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## LEGAL PLURALISM IN EARLY MODERN ENGLAND AND COLONIAL VIRGINIA

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**ABSTRACT:** This article argues that early modern England should be considered as a legally pluralistic society. Historians have long recognised the fact of early modern legal pluralism, however few use this term and discussion of what this might mean is absent from the historiography. This article seeks to integrate the theory behind legal pluralism with the study of early modern England. Furthermore, this article argues that bringing the early modern into the study of legal pluralism adds historical depth to the concept, and allows legal pluralists to consider a pluralism that was state-endorsed, rather than oppositional to the state.

**KEYWORDS:** Legal Pluralism; Law and Development; Law.

### I. INTRODUCTION

This article aims to put into dialogue two areas of study that have so far lacked contact with each other: early modern historiography, and the theory of legal pluralism.<sup>2</sup> Legal pluralism provides a set of models and ways of thinking about law that would be beneficial to historians of this period, and the theory of legal pluralism can be helpfully expanded by engagement with a society which legal pluralists have, generally, neglected. This paper will show the benefits for both early modern historians and legal theorists of more expansive interdisciplinary engagement.

This article makes two key contributions to the literature as it stands. First, it expands on scholarship regarding legal pluralism by using data from the early modern period, roughly defined between 1500–1750. The vast majority of writing on legal pluralism does not engage with the early modern period, which has key insights for creating a more systematic understanding of cross cultural legal pluralism. Second this paper uses legal pluralism as a method and theory to understand the early modern period itself. Legal pluralism allows historians to more

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thoroughly think about the differences in early modern law-as-practice and law-as-theory.

Crucially, this paper also uses data from early modern Virginia to provide a more detailed model of early modern English legal pluralism. Much of the scholarship that concerns legal pluralism centres around colonial societies. The early colonisation of America has, however, been omitted from this work. The inclusion of the early American data in this paper goes some way to thinking about different kinds of colonial legal pluralism, as well as adding a depth to the understanding of early modern English law. This paper deals with the fracturing of the colonial British legal system, and its implication for ideas of the early British state and society.

## II. DISCUSSION

Historians are used to talking about events and processes that sound a lot like legal pluralism: strategic or opportunistic litigation, a widespread preference for arbitration and the multiplicities of law courts over this period. Historians, however, currently lack the conceptual tools and vocabulary to be able to talk about what these attitudes and behaviours meant for the structure of law and society. There are too few scholars applying legal concepts to early modern England so, often, advances made by legal theory or legal anthropology have not been extended to the early modern period. The majority of legal historians, moreover, have been concerned with the development of legal institutions and doctrine exclusively.<sup>3</sup> Although the last thirty years has seen the development of a 'social history of law', this work has often been unconcerned with legal theory or anthropology.<sup>4</sup>

The language of legal pluralism provides a conceptual vocabulary that allows historians to talk with more clarity and sophistication about the interface between the legal and social spheres in early modern England. Scholars of legal pluralism have spent over thirty years documenting the instances where state law deviates from social practice, or where people have had complicated and contradictory

<sup>3</sup> A point made by Powell in 1984, see Edward Powell, 'Settlement of Disputes by Arbitration in Fifteenth-Century England,' *Law and History Review* 2, no. 1 (1984): 21.

<sup>4</sup> The key works in this field are those of Chris Brooks. Other socio-legal-historical works have, largely, been more concerned with crime as a conceptual category. See, for example, Garthine Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge: Cambridge University Press, 2003); Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge: Cambridge University Press, 2000); James Sharpe, *Crime in Early Modern England 1550-1750* (London: Taylor & Francis, 2014); Tim Hitchcock and Robert Shoemaker, *London Lives* (Cambridge: Cambridge University Press, 2015).

relationships with the law and legal systems.<sup>5</sup> The use of legal pluralism (and legal anthropology more generally) provides a new way to visualise early modern England. In one sense this is novel: legal pluralism has not been written about in any period before the eighteenth century. Yet this research fits into a more general historiographical and theoretical pattern. Legal anthropology provides a way to continue Chris Brooks' concern with analysing early modern law and society together.<sup>6</sup> This historiographical focus complements a broader shift within the discipline of law. Increasingly, legal theorists are writing about the law as *practice*, not doctrine.<sup>7</sup>

<sup>5</sup> Karen Barkey, "Aspects of Legal Pluralism in the Ottoman Empire," in *Legal Pluralism and Empires, 1500–1850*, ed. Richard J. Ross and Lauren Benton (New York: New York University Press, 2013); Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 34, no. 47 (2002): 37–82; Lauren Benton, "Historical Perspectives on Legal Pluralism," in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. Brian Tamanaha, Caroline Sage, and Michael Woolcock (Cambridge: Cambridge University Press, 2012), 21–33; Masaji Chiba, *Legal pluralism: toward a general theory through Japanese legal culture* (Tokai University Press, 1989); Jean L. Cohen, "The politics and risks of the new legal pluralism in the domain of intimacy," *International Journal of Constitutional Law* 10, no. 2 (2012): 380–397; John Griffiths, "What is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55; Anne Griffiths, "Legal Pluralism in Africa: The Role of Gender and Women's Access to Law," *Political and Legal Anthropology* 19, no. 2 (1996): 93–107; Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 5, no. 1988 (22): 869–96; Sally Engle Merry, "Legal Pluralism and Legal Culture: Mapping the Terrain," in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. Brian Tamanaha, Caroline Sage, and Michael Woolcock (Cambridge: Cambridge University Press, 2012), 66–82; Ralf Michaels, "Global Legal Pluralism," *Annual Review of Law and Social Science* 5, no. 1 (2009): 243–262; Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217; Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000): 296–321; Brian Tamanaha, "Understanding Legal Pluralism: past to Present, Local to Global," *Sydney Law Review* 30 (2008): 375–411

<sup>6</sup> Chris Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008), vii, 1–8; Chris Brooks, *Lawyers, Litigation and English Society Since 1450* (London: Hambledon Press, 1998), 2–10.

<sup>7</sup> The Socio-Legal Studies Association, for example, was founded in 1990. Tamanaha has written about the need for Legal Theory to be more sociological, and rooted in 'real life': Brian Tamanaha, *Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997), 249–253. For a history of the sociology of law see: David Nelken, "Law in action or living law? Back to the beginning in sociology of law1," *Legal Studies* (Oxford) 4, no. 2 (1984): 157–174; N. S. Timasheff, *An Introduction to the Sociology of Law* (London: Routledge, 2002).



Legal anthropology takes law (and more broadly, social and cultural rules) as its theoretical concern, and the cross-cultural, case study approach of traditional anthropology as its methodology. Legal anthropology grew out of a concern with non-western societies, at the time glossed as ‘less complex’ or, even, ‘primitive’. In the last half-century, however, legal anthropology has transformed into a globalist discipline concerned with common themes of law, order, control, conflict and so on. Indeed, anthropologists’ critique of their predecessors work has led to an embarrassment about the west-centric heritage of their discipline. As a result, legal anthropology has emerged as a diverse field (geographically, ethnically, politically) with the common purpose of understanding law in different societies, and what different societies can tell us about our own concepts of law (and how we got them wrong).<sup>8</sup> Legal anthropology is a diverse area of scholarship, and many of its ethnographically-driven insights—often taken from outside the modern-west—offer the historian new ways to think about law in the past.

Most of the legal anthropology dealing with legal pluralism has been developed in twentieth and twenty-first century, colonial and neocolonial societies. The way that legal pluralism has developed, as a body of theory, has been influenced by the prominence of these societies. Using the language of legal pluralism allows me to compare some of these societies to early modern England. By doing so, I can ask some of the obvious questions (why is early modern English legal pluralism different from the legal pluralism seen in contemporary South Sudan?) and also use early modern England as an example to add to the theoretical concept of legal pluralism.

