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Salamanders and Sons of God: Transatlantic Legal Culture and Colonial Rhode Island

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# Salamanders and Sons of God:
# Transatlantic Legal Culture and Colonial Rhode Island

A thesis presented

by

Mary Sarah Bilder

to

The Committee on Higher Degrees in the History of American Civilization

in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy
in the subject of
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Salamanders and Sons of God:
Transatlantic Legal Culture and Colonial Rhode Island

Mary Sarah Bilder
Advisers: David D. Hall, Morton J. Horwitz, Bernard Bailyn

This dissertation suggests a new interpretation of colonial legal history by arguing that colonial law was a transatlantic legal culture. It focuses on the appeal, early legal profession, publication of colonial statutes, equity, legal rights of women within property law, and religious establishments. Based on primary research in England and Rhode Island and adopting different methodologies from prosopography to microhistory, the study brings to life the litigants and lawyers who made the transatlantic legal empire work, particularly in the context of numerous appeals to the Privy Council and so-called reception statutes.

Colonial legal culture has traditionally been understood as either a mere imitation of English legal culture or a wholly local product. This study demonstrates instead that it resulted from ongoing transatlantic negotiation and argument between dual governmental authorities. Transatlantic legal culture was anchored in a coherent jurisprudence stated in the charter: the colony's laws could not be repugnant to the laws of England but could consider the local people and conditions. Yet transatlantic legal culture had to legitimize a range of answers to a central question: how strictly were colonial law and legal culture to follow English laws and legal developments?

Legally literate attorneys used English law books, commonplace books, and prior colonial cases to litigate within this legal culture and to act in many respects as a bar. The Assembly operated within the same jurisprudence and the reluctance to publish statutes reflected the concern that while publication established local authority it also revealed departures from English law. The specific boundaries of transatlantic legal culture were debated through the appeal to the Privy Council. In these equity-based appeals, litigants and lawyers shaped social disagreements into arguments over colonial law's permissible departure from English law. As an empire of land became one of commerce, enforcing the laws of England became a way for the Council to establish areas of uniformity. Departures were permitted in areas uniquely linked to local circumstance. Later constitutional developments such as federalism, and judicial review reflect an adaptation of this legal culture to a new, nontransatlantic nation.

Table of Contents

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## Introduction:
## Transatlantic Legal Culture

In 1753, the Reverend James MacSparran, plaintiff in colonial Rhode Island's most famous case, wrote that the colony had "a vast many law suits, more in one year, than the County of Derry has in twenty." To modern minds, the comparison is somewhat unusual; historians and legal historians tend to compare Rhode Island to some other North American colony, such as Massachusetts or Virginia, in an intellectual exercise that searches for a proto-national legal culture. MacSparran, however, saw Rhode Island's law and legal culture through a transatlantic lens. Although a recent immigrant to the colony, his way of thinking about colonial legal culture was widely shared by his neighbors, as well as in England. Law in Rhode Island was inextricably linked to law in Great Britain; legal developments in the colony were permeated with an awareness of legal developments on the other side of the Atlantic.[1]

Conventionally, students of the legal history of the English colonies in America have adopted one of three analytical extremes: they ignore English legal culture and the laws of England; they assert that a colony's legal culture was the same as England's and that colonists sought the benefit of the laws of England; or that it was substantially different and colonists tried to establish their own laws and customs. This dissertation attempts to move beyond all three approaches. Situated within an empire, colonial legal culture was transatlantic. In fact, it was the very complexity of the transatlantic legal relationship that gave colonial legal culture its peculiar and unique characteristics.

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[1] MacSparran noted it was "no good symptom." James MacSparran, America Dissected . . . (1753) reprinted in Wilkins Updike, A History of the Church in Narragansett (Boston: The Merrymount Press, 1907), 3:37-38.

