

**Promoting Dialogue Between History and Socio-legal Studies:
The Contribution of Christopher W. Brooks and the ‘Legal Turn’ in Early Modern
English History**

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This paper is a draft of an article which will appear in the *Journal of Law and Society* (2017) volume 44, issue 5, Special Issue: *Main Currents in Contemporary Sociology of Law*, ISSN: 0263-323X, pp. 37- 60 (published by Wiley Blackwell, on behalf of the Cardiff University Law School). On-line publication is scheduled for October 2017.

Abstract: Although history, legal history, and socio-legal studies significantly overlap in concerns, methods, values and history, and a common tradition, these commonalities are frequently overlooked. In seeking to promote greater dialogue between these disciplines, this article examines their complex interaction, arguing that the work of socio-legal scholars, historians, and legal historians would benefit from greater cross-fertilization. It focuses on the ‘legal turn’ in recent history writing on early modern England, particularly Christopher W. Brooks’s ground-breaking analysis of the nature and extent of legal consciousness throughout society, and the central role of law and legal institutions in the constitution of society. It then outlines some areas of common interest and, having highlighted the increasing convergence between history, legal history, and socio-legal studies, concludes that greater dialogue would enhance our understanding of the role of law in society, and of society, and would be of more than mere historical interest.

I.

Socio-legal studies is embedded in a cluster of social practices and relations sustained by many disciplines. Within this broad church, history has always been an important strand, although the linkages between history and socio-legal studies are complex and paradoxical. Socio-legal studies was constituted against the dominant tradition of legal education and scholarship, with its focus on the principles of law, and that vein of legal history preoccupied with the genealogy of legal doctrine. Doctrinal legal history, and the use of the past by lawyers (who are, among other things, historians), attracted the suspicion of socio-legal scholars in that it underpinned and legitimated a preoccupation with the narrow technicalities of the law and the treatment of law as largely divorced from the society, politics, and economy in which it operated. Given the implicit hope that socio-legal scholarship would identify, and therefore bolster, movements that might ‘change society through law’, and that the past was replete with things that we should be leaving behind with the march of progress, the moral was clear: the less history the better. Hence, some ‘law in context’, and other legal scholarship, explicitly set their sights on the present, and against the

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past.¹

However, many socio-legal scholars embraced and were inspired by history, especially social history. They were energized by history's reading of law as a social, political, and cultural formation that could only be understood over time; the contingency of particular legal arrangements; that ordinary people contributed by their conscious efforts to the making of history; and that law and legal practices were systematically structured by economic, cultural, and political power, thereby reinstating facets of the past that were otherwise marginalized. That E.P. Thompson, the doyen of social history and a lion of the political left, identified law as the locus of political contention² was not without irony, as some of his comrades noted.³ But it was music to the ears of critical and socio-legal scholars, and legal activists, justifying what they did. At 'a practice level', Thompson's message to his readers was '... Go to Law School'.⁴

Deciphering the relationship between history and socio-legal studies necessitates addressing institutional factors and interests as well as ideas. The modern disciplines of law, history, and socio-legal studies were in important respects constituted against each other, and as separate from one another. They were competitors – for academic legitimacy, cultural authority, student numbers, and material support – making boundary maintenance part of their *raison d'être*.⁵

Academic historians harboured similar suspicions concerning law and legal history, adding further objections of their own. They stigmatized law and legal historians (with some notable exceptions) as intrinsically unhistorical, given their preoccupation with reading the past in the light of modern legal doctrine.⁶ Divorcing history from law and legal history spoke to the self-identity of modern professional historians.⁷ It was with pride that Geoffrey Elton, the foremost Tudor historian of his generation, proclaimed to his legal audience, 'I am not a legal historian'.⁸ Belittling law and legal history was fair sport among historians. Hence Elton's delicious quip: that the standard-bearer of English legal scholarship, the *Law Quarterly Review*, was 'an austere journal in which incomprehensible problems so regularly receive incomprehensible solutions.'⁹

¹ R. Cocks, 'History in Eclipse?' in *The Life of the Law*, ed. P. Birks (1993) 257.

² E.P. Thompson, *Whigs and Hunters* (1975) 258-269.

³ P. Linebaugh, 'From the Upper West Side to Wick Episcopi' (1993) 201 *New Left Rev.* 18, at 23.

⁴ *id.*, p. 24.

⁵ The existence of law faculties in England staffed by academics, and principally concerned with teaching the indigenous system, dates from c.1850 onwards. The scale of operations was small until the expansion of higher education after the Second World War, and especially from the mid-1960s onwards. The academic discipline of history is similarly of recent vintage, but, unlike law, it rapidly succeeded in attracting large student numbers and cultural capital. Although history remained important in law, and vice-versa, their interplay was rendered problematic by the drive to establish wholly independent academic subjects, specialization, professionalization, and a scientific model of intellectual work.

⁶ The practices of historians are, of course, as presentist in their own ways as those of the legal community: P. Novik, *That Noble Dream* (1988). Moreover, lawyers played a significant role in creating modern historical method: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (1957); D.R. Kelley, *Foundations of Modern Historical Scholarship* (1970).

⁷ An important exception is the history of medieval England, where law and legal sources have long been treated as central to the field.

⁸ C. Holmes, 'G.R. Elton as a Legal Historian' (1997) 7 *Transactions of the Royal Historical Society* 267, at 267.

⁹ Holmes, *id.*, p. 269.

Assorted professional lawyers and jurists tried to return history's fire, branding the discipline of history 'antiquarian', 'literary', unable to explain the present, and reductive, reasserting the central (and beneficial) role of law and lawyers within the British polity.¹⁰

While historians and socio-legal scholars recognize the utility of legal records, they have primarily been interested in their value as sources for social and cultural history, rather than the social history of law itself.¹¹ Both socio-legal studies and history are disposed to the view that 'the law' itself is not a rewarding or worthwhile subject of investigation.¹² The fog of the law, with its highly technical and arcane persona, is regarded with some justification as obscure and daunting. Hence, the social history of law itself has an image problem for history and socio-legal studies, further contributing to keeping 'law' and 'legal history' at arm's length.

Neither using history propelled primarily by the concerns and methods of social science, nor the appropriation of socio-legal scholarship by history, is straightforward. Socio-legal scholars tend to be less sceptical of 'theory' than historians, perhaps finding history's preoccupation with the particular and detailed overwhelming, daunting or simply 'positivist'.¹³ Socio-legal scholars may treat history as largely a repository of examples and data that they can draw upon for their own purposes.¹⁴ But historians may regard this as ransacking secondary sources in order to 'theorize the facts', an exercise whose potential pitfalls include over-simplification. Yet there are important instances of successful borrowings and transplanted between history, legal history, and socio-legal studies. Indeed, there are long-standing traditions that both integrate history and law, and treat law as a social institution. Enlightenment jurists, for example, stressed that law was the product of time and historical development, and that it should be studied comparatively and, therefore, sociologically. In this way, the study of law and its history became a principal way of studying society – a perspective that was enthusiastically embraced by several leading social theorists, jurists, and historians of the pre-modern Western world.¹⁵

In short, the relationship between history and socio-legal studies evinces both a striking overlap in concerns, methods, values and, indeed, history, and a common tradition. At their best, they both question received perspectives, have the power to contextualize, understand that effects often have multiple causes, and are able to challenge dominant myths. Yet these commonalities are frequently overlooked.¹⁶ To paraphrase Margot Finn, by confining their inquiries to separate channels, scholars of history and socio-legal studies too often navigate

¹⁰ For example, A.V. Dicey, *The Law of the Constitution* (1885) at vi-vii, 12-19 - notwithstanding that Dicey made extensive use of history when it suited him.

