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Introduction*

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When Christopher W. Brooks died of a heart attack, on 19 August 2014, he was at the height of his intellectual powers.[1] Since 2010, he had been able to devote himself full-time to researching his volume of the *Oxford History of the Laws of England* thanks to being awarded two prestigious fellowships from the Leverhulme Trust and the Huntington Library. He planned to retire the following October from his chair in the History Department at Durham University – where he had been since 1980 – and was about to embark on writing up the great 350,000-word project of the *Oxford History*, as well as another book on 'Law and Religion in Early Modern England'. At the same time, he had a number of other projects on the go: preparing papers on law and literature, and law and the people in early modern England;[2] and preparing an exhibition on law and life in Shakespeare's England for the Folger Shakespeare Library in Washington, DC.[3] Chris Brooks had established a firm reputation as the most important and influential historian of law and society in early modern England – but he still had a great deal more to say. He was in many ways uniquely placed to write the history of English law from Charles I to James II for the *Oxford History* – a project he had been working on for twenty years – and his untimely death robbed the

* The editors would like to thank Sharyn Brooks for her help, particularly in making available the two hitherto unpublished pieces by her husband, which are included in this volume.

1 For an appreciation, see Adrian Green, 'Christopher W. Brooks, 1948–2014: a tribute', *The Seventeenth Century* 29 (2014), 403–409.

2 The first of these was originally given as a lecture to the Centre for Mediaeval and Early Modern Law and Literature, St Andrews University, October 2013. It was published posthumously as Christopher W. Brooks, 'Paradise lost? Law, literature, and history in Restoration England', in Lorna Hutson (ed.), *The Oxford Handbook of English Law and Literature, 1500–1700* (Oxford University Press, 2017), pp. 198–218. The second, intended for Keith Wrightson (ed.), *A Social History of England, 1500–1750* (Cambridge, 2017), was never completed.

3 This exhibition, entitled 'Age of Lawyers: The Roots of American Law in Shakespeare's Britain', was held at the Folger Shakespeare Library between 12 September 2015 and 3 January 2016.

scholarly community of the knowledge and insights he would have brought to this subject.[4]

This volume derives from a conference on Law and Society in Early Modern England held in Durham in Chris Brooks's memory in March 2016.[5] Alongside the scholars whose work is included in this volume, there were contributions at the conference from friends and colleagues including Jonathan Barry, Bernard Capp, Alan Cromartie, Henry French, Cynthia Herrup, Lorna Hutson, Judith Spicksley, Tim Stretton and Andy Wood. The aim of the conference was to explore the implications of Chris's work for the wider historiography of seventeenth- and eighteenth-century England, in terms of both his distinctive interpretations and his wider approach in bringing together the tools of legal history and social history. As is more fully explained in the discussions of his work in this volume by Michael J. Braddick (see Chapter 2) and David Sugarman (see Chapter 3), a hallmark of this approach was the combination of painstaking, detailed archival research with a focus on contributing to our understanding of the major topics in the historiography (and taking them in new directions). Chris's first book, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England*, might at first glance look like a narrow study of a specialised topic: the history of attorneys. But both its thesis and its data established how pervasive and important the law and lawyers were in early modern England – a point that had important ramifications for our understanding of the political, constitutional, social and economic history of the era. These themes would be developed in even greater depth in *Law, Politics and Society in Early Modern England*. In the light of his scholarship bridging legal history and early modern historiography as a whole, historians of early modern England can no longer afford to ignore the impact of law, its languages or law-mindedness.

The chapters in this volume each explore how law was understood or used in early modern England. The volume begins with three historiographical chapters, two (by Braddick, in Chapter 2, and Sugarman, in Chapter 3) focusing on Chris Brooks's own work, and one (by R. A. Houston, in Chapter 4) on the significance for early modern history of F. W. Maitland. Often seen as a key figure for the history of medieval legal doctrines and institutions, Maitland is also recognised by Houston

[4] The task of completing this volume has now passed to a younger generation of scholars.
[5] The conference, which was co-organised by Professor John O'Brien, was hosted by Durham University's Institute for Medieval and Early Modern Studies, with support from the Selden Society and the Huntington Library.

as an important forerunner of the kind of approach taken by Brooks and as a vital influence on the historiography on the early-modern social history of law. Two chapters follow that shed new light on some central debates relating to the early seventeenth-century common law. In Chapter 5, R. W. Hoyle explores the question of the king's power to decide legal cases – a question much debated among contemporaries in the well-known controversy of the case of prohibitions. Hoyle looks at an aspect that has not hitherto received the attention it deserves: the king's intervention as an arbitrator, making decisions in disputes that might then be enforced by order of court. Phil Withington's contribution (Chapter 6) considers a question much debated since Maitland's time: the impact of the Renaissance on English law. By tracing the use of the language of 'modernity' in the legal literature of the early seventeenth century, Withington shows that English lawyers were much less impervious to the influence of the European Renaissance than is sometimes assumed.