The study of early modern England has something particular to add to theoretical discussions of legal pluralism. The historical narrative that appears in monographs and articles about legal pluralism is reductive and, often, misses the ‘early modern’ completely. For instance, Tamanaha charts a course from medieval to modern legal pluralism. In his telling, the mid-to-late medieval period had a ‘remarkable jumble of laws [and institutions]’.<sup>9</sup> It was then, with the success of the state building enterprise, the treaties of Augsburg (1555) and Westphalia (1648), and advances in the seventeenth- and eighteenth-centuries that bureaucratic states developed and legal pluralism moved from its medieval to its modern incarnation.<sup>10</sup>

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<sup>8</sup> I found Simon Roberts and Sally Falk Moore’s descriptions of legal anthropology most helpful: Sally Falk Moore, “Certainties undone: fifty turbulent years of legal anthropology, 1949-1999,” *Journal of the Royal Anthropological Institute* 7, no. 1 (2001): 95–116; Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (New Orleans, LA: Quid Pro, LLC, 2013).

<sup>9</sup> Tamanaha, “Understanding Legal Pluralism: past to Present, Local to Global,” 376.

<sup>10</sup> *Ibid.*, 377–381.

This narrative has been repeated elsewhere.<sup>11</sup> The problem with this story is not that it is wrong but, rather, that it is too neat and too simple. The creation of the nation state provides a useful pivot for history, and legal pluralism is essentially split into pre- and post-Westphalian concepts.<sup>12</sup>

Figure 1 shows more clearly how the early modern falls out of this narrative. The primary models or concepts of legal pluralism (Globalist, Post-Colonial, Colonial, and Medieval) are all shown. Tamanaha's jumble of laws comes to an end with the medieval period, and colonial legal pluralism (in the literature) is represented as starting some time in the eighteenth century. This chronology can be disputed—by extending the colonial model further back in time, and bringing the jumble-of-laws model forward. Yet the central issue remains: these models pivot around the Treaty of Westphalia, and rely on a clear distinction between pluralism caused by the modern state, and pluralism that existed before it.

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<sup>11</sup> Berihun A. Gebeye, "Decoding legal pluralism in Africa," *The Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (2017): 233–235.

<sup>12</sup> Kelly makes similar criticisms of this narrative, although his criticism focuses more on applying a universal model of dispute in *pre-industrial* societies, see Benjamin Kelly, *Petitions, Litigation and Social Control in Roman Egypt* (Oxford: Oxford University Press, 2011), 266–7.

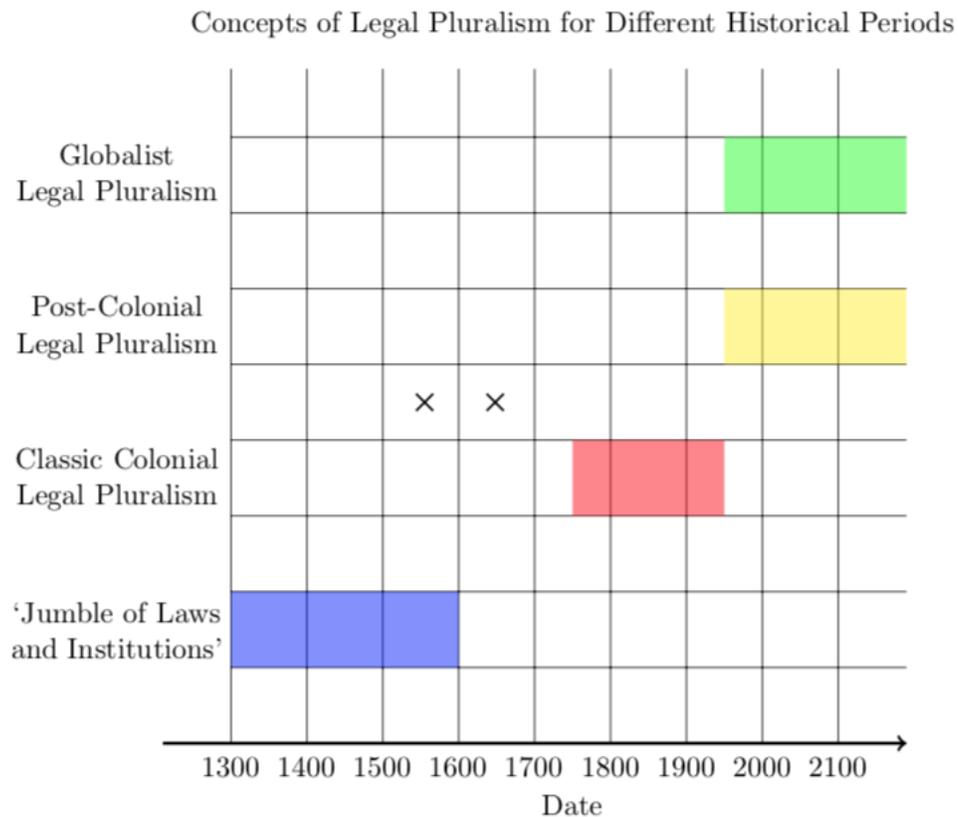


Figure 1: Different Concepts of Legal Pluralism and the time period they have been applied to in the scholarly literature. The two standalone ticks represent the Treaties of Augsburg and Westphalia.

Pluralism existed during the process of state-building, and early modern legal pluralism was different to medieval legal pluralism. From the early-seventeenth century onward, the government was dealing with the integration (at varying levels) of England and Scotland, following James I's accession to the crown. It could also be argued that the relative judicial and governmental independence of much of the North in this period constituted a form of legal pluralism. There have been some studies more sensitive to the early modern, although not very many.<sup>13</sup> The main

<sup>13</sup> For example, Philip Stern, "Bundles of Hyphens: Corporations as Legal Communities in the Early Modern British Empire," in *Legal Pluralism and Empires, 1500–1850*, ed. Lauren Benton and Ross Richard (New York: New York University Press, 2013), 21–48.

problem seems to be that scholars of legal pluralism are not acquainted with the idea of the 'early modern' and it tends, therefore, to get subsumed into the medieval.

Fitting the early modern into this history does more than simply disrupt the pre- and post-Westphalian narrative. Early modern legal pluralism could itself be a distinct category. Early modern law was never uniform: different jurisdictions applied to different areas, arenas (common law, civil law, ecclesiastical law) and people. And there were enough grey areas to be exploited by those with the right knowledge. The early modern period saw the growth of the modern state in Europe and the west, and the redefinition of law accordingly. Early modern people did not wake up one day surrounded by the apparatus of the modern bureaucratic state. During the period of state-formation, the operation of types of state-power (such as law) was often confused and contradictory.<sup>14</sup> Early modernity saw growing tension between two forms of government—bureaucratic, constitutional and parliamentary on one hand; personal, absolutist and monarchical on the other. The disruption associated with, say, the English Civil War and the American and French Revolutions had profound implications for who was subject to what laws, and how. The reformation provided a challenge to established religious and ecclesiastical control.<sup>15</sup> Early modern institutions with their own rules and sanctions—guilds, monasteries, corporations and so on—were characteristically different from their modern and medieval counterparts.<sup>16</sup> Early modernity was also a time of colonial expansion, and this too had its effects on the law. Early modern society had its own

<sup>14</sup> For different takes on state-formation, see Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (London: Wiley, 2000); Harald Gustafsson, "The Conglomerate State: A Perspective on State Formation in Early Modern Europe," *Scandinavian Journal of History* 23, nos. 3-4 (1998): 189–213; M.J. Braddick, *State Formation in Early Modern England, C.1550-1700* (Cambridge: Cambridge University Press, 2000); Stephen Pincus, "Nationalism, Universal Monarchy, and the Glorious Revolution," in *State/Culture: State-Formation After the Cultural Turn*, ed. George Steinmetz (Ithaca, NY: Cornell University Press, 1999), 182–209.

<sup>15</sup> R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 2004), 28–54.