The transatlantic legal relationship intertwined with the question of empire. Although England had been for many years merely an island, it had long conceptualized itself legally as an empire. English law had developed a jurisprudence that sought theoretically to reconcile the aspiration of imperial authority and the pragmatic reality of accepted local authorities. As England expanded outward as an empire, this legal culture followed. Colonial legal culture thus developed with a fundamental ambiguity over the scope of sovereignty. It recognized dual authority, that of the English government and the government of the colony, and accepted that authority might emanate from a single source or reside in diverse people and locales. A single question came to dominate this jurisprudence: How strictly did colonial law and legal culture need to follow the laws of England and the most recent English legal developments? What characterized colonial legal culture was not a specific answer to the question but the degree to which it legitimized a range of different answers. Ultimately, colonial legal culture was distinctive for the conversation and arguments it produced among participants on both sides of the Atlantic over authority, law, and legal culture.[2]

Merely to say that colonial legal culture was transatlantic states the obvious. Because Rhode Island was part of a growing imperial legal system, any legal culture arising in the colony had to be, to a certain degree, transatlantic. Nor, as a matter of history, is this subject a blank slate. Over a century ago, colonial historians studied the imperial relationship as it affected aspects of trade and foreign relations. Currently,

[2] An unpublished essay by Alan Ford, "Ireland and England in the Early Seventeenth Century: Power and Distance," was helpful in clarifying these points in a discussion about Ireland within the empire. Another excellent work on this subject is Richard R. Johnson, Adjustment to Empire: The New England Colonies, 1675-1715 (Newark: Rutgers University Press, 1981).

scholars of the "Atlantic world" return to the question of the empire with more theoretical conceptions of state, geography, and authority. Similarly, as a matter of legal history, the existence of a transatlantic empire and the nature of the relationship between colonial law and English law underlay old debates over common-law reception, conceptions of legislation or adjudication, charter revocation, and institutional development. Lastly, to point out that a legal empire such as the British colonial one creates a tension in authority is, to a large degree, a product of definition: the purpose of empire is to balance control from the center and discretion within the localities.[3]

Accordingly, my study does not supplant, but refines and redirects the emphasis of those histories. Although historians and legal historians have commonly touched on the transatlantic nature of the English empire, there has been no sustained attempt to describe the legal implications and significance of the colonial period's transatlantic relationship. Rather, as Stanley Katz pointed out nearly thirty years ago in his essay on "The Problem of a Colonial Legal History," American legal history has embraced no more than a vaguely bored tolerance of colonial legal history, a field to be "either ignored or caricatured as stable, unchanging, and in the end uninteresting." Social and cultural legal



[3] On the imperial school, see Charles Andrews, History of the Colonial Period and R.L. Schuyler, Parliament and the British Empire (New York, 1929). The modern understanding of "imperialism" makes it difficult to use the word in describing the cultural exchange between the colonies and England. Bernard Bailyn runs a seminar on the Atlantic world and his students have moved in this direction. See Susan Lindsey Lively, Going Home: Americans in Britain, 1740-1776, Ph.D. diss., Harvard University, 1996. For an excellent overview of the classic legal history debates, see the bibliography to Peter Hoffer's Law and People in Colonial America (rev. ed., Baltimore: John Hopkins Press, 1998). Jack P. Greene's work on empire and the colonial constitution explores these issues. See Jack P. Greene, Negotiated Authorities: Essays in Colonial Political and Constitutional History (Charlottesville: University Press of Virginia, 1994), in particular, chapters 1-4. For recent work by legal historians in the area, see Christine A. Desan, "Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York"; Daniel J. Hulsebosch, "*Imperia in Imperio*: The Multiple Constitutions of Empire in New York, 1750-1777"; and comments and responses in "Forum: Constitutions on Edge: Empire, State, and Legal Culture in Eighteenth-Century New York," 16 Law and History Review 257-401 (1998).

history investigations into gender, race, class, and sexuality in early America, all of which help to establish a starting point for present concerns, have been well received. But Katz's perception remains pertinent to institutional, doctrinal, and procedural developments.[4]