The subsequent chapters focus on the local uses and knowledge of law in early modern England. Steve Hindle's fine-grained study, in Chapter 7, of a Warwickshire tithe dispute from 1657 shows how a close study of the documents generated by litigation can tell us a great deal not only about the means used by seventeenth-century communities in settling their disputes, but also about the wider social and spatial dynamics in which these disputes were played out. As he shows, 'law' did not simply supplant 'love' as a means of dispute resolution in this era; rather, litigation was one strategy that might be used alongside agreement, mediation or arbitration. In his contribution (Chapter 8), John Walter explores the nature and extent of popular knowledge of law. He shows both how ordinary folk came to obtain knowledge of the law and how they then used that knowledge, for instance in the way in which they protested against perceived infringements of their rights, such as enclosures. Peter Rushton's chapter (Chapter 9) explores the paradoxical relationship between central and local authorities in early modern England, showing that, as the early modern state developed and became stronger, so it required local authorities to take on more responsibilities. This raises the question of how far there might be local legal cultures that were distinct and how far local practice deviated from what national 'law' demanded.

Our next set of chapters explores aspects of law in the eighteenth century. In Chapter 10, Joanne Begiato takes up the theme of how far popular uses of law deviated from its letter, looking at marriage practices in the early eighteenth century. Although recent work by Rebecca Probert

has suggested that there were few 'clandestine' marriages in the eighteenth century (and that almost all couples married formally in a church),[6] Begiato shows that a greater diversity might exist at local levels, where legal forms might be manipulated and moulded to ensure that, although couples might not have followed the strict forms of the law, they might nonetheless be regarded as 'wed enough'. In his chapter (Chapter 11), Craig Muldrew takes up a question explored in one of Chris Brooks's most influential articles and in Muldrew's own earlier work on litigation:[7] why did litigation rates, which had been so high in the seventeenth century, decline so rapidly in the eighteenth? Muldrew addresses this problem by noting the changing way in which credit was negotiated in the later era. In the early seventeenth century, most credit was unsecured, resting on reputation and one's ability to pay the debts one had contracted verbally. By the eighteenth century, however, credit was becoming ever more securitised, in the form of written notes and bonds, as well as mortgages. Lawyers were heavily involved in the creation and maintenance of this credit network, which did not require litigation. Thus, although litigation declined, the role of law and lawyers certainly did not. Gwenda Morgan's contribution (Chapter 12) looks to compare the lives and careers of two justices of the peace, Landon Carter of Virginia and Edmund Tew of County Durham, as reflected in their personal diaries, which shed important light on their different experiences of life on the bench.

Adrian Green's chapter (Chapter 13) takes us back to the city in which Chris spent more than thirty years of his life in exploring a theme central to his concerns: the relationship between law and society as a lived experience, seen through the architecture of the courts and legal offices in early modern Durham. Green demonstrates the variety of courts and jurisdictions on the peninsula between the cathedral and the castle, and how they were housed and operated. He also takes us into the life of the lawyers in this city. It is, perhaps, rather satisfying to discover that the office that Chris occupied on the North Bailey for so many years was

[6] Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge, 2009).

[7] Craig Muldrew, '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 Honour of Lawrence Stone* (Cambridge, 1989), pp. 357–399. See also Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke, 1998), pp. 216–236.

home to law offices in the eighteenth century, with architectural detail modelled to imitate those of fine chambers in London.

The collection is rounded off with two hitherto unpublished pieces by Christopher W. Brooks himself. The editors have chosen to include them with some sense of caution, for he was a very meticulous scholar who did not rush into print, but was always keen to work out his ideas thoroughly and fully before publishing them. Readers are therefore asked to bear in mind that these pieces were very much works in progress on topics that he was still developing. The two pieces are snapshots of his thinking about two projects, which Chris envisaged as growing into books, rather than articles.

The first of these is entitled 'Law and Revolution: The Seventeenth-Century English Example'. This paper grew out of the project with which Chris was engaged at the time of his death – that is, the volume of *The Oxford History of the Laws of England* covering the period 1625–1688. A number of versions of the paper were delivered at various institutions during the academic year 2012/13, which he spent as Fletcher Jones Distinguished Fellow in British History at the Huntington Library, in California. The version published here was delivered at the University of Southern California (USC) in November 2012.[8] Another shorter version, entitled 'Through the Looking Glass: Law and Revolution in England 1640–1650', was delivered in April 2013 as part of USC's Early Modern British History Seminar series, under the aegis of the USC–Huntington Early Modern Studies Institute.