<sup>16</sup> Sheilagh Ogilvie, "Whatever Is, Is Right? Economic Institutions in Pre-Industrial Europe," *Economic History Review* 60, nos. 649–684 (2007); Stephen Epstein, "Craft Guilds in the Pre-Modern Economy: A Discussion," *Economic History Review* 61 (2008): 155–174; Jan Lucassen, Tine de Moor, and Jan Luiten van Zanden, eds., "The Return of the Guilds," *International Review of Social History*, no. S16 (2008); J. P. Ward, *Metropolitan Communities: Trade Guilds, Identity, and Change in Early Modern London* (Stanford, Calif.: Stanford University Press, 1997); Rebecca King, "The Sociability of the Trade Guilds of Newcastle and Durham, 1660–1750: The Urban Renaissance Revisited," in *Creating and Consuming Culture in North-East England, 1660–1830*, ed. Helen Berry and Jeremy Gregory (Aldershot: Ashgate, 2004), 51–71.

legal pluralism, but the characteristics of classic legally pluralist societies (state and non-state law, colonialism) were born in this period, too. If we understand the early modern to be a place of pluralism then we will have a better understanding of law, legal pluralism and the state. We will also be able to approach the question of change over time. The models presented in Figure 1 have an obvious gap between the years 1600–1750, which can be filled by more research into how the state, law and legal pluralism developed over the course of these centuries.

Legal pluralism is a politically charged subject. John Griffiths' seminal *What is Legal Pluralism?* argues that the purpose of legal pluralism is to disrupt the ideology of 'legal centrism', which he defines as:

[the belief that] law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions [...] an exclusive, systematic and unified hierarchical ordering of normative propositions.<sup>17</sup>

Thirty years later, Sally Engle Merry felt confident enough to state that 'legal pluralism has proved enormously fruitful in challenging ideas about the centrality of the state'.<sup>18</sup> Challenging legal centrism is a running theme in the literature on legal pluralism. Most scholars of legal pluralism are committed to a more diverse understanding of what the law is, and can be, than the image sketched by Griffiths' legal centrists.<sup>19</sup> The empirical *fact* of legal pluralism gives pause to any advocacy of legal centrism.<sup>20</sup> After all, a society that contains more than one legal system cannot make any claim to be exclusive, systematic and unified.

Even at this basic level, legal pluralism is political. The very idea of legal pluralism challenged the wisdom of 'most western legal theorists' writing before the nineteen-eighties.<sup>21</sup> These theorists and scholars were responsible for educating new generations of lawyers, and their conception of law did not make room for anything outside of conventional state law. So, legal pluralism provided a deliberate challenge

<sup>17</sup> Griffiths, "What is Legal Pluralism?," 3.

<sup>18</sup> Merry, "Legal Pluralism and Legal Culture: Mapping the Terrain," 66

<sup>19</sup> Tamanaha, "Understanding Legal Pluralism: past to Present, Local to Global," 375–6; Tamanaha, "A Non-Essentialist Version of Legal Pluralism"; Benda-Beckmann, "Who's Afraid of Legal Pluralism?," 37; Merry, "Legal Pluralism"; Benton, "Historical Perspectives on Legal Pluralism."

<sup>20</sup> This is one of the main arguments made by Gordon R. Woodman, "Ideological Combat and Social Observation," *The Journal of Legal Pluralism and Unofficial Law* 30, no. 42 (1998): 21–59.

<sup>21</sup> *Ibid.*, 22.

not only to the ideology of legal centrism, but also to how law was taught and received.<sup>22</sup>

By focusing attention away from legal centralism, pluralist conceptions of the law have, principally, made room for integrating ideas of community and indigenous law into a legal theory whose primary focus had been state law.<sup>23</sup> Pluralists deemphasise centralist state-law and open up space for a legal theory freer of its western heritage. Moreover, they challenge the idea that the rule of law necessarily means the rule of state. Pluralism, by its very nature, requires a conception of law that goes beyond what was considered by traditional legal theory. This is a good or bad thing depending on your politics. Legal pluralism provides the apparatus to see past the west-centric nature of legal theory and opens up avenues to explore alternative legal traditions and ways of doing law.<sup>24</sup> As Chiba points out, legal pluralism is a conceptual tool that helps to write about non-Western law in a manner that does not deprive it of the qualities of 'law'.<sup>25</sup> What western lawyers used to—patronisingly—call 'custom' is now law. Yet scholars have been cautious about fully embracing legal pluralism, worried that it dilutes our understanding of what real 'law' is. For some, the writing of custom or 'normative rules' into law is a needless expansion of the term, and risks robbing the law of the qualities that make it Law.<sup>26</sup>

<sup>22</sup> Similar arguments about the relationship between ideology and legal teaching have been made by Robert W. Gordon, "Law and Ideology," *Tikkun* 3, no. 1 (1988): 1443–1462; Philip C. Kissam, "The Ideology of the Case Method/Final Examination Law School," *University Cincinnati Law Review* 70 (2001): 137; J. Peter Byrne, "Academic Freedom and Political Neutrality in Law Schools," *Journal of Legal Education* 43, no. 3 (1993): 315–339. Similar points are made about the harmful effects of ideological consensus on teaching in Joe Earle, Cahal Moran, and Zach Ward-Perkins, *The Econocracy: On the Perils of Leaving Economics to the Experts* (London: Penguin Books Limited, 2017).

<sup>23</sup> Marc Galanter, "Justice in many Rooms: Courts, Private Ordering, and Indigenous Law," *The Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 1–47.

<sup>24</sup> For example, different ways of defining 'people' Franz von Benda-Beckmann, "Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism," *Law and Anthropology* 9 (1997): 4–5. Or, as a tool for ethnic minority studies P. Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (Glass House Press, 2005).

<sup>25</sup> Chiba, *Legal pluralism: toward a general theory through Japanese legal culture*; Masaji Chiba, "Legal Pluralism in Sri Lankan Society," *The Journal of Legal Pluralism and Unofficial Law* 25, no. 33 (1993): 197–212; Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World," *Ratio Juris* 11, no. 3 (1998): 228–245.

<sup>26</sup> Merry, "Legal Pluralism," 878; Martti Koskenniemi, "Global Legal Pluralism: Multiple Regimes And Multiple Modes Of Thought," 2005, 16–17, <http://www.helsinki.fi/>

The case studies used by theorists exploring legal pluralism can also be political or controversial. A great deal of scholarship deals with non-western legal institutions. Much of the literature also draws on studies from areas where the legal bodies of different states fail to reach, or where the state exerts its influence in unusual ways. The work of Cherry Leonardi, for example, considers the idea, operation and provision of the state across urban frontiers in South Sudan. Leonardi makes clear that traditional ideas of the state—as oppressive, or emancipatory—are wrong. Instead, she argues, that South Sudanese interaction with the state has been contradictory; individuals often engage with the state and its materials, even when fighting its influence elsewhere. The state in South Sudan does not fit into easily definable models, but has been changed and appropriated by the South Sudanese.<sup>27</sup> Other scholars have used legal pluralism to explore more controversial topics, focusing, for example, on the implementation of sharia and feminist courts.<sup>28</sup>

Pluralism has also become a significant part of the intellectual apparatus used by development scholars—often associated with institutions such as the World Bank, the United Nations and the International Monetary Fund. Legal pluralism is used to understand international law, globalisation and resistance to state-building where it occurs. In Afghanistan or Iraq reports from development agencies increasingly refer to things such as ‘Non-State Justice Institutes’—providers of legal pluralism.<sup>29</sup> Legal

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eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf; Michaels, “Global Legal Pluralism,” 254.

<sup>27</sup> Cherry Leonardi, *Dealing with Government in South Sudan: Histories of Chiefship, Community & State* (Woodbridge, Suffolk: Boydell & Brewer, 2013), Conclusion, esp. 222–224. See also Cherry Leonardi, “South Sudanese Arbaic and the Negotiation of the Local State,” *Journal of African History* 54 (2013): 351–72.

<sup>28</sup> Merry, “Legal Pluralism and Legal Culture: Mapping the Terrain”; Maria Reiss, “The Materialization Of Legal Pluralism In Britain: Why Shari’a Council Decisions Should Be Non-Binding,” *Arizona Journal of Internation & Comparative Law* 26, no. 3 (2009): 739–778; Ido Shahar, “Legal Pluralism and the Study of Shari’a Courts,” *Islamic Law and Society* 15, no. 1 (2008): 112–141; Gebeye, “Decoding legal pluralism in Africa”; David Pimentel, “Global Legal Pluralism: Multiple Regimes And Multiple Modes Of Thought,” *Yale Human Rights and Development Journal* 14, no. 1 (2011): 59–104; Richard A. Wilson, “Reconciliation and Revenge in Post-Apartheid South Africa,” *Current Anthropology* 41, no. 1 (2000): 75–98.