¹¹ C.W. Brooks, *Law, Politics and Society in Early Modern England* (2008), 2.

¹² id. Compare D. Cowan and D. Wincott (eds.), *Exploring the 'Legal' in Socio-Legal Studies* (2016).

¹³ Historians have expressed similar concerns about history: J. Guldi and D. Armitage, *The History Manifesto* (2015).

¹⁴ M. Lobban, 'Legal Theory and Legal History' in *Law in Theory and History*, eds. M. Del Mar and M. Lobban (2016) 3.

¹⁵ J.H. Franklin, *Jean Bodin and the Revolution in the Methodology of Law and History* (1963); Q. Skinner, *The Foundations of Modern Political Thought* (1978); D. Kelley, *The Human Measure* (1990). On the close interplay between law, history, and social theory in modern Anglo-American legal scholarship: D.M. Rabban, *Law's History* (2013); B.Z. Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 *William & Mary Law Rev.* 2235.

¹⁶ For incisive discussions of the relationship between law and history, see P.G. McHugh, 'The Common-Law Status of Colonies and Aboriginal Rights' (1998) 61 *Saskatchewan Law Rev.* 393; C. Tomlins, 'Law and History' in *Oxford Handbook of Law and Politics*, eds. R. D. Kelemen et al. (2008) 665; R.W. Gordon, *Taming the Past* (2017) chs. 10, 12, 13.

shared waters only to pass silently at a measured distance, like two ships in the night.¹⁷ At worst, historians and socio-legal scholars are in danger of developing theories and general conclusions based on overly restricted or misleading factual and methodological underpinnings.

Since 1984, when I advocated a ‘more holistic and interdisciplinary’ history of English law, economy, and society, there has been an explosion of historical scholarship that has substantially extended and problematized our knowledge of the structure, function, development, and significance of legal discourse and legal practice in England and its empire in past times.¹⁸ Socio-legal scholars have made significant contributions to this metamorphosis and regularly take their inspiration from historically-informed work. And yet, at least in England, history is still not as fully integrated within socio-legal studies as it is in, say, Canada and the United States. In so far as it is historically-informed, socio-legal writing has long focused on the period since the eighteenth century, concentrating primarily on crime and the criminal justice system, the subject of some of the best British socio-legal history.¹⁹ Consequently, important history writing on other topics and on law and society in medieval and early modern England, is either unknown to, or under-appreciated by, the socio-legal community. This limited engagement is not one-sided. While historians increasingly resort to legal records and engage in law-related research, socio-legal scholarship is usually off their radars.

This article argues that the work of both socio-legal scholars and historians would benefit from greater cross-fertilization, and from taking the social history of law itself more seriously.²⁰ As an illustrative case study, I focus on the ‘legal turn’ in recent history writing on early modern England,²¹ particularly, its ground-breaking analysis of the nature and extent of legal consciousness throughout society, and the central role of law, the civil justice system, litigation, and lawyers in the constitution of society.

The ‘legal turn’ in early modern English historiography elucidates how and why historians and socio-legal scholars have much to gain from deeper engagement with each other. At the centre of this legal turn is the historian, Christopher W. Brooks, who transcended the boundaries of social, political, and legal history, and placed law centre-stage. He demonstrated that law exercised a fundamental role in mediating and constituting social, political, and economic relationships at all levels of society throughout the sixteenth and seventeenth centuries. He investigated both elite and popular legal consciousness on an

¹⁷ M. Finn, ‘Victorian Law, Literature and History’ (2002) 7 *J. of Victorian Culture* 134, at 135.

¹⁸ D. Sugarman and G.R. Rubin, ‘Towards a new history of law and material society in England 1750-1914’ in *Law, Economy and Society: Essays in the History of English Law 1750-1914*, eds. G.R. Rubin and D. Sugarman (1984) 1.

¹⁹ Notable exceptions include P. Goodrich, *Languages of Law* (1990); A. Hunt, *Governance of the Consuming Passions* (1995); M. Burrage, *Revolution and the Making of the Contemporary Legal Profession* (2006); the ‘turn to history’ in constitutional and international law; significant elements within ‘law and literature’; and legal life writing.

²⁰ For a parallel endeavour, see C. Barzun and D. Priel, ‘Jurisprudence and (Its) History’ (2015) 101 *Virginia Law Rev.* 849.

²¹ The early modern period roughly corresponds to the sixteenth, seventeenth, and eighteenth centuries. The mushrooming of interest in legal and allied sources has been characterized as ‘the closest thing historians get to a gold rush’: T. Stretton, ‘Social historians and the records of litigation’ in *Fact, Fiction and Forensic Evidence* ed. S. Songer (1997) 15 at 15.

almost unparalleled scale, adopting top-down and bottom-up approaches that revealed the trickle-up, as well as trickle-down, diffusion of legal ideas.

Brooks engaged with many of the principal concerns of socio-legal studies. He challenged significant elements of the traditional narratives and taken-for-granted assumptions about the character of early modern and modern England and its law, suggesting that how we got from ‘there’ to ‘here’ was less linear and progressive than is often assumed; and that what has frequently been surmised may be little more than musty cliché. His startling and counter-intuitive conclusions include that: there was probably more litigation per head of population in England in 1600 than in the United States in 1990; the legal culture of sixteenth and seventeenth century England was more all-pervasive and inclusive, and access to justice was significantly greater than subsequently; whilst modern historians of crime emphasized the central role of law in sustaining the hegemony of the powerful in eighteenth-century society, paradoxically perhaps, rates of litigation, resort to the law, and the importance of legal discourse all declined during the same period.

In this article, I critically review Brooks’s principal ideas and findings, the contexts within which they arose, their theoretical underpinnings, and their larger significance.²² I hope to demonstrate that the legal turn in early modern English history is of fundamental interest to socio-legal studies. To this end, I also touch briefly on how historians might benefit from socio-legal scholarship. Although addressed primarily to socio-legal scholars, I hope it will be of interest to historians.

II.

Chris Brooks (1948-2014) was a United States-born historian who came of age in 1960s America, but spent much of his life in Britain, where he was a member of the Department of History at Durham University from 1980 until his death. His early life sensitized him to the omnipresence of law and lawyers in American society. As an undergraduate student at Princeton, inspired by his teacher, Lawrence Stone, he concentrated on the study of early modern England. Brooks would always remember Stone’s injunction that historians should address big questions and postulate bold ideas.

Following Princeton, Brooks began postgraduate study at John Hopkins where, in his first PhD supervisor, Wilfrid Prest, he found a lifelong mentor, friend, and interlocutor. With Prest’s encouragement, Brooks transferred to Oxford, where his doctoral supervisor, J.P. Cooper, was another important formative influence, shaping Brooks’s conception of the vocation of the historian, with careful attention to archival sources, emphasis on precision and presenting the right evidence, erudition, and breadth of interests. Subsequently, as a Junior Research Fellow at Brasenose, Oxford, Brooks deepened his knowledge of early modern English history and became acquainted with some of the leading historians of English law. Moving to Durham in 1980, Brooks taught and supervised generations of students, and exercised, from the early 1990s onwards, an increasing influence on the writing of early modern English history. He was the foremost historian of law in early modern English society of the last half century.

