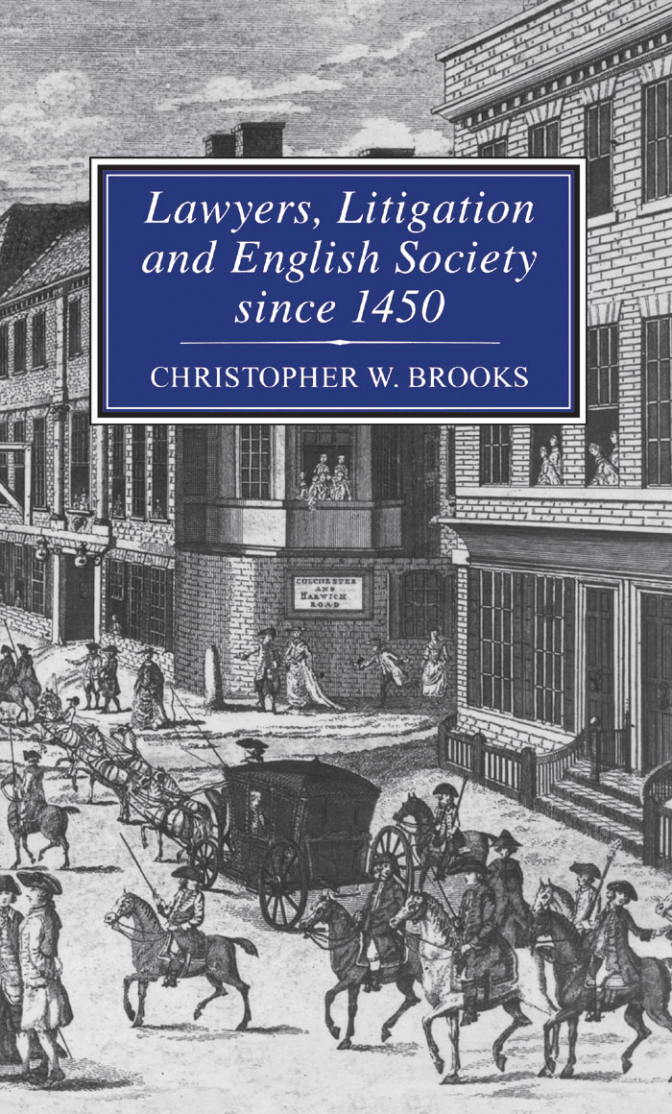
Lawyers, Litigation and English Society since 1450

CHRISTOPHER W. BROOKS



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Contents

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Figures

Preface

The essays gathered together in this book are best explained in terms of a personal course of study which began, in the early 1970s, with an interest in the role of lawyers and legal ideas in parliamentary debates during the early seventeenth century, the age of Sir Edward Coke. Only two of the essays here take up such questions in any detail. This is because I soon became convinced that the kind of understanding I wanted of the political history of the period could only be achieved by trying to gain a better appreciation of what social life, more broadly defined, was like. Since I was interested in the political ideas expressed by lawyers, an examination of lawyers and what lawyers did seemed a logical place to start. What began as a digression became an ongoing preoccupation.

Although the book is unorthodox in that it consists of a series of studies more or less evenly divided between work which has been published elsewhere and that which has not hitherto appeared in print, there is, I hope, an evident unity of themes and concerns. The idea of publishing in this form arose from a growing awareness that, as much by chance as by design, I had gradually accumulated material which constituted a version of the history of court usage and the legal profession from the later middle ages to the twentieth century, an account that, whatever its flaws, was not readily available elsewhere and which might, therefore, be useful to others.

I am grateful to Martin Sheppard, of the Hambledon Press, for undertaking publication; I have valued his editorial advice, his patience and the care he has taken in preparing the text for the press. The previously unpublished papers have been extensively revised, but nothing of substance has been altered in those which have appeared elsewhere.

Nearly three decades ago, Professor John Baker accurately described the post-medieval period as the 'Dark Age of English Legal History'. While much still remains to be done, a number of scholars have during the intervening years produced illuminating work on many aspects of the sixteenth, seventeenth, eighteenth and nineteenth centuries. My debt to the writings of others will be clear from the footnotes, but I also warmly thank those friends who have helped me more directly either by reading one or more chapters or by passing on references: Paul Brand, James Cockburn, Henry Horwitz, David Lemmings, Wilfrid Prest, Tim Stretton and David Sugarman. In addition, it is a pleasure to acknowledge the recent work of Bill Champion

and Craig Muldrew: their own studies of early modern litigation have done a great deal to encourage me to persist with my own.

Closer to home, grants made from staff travel funds by the History Department and the University of Durham have enabled me to carry out research in London and in archives in other parts of the country. As always, I owe an immeasurable debt to Sharyn Brooks, both for her forbearance in putting up with my obsessions and for her help with many different aspects of the research and writing. Finally, I feel particularly lucky that, during the period in which much of the work was done, I was able to benefit from the advice and quiet encouragement of my friend, and former colleague, Michael Lobban. Although I wish the book itself was more worthy, I will always associate it with an enjoyable and fruitful collaboration during what was in most other respects a bleak epoch in British academic life.