<sup>29</sup> John Dempsey and Noah Colburn, *Informal Dispute Resolution in Afghanistan* (US Institute of Peace, 2010); Deborah H Isser et al., *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options* (US Institute of Peace, 2009); Brian Tamanaha, “Introduction: A Bifurcated Theory of Law in Hybrid Societies,” in *Non-State Justice and the Law: Decision Making at the Interface of Tradition, Religion and the State*, ed. Matthias Kötter et al. (Basingstoke: Palgrave Macmillan, 2015), 1–21; Eric Sheye, “Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice

pluralism is not simply a theory, it is a policy field. Indeed, legal pluralism often emerges as an obstacle to the neoliberal globalisation of the last forty years. The emergence of new markets depends upon the stability of states (or, at least, regions within a state) which in turn depends on the state-building methods encouraged by the international community. Many examples of legal pluralism are examples of individuals and communities resisting the encroachment of internationalism, international law and state-building.<sup>30</sup>

Legal pluralism is not only political but *ideological*. The critique of the centrality of state law feeds into a wider debate about the function of law in society. Scholars from all kinds of backgrounds have debated the political efficacy and morality of placing such an emphasis on state law. Moreover, many scholars think that law is, in itself, an oppressive structure.<sup>31</sup> This view of law has a significant intellectual history—going back, at least, to Weber’s definition of the state as an entity that has a monopoly on the legitimate use of violence.<sup>32</sup> Even if law is not inherently oppressive scholars, journalists and activists also claim that, in practice, law tends to reflect societal biases.<sup>33</sup> As Kerruish puts it, how can ‘universally valid principles be thought to exist in a world where social relations oppose the needs of some to those of others?’<sup>34</sup> So, for example, showing deference (or even adherence) to the state law of the United States can be considered a racially charged act. Developing theories of legal pluralism is a part—if only tangentially—of these critiques. Legal pluralism states that a law should not be legitimate just because someone powerful says so.

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and Security Networks,” 2009, 1–44; UN Security Council, “The rule of law and transitional justice in conflict and post-conflict societies : report of the Secretary-General,” 2004.

<sup>30</sup>See Tamanaha, “Introduction: A Bifurcated Theory of Law in Hybrid Societies.”

<sup>31</sup> See, for example, arguments made by the Critical Legal Studies Movement P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992); Allan C. Hutchinson, ed., *Critical Legal Studies* (Totowa, NJ: Rowman & Littlefield, 1989); R. M. Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (London: Verso Books, 2015).

<sup>32</sup> Max Weber, *Politics as Vocation* (1918).

<sup>33</sup> Ian F. Haney Lopez, “Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama,” *California Law Review* 98, no. 3 (2010): 1023–1074; G. C. Loury et al., *Race, Incarceration, and American Values* (Cambridge, MA: MIT Press, 2008); J. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (New York: Basic Books, 2017); Dorothy E. Roberts, “Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework,” *Columbia Human Rights Law Review* 39 (2008): 261–285; Ashley Nellis, *The Color Of Justice: Racial And Ethnic Disparity In State Prisons* (The Sentencing Project, 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

<sup>34</sup> Valerie Kerruish, *Jurisprudence as Ideology* (London: Routledge, 1991), 1–2.

A common communitarian thread runs through the examples used by scholars of legal pluralism. From localised community meetings in Liberia to all-female Indian courts—these examples share a vision of law that is integrated in specific communities that are smaller than those of the nation state. This is a politically appealing model. Taking the laws of communities seriously opens up new ways to think about what the law is, how it is applied and, crucially, what the law *should* be. This is not to romanticise small-scale communities, which can be exclusionary and hierarchical. When closed communities start creating their own laws or social rules, they can end up giving authority to those already powerful in that community and excluding those who do not fit in. After all, one way to read the history of the twentieth-century is as a series of communities enacting their own ideas of law and justice, with catastrophic results. Lynchings, genocide and ethnic cleansing are the most terrible (and obvious) examples. Indeed, as we have moved into the information age we are increasingly seeing the perils of a ‘crowdsourced’ justice that imposes its own sanctions (public shaming, pressure on employers to sack people) and operates outside the law (on Twitter, for example).<sup>35</sup>

The extent of pluralistic legal behaviour should not be overstated. Most pluralisms, like early modern custom, are bounded both demographically (who can use them) and temporally (when they can be used). Legal pluralism—and community pluralism—does not provide a coherent alternative to state-law. Individuals living in pluralistic societies appeal to a variety of legal systems, often conscious of when and where different types of law could be turned to.

Community justice is not in and of itself emancipatory, radical or a good thing. Nor is state law inherently oppressive. State and community can both operate in good and bad ways. The political positives of a ‘bottom up’ idea of what law could be have, however, been downplayed in the literature. Part of the purpose of this study is to take seriously (early modern) communitarian ideas of justice, and not simply rely on the idea that power should emanate from the state and nowhere else.

The difference between the early modern and the modern, in terms of state power and influence, means that early modern society has little to say about modern legal centrism. Proving that early modern England was pluralistic doesn’t offer much of a political defence of pluralistic societies, or community law, or anything else. Yet, given that early modern and medieval Europe have been held by anthropologists as legally pluralistic societies, it is strange that few historians are engaging with them as such. Stranger still is that very few legal historians have written a history of law as anything but the development of doctrine and institution. This history is part of a centrist ideology that implicitly suggests that the development of the state has been

<sup>35</sup> Jon Ronson, *So You’ve Been Publicly Shamed* (London: Pan Macmillan, 2015).

the development of the law. The small political purpose of this essay is deepen the historical understanding that law has been situated in specific communities and to explore the tension between these communities and the state.

What did this early modern legal pluralism look like? The first constituent of this pluralism was a personal and institutional preference for arbitration rather than a recourse to the law courts. Early modern arbitration was both informal and formal, and could be backed by the government, guilds, merchants, the courts and the local community. The most substantial treatment of early modern arbitration has been Derek Roebuck's *The Golden Age of Arbitration*. Roebuck focuses on the public arbitration initiated by Elizabeth I and her privy council.<sup>36</sup> The council provided backing and enforcement for the arbitration that it initiated. If a party refused to abide by the arbitration the council could demand to see them, imprison them, or raise the threat of 'military action'.<sup>37</sup> Roebuck's thesis is limited to official arbitration and, thus, has little to say about the more pluralistic aspects of early modern arbitration: the arbitration Roebuck focuses on could be considered to fall under the conventional legal system, backed by the early modern state.

Even the privy council's advocacy for arbitration could seem informal. For instance, the council often advocated for 'some good agreement' or 'some good end' to be brought between the parties.<sup>38</sup> Arbitration in this case seems to have been used simply as a synonym for agreement. In 1560 a border court at Jedburgh advised the inhabitants of Teviotdale to resolve the 'great variances' between them 'by amicable composition and good arbitration'.<sup>39</sup> In 1572 Henry Killigrew wrote to Sir Thomas Smith that he had advised the opposing parties in the Scottish Marian civil war 'to think of some arbitration in time', for the ending of the war and their disputes more generally.<sup>40</sup> In these cases, arbitration was simply understood as an advisable form of action that was less contentious than litigating or punishing a crime. Even these formalised accounts of arbitration were linked to the more informal bonds of friendship. In a dispute between Robert Charteris and Agnes Maxell, Charteris proposed that they might 'accept the arbitration of mutually agreed friends'.<sup>41</sup>

<sup>36</sup> Derek Roebuck, *The Golden Age of Arbitration: Dispute Resolution Under Elizabeth I* (Oxford: Holo Books, 2015), 4, 23–42.

<sup>37</sup> *Ibid.*, 80–84.