²² This essay focuses largely on Brooks’s principal books, rather than a comprehensive survey of all his publications. See, further, A. Green, ‘Christopher W. Brooks, 1948-2014’ (2014) 29 *The Seventeenth Century* 403.

III.

Brooks's scholarship should initially be read as a response to the distinctive historical and socio-legal currents of the 1970s and 1980s. At this time, the academic study of lawyers in history tended to:

- be largely *institutional*, focusing on the establishment, organization, and evolution of professional infrastructure, rather than its social history;
- conflate professionalization with the Industrial Revolution, and the 'professional project' of 'market control', generating a linear notion of professionalization, and monocausal explanations of the relationship between professions and society;²³
- frequently assume that few people came in contact with the law, save, on the one hand, the richest and most socially elevated, and, on the other, those unfortunate enough to be caught up with the criminal justice system, generally those on the bottom rungs of society. The social control functions of law were a central claim advanced by the first phase of the new social history of crime, criminal law, policing, and punishment, and much of this work adopted a two-class (patrician/plebeian) model of eighteenth-century society.²⁴ Hence, civil law, lawyers, civil litigation, and the 'middling sort'²⁵ received limited attention.

Several distinct but overlapping revisionist movements challenged these ideas: new histories of civil law and the professions, the turn to the 'social' in history, and histories of crime that treated law as more than the monopoly of the elite. These movements help situate Brooks's initial work historically.

First, the professions began to attract sustained historical interest, with some studies harnessing quantitative and qualitative research to illuminate the social, economic and intellectual history of professions.²⁶ Second, E.P. Thompson emphasized that early modern society was not simply the product of the decisions of the elite, but involved an on-going process of negotiation in which a broad cross-section of the population participated.²⁷ The partial autonomy of the rule of law rendered rulers at least occasionally 'prisoners of their own rhetoric'.²⁸ The law could sometimes be appropriated and used by the politically and economically dispossessed, as well as by the elite. Rather than mere superstructure, the law was imbricated within social and economic relations, and could be found at 'every . . . level of society'.²⁹ Thompson's credo found immediate resonance in Brooks's doctoral research on lawyers and litigation, sustaining his determination to address the culture of the rule of law.

Third, Thompson also influenced those who advanced a modern history of civil law that transcended the dominant preoccupation with tracing genealogies of legal doctrine, instead treating law and legal institutions in their wider contexts. Hence, a collection of essays argued that civil law (such as contract, property, and family law) and lawyers were at least as important as the criminal law for understanding the place of law in mapping political,

²³ M.S. Larson, *The Rise of Professionalism* (1977).

²⁴ E.P. Thompson, 'Patrician Society, Plebeian Culture' (1974) 7 *J. of Social History* 382.

²⁵ 'Middling sort' includes apothecaries, artisans, small merchants, shopkeepers, doctors, surgeons, lawyers, clergy, tutors, and the military: see H.R. French, 'The search for the "middle sort of people" in England, 1600-1800' (2000) 43 *Historical J.* 277.

²⁶ L. Stone, 'The History of the Professions' (1977) 11 *J. of Social History* 130; R.L. Kagan, *Lawyers and Litigants in Castille, 1500-1700* (1980).

²⁷ Thompson, op. cit., n. 2, pp. 259-69; also, E.P. Thompson, *Customs in Common* (1993) at 97-351.

²⁸ id. (1975) at 264.

²⁹ E.P. Thompson, *The Poverty of Theory* (1978) at 288.

economic, social, and legal relationships in England during 1750-1914.³⁰ The collection emphasized the plurality of law, ordering, and society; the complex and contradictory significance of law and lawyers as a source of ideas, ideologies, values, and instrumentalities; and ‘. . . cast doubt upon the dominant tradition of English legal historiography: evolutionism and functionalism.’³¹

IV.

But Brooks was more than the embodiment of these diverse movements. He developed them in new and fruitful directions. Whilst most historians writing about early modern England acknowledged the importance of lawyers, there was little detailed research to support or amplify this conviction. Insofar as the history of England’s lawyers was scrutinized, it was largely preoccupied with the upper echelons, such as barristers and judges. In *Pettyfoggers and Vipers of the Commonwealth*,³² Brooks remedied this with regard to the so-called ‘lower branch’ of the legal profession – attorneys, solicitors, and minor legal officials – the largest group of legal practitioners of their day and the precursors of modern solicitors. He transcended the confines of institutional history by reconstructing both the professional *and* social history of the ‘lower branch’, who they were, their intellectual formation and culture, the services they provided, their interaction with their clients and their larger significance.

The most significant development with which Brooks dealt was the dramatic growth in the amount of litigation that came before the courts during the sixteenth and seventeenth centuries. By 1550, the courts of Kings Bench and Common Pleas were hearing approximately six times more actions than at the end of the fifteenth century.³³ The volume of litigation continued to grow – mostly fuelled by actions for debt – until well into the seventeenth century. Apparently, this was the most litigious period in English history. It is ascribed by Brooks to the relative cheapness of the central courts, substantially widening access to the courts and lawyers, and to a combination of social, economic, and demographic change, notably, more people and more prosperous times, rather than to a greater respect for law and order, or the wicked ways of lawyers. 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. This explosion in litigation prompted the striking increase in the number of lawyers working in the central courts, multiplying much faster than the population growth over the period.³⁴

Underlying Brooks’s conclusions, which rested on years of painstakingly assembled data, was the kernel of a thesis that he advanced in greater detail in his subsequent work, and which almost immediately was taken up by other historians: namely, the causal importance of law, lawyers, and litigation – that they not only revealed much about the development of society, but that they actually helped to shape social-political-economic relations.

V.

Brooks developed the insights and methodology of *Pettyfoggers*, and also addressed important new issues in fresh ways in subsequent publications. That he inspired others to

³⁰ Rubin and Sugarman, op. cit., n. 18.

³¹ Sugarman and Rubin, op. cit., n. 18, p. 121.

³² C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth* (1986).

³³ id., pp. 52-3.

³⁴ id., pp. 112-13. A similar ‘legal revolution’ has been discerned elsewhere in the Western world: see, for example, Kagan, op.cit., n. 26.

research early modern litigation, and that they largely confirmed his findings, was a source of encouragement to Brooks.³⁵ He was now part of a larger community. In particular, he collaborated, both institutionally and intellectually, with the legal historian, Michael Lobban, a colleague at Durham during the mid-late 1990s, who remained important to Brooks.