Durham

Christopher Brooks

January 1998

Acknowledgements

1 This appears here for the first time.

2 Published originally in *Legal Records and the Historian*, ed. J.H. Baker (Royal Historical Society, London, 1978).

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4 This appears here for the first time.

5 This appears here for the first time in English.

6 This appears here for the first time.

7 This appears here for the first time.

8 First published in *The Roots of Liberty: Magna Carta, Ancient Constitution and the Anglo-American Tradition of Rule of Law*, ed. Ellis Sandoz (University of Missouri Press, Columbia, MO, 1993).

9 First published in *The Middling Sort of People: Culture, Society and Politics in England, 1550–1800*, eds Jonathan Barry and C.W. Brooks (Macmillan Press, Ltd., Basingstoke and St Martin's Press, New York, NY, 1994).

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Abbreviations

Add.	Additional Manuscripts, Department of Manuscripts, British Library, London
BL	British Library, London, Department of Manuscripts
PRO	Public Record Office, London

Citations to printed law reports are made either to the original editions or to the works of named reporters reprinted in *The English Reports* (London, 1900–32), a multi-volume collection of the principal reports from the mid sixteenth to the nineteenth centuries.

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1

Introduction

There are a number of ways to approach to the study of legal history. While one of the most familiar of these is of course the examination of the evolution of legal doctrine, that which is pursued in this book is by contrast based on an attempt to reconstruct the social history of lawyers; to look at the work they did in court for the people they served as clients; and to investigate the impact of legal culture on the more general social and political life of the country.

The first half of the book has grown out of the discovery of an unexpected solution to a methodological problem that arose during the early stages of research towards a mass-biographical account of the 'lower-branch' of the legal profession in the period 1550–1650.[1] As is well-known, since its earliest days in the thirteenth century, the English legal profession has been divided into two groups.[2] The first of these, 'the upper branch', was composed of serjeants at law and barristers, the lawyers who enjoyed a monopoly over advocacy in civil cases heard before the high courts in London. The second, the attorneys and solicitors (or 'lower branch'), were by contrast concerned primarily with organising cases, handling the procedural aspects of litigious work and providing other miscellaneous legal services such as conveyancing. The task of finding out who was qualified to act as an advocate in the early modern period is relatively easy because the call to the bar, or right of audience, was granted by one of the four inns of court in London, societies which kept registers of admissions.[3] The attorneys, on the other hand, present more difficult problems. Although many of them were members of legal inns, the records of the inns to which they belonged, the inns of chancery, have mostly been lost.[4] The key to identifying such practitioners therefore turned out to be two series of records kept by the major royal courts, King's Bench and Common Pleas: the docket rolls and the rolls of warrants of attorney. As it happens, since one function of the attorneys was

[1] Now published as C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge, 1986).

[2] For the most recent authoritative account see P. Brand, *The Origins of the English Legal Profession* (Oxford, 1992).

[3] For an excellent study which makes use of such materials, see Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar, 1590–1640* (Oxford, 1986).

[4] C. W. Brooks, The *Admissions Registers of Barnard's Inn, 1620–1869*, Selden Society supplementary series, 12 (London, 1995), pp. 1–2.

to act in the name of the people who employed them, these same records also provide information about the identity, social status and place of residence of the litigants, as well as a very brief indication of the nature of the case which had brought them into court.[5]

For a post-graduate student who grew up in the United States during the civil rights campaigns of the 1950s and 1960s, and who was working, in the early 1970s, at a time when scholars were beginning to investigate criminal legal records,[6] the idea of combining a study of the legal profession with an investigation of court usage appeared a potentially useful approach to take to the task of studying the relationship between law and society. While the technical pitfalls involved in using court records to trace patterns of litigation seemed formidable, the risky nature of what then seemed a novel historical approach was to a degree offset by the discovery that, since the early nineteenth century, parliament has been encouraging court officials to undertake precisely the same task.[7] Although the results may still seem problematical to some, the mere fact that they involve the interpretation of sources and quantification does not necessarily mean that they are any more (or less) open to question than more conventional legal historical analyses.