The aim of the paper was to explore some of the larger questions concerning the nature of legal change in the era Chris was studying for the *Oxford History*, to help him to make sense of the period as a whole. Part of his concern was to address questions about the nature of legal change over time that he felt had not hitherto been asked very vigorously. Working, as he was, on a history of law in the seventeenth century, he was interested in exploring both the impact of the short-term changes that occurred in the turbulent period of the civil war and its aftermath, and also the long-term changes that he saw emerging from the interaction of legal ideas and economic and social changes over the century before the civil war (and which could be seen reflected in the long-term fluctuations in litigation that he had explored in earlier work). Looking at the longer

[8] An earlier version was also given in October 2011 at the 'Law and Governance in Pre-Modern Britain' conference at the University of Western Ontario and subsequently at Yale Law School.

term, he saw this period as a remarkable phase in the history of the common law, in which a legal system that was much more accessible to the middling sorts was forged by judges and lawyers. Looking at the common law as a working system that had penetrated into the daily lives and consciousness of the people of England, the shorter-term crisis of the civil war did not prove to be revolutionary. The system of law survived, at a time when the Church of England collapsed, and proposals for radical legal reform went nowhere. However, as Chris saw it, if the civil war was not a watershed for the legal system as a system of *law*, the years down to 1689 did see significant change in the role of the common lawyers as political actors – for, as he explains in the second part of this paper (and more fully in the second paper on 'Religion and Law in Early Modern England', which is published here as Chapter 15), after the Restoration, the political centrality of common law discourse was dislodged, partly as a result of the dynamic between religion and law in this era. As he put it in his comments to his audience in 2012:

> [W]hen parliamentary legislation of the 1660s and 1670s was countered by royal declarations of indulgence to dissenters, the common law and its judges became hopelessly caught up in openly political partisanship, which undermined their independence, their credibility, and their authority. At the same time, the decline of the learning exercises at the inns of court seems to have deprived common law thought of its vitality and its confidence. The intellectual life of the law and its role in English politics was never the same thereafter.[9]

In the shorter version of this paper, 'Through the Looking Glass', these issues are explored from the narrower perspective of the 1640s and 1650s. In this paper, Chris takes up an argument made in *Law, Politics and Society* – that is, that 'the advent of civil war represented the failure rather than the success of the political use of legal discourse and ideas'.[10] In the

[9] The text of 'Through the Looking Glass' ends thus: 'Conscientious judges, like Henry Rolle insisted that they should maintain the fundamental laws of the land, but the profession itself was divided by politics, and [the] institutional infrastructure that had helped to shape those laws, the learning exercises and student culture at the inns of court[,] was severely atrophied in the 1650s, and, arguably, has never recovered. No distinctive view of the new polity was developed at the inns. Law became plumbing, social and economic infrastructure that kept the paperwork flowing in the right direction, and the direction was determined largely by the state, whatever form that might take. Medieval community of the realm mediated by law was replaced by a notion that someone had to be in charge and then law becomes instrumental' (Christopher W. Brooks, 'Through the Looking Glass: Law and Revolution in England 1640–1650', ts, ff. 24–25).

[10] Ibid., f. 4.

decades before the civil war, it was disagreements over the nature of the ecclesiastical polity that led lawyers to make their most important interventions. One of these was Edward Bagshaw's 1640 reading on the ecclesiastical legislation of Edward III, which articulated a vision that had been maturing among common lawyers for a century, denying the bishops any secular political authority (an issue discussed at greater length in 'Religion and Law in Early Modern England', published here as Chapter 15). This, Chris asserts, 'can probably be described as the last really controversial and significant law lecture to be given for the next two hundred years'; it was also 'the first reading at the inns of court ever to have been suppressed by the government'.[11] However, if, in the event, it was the church that came off worst in the conflict, it was also the case that the common lawyers did not know what to replace it with: '[H]aving undermined the existing church, lawyers were much more ambivalent about what to put in its place.'[12]

Chris's explorations of the relationship between temporality and spirituality link the two papers published here, for, as he explained on one occasion, 'it is the relationship between religion and municipal law which constitutes the single most important dynamic of the period'.[13] This was the topic more fully explored in 'Religion and Law in Early Modern England' (see Chapter 15). An early version of this paper was delivered at the University of Southampton in February 2008.[14] A fuller version, the one produced here, was drafted in the autumn of 2010 and refined over the next few months. Chris contemplated submitting it to a leading journal, but in the end decided not to do so, since he felt that he had much more to say on this topic. In the next couple of years, he increasingly thought of developing it into another book. He did, however, air some of the ideas he was working on during his year at the Huntington Library, presenting papers under the title 'Providence versus Prudence: Law and Religion in Early Modern England' at the Huntington in February 2013 and at the Triangle Legal History Seminar/Triangle Global British Studies Seminar in Durham, North Carolina, in September 2013.