Although, like most historians, Brooks was not prone to detailed reflections on theory and method in print, he subsequently sketched his thoughts on these subjects.³⁶ Here I focus on the ‘theory’ dimensions of his discussion, which singled out four works that shaped his perspective. One was Habermas’s study of the rise of middle class associational activities in the eighteenth and early nineteenth centuries, which Habermas argued created a new public sphere – a space of public discourse organized into a body under law independent of the state – subsequently diminished by capitalism.³⁷

Of the remaining works Brooks cited, one elevated culture as the primary determinant of historical reality,³⁸ and the other two claimed that law was constitutive of society.³⁹ The most important of these was Robert Gordon’s ‘Critical Legal Histories’,⁴⁰ an influential essay on theory and method in legal history, that both deepened earlier critiques of legal functionalism⁴¹ and marshalled the case for taking law seriously. Gordon argued that ‘. . . it is just about impossible to describe any set of “basic” social practices without describing the legal relations among the people involved . . .’ and that law was ‘constitutive of consciousness’.⁴² In order to fully investigate the constitutive character of law, and to transcend the confines of those who focused exclusively on popular legal consciousness, Gordon advocated studying elite legal thought and thinkers, and their symbiotic relationship with other elite and popular discourses and actors, including lower-order officials, law makers, and practitioners.⁴³ Law as ‘constitutive of consciousness’, the importance of legal doctrine, and the two-way relationship between mandarin legal thought and its vernacular forms, became significant elements in Brooks’s theoretical armour. Together with his turn to culture, it underpinned his move from a concern with legal ‘ideas’ shaping society, to legal ‘discourse’ inscribing social, political, and economic relationships. He was also affected by, and contributed to, a growing body of work that emphasized the importance of the middling sort in the sixteenth, seventeenth, and eighteenth centuries, highlighting the vital role that professions played in advancing the culture and interests of the middling sort.⁴⁴

³⁵ H. Horwitz and P. Polden, ‘Continuity or change in the court of Chancery in the seventeenth and eighteenth centuries?’ (1996) 35 *J. of Brit. Studies* 24; W.A. Champion, ‘Recourse to law and the meaning of the great litigation decline, 1650-1750’ in *Communities and Courts in Britain 1150-1900*, eds. C. Brooks and M. Lobban (1997) 179; C. Muldrew, *The Economy of Obligation* (1998).

³⁶ C. Brooks, *Lawyers, Litigation and English Society since 1450* (1998) 179-98.

³⁷ J. Habermas, *The Structural Transformation of the Public Sphere* (1989).

³⁸ R. Chartier, *Cultural History* (1988).

³⁹ R.W. Gordon, ‘Critical Legal Histories’ (1984) 36 *Stanford Law Rev.* 57; S. Humphreys, ‘Law as Discourse’ (1985) 1 *History and Anthropology* 239.

⁴⁰ Brooks usually cited the most important authors first in his footnotes to Brooks, op. cit., n. 36. Gordon is the first named author in a list that is neither alphabetical nor chronological. The notion of law as ‘constitutive’ recurs in Brooks’s later work; Gordon’s thesis was quoted in Brooks, op. cit., n. 11, p. 5.

⁴¹ The content of a legal rule is explained (causally) by the function the rule serves.

⁴² Gordon has emphasized that the claim that law was constitutive was a hypothesis, and that law is partly, not wholly, constitutive: R.W. Gordon, ‘Critical Legal Histories Revisited’ (2012) 37 *Law & Social Inquiry* 200.

⁴³ Gordon, op. cit., n. 39, pp. 120-4.

⁴⁴ J. Barry and C.W. Brooks (eds.), *The Middling Sort of People* (1994).

The cornerstone of his next book, *Lawyers, Litigation and English Society since 1450*,⁴⁵ was an innovative, if speculative, analysis of changes in court use in England over the eight centuries from 1200 to 1996, and their underpinning causes inspired, in part, by socio-legal scholarship.⁴⁶ It confirmed that economic and demographic factors were more important than the legal profession or institutional innovation in the law. Again, the eruption of litigation during the period 1550-1640 was striking. Brooks estimated that the overall rate of litigation was twice as great per 100,000 of population in 1600 as in 1992.⁴⁷

In terms of numbers of lawyers, professional organization and education, the legal profession of the 1880s looked strikingly similar to that of the 1680s.⁴⁸ Rather than exhibiting a linear progression over time, the legal profession experienced a significant period of de-professionalization throughout the eighteenth century.⁴⁹ The numbers of lawyers and amount of litigation markedly declined, and legal education, jurisprudence, and intellectual life atrophied. Brooks concluded that the dramatic decline in litigation was probably a consequence of reduced indebtedness, more flexible credit arrangements, and the ways courts and lawyers priced themselves out of the market.⁵⁰

Although the number of lawsuits and lawyers began to grow again in the nineteenth century, English litigation rates per capita continued to lag behind those of the United States and Germany during the twentieth century. The persistence of apprenticeship as the primary method of training for both branches of the profession in the wake of the inns' decline inhibited plans for the introduction of more academic approaches to legal education, and the development of university law schools. Despite the advent of the cheaper system of dispute resolution associated with the creation of the new county courts, the liberalization of divorce law, and the introduction of state-funded legal aid after the Second World War, litigation became costlier and remained largely the preserve of the corporate world and the rich.⁵¹

Brooks insisted that changing levels of litigation were important not in themselves but for what they might reveal about the changing character of society. He argued that the decline in litigation in the eighteenth, nineteenth, and twentieth centuries, relative to that in the sixteenth and seventeenth centuries, denied broadly-based social groups access both to the law, and to social and political participation in civil society through the law, locally and nationally.⁵²

This set the stage for a series of provocative hypotheses that Brooks intended as suggestive rather than conclusive, and which he hoped would be refined by further research, namely, that:

- The legal culture of early modern England was more inclusive and vibrant to a degree not seen since.
- The post-1670 decline in litigation, the Inns of Court, the numbers of lawyers, and institutional legal education was particularly deleterious and coloured the subsequent

⁴⁵ Brooks, *op. cit.*, n. 36.

⁴⁶ *id.*, pp. 63-128, developing arguments originally advanced in Brooks's most influential essay, 'Interpersonal conflict and social tension: civil litigation in England, 1640-1830' in *The First Modern Society*, eds. A.L. Beier et al. (1989) 357.

⁴⁷ *id.*, p. 79.

⁴⁸ *id.* (1998), pp. 68-72, 80-1, 104-15.

⁴⁹ *id.*, p. 29.

⁵⁰ *id.*, p. 91.

⁵¹ *id.*, p. 109.

⁵² *id.*, p. 119.

history of the English legal system and legal culture.⁵³ Ordinary people became isolated from the legal system with professional lawyers and courts becoming more disconnected from society. Accordingly, ‘legal culture was arguably less significant in eighteen and nineteenth century England than it had been before 1700.’⁵⁴

- ‘Professionalisation’ as a characterization of the way the present differs from the past should be rejected.⁵⁵
- ‘. . . [T]he civil law is even more important than the criminal law in maintaining the social and economic relationships in any society.’⁵⁶

Brooks emphasized the political role of law and lawyers in the sixteenth and seventeenth centuries, their prominence in the constitutional and political debates of the early seventeenth century, concluding that they probably figured more significantly and deeply in the political life of the nation than in the period after 1700. He also developed his earlier arguments questioning the portrayal of the common law as monolithic, parochial, and unchanging – the language of the so-called ancient constitution.⁵⁷ He demonstrated that the idea of the ancient constitution coexisted alongside other prominent discourses coloured by continental European humanism that provided a basis for legal change when human law did not conform with the higher laws of society or reason.⁵⁸

VI.

In his final book, *Law, Politics and Society in Early Modern England*,⁵⁹ Brooks examined the nature and extent of legal consciousness, and the inscription of law in politics and society, from the later middle ages until the outbreak of the English civil war. Its subject was the place occupied by, and the importance attached to, law – in particular, the amorphous culture of the rule of law – within the mental furniture of early modern English people as a whole. Brooks concluded that law permeated almost all levels of society, and, like religion, was a principal discourse through which the English understood their world; and that legal culture infused society to a degree probably not seen since. 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 . . .’.⁶⁰ Brooks also set out to persuade early modern historians that they should take the social history of law itself more seriously, and showed how they might do so.