The earliest fruits of this approach, as Chapter 2 indicates, suggested two conclusions. The first was that during the second half of the sixteenth century there was an increase in the size of the legal profession that far outstripped increases in population, a result to some degree anticipated but none the less unexpected in its scale. The second, much more surprising, finding was that there was also a massive growth in the amount of litigation that came before the courts, the greater proportion of it consisting of actions of debt which were brought by people of ordinary, middling status. Although these observations pointed to several different lines of further inquiry, problems raised by some of the existing secondary literature indicated that it would be difficult to understand the Tudor and Stuart developments without looking back to the fifteenth century, when the volume of central court business was low.[8] A subsequent investigation of the late seventeenth and eighteenth centuries (Chapter 3) produced yet another surprise: a period which is noted for the consolidation of the state and for commercial, even industrial, expansion was evidently also one in which litigation in all the courts of the realm declined from a high point in the seventeenth century to reach a nadir in 1750.[9] Gradually, as the interpretative puzzles became more complex, and as students of the contemporary legal scene became increasingly interested in both 'hyperlexis' and the problem of access to the courts, it emerged that there was sufficient source material available for the

[5] See Chapter 2, pp. 9–10.

[6] For some of the relevant literature, see Chapter 7, pp. 179–80.

[7] See below, pp. 11, 28ff and 108.

[8] See Chapter 4, pp. 66.

[9] See Chapter 3, pp. 29ff.

study of civil litigation over very long periods of English history.[10] The potential advantage of such an approach was that a comparative treatment would add perspective to how we see the role of lawyers and the courts in the present as well as how we see them in the past.

Chapter 4 outlines a chronology of the changes in the relationship between the civil (as opposed to the criminal) law and society over the course of English history since 1200, one which may be of use to others either as a signpost or a target. It argues against any kind of linear, or progressive, evolution over time, showing that there have been ebbs and flows, changes as well as continuities in the nature of court usage over some eight centuries. Perhaps surprisingly, the continuities involve the composition of the litigants and the nature of their business. More predictably, the changes have been caused by the impact of demographic and economic trends, as well as alterations in the legal profession and in the relationships between jurisdictions. It suggests, for example, that the late fourteenth and early fifteenth centuries constituted a surprisingly important phase in the history of the profession, while arguing that the eighteenth century may have been one during which professional lawyers and courts, on the local as well as the national level, became to a degree disconnected from society. Nineteenth-century reforms, most notably the creation of new county courts, did little to remedy this. Access by ordinary people to justice has probably been more problematic in the twentieth century (despite the British experiment with state-funded legal aid) than it was at any time before 1700.

These observations are the starting points for the remainder of the book. Chapter 5 puts together insights from work on the legal professions of the sixteenth and seventeenth centuries, barristers as well as attorneys, with what has been learned more recently about their state in the eighteenth. The argument is that the decline in legal business from about 1700 onwards was accompanied by a decline in many of the institutional features, such as the legal inns, which had characterised the profession in the earlier period. Whether this might better be labelled a transformation than deprofessionalisation (as it is characterised here) is probably a matter for debate. The point is that the commonly held view that the eighteenth century was a time of advancement for lawyers is open to doubt. Contracting in size, the profession was not so popular as a career choice as it is often imagined to have been. Lawyers were probably less readily available in the provinces than they had been a century earlier, while eighteenth-century governments were in general more successful in finding new ways to tax legal practitioners

[10] 'Hyperlexis', or excessive litigiousness, is discussed in Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society', *UCLA Law Review*, 31 (1983), pp. 6–11. While Galenter suggests that anxiety about excessive litigiousness is a new concern of the later twentieth century, the phenomenon was also much discussed in the late sixteenth and early seventeenth centuries. See below, pp. 13–14, 22–25 and 86–87.

than in guaranteeing the quality of their training. Chapter 5 suggests, for example, that attacks on the unreformed attorneys, which have dominated so much writing about them in the nineteenth and twentieth centuries, appear to have taken on their modern form for the first time in the 1790s.[11] They are reflections on the state of the profession as it was after 1750, not as it was before 1700.

Nevertheless, as Chapter 6 shows, during the eighteenth century, various forms of apprenticeship, including those inherited from the period before 1700, provided continuity in the ways in which lawyers were trained, and served as the basis for many of the reforms in legal education which took place in the nineteenth century, when the numbers of lawsuits and the numbers of lawyers began to grow once again. While campaigns to improve legal education in the late Georgian and early Victorian periods were not the dismal failures they have sometimes been portrayed as, the persistence of apprenticeship as the primary method of training for both branches of the profession did inhibit plans for the introduction of more academic methods and the creation of an effective professoriate. Based on the examples found in Germany and the United States, this more ambitious reform agenda was promoted by those who wanted to raise English law onto a more jurisprudential and intellectual plane, where it could be learned more effectively by students and more readily appreciated by the wider public. Whether their failure was due primarily to the strength of the vocational tradition, or merely a manifestation of what Donald Kelley has described as a more general displacement of legal science from the European intellectual firmament, is a question that requires further research.[12] Whatever the answer, legal culture was arguably less significant in eighteenth- and nineteenth-century England than it had been before 1700, when the intellectual life of the law was on firmer institutional foundations and legalistic approaches to political and social issues were not only common, but quite often paramount.