To a large degree, such boredom is linked to the fact that colonial legal history has had no interesting overarching narrative. As Katz suggests, most colonial legal history is based on "very crude assumptions about the general character of the colonial legal system." Colonial legal historians tend to categorize legal culture and developments either as innovative and therefore "colonial," or as derivative, imitative, imperial, and therefore "English." The standard story of colonial law is straightforward. In the seventeenth century, colonial law is original in that it was different from and less sophisticated than contemporary law in England. Beginning at the very end of the seventeenth century, colonial legal culture "anglicizes," that is, becomes more imperial and English. Then somehow, at mid-century, it becomes both more sophisticated and more original—just in time to abet the movement for independence from England. As this brief accounting suggests, colonial law is trapped between opposites: either it is derivative or it is the frontier thesis in action, albeit with a cosmopolitan twist.[5]

Given the obvious deficiencies, the hold of this story is curious. Most legal historians would have little difficulty demonstrating its problems. As a factual matter,

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[4] Stanley N. Katz, "The Problem of a Colonial Legal History" in Colonial America: Essays in Political and Social Development, 473 (1971).

[5] Id. The anglicizing argument comes from John Murrin's influential essay. John Murrin, The Bench and Bar of Eighteenth-Century Massachusetts, in Colonial America: Essays in Politics and Social Development, Stanley N. Katz ed. (Boston: Little, Brown, 1971), 415. The struggle to move beyond this dichotomy is also old. See, e.g., "After English Ways" in George Lee Haskins, Law and Authority in Early Massachusetts: A Study in Tradition and Design (New York: The MacMillan Co., 1960).

few colonial legal developments—procedures, substantive law, the legal profession, legal institutions, even legal culture—can be shown to be "colonial" in the first period and "anglicized" in the second, or vice-versa. As a theoretical matter, three assumptions underlie the framework, all of which are vulnerable to criticism and seem worth moving beyond.

First, the model presumes a static model of English law, one that pushes off from England in the early seventeenth century and never returns. The "laws of England" or the "rights of Englishmen" are interpreted as having always remained constant. This assumption appears even in Katz's otherwise critical essay when he declares that the study of "the transit of legal ideas and institutions from the old country to the new" is central to colonial legal history. In truth, the "old country" did not stay old; English law was not frozen in time but constantly changing. The late seventeenth and eighteenth centuries saw profound changes in English legal procedures, laws, and the legal profession. "Colonial" and "Anglicized" developments can usually both be found in England, in theory or in practice, as old law and new law. As this thesis shows, "new world" observers followed these changes with great contemporary interest, the result being that old and new law often coexisted.

Second, somewhere along the line, lawyers, legal scholars, and historians became obsessed with the common law and ignored statutory law so completely as almost to deny the latter's existence. Whether this turn was due to the failure of codification, an increasing distrust of legislatures, an effort to improve the stature of the judiciary, or changes in legal education is unclear. Whatever the reason, the narrow focus on the common law has had grave consequences for the colonial period. Although much of

colonial law developed through statutes, this body of evidence has been treated as less important and not studied systematically. Ironically, however, despite the bias in favor of case law, colonial legal history has tended to avoid any substantive legal analysis of case files, perhaps because of the inherent research difficulties. Hence, common law case development or case interpretation of statutes disappear. Seventeenth and eighteenth-century English and colonial law, however, was to a large degree statutory. To a practitioner, it was comprised of basic rules and definitions, applicable statutes, and explanatory cases. This thesis attempts to restore this interplay of statute and case law, and in doing so reveals a subtle conversation about political authority in the colony and England.

Third, the conventional model values that which contributes to our understanding of the Revolution and the path by which the colonists came to identify as "Americans." What the story prizes are the moments of proto-Americanism: the abandonment of primogeniture, the emergence of a law of slavery, the separation of legislation and adjudication. Colonial legal history rushes forward from Plymouth Rock and Jamestown toward foreordained revolution. The Revolution, however, was hardly a foregone conclusion and the "proto-Americans" saw themselves as equally English. In the following chapters, I attempt to return the colonists to a pre-Revolutionary mode of thought. In this world, disagreement over the content, extent, and application of English law was an expression of Englishness and had a long English pedigree.