In addition to the influences outlined previously, Brooks drew on recent historical scholarship concerning the ‘law-mindedness’ of the period, the cosmopolitanism of the common law mind, the prominence of legal thought within early modern political culture, and the interplay between legal, religious, and philosophical discourses.⁶¹ Brooks’s growing interest in how legal processes fitted into the social and political life of communities and localities was sustained by the contribution of Keith Wrightson⁶² and his students, some of whom were

⁵³ *id.*, pp. 109, 147, 150, 177-8.

⁵⁴ *id.*, p. 109.

⁵⁵ *id.*, p. 186.

⁵⁶ *id.*, p. 28.

⁵⁷ C. Brooks and K. Sharpe, ‘History, English Law and the Renaissance’ (1976) 72 *Past & Present* 133.

⁵⁸ Brooks, *op. cit.*, n. 36, p. 144.

⁵⁹ Brooks, *op. cit.*, n. 11.

⁶⁰ *id.*, p. 10.

⁶¹ A. Cromartie, *The Constitutionalist Revolution* (2006).

⁶² On whom, see S. Hindle, A. Shepard et al., ‘The Making and Remaking of Early Modern English Social History’ in *Remaking English Society*, eds. S. Hindle, A. Shepard et al. (2013) 1.

influenced by Brooks.⁶³ Importantly, Brooks deepened his already considerable understanding of the legal system and law of the period, aided by the counsel and scholarship of J.H. Baker, the premier legal historian of early modern England.⁶⁴

Brooks delineated the constitutive and penetrative character of law throughout society by mapping the creation, transmission, and reception of legal thought. He emphasized that many gentry were educated at universities, the inns of courts, or both, that they undertook a growing number of legal duties, acting as justices of the peace, and the like, and regularly gave public talks on law, order, and community. This meant that they inevitably found themselves within the ambit of the quirks of the law, and the rhetoric of juristic humanism that came with them, including a circumscribed view of elite privilege, and a remarkably benign notion that the power of the elite should be harnessed in the service of the good of the community.⁶⁵ This was but part of a distinctive, sophisticated culture of learning, teaching, debate, and discourse distinguishable from the custom-based popular culture of the law, one imbibed by lawyers, politicians, churchmen, landowners, merchants, and local and national officers, and one of many distinct but interconnected strands indicating the breadth and depth of ‘legal-mindedness’.⁶⁶

Brooks tracked lawyers’ views of law and jurisdiction from the lectures at the inns of court, law reports, and legal treatises to the private papers of government law officers, lawyers, and magistrates, and the off-the-peg material written by lawyers and plundered by the gentry for their speeches.⁶⁷ He also charted how the revolution in printing – including the growing availability of printed legal materials, and the consumption of newspapers and magazines – contributed to the law’s penetration into society.⁶⁸

The transmission and diffusion of legal ideas, and the ‘social depth’ of legal knowledge, were further illuminated by incisive examinations of the interplay between law and religion, their evolution as part of contemporary debates on religion, economics, the constitution, and politics, the ways they competed with and borrowed from one another, and the permeation of the law in constitutional debates and political thought.⁶⁹

Brooks also drew on the many assize sermons, speeches (‘charges’) to juries at quarter sessions and assizes by judges or magistrates, and addresses to local courts by non-lawyer members of the landed gentry that communicated orally the content, procedures, and values of the law to the wider public.⁷⁰ Although they ‘presented an idealised vision of justice that could border on propaganda’,⁷¹ these speeches will have made the ideas they eulogized familiar to ordinary people. To investigate law in the community, Brooks consulted court records at the local and regional level as well as those of the central jurisdictions in London, providing crucial evidence of face-to-face participation in, and experience of, the law.⁷²

⁶³ This would include Craig Muldrew, Alexandra Shepard, and Tim Stretton.

⁶⁴ Brooks, *op. cit.*, n. 11, p. viii.

⁶⁵ *id.*, pp. 278-306.

⁶⁶ *id.*, p. 17.

⁶⁷ *id.*, pp. 294-306.

⁶⁸ *id.*, pp. 68-75.

⁶⁹ *id.*, p. 89.

⁷⁰ *id.*, p. 161.

⁷¹ T. Stretton, *H-Albion* (2009), at <<http://www.h-net.org/reviews/showrev.php?id=25362>>.

⁷² Brooks, *op. cit.*, n. 11, pp. 87-114.

Brooks lavished particular attention on the thousands of local courts whose trials involved the presentation of oral testimony in a public forum and where decisions were made by jurors drawn broadly from the same locality as that in which the dispute occurred. The importance of these courts stemmed from their roles as mechanisms for dispute resolution and important administrative agencies. 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.’⁷³

Easy access to the courts – with their new remedies and procedures – was a source of individual agency and provided another basis for direct contact with the law. Local attorneys were readily available, with significant numbers not merely residing in rooms in urban inns, but actually owning alehouses.⁷⁴ Moreover, most men, and many women, regularly used legal instruments to record the most important transactions in their lives.⁷⁵

Brooks showed how the law touched the lives of almost everyone as a consequence of the competing and sometimes contradictory multiplicity of legalities (English, Welsh, Scottish, and Irish), laws and regulations, ideas, courts (common law, equity, ecclesiastical, customary, and more) and legal personnel that together constituted ‘the law’, each with its own histories and distinctive niches.⁷⁶

Particularly interesting are the large number of relatively autonomous intermediate institutions such as guilds, towns, religious foundations, and corporate bodies – created, governed, and protected by the law – reflecting the multiplicity of venues and diversity of speakers now participating in public discourse. This takes us closer to understanding why law was so central in this period.

The manifold ways in which legal ideas reflected social, economic, and political relations, mediated class relations, and were experienced personally by a large swathe of society were also surveyed: from relationships between the subject and the monarch, the individual and government, and landlords and tenants, to those between buyers and sellers, masters and servants, the person and the community, and between wives, husbands, and children. All were contested in courts, and discussed within the medium of legal thought.⁷⁷

One of the most striking features of the culture of the rule of law in the period was the way it provided the language of early modern ‘rights speak’ – giving space for words such as ‘freedom’ and ‘liberty’ as well as notions of due process and equality before the law.⁷⁸ Whilst Brooks recognized that status and wealth could influence justice, that the rights of the very poor were limited, and the gulf between the letter and ostensible aspirations of the law and their operation in practice could be great, he argued that the law was not simply an instrument by which the rulers controlled the ruled, but essentially the creature of the wider community. The institutions and processes of English law ‘made it subject to an ongoing process of negotiation participated in by a broad cross-section of the population.’⁷⁹

⁷³ *id.*, p. 425.

⁷⁴ C. Brooks, ‘Litigation, Participation, and Agency in Seventeenth- and Eighteenth-Century England’ in *The British and their Laws in the Eighteenth Century*, ed. D. Lemmings (2005) 158.

⁷⁵ Brooks, *op. cit.*, n. 11, p. 308.

⁷⁶ *id.*, p. 102.

⁷⁷ *id.*, p. 7.

⁷⁸ *id.*, p. 432.

⁷⁹ *id.*, pp. 430-1.

The intellectual world of the law buttressed the rule of law and the independence of lawyers. The outwardly conservative, unchanging, and insular ‘common law mind’ was mediated by Continental European jurisprudence, classical literature (especially, Aristotle and Cicero), and a degree of humanist-inspired idealism. Most lawyers opposed those rulers, whose very being supposedly underpinned their legitimacy. Moreover, when the tensions between the monarch and parliament intensified in the seventeenth century, the culture of law-mindedness was sufficiently powerful that the opposing parties initially spoke the language of constitutional principles rather than naked self-interest or power politics. But the catastrophic breakdown of relations that heralded the English Civil War was a powerful reminder of the limits of legal thought. Brooks speculated that this huge trauma for both law and society may have driven lawyers towards a greater reliance on legal formalism and positivism.