The general thrust of several of the chapters in this book is that there is a need for constant review and revaluation of our perception of the role of law in the present because this inevitably influences our view of the past. To make such a statement is of course merely to retail a variation on a commonplace of the historian's craft, but there are good grounds for pleading the particular case, especially since the state of legal history as a subject of study is one of the issues at stake. The teaching of English law and the teaching of history were introduced at the same time (and briefly in the same faculties) in the reformed Victorian universities, which of course already taught divinity.[13]

[11] See Chapter 5, pp. 136, 141.

[12] D. R. Kelley, *The Human Measure: Social Though in the Western Legal Tradition* (Cambridge, MA, 1990).

[13] R. N. Soffer, *Discipline and Power: The University, History and the Making of an English Elite, 1870–1930* (Stanford, CA, 1994), pp. 54–55, 64–67; J. P. Kenyon, *The History Men* (London, 1983).

The contribution to medieval history made by the turn-of-the-century generation of legal historians led by F. W. Maitland is well known. In the mid and later twentieth century, in contrast, while that other 'pillar' of pre-modern English society, religion, has been widely and illuminatingly studied, legal history has been considerably less fashionable.

One reason for the more limited contribution of legal history to general history has undoubtedly been the preoccupation of university law departments with purely vocational subjects. But the attitudes and assumptions of academic historians may also be significant. The lack of interest in legal institutions and ideas, which until recently seems to have characterised the approach of many early modern social historians, arguably owes much to the particularly twentieth-century sense of disjunction between law and society. At the same time, the inaccessibility of modern courts, and the view that law is nothing other than legislative fiat, fits well with another important concern of recent historiography, the distinction between elite and popular culture.[14] The result is that some of the most compelling accounts of early modern social history have been written without exploring the legal dimension in detail, largely because it has been taken for granted that the law, especially the civil as opposed to the criminal law, was of little consequence for, or offered little in the way of agency to, the vast majority of the population.[15] In a book published as recently as 1996, one of the most important mid twentieth-century British historians of the seventeenth century, Christopher Hill, has restated the case for seeing English law merely as the tool of the ruling elite, a weapon useful only for the protection of property and the oppression by the gentry of the rest of the population.[16] Dr Hill's principal argument in support of this proposition is the observation that the 'law' was made in parliament, and enforced in the localities, by a social elite who were looking out primarily for themselves. While this view is certainly not to be dismissed lightly, he does not bother to complicate the issue by confronting any of the recent works which have argued that there was a surprisingly large degree of participation in early modern legal processes by social groups apart from the gentry. Since for Dr Hill the role of

[14] The seminal work on this subject was of course P. Burke, *Popular Culture in Early Modern Europe* (London, 1978). For thoughts on some of the problems involved, see G. Strauss, 'The Dilemma of Popular History', *Past and Present*, 132 (1991), pp. 130–49.

[15] See below, Chapter 7, pp. 189–90. For examples of newer work in which legal processes do figure significantly see P. Griffiths, A. Fox and S. Hindle, eds, *The Experience of Authority in Early Modern England* (London, 1996). In addition, it is notable that some of the most interesting work on law and agency has been done in connection with women. See, for example, Jenny Kermode and Garthine Walker, eds, *Women, Crime and the Courts in Early Modern England* (London 1994).

[16] C. Hill, *Liberty against the Law: Some Seventeenth-Century Controversies* (London, 1996). Revealingly, Hill (p. 338) is evidently uncomfortable with the more favourable picture of law as a cultural resource that is found in the final chapter of Edward Thompson, *Whigs and Hunters: The Origins of the Black Act* (London, 1975), a characterisation which I have always found particularly thought-provoking.

law is predetermined, legal history is evidently irrelevant to his study of social and political relationships.

By contrast, Chapter 7 in this book was written to make exactly the opposite case. Arguing that the modern concept of professionalisation has done much to distort our view of the past, it claims that law and legal discourse should be taken seriously precisely because they were accessible in the period before 1700 to a wide cross-section of the population. While attempting to suggest some lines for further research, it also indicates work which has already borne fruit. Others will have to judge (and investigate further) these alternative characterisations of the role of the law in the past, but the question at stake has much to do with how we characterise English society before 1700 at the most general level. Was the great mass of the population living in an illiterate, hierarchical, patriarchal and deferential society in which the only form of protest was to break the law? Or did they inhabit instead a litigious, even quarrelsome, world where self-interest had a good deal to do with the acceptance of political authority and where individuals knew something about what they were entitled to and how to go about getting it by utilising legal processes?

