionalism.<sup>99</sup>

Also, what makes ‘law-mindedness’ or a promise to perform a contract ‘legal’, as distinct from ‘religious’, ‘moral’, ‘economic’, ‘political’ and so on (all of which may be partly shaped by ‘law’)?<sup>100</sup> Of course, law matters – but ‘everyday life has its own battery of normative ideas and habits, which interact with law, even when law is at its most constitutive’.<sup>101</sup>

This suggests that, until we know how individuals such as defendants judged their engagement with the law, claims about law-mindedness and legitimacy are best kept modest and circumspect. It also points towards the need for greater discussion of the complex and diverse definitions of law-mindedness, law-consciousness, legitimacy, imbrication, ideology, negotiation and other key concepts explicitly and implicitly employed in such research, and the possible locations of their empirical referents.

<sup>99</sup> ‘Eighteenth-century law . . . existed in its own right’: Thompson, *Whigs and Hunters*, p. 262. See further Christopher Tomlins, ‘How autonomous is law?’ *Annual Review of Law and Society* 3 (2007), 45–68, pp. 49–52, 57–59. For criticisms of Thompson’s treatment of the rule of law see, e.g., Adrian Merritt, ‘The nature and function of law’, *British Journal of Law and Society* 7 (1980), 194–214; for a defence of Thompson, see Daniel H. Cole, ‘An unqualified human good’, *Journal of Law and Society* 28 (2001), 177–203. For a critique of law as constitutive of consciousness, see Anthony Woodiwiss, *Rights v. Conspiracy* (New York, 1990), pp. 141–173. These criticisms are elaborated and extended in Tomlins, ‘How autonomous is law?’ Robert Gordon has emphasized that his claim that law was, in significant respects, constitutive was a hypothesis: see, generally, Robert W. Gordon, ‘Critical legal histories revisited’, *Law & Social Inquiry* 37 (2012), 200–215. Did Brooks’s increasing embrace of lawyer’s law and legal history accentuate a tendency to be ‘too lawyerly’? Apparently, Lawrence Stone thought so: Adrian Green, ‘Christopher W. Brooks, 1948–2014’, *The Seventeenth Century* 29 (2014), 403–409.

<sup>100</sup> See further Hendrik Hartog, ‘Introduction to symposium on “critical legal histories”’, *Law & Social Inquiry* 37 (2012), 147–154, p. 153; S. L. Blumenthal, ‘Of Mandarins, legal consciousness, and the cultural turn in US legal history’, *Law & Social Inquiry* 37 (2012), 178–179.

<sup>101</sup> Austin Sarat and Thomas R. Kearns, ‘Beyond the great divide: forms of legal scholarship and everyday life’, in Austin Sarat and Thomas R. Kearns (eds), *Law in Everyday Life* (Ann Arbor, 1993), pp. 21–62, at pp. 54–55. Brooks was sensitive to differences of legal penetration and import across regions, localities and time, and this has become an important way of problematizing some of the larger claims made about the import of law in early modern Britain.

The problems posed by Brooks's larger conclusions reflect, to some extent, the problems of social history and the wider study of law-in-society.<sup>102</sup>

The claim that legal culture was less important after c. 1700 than in the period c. 1560–1700 is difficult to access in any general sense, at least without much more research, and is likely to elicit a complex response.<sup>103</sup> To some extent, it depends where you look. While the decline of legal culture in the eighteenth century has been persuasively canvassed,<sup>104</sup> for those engaged in modern history, the story may not be straightforward. Lawyers and legal thinkers such as Bentham, Fitzjames Stephen, Maine, Dicey and Bryce were, in varying degrees, public intellectuals who supplied ideological rationales for the character of English society or for social reform, staking claims to represent certain cultural practices and ideas, or certain groups, such as the middle classes. More generally, law and lawyers were active in both the construction of the British state and the British Empire – with lawyers playing key roles as administrators, the drafters of comprehensive codes of law, the authors of legal textbooks that reconstituted the law, and as members of Parliament, judges and jurists.<sup>105</sup> The close involvement of lawyers and professional bodies such

<sup>102</sup> Historians may find recent contemporary research on law-consciousness suggestive: see, e.g., Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago, 1990); Austin Sarat, "'... The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor", *Yale Journal of Law and the Humanities* 2 (1990), 343–379; Patricia Ewick and Susan Silbey, *The Common Place of Law* (Chicago, 1998).

<sup>103</sup> Brooks, *Lawyers*, p. 109.

<sup>104</sup> Brooks, 'Litigation', pp. 160–176; Lemmings, *Gentlemen and Barristers*; Lemmings, *Professors of the Law*; Lemmings, *Law and Government in England*.