VII.

Always careful and rigorous, Brooks acknowledged the methodological and interpretative pitfalls involved in piecing together court usage and law-mindedness. Although he conveyed a strong sense of the complex reasons for the phenomena he investigated, the sweep and ambition of his scholarship renders it more vulnerable to criticism.⁸⁰

Grounds for statistical quibbling are inevitable given that the extent of the court records necessitated sampling by selected years, and the twisted and skewed nature of some of the evidence.⁸¹ Prest has alluded to a related problem:

Legal actions, then as now, were far from created equal in terms of length and procedural complexity, let alone quantity and quality of the parties involved and their lawyers. So, it is no simple matter to read off social or professional meaning from observed changes in the raw frequency of litigation, especially since these fluctuations may well reflect alterations in judicial procedure . . . as well as or indeed rather than events occurring in the world outside the court room.⁸²

The decline in litigation discerned by Brooks is perhaps best seen as a return to normal levels of litigation.⁸³ Whether his claim that law and lawyers were less important after c.1700, than in the period c. 1560-1700, has much veracity is difficult to access in any general sense. It will require much more research, and is likely to elicit a complex response.

Some may be sceptical of Brooks’s claims about the range and depth of law consciousness.⁸⁴ Apparent use and conformity with the law may obscure non-conformity and a lack of legitimacy.⁸⁵

⁸⁰ Brooks subtly developed and stoutly defended several of his core arguments in two important late essays: most notably, Brooks, op. cit., n. 74; and also, C.W. Brooks, ‘The Longitudinal Study of Civil Litigation in England 1200-1996’ in *Litigation*, eds. W. Prest and S.R. Anleu (2004) 24.

⁸¹ W. Prest, ‘The Experience of Litigation in Eighteenth-Century England’ in Lemmings, op. cit., n. 74, p. 133.

⁸² W. Prest, ‘Law Tricks’ (2005) 39 *J. of Brit. Studies* 372, at 375; also S.R. Anleu and W. Prest, ‘Litigation’ in Prest and Anleu (eds.), op. cit., n. 80, p. 1.

⁸³ C. Muldrew, ‘From a “Light Cloak” to an Iron Cage’ in *Communities in Early Modern England*, eds. A. Shepard and P. Witherington (2000) 156.

⁸⁴ R.W. Hoyle, ‘Review of *Law, Politics and Society in Early Modern England* by Christopher W. Brooks’ (2011) 59 *Agricultural History Rev.* 132, at 133.

⁸⁵ However, individuals’ legal consciousness may be framed by ideas about law even when they are actively resisting it.

Brooks was, perhaps, over-generous in his treatment of the lower branch and of legal services and too dismissive of contemporary criticisms of attorneys, the inequities of the legal system, the adequacy of the inns of courts' provision for professional regulation and education, and persistent demands for law reform.⁸⁶ He was probably reacting to easy acceptance by historians of contemporary complaints about the law and lawyers.

More generally, Brooks's depiction of early modern England, particularly, its law and legal system, is sometimes overly-rosy. He often reaches conclusions that emphasize consensus, agency, the role of the law in disciplining elite and state power, and as a defence against repression; and minimizes conflict, coercion, domination, structural inequality, acquiescence, inaction, and law's role in the legitimation of power.⁸⁷ Participation, negotiation and going to court are not necessarily empowering, and their equation with power is likely to mislead.

It is also unclear what 'one of the most striking features of the rule of law' – 'a language of liberty'⁸⁸ – means in the context of the 'integration' of Wales⁸⁹ and the use of English law and legal institutions as '. . . instruments of social engineering . . .' and '. . . cultural imperialism . . .' in Ireland.⁹⁰ And, as Rabin noted:

Despite the expansion of English dominion into surrounding regions and the recurrence of the word 'empire' in his sources, Brooks does not consider a full-fledged analysis of what empire meant to early modern English society and how the legal framework . . . enabled empire to emerge as a project for early modern contemporaries.⁹¹

If, as Brooks discerned, law and society were hopelessly tangled up, disentangling this befuddling cacophony, and mustering sufficient evidence to elevate law as the prime determinant may prove an intractable problem of historical explanation. Brooks did not tackle head-on what made 'law mindedness' 'legal', as distinct from something else.⁹² Was, for example, a promise to perform a contract or to marry 'legal', 'religious', 'moral', 'political', 'economic' or 'emotional' – all of which may have been partly framed in legal terms – or some, all, or none of them?

VIII.

None of this is to deny the power, nuance, and significance of Brooks's scholarship. The relationship between the legal ideas discussed in Parliament, or famous state trials, and the everyday legal life of the mass of the population, for example, was recognized as problematic.⁹³ Neither the extensive use of law courts, nor simply knowing the law, in

⁸⁶ Prest, op. cit., n. 81; W.R. Prest, 'Law Reform in Eighteenth-Century England' in *The Life of the Law*, ed. P. Birks (1993) 117; P. Raffield, 'A Discredited Priesthood' (2005) 17 *Law and Literature* 365.

⁸⁷ On agency, participation, negotiation and the law, see: S. Hindle, *The State and Social Change in Early Modern England* (2000); M. Braddick and J. Walter (eds.), *Negotiating Power in Early Modern Society* (2001). Brooks's treatment of the period contrasts with those historians who emphasise a polarity between the mass of the population and the elites: for example, A. Wood, *The Politics of Social Conflict* (1999).

⁸⁸ Brooks, op. cit., n. 11, p. 423.

⁸⁹ id., pp. 125, 425.

⁹⁰ id., p. 129.

⁹¹ D. Rabin, 'Christopher W. Brooks. Law, Politics and Society in Early Modern England' (2010) 115 *Am. Historical Rev.* 604, at 605.

⁹² H. Hartog, 'Introduction to Symposium on Critical Legal Histories' (2012) 37 *Law & Social Inquiry* 147, at 153; S.L. Blumenthal, 'Of Mandarins, Legal Consciousness and the Cultural Turn in US Legal History' (2012) 37 *Law & Social Inquiry* 167, at 178.

⁹³ Brooks, op. cit., n. 11, pp. 9-10.

themselves proved that the rule of law was accepted as a cultural value by the poorest as well as the richest. Rather, Brooks acknowledged that ‘it is not easy to measure the practical impact of’ law’.⁹⁴ And while emphasizing the degree of consensus across society concerning the idea of the rule of law, he also highlighted the conflicts over its practical import, the indeterminacy of legal principles, the ‘many different voices’ contained within legal discourse and constitutional thought, and the tensions between the ecclesiastical and secular courts in the aftermath of the reformation. Widespread ‘legal-mindedness’ among many social groups did not mean that its outcomes were always predictable.