The final two chapters turn to detailed studies of the contribution of law and lawyers to political thought and action during the Tudor and early Stuart periods, a subject which has remained of perennial interest,[17] even though general historians have expressed doubts about the ultimate influence of ideas such as 'law and liberty' on political reality.[18] The immediate aim of Chapter 8, on the place of Magna Carta and the 'ancient constitution' in sixteenth century legal thought, was to investigate the Tudor characteristics of what Professor Pocock long ago dubbed the 'common law mind'.[19] While it suggests that values surrounding the idea of the rule of law were important, the overall thrust of the chapter is to cast English legal thought during this period more in terms of the jurisprudential values of European humanism than in terms of an insular historical view that sought the solution to current problems by reference to past precedents. Although the conclusion indicates some of the reasons why Sir Edward Coke's particular brand of ancient constitutionalism may have achieved a wider currency during the seventeenth century, the implications of the argument are that it is unlikely that 'the common law mind' can be properly understood without taking into account the influence of the complex tradition of European jurisprudence, or indeed that of the Protestant Reformation. At a more general level, the

[17] See for example, J. P. Sommerville, *Politics and Ideology in England, 1603–1640* (London, 1986); G. Burgess, *The Politics of the Ancient Constitution* (Basingstoke, 1992); Paul Christianson, *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635* (Toronto, 1996).

[18] The twentieth-century historiography is briefly and well summarised in D. Underdown, *A Freeborn People: Politics and the Nation in Seventeenth-Century England* (Oxford, 1996), pp. 1–4.

[19] For the historiography, see Chapter 8, pp. 199–200.

piece is part of an (as yet incomplete) inquiry into the evolution of English legal discourse over a long period from the early sixteenth century through to the end of the Civil War period, a study designed to trace changes and to seek out the ways in which legal ideas were expressed in different forums. If the chapter has any claim to a degree of methodological innovation it is that, rather than concentrating on parliamentary debates or state trials, it draws some of its principal source material from professional works, including lectures (or 'readings') given by lawyers within the legal inns, and speeches made to grand jurors and magistrates assembled at quarter sessions and assizes.

Just as historians of religion nowadays are interested in the content of sermons and the beliefs of parishioners, as well as formal theology, so too the student of legal thought needs to supplement an understanding of the content and genealogy of legal ideas with an investigation of how, and with what result, they were exchanged with the public. Working within the broad context of a general evaluation of the relationship between the three learned discourses — religion, medicine and law — and the middling sections of early modern society, Chapter 9 was written with this goal in mind. A consideration of the social origins of most early modern 'professional' men, as well as a look at the social composition of those who used their services, suggests that we should expect there to be a relationship between professional ideologies and the values of that 70 per cent of the population between the extremes of poverty, on the one hand, and great wealth on the other. Indeed, during much of the period, professional men evidently thought it so important to propagandise for their particular way of seeing the world that there is a good case for seeing this as amounting in effect to an educative process. It is also significant that the clergy and the lawyers competed with each other in expressing the unique, or paramount, importance of their own disciplines, while at the same time frequently borrowing ideas from one another. Like most other recent examinations of the subject, the essay sees the accession of Charles I in 1625 as a point of significant divergence between some brands of clerical political thought and that expressed by the lawyers,[20] but one of its broader implications is that it is probably dangerous to ignore the possibilities for the interaction between religion and law at any point in the sixteenth and seventeenth centuries.[21] Furthermore, there were amongst the lawyers, just as there were amongst the clergy, a number of different lines of thought about the power of princes and the place of 'the people' in the political processes of the day. As has often been pointed out, religion and law provided the terms of the debate during a period of unprecedented

[20] For example, Burgess, *Politics of the Ancient Constitution*.

[21] For a good illustration of this point compare Burgess, *Politics of the Ancient Constitution*, ch. 4, with Alan Cromartie, *Sir Matthew Hale, 1609–1676: Law, Religion and Natural Philosophy* (Cambridge, 1995)

national turmoil. It is ultimately not surprising therefore that law, like religion, became contested territory in the 1640s and 1650s.

Although legal thought certainly continued to figure significantly in the political life of the nation after the Restoration,[22] the logic of Chapters 2–6 is that, after 1700, the reach of the central courts never again penetrated so deeply into the localities, and legal culture rarely if ever again attained the same general importance. Like so much else in the following pages, this hypothesis will no doubt be greatly refined by further research.

[22] Starting points on this subject include J. G. A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, 1985); David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, 1989); J. C. D. Clark, *The Language of Liberty, 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge, 1994).

2

Litigants and Attorneys in the King's Bench and Common Pleas, 1560–1640

The late sixteenth and early seventeenth centuries were a great age for lawyers. The most famous members of the profession, Egerton, Coke, Noy, Hakewell, Dodderidge, Whitelocke, played an active role in early Stuart political controversy.[1] King Charles I relied so heavily on the advice of his judiciary that the members of the Long Parliament were as anxious to impeach judges as they were Archbishop Laud. Yet, while we can appreciate the importance of these lawyer politicians, we know all too little about the structure of the legal profession, its aims, or the way in which the judicial system it operated touched on the lives of those who used it. In any society, the administration of justice is made up of so many different components – the litigants, the lawyers, the courts, the bureaucracy, procedural and substantive law – that it is difficult to say very much about any one part without looking at the others. None the less, in the history of English law during the sixteenth and seventeenth centuries, two particular features stand out. The first is that between 1560 and 1640 there was a great, and probably unprecedented, increase in the amount of litigation entertained by the two main common law courts at Westminster, the King's Bench and Common Pleas. The second is that the increase in litigation was accompanied by an increase in the number of lawyers. Both of these points have been recognised for a long time but, because the plea rolls are such intractable sources,[2] the exact dimensions of the increase – who the clients were, how many lawyers practised – have never been fully explored. The purpose of this chapter is to say something about the number of cases entering the two courts, about the social status of the litigants and, finally, about the lawyers (particularly the attorneys) who served them.