<sup>38</sup> Acts of the Privy Council of England, 1542–June 1631: 1591, PC 2/18 f.246; 1571–75, PC 2/10 f.291; 1591, PC 2/18 f.246; 1591–2, PC 2/19 f.70; 1591–2, PC 2/19 f.224.

<sup>39</sup> Calendar of State Papers Foreign, Elizabeth, 1558–1589: 1560–1561., 445.

<sup>40</sup> Calendar of State Papers relating to Scotland and Mary, Queen of Scots, 1547–1603: 1571–1574, SP 52/23/2 f.227.

<sup>41</sup> State Papers Domestic: Supplementary. Scotland, 1546–1653, SP 46/129 f.204.



Arbitration by friends was a fairly common theme suggested in cases discussed by the Privy Council.<sup>42</sup> The accounts in the privy council are, therefore, both examples of formal government backed arbitration, but also evidence of how informal the process could be—even when directed by the state.

Most early modern arbitration cases were, however, instigated in a much less formal way. For instance, in 1573 Mary Pelson initiated a defamation suit against George Poyntell. Before the suit began, Poyntell went to Lord Wentworth ‘to seeke some redress’ in the case. Poyntell, Pelson and a variety of their neighbours appeared before Wentworth and rehearsed the details of the case. Wentworth was unconvinced that the case was anything more than a rather trivial dispute between neighbours and told the assembled crowd: ‘gett the home and lett this matter be taken up by your neighbours’.<sup>43</sup> Poyntell appealed to Wentworth on the basis of his authority as a Lord, instituting the process of informal arbitration with Wentworth as the arbitrator. Wentworth’s reply made clear that he thought this case would be best to be resolved without his help—that it should be taken up and mediated by communal, neighbourhood authority rather than through the law courts or himself.

The vast majority of cases of arbitration in the court records are even more informal than this appeal to Wentworth. A representative example was when, in January 1566, Mr. Thomas Lucas and one ‘Mr. Walgrave’ agreed to ‘arbytrate’ a case between Nicholas Clare and Elizabeth Rose. They met with their neighbours at the King’s Head in Colchester, came to an agreement, wrote it down and sealed it. A year and a half later, the case was put before the church court in London.<sup>44</sup> The initial arbitration between Clare and Rose seems to have been a simple agreement in front of their neighbours, using the communal authority of the neighbourhood to bind the agreement. The King’s Head, in this case, became the setting for a public statement between Clare and Rose regarding their dispute and the arbitration of it.

As with the cases taken from the privy council, the animus behind this kind of informal arbitration was the need for agreement and an end to variance and argument. This is made clear by one case from 1609. Wiliam Pease, the vicar of Bursted (Essex), deposed before the church courts about a series of disputes between Mary and George Underwood and their neighbours. The Underwood’s, he claimed, had slandered a variety of their neighbours and ‘dissencion hath growne amongst [the] neighbours’. Because of a variety of complaints against Mary, Pease attempted to

<sup>42</sup> Calendar of State Papers, Domestic Series, of the reign of Charles I: Addenda 1625–1649, SP 16/537 f.15; 1625–36, SP 63/250 f.243; Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII: 1537, SP 1/118 f.110.

<sup>43</sup> 1573, 179R–V.

<sup>44</sup> LMA, DL/C/0210, 32R–33R, 35R–V.

'persuade the said Mary Underwood to meete with her neiighbours before this depoennt that hee might use meanes to reconcile them'. Pease similarly met with George to ask him about the 'charitie' he bore his neighbours. Determining that neither Mary nor George could be persuaded to come to terms with their neighbours, Pease stopped them from taking communion in the parish church.<sup>45</sup> Pease was acting—in his role as vicar—as a type of arbitrator. He was not acting, however, because the law compelled him, but rather his stated goal was to reconcile the members of his parish and bring a halt to the dissension there. These cases of informal arbitration suggest the importance of different types of neighbourly authority in early modern arbitration. Vicars, neighbours, Lords had a quasi-legal duty in bringing members of the parish to agreement, *before* the neighbours took their grievances to the state.

The state relied on this kind of local arbitration to keep peace within the parishes, a process it was incredibly invested in. The early modern state lacked a paid bureaucracy or a standing army so the ability to project its authority—in the Weberian sense—was limited. The state therefore relied on the cooperation of individuals acting within their own communities. This cooperation went beyond the process of arbitration.

In 1567 Elizabeth Buter described a neighbourhood altercation with William Locky. Locky, a resident of Shoreditch, was known to beat his wife, which Elizabeth and her husband, Vincent, took him to task for, saying that he should do 'to others good and well'.<sup>46</sup> At some point, however, the constable of Shoreditch became interested in Locky's behaviour and:

[he] brought worde to this deponente [Elizabeth Buter] that the sayde Lockye kept a wenche in his seller where uppon this [deponent's] husbande, the constable and others wente to the sayd Lockye's house and serched the seller wheare they founde a cusshon whereuppon the sayd wenche hadd sytt but she was gone and conveyed a waye before they came but they found there beinge in lente tyme a turkey cock pye with other chew which he the said Lockye hadd parcyled for his minion but the next daye it fortunod so that the sayd wench came againe to the sayd Lockye's house for certyn money which the sayd Lockye dyd owe her and the sayde Lockye sayde to her awaye hoore awaye if thou be taken here thou wilt be punisshed as this deponente

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<sup>45</sup> 1609, 55V–56R.

<sup>46</sup> LMA, DL/C/0210, 60R.



[Buter] then standinge in the streate and seeing them together talkinge and ymedyatlie the constable and others understandinge that she was there went thither and apprehended her and after her apprehensyon they examined her which sayde wenche dyd openlye confesse that the sayde Lockye hadd kept her in a seller in his house iii dayes and nightes duringe which tyme he hadd his pleasure of her dyvers tymes and afterwardes they comitted her to a prison and punished her.<sup>47</sup>

Locky's actions elicited a whole spectrum of legal and legal-adjacent reactions. First, Vincent tried to advise him on his treatment of his wife and his own morality. Then the state became involved via its representative, the constable of Shoreditch. The constable did not work alone. Buter's testimony is vague as to who was involved in searching of Locky's cellar, naming only her husband and the constable of Shoreditch. Another deponent, Margaret Woodrose, stated that she and her husband were also there at the time of the searching.<sup>48</sup> Neither of the deponents mention the searchers holding any particular office, other than the constable of Shoreditch. It seems, then, that those who went looking for Lucky's 'wench' were a group of Shoreditch locals—presumably brought together for the purpose of harassing Locky. Buter's statement that she was standing in the street and 'fortuned' to see Locky the next day is slippery. The parish of St. Leonards (Shoreditch) is not very big, and it is possible that Buter happened to be passing by and made this lucky discovery. It is also possible that she set herself up outside Locky's house on the hope of catching him in the act. In any case, it seems that she had no difficulty 'ymedyatlie' calling the 'constable and others'. Before long the good people of Shoreditch had succeeded in committing the 'hoore' to prison and punishing her.

One of the more interesting glosses of Buter's testimony is that we are not told who accompanied the constable. 'The constable and others' came to Locky's house search it. 'They' punished the 'hoore'. Either Buter or the notary thought it was unnecessary to commit to record the others who accompanied the constable in this instance. This crowd could have been some randomly assembled neighbours, the better sort of the parish, or parishioners who had a semi-official role in assisting the constable. Such examples are easy to find in the literature, and could exist on a semi-official basis. The 'hue and cry' was still sometimes used when spotting a theft or

<sup>47</sup> LMA, DL/C/0210, 60R–V.

<sup>48</sup> LMA, DL/C/0210, 61R.



felony, and provided a 'significant legal tool' for those without wealth or power.<sup>49</sup> Herrup has written about how, in the seventeenth century, criminal investigation was still thought of as 'private and communal', despite the state's formal control over the enforcement structure.<sup>50</sup> These values seem to be present in the communal investigation of Locky's behaviour. Perhaps because of this communal obligation, the identity of the crowd was either thought irrelevant or, more interestingly, self-evident. If the later is the case, this would suggest that Buter or the notary thought that at least the type of people accompanying the constable would need no explanation.