<sup>105</sup> Christopher Harvie, *The Lights of Liberalism* (London, 1976); Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (London, 1979); Duman, *The English and Colonial Bars*; Stefan Collini, Donald Winch and John Burrow, *That Nobel Science of Politics* (Cambridge, 1983), chs 7 and 9; David Sugarman, 'Legal theory, the common law mind and the making of the textbook tradition', in William Twining (ed.), *Legal Theory and Common Law* (Oxford, 1986), pp. 26–61; David Sugarman, 'Simple images and complex realities: English lawyers and their relationship to business and politics', *Law and History Review* 11 (1993), 257–301; Leonore Davidoff and Catherine Hall, *Family Fortunes* (London, 1987); R. C. J. Cocks, *Sir Henry Maine* (Cambridge, 1988); Stefan Collini, *Public Moralists* (Oxford, 1991), chs 5 and 7; Lauren Benton, *Law and Colonial Cultures* (Cambridge, 2001); Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford, 2006); Duncan Bell, *The Idea of Greater Britain* (Cambridge, 2007); Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, 2010); Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire* (London, 2014).

as the Law Society in the formulation of legislation, law reform and legal practice suggests that they exercised an important influence on the available normative languages, on the contemporary definitions of the public and the private, and therefore on the presuppositions of the legislative and decision-making process.<sup>106</sup> Moreover, the law was far from absent in contemporary fiction.<sup>107</sup>

None of this, however, challenges the importance of Brooks's scholarship. Brooks's achievement was to systematically integrate law, politics and society, and legal, social and political history, and to demonstrate the considerable increase in historical knowledge that is likely to ensue from this fusion. He took law out of the law courts and lawyers' offices and brought it into society. Brooks, probably more than any other social historian of early modern England, appreciated and internalized the significance of legal history, legal doctrine and legal culture – the law from the 'outside' and the 'inside'.<sup>108</sup> This substantiated their importance, providing valuable guidance on how they might be understood and on the sources for researching them. He demonstrated that law and lawyers warranted at least the same attention as that traditionally lavished on religion and clerics.<sup>109</sup> While his larger conclusions may be contested, it is hard to see how his emphasis on the centrality of law to so many aspects of early modern England will ever be overturned.

Brooks was clear that his was the first, not the last, word on the subject.<sup>110</sup> Like most original, cutting-edge scholarship, his raises as many questions as it answers, but in so doing it highlights important

<sup>106</sup> David Sugarman, 'Bourgeois collectivism, professional power and the boundaries of the state: the private and public life of the Law Society, 1825–1914', *International Journal of the Legal Profession* 3 (1996), 81–135.

<sup>107</sup> Tim Dolin, *Mistress of the House: Women of Property in the Victorian Novel* (London, 1997); Kieran Dolin, *Fiction and the Law* (Cambridge, 1999); Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (Cambridge, 2000); Catherine O. Frank, *Law, Literature and the Transmission of Culture in England, 1837–1925* (London, 2010).

<sup>108</sup> Brooks's increasingly positive attitude towards legal history, and his emphasis on its centrality to the writing of early modern social and political history, was perhaps, in part, connected to the counsel and works of Sir John Baker (Brooks, *Pettyfoggers*, p. ix; Brooks, *Law, Politics and Society*, p. viii), and Brooks's collaboration with, and the advice and encouragement that he received from, Michael Lobban (Brooks, *Lawyers, Law, Politics and Society*, p. viii), as well as Brooks's election to, and service on, the Council of the Selden Society.

<sup>109</sup> Brooks's 'blind spot', when it came to religion, may explain his tendency to downplay the religious and perhaps exaggerate the importance of the secular (including secular courts and their law) in early modern England: see Green, 'Christopher W. Brooks', p. 403.

<sup>110</sup> Brooks, *Lawyers*, p. 8.

themes and issues for future scholarship to consider. More generally, Brooks's manifesto and his stress on the need for an analytical framework capable of doing justice to the complex and multifaceted role of law in society remain both important visionary prescriptions and challenges for historians. This is especially so in this age of constant pressure for quick returns on university budgets, and the increasingly limited ability of universities in general and the humanities in particular to undertake long-term research and to foster sustained interdisciplinary collaboration of the kind advanced by Brooks.<sup>111</sup> Likewise, the lack of institutional commitment to bringing together history and law in the United Kingdom relative to, say, Canada and the United States, may inhibit his impact. Is there, for example, sufficient support to enable and encourage historians to acquire the requisite skills necessary for working on lawyer's materials? It would be regrettable if Brooks's reach were to fail to extend beyond social history and law and literature into the realms of general history, the history of politics and socio-legal studies.

By describing and analysing in such exceptional detail what he conceived as the golden age of English law and society, and by arguing against any kind of linear or progressive evolution over time, Brooks reminds us why the questions that were at the forefront of his attention – lay participation in law and governance, access to justice, the recognition of the public interest and moral imperatives, as well as private interest, within legal discourse and legislative authority, and the rule of law as a bulwark against authoritarianism and the abuse of power – remain so compelling.

<sup>111</sup> See, generally, Jo Guldi and David Armitage, *The History Manifesto* (Cambridge, 2014).