The study is based mainly on two sets of documents from the King's Bench and Common Pleas, the docket rolls and the rolls of warrants of

[1] Many of the issues first raised in this chapter are developed further in C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch of the Legal Profession in Early Modern England* (Cambridge, 1986)

[2] J. H. Baker, 'The Dark Age of Legal History', *Legal History Studies 1972: Papers Presented to the Legal History Conference at Aberystwyth, 18–21 July 1992*, ed. Dafydd Jenkins (Cardiff, 1975), p. 2, quotes Maitland's comment that the plea rolls are so unwieldy 'that we can hardly hope that much will ever be known about them'.

attorney. There is no good source from which the number of actions commenced in the two courts can be derived, but the docket rolls are a satisfactory source from which to discover the number of cases in advanced stages which were in progress during any particular year. Counts of docket roll entries have yielded statistics on the number of cases in the King's Bench and Common Pleas for the years 1560, 1580, 1606 and 1640.[3] At the same time, information about the social status and geographical origins of the litigants, along with the forms of action on which they were suing, has been collected from the rolls of warrants, which are found at the end of the plea rolls of each court. An analysis has been made of litigants in sample terms in 1560, 1606 and 1640.[4] It should be emphasised that both the docket rolls and the rolls of warrants are short cuts to the plea rolls, which are of course the only authoritative source.[5] Because they are short cuts, worries about their completeness and accuracy inevitably arise and should be kept in mind. But all major problems can be satisfactorily resolved, and on some crucial points – such as the identification of all litigants who claimed the social rank of gentleman or above – there is every reason to believe that the rolls of warrants are more accurate than most other early modern documents.

Studies by Drs Blatcher, Hastings and Ives show that at the end of the fifteenth century about 2000 cases in advanced stages were making their way through the King's Bench and Common Pleas each year.[6] Following

[3] The docket rolls used for the Common Pleas are PRO, IND 54–56, 157–65, 353–58; for the King's Bench, IND 1336, 1339, 1347, 1356, 1370. The docket rolls of both courts relate only to cases enrolled by the prothonotaries and therefore in advanced stages: either cases in which both parties were in court or in which the plaintiff was about to outlaw a defendant for failing to appear. They do not provide a guide to the actual number of suits commenced.

[4] The rolls of warrants used are in PRO, CP 40/1187, 1753, 2476; and KB 27/1194, 1395, 1649.

[5] The use of these documents has required a detailed study of their history, and the procedures which produced them. The most important point is that, since during this period each King's Bench case received only one entry in the plea rolls (and hence in the docket rolls), there is no chance that the numbers of cases have been inflated by counting the same case twice. However, Common Pleas docket rolls could contain more than one reference to the same case in any one year or term. Studies of sample case loads of various attorneys suggest that about 80 per cent of the total docket roll entries represent individual cases, so total counts of Common Pleas entries have been reduced by 20 per cent to allow for duplication.

[6] M. Blatcher, 'Touching the Writ of Latitat', *Elizabethan Government and Society*, ed. S. T. Bindoff et al. (London, 1961), p. 201 n. 1; E. W. Ives, 'Common Lawyers in Pre-Reformation England', *Transactions of the Royal Historical Society*, 5th series, 18 (1968), p. 167; M. Hastings, *The Court of Common Pleas in Fifteenth-Century England* (Ithaca, NY, 1947), p. 183. The work of Blatcher and Ives suggests that an average of about 400–500 cases a year in the King's Bench is likely for the early 1490s; these figures, which are based on the docket rolls, are comparable with mine. The Common Pleas presents difficulties, mainly because there are no docket rolls for that period. For Michaelmas 1483, Hastings counted 6000 plea-roll entries but, since about 5100 of these were related to mesne process, this figure is not comparable with the King's Bench

this period came a decline in the fortunes of the common law, which Dr Ives associates with the transfer of property litigation to Chancery. By the opening years of the reign of Elizabeth I, however, the King's Bench had recovered its position, with 914 suits in 1560. Because there is no complete series of docket rolls for the Common Pleas before 1580, exact estimates of its business in 1560 are difficult, though it is probable that the court had surpassed its late fifteenth-century volume of about 1500 suits each year. From 1560 litigation in both courts clearly began to soar. By 1580 King's Bench litigation had increased by four times to just over 4000 suits a year. The 9300 cases in the Common Pleas at the same date represent an equally remarkable increase. Taken together, the two courts were hearing about six times more cases than they had been at the end of the fifteenth century. The increase continued, though at a slower pace, between 1580 and 1606. Business in the Common Pleas doubled; that of the King's Bench went up by more than 50 per cent. From 1606 there was a steady but much less rapid growth, so that by 1640 a total of just over 29,000 cases were making their way through the courts: 8500 in the King's Bench and 20,625 in the Common Pleas. By 1640 there was three times more litigation than in 1580, perhaps fifteen times more than there had been in the 1490s.