Nonetheless, as even my criticism of these assumptions demonstrates, they retain persuasive power. The difficulty in moving decisively away from them will be apparent in the following chapters. Although I emphasize that colonial law is transatlantic, I often

distinguish an "English" practice—one that had become the contemporary norm in England—with another practice which still had resonance in the colonies. The latter practice was often English in origin or suggested by English reformers, but it is hard not to characterize it as a "Rhode Island" one. Similarly, although an attempt to counter teleological-driven approaches to colonial legal history is implicit in the following six chapters, a brief conclusion on the years immediately preceding and following the Revolution ties transatlantic legal culture to more modern "American" legal culture.

In addition to rethinking the assumptions that underlie colonial American legal history, the thesis also tries to restore interest in an explicit example of transatlantic legal culture, the appeals to the Privy Council or, as contemporaries referred to it, the King in Council. Joseph Smith's extraordinary tome, Appeals to the Privy Council from the American Plantations, looms as an intimidating presence over any such attempt to discuss the appeals. Prior to Smith's volume, a number of historians—John Franklin Jameson, Paul L. Ford, the young Arthur Schlesinger, Harold Hazeltine, Charles Andrews—thought that the appeals were important in understanding colonial legal culture. Smith, however, was the only one to study the appeals systematically. Having worked through many of the materials myself, I am in awe of the quantity and depth of Smith's research and of his effort to address comprehensively the subject. Yet Smith's prodigious research eventually became subservient to his belief that the Privy Council was a "judicial body" and hence that the only interesting questions were whether it could be classified "adjudicative" or "legislative" and could be considered an example of early judicial review. The layers of technical detail and the general complexity of Smith's writing style, combined with an equally obscure opening essay by his advisor, Julius Goebel, had the

predictable effect of ending further inquiry into the nature of transatlantic legal culture and the significance of appeals.[6]

The failure of subsequent scholars to address Smith's work and the appeals to the Privy Council has been unfortunate. As a historical matter, Smith's work left extensive areas open for research. While his work on the Privy Council side of the appeals was almost exhaustive in its use of the Privy Council Registers (the record of judgments and appearances in England), he did far less to investigate case records and contexts on the colonial side. His approach was equivalent to trying to understand the last two centuries of the Supreme Court by analyzing only the docket and a few cases and briefs. Unsurprisingly, Smith's book was overwhelmingly procedural. As he acknowledged, the sources he used "are most fruitful on matters of administration and procedure; they have much less to yield in respect of substantive law." Because Smith's research rarely included the colonial cases prior to the time they were appealed to the Privy Council, he usually did not know what the appealed cases were about; why they had been appealed to England; or why some were prosecuted and others dismissed. His work attempted to lay out what one might call the Article III jurisdictional equivalent for the Privy Council, but it told one very little about what the transatlantic law substantively looked like.[7]



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[6] Joseph H. Smith, Appeals to the Privy Council from the American Plantations (New York: Columbia University Press, 1950; reprint ed., Octagon Books, Inc., 1965), v; see also "Administrative Control of the Courts of the American Plantations," 61 Columbia Law Review 1210-53 (1961). The best work on the colonial transatlantic legal relationship remains the first chapter of Elizabeth Gaspar Brown's British Statues in American Law, 1776-1836 (Ann Arbor: The University of Michigan Law School, 1964), 1-22; see also Brown, "British Statutes in the Emergent Nations of North American: 1606-1949," 7 American Journal of Legal History 95-135 (1963).

[7] Smith, Appeals, 464.