The Locky case illustrates the ways in which early modern people acted for state although not *with* the state. Early modern England was a society where the responsibility for maintaining order and policing the people was diffused amongst the locale.<sup>51</sup> Locky and Buter's case is an unusually explicit example of this type of practice. More commonly, the individual parishes that made up early modern England were able to run themselves through a mixture of local and ecclesiastical authorities, neighbourly pressure and custom. The importance of custom has been highlighted throughout the historiography, but the legal component of custom is often under-emphasised. The prevalence of customary behaviours within the parish

<sup>49</sup> Samantha Sagui, "The hue and cry in medieval English towns," *Journal Historical Research* 87, no. 236 (2013): 186; A. R. DeWindt and E. B. DeWindt, *Ramsey: The Lives of an English Fenland Town, 1200–1600* (Washington, D.C.: Catholic University of America Press, 2006), 73–76; Emese Bálint, "Mechanisms of the Hue and Cry in Kolozsvár in the Second Half of the Sixteenth Century," in *Cultural History of Early Modern European Streets*, ed. R. Laitinen and T. T. V. Cohen (Boston: Brill, 2009), 39–61.

<sup>50</sup> Cynthia Herrup, "New Shoes and Mutton Pies: Investigative Responses to Theft in Seventeenth-Century East Sussex," *The Historical Journal* 27, no. 4 (1984): 829.

<sup>51</sup> Susan Amussen, *An Ordered Society: Gender and Class in Early Modern England* (New York: Columbia University Press, 1994); Mike Braddick and John Walter, "Grids of Power: Order, Hierarchy and Subordination in Early Modern England," in *Negotiating Power in Early Modern England*, ed. Mike Braddick and John Walter (Cambridge: Cambridge University Press, 2001), 1–43; David Underdown, "The Taming of the Scold: the enforcement of patriarchal authority in early modern England," in *Order and Disorder in Early Modern England*, ed. Anthony Fletcher and John Stevenson (Cambridge: Cambridge University Press, 1987), 116–136; Keith Wrightson, "Two Concepts of Order: Justices, Constables and Jurymen in Seventeenth-Century England," in *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries*, ed. John Brewer and John Styles (London, 1980), 21–46.

meant that early modern parishes could, at least theoretically, govern themselves with little help from the state or its law.

Of course, early modern people were not divorced from the law. The majority of archival material used in this article are taken from the law courts. Historians' have used the term 'law-mindedness' to describe early modern people's constant and creative interaction with the law in this period.<sup>52</sup> Law-mindedness describes the everyday awareness and understanding of the law amongst early modern people, and their willingness to use it. Law-mindedness has, in fact, been said to be a fundamental characteristic of early modern England.<sup>53</sup> Early modern people understood how the law could be used for them, and would often sue each other in multiple courts to guarantee a favourable outcome. Despite these law-minded attitudes, it is frequently commented on that recourse to the law was actually a last resort option for early modern Englishers.

The early modern idea of law mindedness has much in common with more legally-rooted concepts. For example, Mnookin and Kornhauser's metaphor of the 'shadow of the law'. Mnookin and Kornhauser argue that private negotiation takes place in the law's 'shadow'—that disputants are aware of the law and that they would rarely settle a private dispute for a result less favourable than one they may gain by resorting to the law.<sup>54</sup> Mnookin and Kornhauser go further, suggesting that divorce law ends up:

'providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.'<sup>55</sup> That is, the influence of the law not only effects the result of private dispute resolution but also the process by which it is conducted.<sup>56</sup>

<sup>52</sup> Steve Hindle, *The State and Social Change in Early Modern England, 1550–1640* (Basingstoke: Palgrave Macmillan UK, 2000), 87–93; Christopher Brooks, "A Law-Abiding and Litigious Society," in *The Oxford Illustrated History of Tudor and Stuart Britain*, ed. John Morrill (Oxford: Oxford University Press, 1996), 143.

<sup>53</sup> James Sharpe, "The People and the Law," in *Popular Culture in Seventeenth Century England*, ed. Barry Reay (London: Croom Helm, 1985), 245.

<sup>54</sup> Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *The Yale Law Journal* 88, no. 5 (1979): 950–997.

<sup>55</sup> *Ibid.*, 950.

<sup>56</sup> See also Stuart Birks, "Why the shadow of the law is important for economists," *New Zealand Economic Papers* 46, no. 1 (2012): 79–90; Robert Cooter, Stephen Marks, and Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior," *Journal of Legal Studies*, no. 11 (1982): 225–251; Herbert Jacob, "The Elusive Shadow of the Law," *Law and Society Review* 26, no. 3 (1992): 565–590.

Mnookin and Kornhauser's concept was developed in the specific context of twenty-first century, American divorce settlements. It does, however, help clarify some aspects of early modern extra-legal behaviour that the concept of law mindedness does not. First, is the focus on the reasons why individuals might strategically litigate. After all, there was no guarantee that any litigation in early modern England would achieve a favourable result. Thus, as Kelly writes about Roman Egypt, the threat of the law often forms part of negotiation and colours the way in which disputants related to each other.<sup>57</sup> Second, the 'shadow of the law' implies the centrality of the law but does not specify any type of behaviour (such as arbitration), and therefore provides a good way to talk about diverse sets of behaviour that all relate to the law. One action that early modern people often undertook, for example, was voicing the threat of law. In slander disputes, people resorted to asking their neighbours to 'bear witness' to the words spoken.<sup>58</sup> Or, in a similar vein they would ask their slanderers to 'stand by' or repeat their words publicly.<sup>59</sup> Such a public declaration amounted, essentially, to a threat of litigation. By having spectators declare themselves, early modern individuals publicly asserted that they had enough witnesses (two in the case of slander disputes) to take the case to a court. The threat of law was, in fact, present as soon as early modern people fell to 'angry words'.

Finally, Mnookin and Kornhauser make clear that the similarities between legal and extra-legal methods could be as much about process as decision. This seems to be particularly important in early modern England. Take, for example, this unusually literal case from the Durham Consistory Court:

that about three yeares agoe ... this examine [Robert Cooper] was intreated by Margaret Bullock to be a mediator for her in a cause betwixt her and Percivell Kennleside, for that the said Percivell and she had referred the hearing and determining of that matter to this examine [Cooper] for her and to one James Crosbye ... they, this examine, and the said Margaret's brother came up to the pallace grene within this cittie and there sent for the said James Crosbie whoe being come and taking the hearing of the matter they did at length

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<sup>57</sup> Kelly, *Petitions, Litigation and Social Control in Roman Egypt*, 266

<sup>58</sup> .LMA, DL/C/0216 32V, 69V.

DDR/EJ/CCD/1/10B, 290R, 306V.

<sup>59</sup> LMA, DL/C/0210, 8V, 25V; DL/C/0211/001, 36V, 263R; DL/C/0216, 34R, 69V.



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order that he the said Percivell should paye unto her the said Margaret for in regard of the education of a childe.<sup>60</sup>

Cooper, Bullock and Crosby were quite literally in the shadow of the law – Palace Green being outside Durham Cathedral where the church court was held. They were in the shadow of the law, too, because Bullock ended up appealing to the same court when Kennleside stopped paying her. And they were in the shadow of the law because the process of arbitration described here seemed to provide a reasonable result, outside the law, for all parties (at least, until Kennleside stopped paying Bullock). Kennleside was let off on some of his more extravagant promises (that he would provide Bullock with a house in Durham or the country) and Bullock received some money for the maintenance of the child.<sup>61</sup> Early modern people had a particular awareness of the law's 'shadow' and integrated it into their strategies of arbitration and litigation.