Figure 2.1
Cases in Advanced Stages in the King's Bench and Common Pleas, 1490–1640[a]

	1490	*1560*	*1580*	*1606*	*1640*
King's Bench	500	914	4000	6945	8537
Common Pleas	1600	[not known]	9300	15,508	20,625
Total	2100		13,300	23,453	29,162

[a] See also C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge, 1986), p. 51.

These estimates of the volume of early modern litigation can be compared with those for England just before the great law reforms, when figures were compiled by the Parliamentary Committee on Courts of Justice and reported in 1829. According to this source, between 1823 and 1827 an average of 72,224 actions were commenced in the King's Bench and Common Pleas during each year.[7] In 1606 the same two courts were handling a combined

figures; if we multiply the remaining 900 entries by twenty and divide by eight (the ratio of return-days in Michaelmas term to the total number in the year: D. Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973), p. 178) we obtain a total of 2100 cases a year in advanced stages; if we then make the same 20 per cent allowance for duplication as for the Common Pleas figures, a total estimate of 1680 emerges.

[7] *Parliamentary Papers, 1829*, v, *First Report of His Majesty's Commissioners [on the] Common Law* (London, 1829), p. 11.

total of about 23,500 cases at stages in which both parties had come into court or in which the plaintiff was about to outlaw the defendant for failing to appear. Thus, if a threefold increase in population between 1606 and the 1820s is allowed for, the raw statistics suggest that the rate of litigation was about the same during the two periods.

Suits commenced and suits in advanced stages are not comparable. In any age many more suits are commenced than reach the stage at which both parties are about to appear in court. For example, figures compiled by a contemporary about the numbers of original writs sued out in Chancery between 1569 and 1584 suggest that up to twice as many suits may have been commenced as reached advanced stages in the Common Pleas.[8] This information implies that there was in fact more litigation per head of population under Elizabeth I and the early Stuarts than there was in the early nineteenth century, and this conclusion is supported by what is known about the volume of litigation in other courts. Perhaps surprisingly, the number of suits commenced in Chancery was much the same during the two periods. It averaged about 1000 in the late sixteenth century and 1500 in the ten years from 1800 to 1809.[9] On the other hand, common law actions started in the Exchequer between 1823 and 1827 averaged about 7400 a year,[10] probably considerably more than were entertained by that court in the early seventeenth century. Against this must be set the existence, as a thriving early-modern jurisdiction, of the Star Chamber (abolished in 1641) and the fact that in this period justice was less confined to the central courts than it was during the reign of George IV. In the late sixteenth and early seventeenth centuries town courts, and even manorial courts, were still active, whereas they had fallen into disuse by the beginning of the nineteenth century It is therefore very likely that the late sixteenth and early seventeenth centuries were the most litigious periods in English history. If England in the mid twentieth century seems less litigious, it is (at least, according to Abel-Smith and Stevens) not because there are fewer disputes to settle but because arbitration boards and special tribunals have provided a way to take them out of court. This has meant a corresponding decline in the general influence of lawyers in political life and social planning.[11]

Comparisons with distant future ages would have meant little to Elizabethan Englishmen, however, because for them the most striking feature of the administration of justice was the rapidity with which the number of lawsuits increased between 1560 and 1640. During the reign of Henry VIII, common

[8] 'Mr Jones Plan to Farm the Seals for Original Writs', BL, MS Lansdowne 47, fol. 122.

[9] For the late Elizabethan estimate, see W. J. Jones, *The Elizabethan Court of Chancery* (Oxford, 1967), p. 304 n. 1. Early nineteenth-century figures for bills in Chancery are given in *Parliamentary Papers 1811: Report from the Committee Appointed to Enquire into the Causes that Retard the Decisions of Suits in the High Court of Chancery* (London, 1811), p. 956.

[10] *First Report on the Common Law*, p. 11.