[11] Ibid., f. 9.
[12] Ibid., f. 12.
[13] Brooks's notes for presenting 'Law and Revolution' at USC in 2012.
[14] In the version given here (see Chapter 15), he observed that he had come to the conclusion '(which some might describe as a no brainer arrived at after years of study) . . . that what Sir John Neale described in the 1950s as the "nationalisation" of religion raised a number of serious problems for the English polity, many of which were worked out in the language of secular legal and constitutional thought'.

One of the points that Chris made at these seminars was that while religion and religious ideas were clearly central to the lives of all seventeenth-century Englishmen and women – who were, at the very least, expected by statute law to attend church on Sunday – there was much to be learned about the ideas and assumptions that drove interpersonal relations on the other six days of the week. In turning one's attention to those questions, the historian was led pretty quickly into the territory of the other major profession, the law. What also struck him was the fact that lawyers before the civil war had an 'unexpected capacity' to 'compartmentalize their professional discourse from that of the evangelical Protestantism of the later sixteenth and seventeenth centuries, even though there is absolutely no doubt that they often knew a great deal about it'.[15] While lawyers like Sir Matthew Hale were undoubtedly very pious and thought a good deal about religion, 'theology or divinity of the kind engaged in by university-trained clergymen, which was based largely on readings of the scriptures and the early Church Fathers, figured hardly at all in every-day professional legal thought or in the political discourse associated with it'.[16] Both in form and content, secular legal thought differed from religious thought. The kind of works men such as Hale put together for their 'day-job' – such as the commonplace book he called his 'Black Book of the New Law' – saw law as an inductive science in which 'the general rules were "discovered" by a consideration of a large number of particular circumstances'.[17] These circumstances came to the lawyer's attention in cases brought by ordinary people into court, which reflected their experiences and predicaments. The kinds of cases and issues digested in Hale's book reflected the social relations that people experienced in the six days of the week when they did not go to church, and which were 'usually dealt with in ways that had very little to do (at least on a formal level) with the teachings of Christianity or the interpretation of scripture, not to mention the book divinity of the more learned clergymen'.[18]

Part of the interest in this paper was therefore to stress the importance of the notion of the rule of law in seventeenth-century minds. As Chris put it in the seminar paper:

[15] Christopher W. Brooks, 'Providence versus Prudence: Religion and Law in Seventeenth-Century England', ts, ff. 1–2.
[16] Ibid., f. 11.
[17] Ibid., f. 13.
[18] Ibid.

> [L]egal discourse contained spaces for more reflective thought about the nature of society and the polity. And in speeches, arguments, briefs and lectures we learn about contracts and kings being limited by the rule of law rather than of divine right or the obligations associated with patriarchy, concepts that that come largely out of clerical writing. Subjects could be described as citizens, and obedience to established authority is not so much a religious precept as a legitimate expression of how best to look out for one's best interests in what would otherwise be a Hobbesian state of nature where the strong might easily subdue the weak.[19]

It was with this in mind that he turned to the broader debates among common lawyers about the nature of the ecclesiastical polity and about the sources of authority for all human law, which he saw as so central to seventeenth-century political thought. In both the seminar paper and the fuller draft article published here, Chris elaborated on some of the themes touched on in the 'Law and Revolution' paper – in particular, the problem faced by common lawyers once the bishops had been removed from the House of Lords and the Church of England had been undermined. Common lawyers remained uncertain during the interregnum about what kind of church settlement they wanted, which created dilemmas for them after the Restoration. Problems concerning the ecclesiastical polity were seen most sharply in the debates over the Declarations of Indulgence, in which there was sufficient room for lawyers to differ in opinion that it was possible for kings to play musical chairs with the judiciary, to secure compliant judges. In a context in which the lawyers were no longer able to give clear answers to the most pressing questions concerning the relationship between temporality and spirituality, the matter ultimately had to be left to Parliament for resolution. The triumph in 1688 of parliamentary authority was therefore in no small part the outcome of the inability of common lawyers to resolve the political and legal problems concerning the ecclesiastical polity.

These unfinished pieces give us some insight into the development of Chris's thinking, as his new research took him further into the second half of the eighteenth century. Had he lived to complete his projected *Oxford History* and *Law and Religion* volumes, the scholarly community would have received the same kind of benefits that it reaped from his earlier works. What is given here can be only a small glimpse into those larger projects. Nonetheless, his legacy remains a great one. The scholarly concerns that drove his work – the need to understand how people

[19] Ibid., f. 14.

worked with the law, and how the law informed and constituted so much of English social agency – are ones that are increasingly regarded as part of the mainstream of seventeenth-century historiography. As the contributions in this volume show, Chris's erudite scholarship was, in many ways, only a starting point; there is much work still to be done, and his own interpretations remain open to challenge and contestation. It is our hope that the chapters in this volume will contribute to moving the field forward, as well as offer a fitting tribute in his memory.