The final, obvious, way in which early modern England can be considered a pluralistic society is through its colonial expansion in the seventeenth- and eighteenth- centuries. Colonisation has been central to the development of the theory of legal pluralism. The experience of early English colonial expansion offers, however, a counterpoint to some of this colonial writing. Unlike other colonial ventures, expansion into America did not produce a 'colonised' and 'colonisers' law. This is largely due to Britain's killing and forced displacement of native Americans. The British colonial enterprise created something like the fracturing of state-law in America, mostly having its genesis in the act of expansion rather than the competition of other concepts of law. Yet, the quintessential colonial processes of violent settlement and conquest were just as much a part of the seventeenth century as they were in the nineteenth. Not only as historical fact, but also in the realm of ideas. As was the understanding that changes in government and law would be fundamental to the colonial enterprise. Lauren Working has demonstrated, for instance, that young men at the Inns of Court were encouraged to think of an 'English polity' 'beyond the boundaries' of the British Isles. This English Polity often hinged on 'overseas projects that proposed to subdue "savages"'.<sup>62</sup>

Edmund S. Morgan has argued that slavery in colonial Virginia was rooted in ideas about labour and population control in England in the sixteenth and seventeenth centuries. He writes that Virginians had created an impressive way of

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<sup>60</sup> DDR/EJ/CCD/1/11, 173R–V.

<sup>61</sup> DDR/EJ/CCD/1/11, 138V–140R.

<sup>62</sup> Lauren Working, "LOCATING COLONIZATION AT THE JACOBAN INNS OF COURT," *The Historical Journal* 61, no. 1 (2018): 30, 49.

keeping men working by extending terms of serving, creating an artificial scarcity of land, and for handing out severe labour-based penalties for offences such as killing hogs. When Virginians wanted switched to using slave labour they didn't enslave anyone: 'they converted to slavery simply by buying slaves instead of servants'.<sup>63</sup> The process of settlement and expansion of empire created new ideas about law, society and politics.

Mary Sarah Bilder has coined the phrase 'transatlantic constitution' to talk about some of the changes in law during the colonial period. Bilder focuses on how law in the American colonies had some autonomy to diverge from English law, only as long as it was 'agreeable', 'near' and not 'repugnant' to English law.<sup>64</sup> The tension between autonomy and control is evident in some of the earliest documents dealing with American colonisation. In the 1609 Charter for Virginia, James I writes that each colony should have a council that

shall governe and order all matters and causes which shall arise, growe, or happen to or within the same severall Colonies, according to such lawes, ordinannces and instructions as shalbe in that behalfe, given and signed with our hande or signe manuell and passe under the Privie Seale of our realme of Englande.<sup>65</sup>

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On one hand, the colonies were given the power to govern themselves. On the other, even in a *private* colony such as Virginia, the law was to be directed from England, by the monarch or otherwise. Similarly, litigation was to be settled 'as near to the common laws of England and the equity thereof as may be'.<sup>66</sup> Litigation itself was under the jurisdiction of the Virginia company, but was expected to be directed by English law.

The legal situation in Virginia was complicated in other ways, too. Whilst, in theory, the law was meant to be guided by English practice, many of the defining

<sup>63</sup> Edmund S Morgan, "Slavery and Freedom: The American Paradox," *The Journal of American History* 59, no. 1 (1972): 5–29; Edmund S Morgan, *American Slavery, American Freedom* (New York: Norton, 1975), 292.

<sup>64</sup> Mary Sarah Bilder, *The Transatlantic Constitution* (Cambridge, MA: Harvard University Press, 2008).

<sup>65</sup> James I. *Second Virginia Charter* May 23, 1609.url: <http://vagenweb.org/hening/vol01-04.htm>.

<sup>66</sup> James I. *First Virginia Charter*. Apr, 1606. <http://vagenweb.org/hening/vol01-03.htm>.



features of English law did not exist in colonial Virginia—there was no Bishop, so there existed no ecclesiastical court; and there were no manors or local jurisdictions either. The features of these separate institutions were consolidated within the jurisdiction of the Virginian general courts.<sup>67</sup> The extent to which of English common law could be considered to exist in America was also up for debate. Blackstone wrote that because American plantations could be considered ‘ceded’ or ‘conquered’ territories ‘by right of conquest and driving out of the natives’, English common law should have no authority there.<sup>68</sup> Col. Landon Carter, commenting on this, wrote that Blackstone was essentially suggesting that the settlers could not be considered English subjects and thus ‘the conquerors are the conquered, and the drivers out of the natives are the very natives themselves’.<sup>69</sup>

Blackstone and Lander’s comments detail contrasting ideas about the place of the colonies in the English commonwealth—both legally and politically. Writing in 1752, James Abercromby detailed the tension between the colonial enterprise and the interests of state government. Colonies, he says, could be considered either with a ‘mercantile view’ or ‘thro the eyes of state’. It is not enough that the colonies had ‘birth from this kingdom’ because,, as they grow, ‘from such increase separate interests arise [through which] all maxims of government are guided’ Thus, the essential question of colonial government is how ‘to make natural and political ties between the mother country and these colonies’. Abercromby states that it is the ‘first principal’ of colonisation that the ‘colonies [be] subservient to the interests of the principal state’. In practice, however, ‘our colonies from their first establishment stand upon a kind of neer independency of government’. Moreover, the colonies themselves differ and stand on ‘different foundations of government and interest in trade’. It is, therefore, an extremely important and difficult task to establish ‘a general consistency by the laws of this kingdom in these governments and trades [Abercromby’s emphasis]’. Abercromby suggests that the benefits of American charter government is that it guards against the English crown’s ability to leave ‘the proprietors nothing but soil’, that is no legal or political power within the colonies themselves. The colonies must not be subject ‘too severe[ly]’ to the mother country’s law as this may ‘prevent the growth and hinder such infant colonies from coming to

<sup>67</sup> William Hamilton Bryson, “English Common Law in Virginia,” *Journal of Legal History* 6 (1985): 249–256.

<sup>68</sup> *Ibid.*, 250.

<sup>69</sup> *Ibid.*, 251.

maturity'. According to Abercromby a mixture of independence and interdependence in law, politics and trade is essential to colonial government.<sup>70</sup>

Abercromby treats the colonies as distinct governments within one principal state. This is shown more clearly in a diagram he creates to represent the different colonies (Figure 1). The colonies are separated into islands and continents, and each colony is given its own place as a separate government within these categories. Abercromby then goes on to detail the difference between corporation, royal and annex governments within the colonies and that, therefore, government must necessarily differ in each of these colonies. Moreover 'as they are no part of the realm of England [...] the ordinary process of law in this kingdom cannot take place in the plantations'. The colonial government must, therefore, have its own principals based on history, local particularities and trade.

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<sup>70</sup> James Abercromby, *An Examination Of the Acts of Parliament Relative To the Trade and the Government of our American Colonies* (1752), James Abercromby Papers. Huntington Library, San Marino, California.