[11] B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (London, 1967), pp. 1–2.

lawyers had been worried that empty courts would put them out of business.[12] From the reign of Elizabeth I the concern was rather that there were too many suits. No one welcomed this new 'multiplicity of suits', and explanations of it, along with proposals for remedies, began to proliferate. With a few not entirely insignificant exceptions, the reforms on which everyone agreed in principle failed to amount to anything. But contemporary analyses of the causes of the increase were realistic and can help us to understand something about how laymen and lawyers conceived the relationship between law and society. Some explained the increase in litigation in terms of failings within the law itself, in particular its uncertainty.[13] Others talked about changes in society or about failings in human nature.[14] In the late sixteenth century, criticisms of the obscurity and inadequacy of the common law seem to have had their widest currency – it is in this context that Francis Bacon's celebrated proposals for reform and even codification should be seen. His ideas were not exceptional, but only the clearest expression of the flexible outlook of Elizabethan lawyers.[15] With the reign of James I, however, the use of precedents and legal arguments in constitutional disputes brought more partisan defences of the common law. In a political atmosphere where law was looked to as a constitutional guide, the notion that it was uncertain about men's property could not be entertained.[16] As Elizabethan reliance on reason and natural law gave way to the more certain – but in the long run more inhibiting – historical myths of Sir Edward Coke, sociological interpretations of the increase in litigation became more popular.

In terms of general explanations of the sudden increase in common law litigation, it is difficult to add to the views of Egerton, Bacon, Davies and Coke. What we can do is follow the leads they give us. There is, for example, evidence that some aspects of the substantive law were as uncertain as contemporaries claimed. The rules about important concepts such as the equity of redemption or perpetuities were undergoing change throughout the period. But knowledge of substantive law during this period is all too limited, so we must leave this aspect of the problem to those better able to deal with it.[17]

[12] F. W. Maitland, *English Law and the Renaissance* (Cambridge, 1901), pp. 22, 82–83.

[13] There are many examples. The Lansdowne MSS in the BL contain a number of projects for law reform. PRO, SP 12/107/95 is a draft parliamentary bill (dated 1576) proposing a code of law and decentralisation of justice. For more see C. Brooks and K. Sharpe, 'Debate: History, English Law and the Renaissance', *Past and Present*, 72 (1976), p. 135.

[14] These are usually the products of the early seventeenth century. See the works of Coke and Davies, cited below.

[15] Brooks and Sharpe, 'History, English Law and the Renaissance', pp. 134–35. Bacon's scheme to reform the statutes was supported by some of the most important lawyers of the day: William Hakewell, Thomas Hedley, Henry Hobart, Henry Finch, William Noy and James Whitelocke.

[16] Ibid., p. 141.

[17] See Baker, 'The Dark Age of Legal History', p. 2.

The idea that the influx of litigation was caused by social change has found wide acceptance among social historians in the twentieth century. In the seventeenth century, two very concise statements of this point of view came from Sir John Davies and Sir Edward Coke. Davies claimed that there were more suits, not because the law was imperfect, but because, 'the commodities of the earth being more improved, there is more wealth and consequently there are more contracts real and personal in the world, which breedeth unthrifts, banckruptes, and bad debtors, more covetousness, and more malice ...'[18] To this Coke added that the general causes of litigation were the advent of peace and plenty, and the dissolution of the monasteries into many hands.[19] With these views in mind we can now turn to the people who were bringing this vastly increased volume of litigation into the King's Bench and Common Pleas.

The social composition of litigants changed relatively little between 1560, the starting-point of the influx of suits, and 1640. Throughout the period, men styled either 'gentleman' or above made up about 30 per cent of all Common Pleas and 20 per cent of all King's Bench litigants. Therefore between 70 and 80 per cent (a considerable majority) of those who utilised these courts were not members of what, for the sake of convenience, is generally called the landed gentry. The non-gentry litigants included in roughly equal proportions men who owned land and those who did not. One-third of all Common Pleas cases arose from the yeomanry, while in the King's Bench these small landowners accounted for about 15 or 20 per cent of all litigants. But another 25 per cent of the litigants in the Common Pleas, and 35 to 40 per cent of those in the King's Bench, were from the commercial and other classes who either owned no land or for whom it did not serve as a principal source of income. This group of litigants represents a wide range of wealth and occupations. Most were merchants, provincial tailors, grocers, chapmen, bakers or innkeepers; but carpenters, bricklayers, miners and labourers, as well as a few university dons, are also included. The remainder of the litigants in both courts (about 10 per cent) were lawyers (mainly attorneys), clergymen and widows who were involved in suits relating to the estates of deceased husbands.[20]

The distribution of litigation in the Common Pleas, and to a lesser extent in the King's Bench, appears to reflect fairly accurately the distribution of wealth in the nation as a whole. It has been estimated that the gentry classes probably owned about 30 per cent of the national wealth; as we have seen,

[18] J. Davies, 'A Discourse of Law and Lawyers' (1615), in *The Complete Works of Sir John Davies*, ed. A. B. Grosart (3 vols, London, 1869–76), iii, p. 266.

[19] Bodleian Library, Oxford, MS Ashmole 1159, fol. 78.

[20] In the rolls of warrants all litigants above the rank of gentleman are styled. Below the rank of gentleman, defendants are described more precisely than plaintiffs, so the detailed statistics for those below that rank are based on the status of defendants only.