Brooks was clear that his was the first, not the last, word on the subject. 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’s importance derives, in part, from the way he serves as a vital bridgehead between legal, social, and political history. From the 1970s onwards, John Baker transformed the history of law and legal institutions in the fifteenth and sixteenth centuries.⁹⁵ But social and political historians were slow to discern the extent to which Baker’s scholarship challenged the historical canon of the period. Brooks was alone among social historians to fully appreciate Baker’s significance and to come to terms with it. For Brooks, law provided *the* vehicle for transcending the divide between political, social, and legal history.⁹⁶ He demonstrated that law had social, political, and legal dimensions of considerable significance, and that legal, social, and political historians had largely neglected those dimensions and, crucially, their interaction. This, in turn, required taking the ‘legal’, as well as the ‘socio’, seriously. Brooks was persuaded that ‘. . . we can understand the social significance of the doctrines expounded by judges [and lawyers] only by resolutely entering the muddy waters of the law itself and emerging on the other side, and not by skirting round them.’⁹⁷

In many respects, Brooks’s work:

. . . defines a new historical space in the gaps between the history of ideas, political thought, legal practice, and economic and social history . . . [It] has implications that stretch far beyond the realm of legal history, because it demonstrates that legal principles and discourse evolve not in a vacuum, or at the will of economic trends, but as part of the debates that also shape politics and society.⁹⁸

IX.

This section draws on the ‘legal turn’ in the history of early modern England to outline some areas of common interest to historians, socio-legal scholars, and legal historians. As a totality, this turn to law constitutes a new history of English law, governance, and society, a history that addresses (amongst other things) the social characteristics and purposes of litigants; popular experience, perceptions, and knowledge of the law; public participation in, and

⁹⁴ *id.*, p. 61. See, also, pp. 241, 383, 426, 432.

⁹⁵ *The Reports of Sir John Spelman 2 vols.*, ed. J.H. Baker (1977-8); J.H. Baker, *The Oxford History of the Laws of England Volume Vi - 1483-1558* (2003).

⁹⁶ Brooks, *op. cit.*, n. 11, p. 10.

⁹⁷ K.W. Wedderburn, *The Worker and the Law* (1971) 8-9.

⁹⁸ H.R. French, ‘Law, politics, and society in early modern England – By Christopher W. Brooks’ (2010) 63 *Economic History Rev.* 237, at 238.

access to, legal institutions; the growth of legislation and its impact on society; law and empire; crime, law, literature, and allied media (such as the popular press) and society; law and the constitution of gender and national identity; and the role of emotions on the behaviour of legal actors and the development of law. It enlarges the field both in terms of subject-matter and methodologies, and also the range of sources utilized, potentially, providing a deeper understanding of the workings of the law and its wider importance.⁹⁹

The interplay between law, agency, social hierarchy, and gender has become an important and exciting field within early modern English history, advancing our understanding of how the law constituted and policed patriarchy, how women attenuated and circumvented coverture¹⁰⁰ using the law and lawyers, the high proportion of female litigants in certain fields, the kinds of disputes in which they were involved, and a comparison of the presentational styles of male and female litigants. More generally, it illuminates gender as a source of identity and as a structuring force in social relations.¹⁰¹

Academic lawyers, legal historians, and socio-legal scholars will find much food for thought in Muldrew's richly-textured and challenging work. Muldrew suggests that early modern England was more market-orientated, and more dependent upon credit, reputation, trust, and community in the settlement of economic disputes than previously suspected.¹⁰² Muldrew criticizes Weber for discerning a 'spirit of capitalism' in the actions and beliefs of market-orientated individuals: 'What mattered was not an internalized or autonomous self, but the public perception of the self in relation to a communicated set of both personal and household virtues.'¹⁰³ According to Muldrew, the infusion of the idea of the 'equality' of the law into so many social exchanges gradually led to the expansion of contractual thinking emphasizing sociability, individual agency, and equality of rights, which had a significant effect on social relations. He argues that, during the eighteenth century, we see a retreat from the ideal of trust, and its displacement by a utilitarian ethic that valued self-interest and personal happiness above community.¹⁰⁴ The expansion of contractual thinking continued, including the rise of 'freedom of contract', in the nineteenth century.¹⁰⁵ Muldrew subtly excavates how lawyers and litigation helped to constitute and re-fashion social relations. Like other notable work on the period, his analysis involves interpretations of literary works, economic and

⁹⁹ The relevant literature is sizeable; hence, the sources cited below are indicative. For an instructive overview, see D. Lemmings, 'Introduction' in *The British and their Laws in the Eighteenth Century*, ed. D. Lemmings (2005) 1. See, further, R. Houston, 'Custom in Context' (2011) 211 *Past & Present* 35 and 'People, Space and Law in Late Medieval and Early Modern Britain and Ireland' (2016) 230 *Past & Present* 47, and the historical scholarship to which they refer; (2017) 38(2) *J. of Legal History* (special issue on law and emotion); C. Churches, 'Going to Law in Early-Modern England' in Prest and Anleu, eds., op. cit., n. 80, p. 44 (on the experience of going to law, the out-of-court tactics of the parties, why the dispute ended in court, rather than other fora, the impact of a lawsuit on the larger community, and how ordinary people gained knowledge of the law).

¹⁰⁰ The legal doctrine whereby, upon marriage, a woman's legal rights and obligations were subsumed into those of her husband.

¹⁰¹ For example, L. Gowing, *Domestic Dangers* (1996); T. Stretton, *Women Waging Law in Elizabethan England* (1998); G. Walker, *Crime, Gender and Social Order in Early Modern England* (2003); T. Stretton and K. Kesselring, *Married Women and the Law* (2013); A. Shepard, *Accounting for Oneself: Worth, Status and the Social Order in Early Modern England* (2015).

¹⁰² Muldrew, op. cit., n. 35.

¹⁰³ id., p. 156.

¹⁰⁴ id., pp. 328-31.

¹⁰⁵ C. Muldrew, 'Trust, Capitalism and Contract in English Economic History: 1550-1750' (2015) 36 *Social Sciences in China* 130. This echoes some of the arguments in P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

social commentaries, legal texts and law cases, and archivally-based studies of economic practices and litigation.¹⁰⁶

While Brooks emphasized the importance of civil litigation, attention to the interface and interplay between the civil and criminal justice system could prove fruitful. Definitions of ‘civil’ and ‘criminal’ changed over time, and were frequently blurred in theory and practice. As Brooks acknowledged, the decline in civil litigation and the rise of the ‘adversarial criminal trial’ were related, ‘. . . and both were central to the watershed that separates the medieval and early modern English legal system from that which evolved from the mid-eighteenth century onwards.’¹⁰⁷ What, exactly, evolved from the eighteenth century to the present, and its larger significance, is the subject of extensive historical writing.¹⁰⁸ Building upon that scholarship, Lemmings argues that during the period 1680-1800, governance was shifting from ‘consent’ to ‘command’ with declining popular participation, the rise of professional administration through the application of statutory powers, as opposed to the common law.¹⁰⁹ He claims that the modernization of government entailed moving away from a ‘big society’ culture towards a more professionalized and mediated experience of power which depended on the management of public opinion, parliamentary absolutism, and a ‘bourgeois’ suspicion of active popular involvement in law and government. This thesis resonates with socio-legal scholarship that has melded law, legal theory, history, and social theory to address similar issues. It is not, for the most part, ‘historical scholarship, but . . . draws on historical research to drive its interpretive project.’¹¹⁰ And like historical research, it is centrally concerned with the expanded scope afforded to lawyers in courts (‘lawyerization’); criminalization; professionalization; the systematization of law and other ‘knowledges’; the decline in the participation of ordinary people in open court; governance and the growth in state power; the rise and fall of democratic citizenship; and the nature of modern society itself.¹¹¹

The disquiet that Brooks expressed about the decline in the number of trials, and the increasing isolation of ordinary people from the legal system, is confirmed in the rich socio-legal literature on the ‘vanishing trial’ and its adverse effects as adjudication is diffused,

¹⁰⁶ Muldrew, *op. cit.*, n. 35.