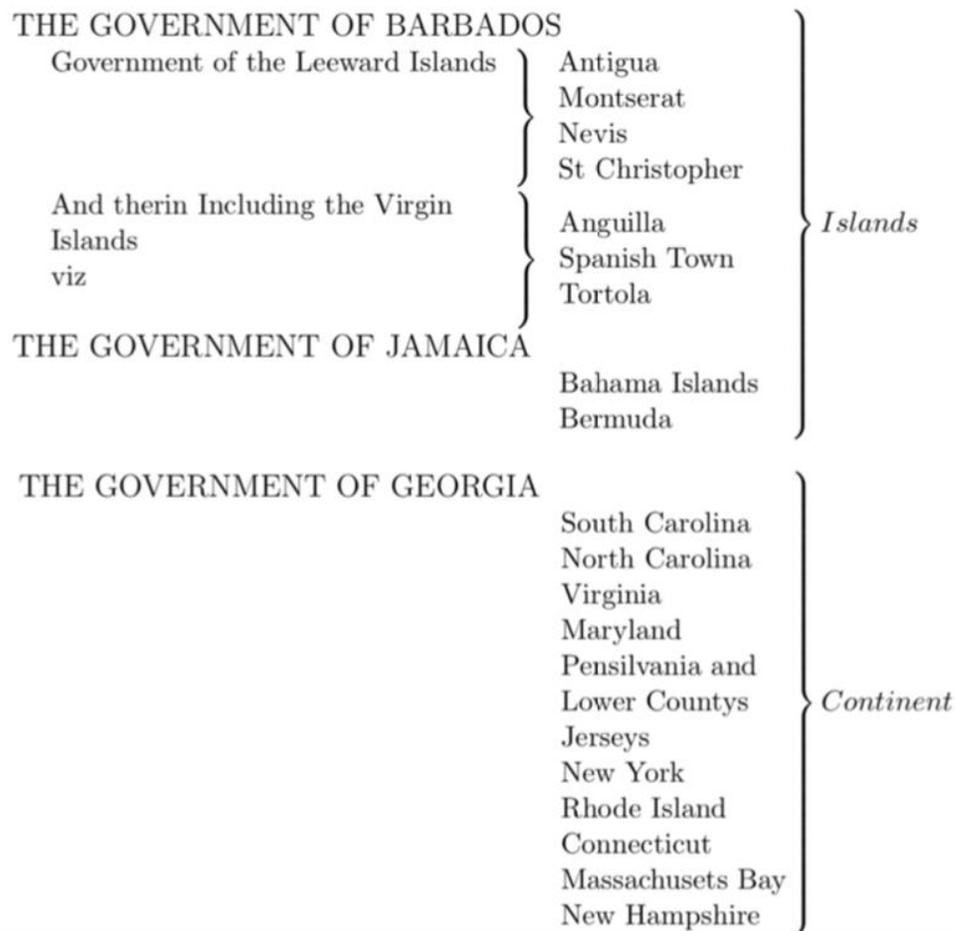


Figure 2: Abercromby's illustration of the American Colonies.

What Abercromby's text makes clear is the absolute tension between the power of a principal state and the autonomy of its colonies. Legally and politically the colonies cannot be the same as the England. And they cannot, therefore, be governed by the same laws and policies—the gulf between England and America is too wide. The process of settlement, the act of charter government and the parallel development of different colonies precludes uniformity in law and politics. English colonisation in the seventeenth century created a situation where the state and its laws fragmented. The American colonies had their own systems of law and governance, that ran parallel to those of England. Colonisation itself, then, created a situation where the English legal system became pluralistic. This was not pluralism in the sense of coloniser/colonised law more traditionally seen in the scholarship. Rather, this was a pluralism rooted in the act of colonisation, and the attempts of the English state to

project itself outside of the British Isles. As the state expanded, it found itself with multiple components all developing at once, and in different directions. Thus, when thinking of 'England' in the seventeenth and eighteenth centuries it is not enough to think of one unified polity. Historians need to consider the ways in which England's colonies were tied to, but necessarily different from, England in law, politics and society. We need to think through the pluralistic implications of English colonisation.

Colonisation changed not only the idea of law—as expressed in writings on jurisprudence—but also ordinary people's interaction with the law, on the ground. This is well illustrated by the ways in which arbitration changed over the colonial period. In the colonial period each American colony developed its own system of arbitration drawn from English law—often picking and choosing different ideas and emphases. It is thus difficult to talk about a single 'history of American arbitration'.<sup>71</sup> Early American arbitration took place against the backdrop of extreme 'localisation': where each state developed arbitration in manners defined by their politics, geography and society. Early Americans, also, adapted processes of arbitration taken not only from English common law, but from English customary law too.<sup>72</sup>

In Kentucky, for example, arbitration was presented as an answer to increasingly vicious disputes over land and title ownership. In New Jersey, arbitration developed through quaker ideas about dispute settlement, friendship and community. And in Massachusetts arbitration was most explicitly invoked in the context of anti-lawyer discourses.<sup>73</sup> The most important, general, study of early American arbitration is Bruce Mann's seminal article 'The Formalisation of Informal Law'. Mann suggests that arbitration began as a communal, neighbourly process during the early colonies but became increasingly legalistic as population growth, migration and land disputes fractured colonial political communities, and made it impossible to perceive arbitration as rooted in community any more.<sup>74</sup>

In Virginia, arbitration developed against a backdrop of smaller communities and disputes about land and debt. Susie M. Ames describes 1630s Virginia as having a sort of 'sociological jurisprudence', where courts attempted to create solutions for the problems of frontier life.<sup>75</sup> Many English statutes and penalties were not applicable in

<sup>71</sup> Carli N Conklin, "A Variety of State-Level Procedures, Practices and Policies: Arbitration in Early America," *Journal of Dispute Resolution*, 2016, 56.

<sup>72</sup> *Ibid.*, 64.

<sup>73</sup> *Ibid.*

<sup>74</sup> Bruce H Mann, "The Formalisation of Informal Law: Arbitration before the American Revolution," *N.Y.U. Law Review* 59 (1984): 443.

<sup>75</sup> Susie M. Ames, "Introduction," in *County Court Records of Accomack-Northampton, Virginia, 1632–40*, ed. Susie M. Ames (Washington, D.C.: American Historical Association, 1954), xl.



the frontier, so the courts had considerable leeway and an expansive role in society. Additionally, colonisers shared a set of ‘common denominators’ which included an interest in land and a tendency to be in debt on both sides of the Atlantic. Out of this series of concerns a new, particularly Virginian, type of arbitration emerged. The ability to arbitrate was, in Virginian society, quite expansive. In 1624, for example, the General Court of Virginia gave Captain Epps the authority to administer an oath of anyone who felt able to decide ‘any small cause [...] by way of compromise and saving the charge and trouble of sending up witnesses hither’.<sup>76</sup> Arbitrators in Virginia often ended up serving as appraisers of land or property—reflecting their importance in Virginian society. And in the case of debt, creditors often had an ‘agent’ to carry out their business for them. This agent later came to be known as an attorney.<sup>77</sup> In the case of Virginia, mediated law, then, was incredibly important—particularly in relation to cases involving land and debt.

Colonisation, as a process, changed English people’s theoretical understanding of the law and the ways in which the colonisers acted, legally. This is not necessarily surprising, although it is worth reflecting on how these experiences of colonisation changed early modern England, as a pluralistic society. Instead of creating a strong administrative colonial state that acted to impose the colonisers’ law, the British experience in America represented a fracturing of the English state. Those involved with the colonising process recognised the inability of the state to govern the colonies in the same way it had in England. In practice, much was left to the (largely) men settling different American colonies creating, in essence, a set of diffuse, competing conceptions of law within English and colonial society.

## CONCLUSION

Early modern English society was legally-pluralistic in several ways. Early modern people showed a preference for arbitration, within their own parishes, as a way to avoid the law courts and more generally appeals to the state. Early modern people, like other individuals from other societies studied by pluralists, expressed this preference by suggesting that communitarian legal processes were less disruptive than the law provided by the state. For early modern people, this preference was often expressed as a desire for social quiet or friendship. State law was seen as distant and divisive; friends, vicars, and other local arbitrators were less so.

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<sup>76</sup> *Ibid.*, lvii.

<sup>77</sup> *Ibid.*, xliii.

Similarly, early modern England was pluralistic in its colonial ventures. Unlike other colonial societies studied by pluralists, however, this colonial pluralism was not a product of a colonisers and colonised law. Rather, the process of settlement, forced migration, and so on, created a distinctly pluralistic state in the context of global early modern Britain. The American colonies developed their own laws and ways of doing things. Nominally they were similar to their English counterparts, but in practice they varied from state to state, creating areas of law that could be quite unlike each other, and unlike England.

Finally, the early modern state could not exert its power in the complete Weberian sense. Instead it had to rely on the actions of people outside the state to assert its power within the parishes and local communities. This could be done in an official sense, relying on office-holders and vestrymen. Or, as often happened, this projection relied on the impetus of individuals with no official connection to the state—instead, the state trusted early modern people to act on its behalf, without acting with it in any conventional sense. Once again, this situation created a fragmented legal picture, one in which the unofficial application of law deviated from the official state-sanctioned legal practice.

Early modern England was pluralistic in particular ways, which often do not chime with the general picture of pluralism that appears in the scholarship. The early modern has not been systematically studied by pluralists, and this essay has tried to draw attention to the ways that this would be a profitable area of study. Studying the early modern period helps complete a history of legal pluralism. Early modern England also offers a way for pluralists to think profitably about a state-driven pluralism. In early modern England, the state often encouraged individuals to act without it—the state itself preferred its members to resolve disputes without it, to govern themselves in the colonies, and to enforce order and quiet in their own parishes.

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