¹⁰⁷ Brooks, *op. cit.*, n. 74, p. 181.

¹⁰⁸ J.M. Beattie, ‘Scales of Justice’ (1991) 9 *Law and History Rev.* 221; D. Hay, ‘Master and Servant in England’ in *Private Law and Social Inequality in the Industrial Age*, ed. W. Steinmetz (2000); P. King, *Crime, Justice, and Discretion in England 1740-1820* (2000); J. Langbein, *The Origins of the Adversary Criminal Trial* (2003); A.N. May, *The Bar and the Old Bailey, 1750–1850* (2006); P. King, *Crime and Law in England, 1750–1840* (2006).

¹⁰⁹ D. Lemmings, *Law and Government in England during the Long Eighteenth Century* (2015).

¹¹⁰ N. Lacey, *In Search of Criminal Responsibility* (2016) 12.

¹¹¹ The relevant historical and socio-legal literature includes Atiyah, *op. cit.*, n. 105; R. Cocks, *Foundations of the Modern Bar* (1983); D. Garland, *Punishment and Welfare* (1985); D. Sugarman, ‘Bourgeois Collectivism, Professional Power and the Boundaries of the State’ (1996) 3 *International J. of the Legal Profession* 81; D. Sugarman, ‘Legal theory, the common law mind and the making of the textbook tradition’ in *Legal Theory and Common Law*, ed. W. Twining (1986) 26; M.J. Wiener, *Reconstructing the Criminal* (1990); J. Vernon, *Politics and the People* (1993); L. Farmer, *Criminal Law, Tradition and Legal Order* (1997); L. Farmer, *Making the Modern Criminal Law* (2016); D.J.A. Cairns, *Advocacy and the Making of the English Criminal Trial 1800-1865* (1998); D. Lemmings, *Professors of the Law* (2000); J.-M. Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (2000); J. Simon, *Governing Through Crime* (2007); A. Fernandez and M. D. Dubber (eds.), *Law Books in Action* (2012); Lacey, *id.*; D. Lemmings (ed.), *Crime, Courtrooms and the Public Sphere in Britain, 1700-1850* (2012); A. Norrie, *Crime, Reason, History* (2014); W.W. Pue, *Lawyers’ Empire* (2016). See, also, the material in n.108 and n. 109.

privatized, and largely unregulated.¹¹² This, and allied scholarship, is timely, given current cut-backs in state-funded legal aid, the erection of other barriers to access to justice by citizens, and the efforts of governments and insurance companies to persuade us of our ‘spiralling . . . compensation culture’.¹¹³ It challenges assumptions that high levels of litigation were undesirable, that it was symptomatic of a ‘fractured society’, and that lawyers were its only beneficiaries. Rather, it suggests that communities can be litigious as well as harmonious.

Brooks stressed the important role played by the transmission and appropriation of foreign ideas, but did not examine it in the context of British colonialism. Of particular interest is whether the legalism of seventeenth-century English culture, and its predilection for creating rule-bound, semi-autonomous communities, shaped colonial and post-colonial America and other British colonies.¹¹⁴ In sum, Brooks’s findings and methods warrant further exposure from a comparative, colonial/postcolonial, transnational, and global perspective.

Since the 1990s, both historical and socio-legal scholarship on legal consciousness have produced detailed accounts of how law was interwoven with, and has helped to structure, the routine practices of social life. But they have differences which suggest that speaking to each other might not be straightforward. They frequently differ on what, precisely, they mean by ‘legal consciousness’. ‘Law mindedness’ – a term sometimes used by historians – suggests a narrower idea than ‘legal consciousness’. Socio-legal research has benefitted from extensive sets of interview data unavailable to early modernists. Historians, chiefly those concerned with the civil law and civil litigation, have tended to neglect issues of legal hegemony, especially, how the law maintains its institutional power despite a recurrent gulf between the letter and ideology of the law, and the law in action – whereas this has been an important vein within socio-legal scholarship. How might this concern with, for example, legal hegemony, Ehrlich’s concept of ‘living law’, or Ewick and Silbey’s taxonomy of before/with/against the law, be salient to historians interested in the centrality (or not) of formal legal norms on how people order their everyday lives?¹¹⁵ That there is common ground is suggested by the fact that historians and socio-legal scholars are increasingly exploring the political, professional and, above all, popular dimensions of legal consciousness.¹¹⁶ And they are doing so by investigating the dissemination, reception and re-constitution of legal ideas and the depiction of legal actors and institutions in non-traditional spheres (public spaces beyond the courtroom, magazines, newspapers and other manifestations of the ‘print revolution’, literature, the theatre, portraits, cartoons and other visual images). The close association between court performance (especially counsel for the accused) and stage performance has been considered by a number of researchers. Legal consciousness traverses intellectual,

¹¹² M. Galanter, ‘The Vanishing Trial’ (2004) 1 *J. of Empirical Legal Studies* 459; J. Resnik and D.E. Curtis, *Representing Justice* (2011); H. Genn, ‘Why the Privatisation of Civil Justice is a Rule of Law Issue’ (2012) 36th F.A. Mann Lecture.

¹¹³ A. Morris, ‘The “Compensation Culture” and the Politics of Tort’ in *Tort Law and the Legislature*, eds. T.T. Arvind and J. Steele (2013) 57.

¹¹⁴ M.S. Bilder, *The Transatlantic Constitution* (2004); L. Benton and R.J. Ross (eds.), *Legal Pluralism and Empires, 1500-1850* (2013).

¹¹⁵ P. Ewick and S. Silbey, *The Common Place of Law* (1998); S.E. Merry, *Legal Consciousness Among Working Class Americans* (1990); M. Hertogh, ‘A “European” conception of legal consciousness: rediscovering Eugen Ehrlich’ (2004) 31 *J. of Law and Society* 455. I am indebted to Sally Sheldon for challenging me on this topic.

¹¹⁶ For example, S. Wilf, *Law’s Imagined Republic* (2010); Lemmings, op. cit. (2012), n. 111. On the relationship between law, literature, the arts, and drama: E. Sheen and L. Hutson (eds.), *Literature, Politics and Law in Renaissance England* (2005); S. Mukherji, *Law and Representation in Early Modern Drama* (2006); J.E. Archer et al. (eds.), *The Intellectual and Cultural World of the Early Modern Inns of Court* (2011).

social, cultural and legal history, and socio-legal studies, in new and exciting ways, posing common questions for both historians and socio-legal scholars.

X.

An increasing number of socio-legal and contextualist histories of law in England are to be found in the legal history lists of publishers, and in legal history periodicals. This reflects an important but largely unnoticed change in the character of English legal history: namely, its growing recognition that while legal doctrine is important, so too is the real impact of law on society.¹¹⁷ The increasing convergence between legal history on the one hand, and history and socio-legal studies on the other, has further opened up the possibility of greater dialogue between them. But making that dialogue happen will require better institutional support, and changes in the cultures and mind-sets of history, socio-legal studies, and legal history, and greater self-reflexivity. It will also generate difficult questions and controversy as to what sort of rapport might be appropriate, when, how and to what effect? I nonetheless hope that I have substantiated the proposition that greater dialogue between history, socio-legal studies, and legal history would broaden and deepen our understanding of the role that law plays in society, and of society itself, and would be of more than mere historical interest.

¹¹⁷ Compare J. Rose, 'English Legal History and Interdisciplinary Legal Studies' in *Boundaries of the Law*, ed. A. Musson (2004) 169.