Only two of Smith's chapters attempted to address substantive law and his interest was limited to categorizing the types of cases heard. One chapter, on the "extension of English law," recognized that the Privy Council looked at questions involving statutes: some expressly applying to the plantations; others made before settlement; others made in affirmance of the common law; others involving admiralty jurisdiction; and finally those made in the colonies themselves. The second chapter, on "judicial and legislative review," recognized that many of the cases involved the relationship between colonial law and English law. Smith distinguished between repugancy and departures, between statutes "in affirmance of the common law" and statutes applying to the plantations, and between disallowance and statutes void ab initio. But although Smith's categories remain useful, his discussion is almost impenetrable. Moreover, his distinction become captive to his struggle to made the few well-known appeals fit into a modern conception of judicial review with its idea of separation of powers, voidness, and a defined, fundamental law.[8]

Puzzling over his book, I have come to believe that Smith knew he was onto something, but ultimately was not sure what to make of the appeals. He recognized that they had some bearing on judicial review (a matter of great interest to legal scholars), but he could not manage to line the cases and statutes up in an analysis that would allow a clear line to be drawn from the colonial to the post-colonial world. Smith as much as acknowledged this difficulty when he wrote that his "conclusions respecting those contemporary constitutional ideas must consequently be tentative, for they are belated

[8] Id., 577. His thesis was that the cases "clearly established that colonial legislation was subject to judicial review," although he acknowledged that "not all the implications of the doctrine were understood" at the time.

rationalization, and even although based on the practice may not correctly reflect the eighteenth century opinion."[9]

One must have great sympathy for Smith's dilemma on this point. The phantom of judicial review haunts any study of the appeals because, as this thesis' conclusion shows, the appeals do have a connection to judicial review. The possibility of appeal to the Privy Council meant that, at a practical and theoretical level, the Privy Council could overturn a certain statute or a certain result of litigation. But lawyers in the eighteenth century were not focused on why or when or on what basis, the Privy Council exercised this power. Although the theory of review—no repugnancies to English law—was simple on its face, legal participants understood that any particular case involved unresolved arguments over what was repugnancy, what constituted English law, and whether or not something was repugnant or represented a permissible departure for local circumstances. Rather than see this lack of clarity as a product of modern misunderstanding or a failure of logic on the part of the eighteenth-century world, I believe it was essential to the functioning of the empire. If modern American law has longed for theoretical, logical, and conceptual consistency over doctrines and institutions, transatlantic law of the colonial period valued a certain pragmatism and flexibility. More crucial to the transatlantic legal structure than any static set of rules was the ongoing conversation created over these questions.

In addition to problems presented by the general assumptions of colonial legal history and Smith's tome, the primary materials have stood as a barrier to constructing a picture of transatlantic law. In the 1960s, Elizabeth Gaspar Brown wrote that the "only

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[9] Id., 523.

means to determine precisely" how English law was used in the colonies was a "paper by paper and page by page examination of the original court records." She pointed out that any such examination was complicated by the lack of records and the "often dusty and ill-kept files and volumes . . . [with] the added problem of crabbed and difficult handwriting." Almost forty years later, the situation has not changed. Jack P. Greene recently noted, "the empirical research necessary . . . to show fully the precise extent and character of the transfer of English law to the colonies remains to be done."[10] This thesis offers a vision of transatlantic legal culture drawn from court records and primary document regarding one colony, with the hope that future efforts in other colonies will help to draw more precisely the dimensions and character of transatlantic legal culture.

With these concerns in mind, in the following chapters, I suggest a framework for discussing colonial legal culture. Colonial legal culture was characterized by a conversation within the colony and with London officials about appropriate legal procedures, culture, developments, and decisions. I have chosen not to use the vocabulary of "center and periphery" to discuss this conversation. While I recognize the advantages of the model as an analytical tool, I am not persuaded that the participants either in London or Rhode Island experienced their world in that way.[11] Although the idea of a "conversation" is currently used in cultural history as a metaphor, I employ it here as an accurate description. Rhode Island and London officials *both* recognized the presence of dual legal authorities. English law *and* Rhode Island law had claims to apply to,

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[10] Brown, British Statutes, 19-20; Greene, "Colonial Origins of Constitutionalism," in Negotiated Authorities, 35.

[11] The colonial historian most identified with the center and periphery language is probably Jack Greene. The structure is also influential in Tudor-Stuart English town and corporation studies.

determine, or decide particular issues. Colonial law was not the product of a unitary English authority to be followed or rebelled against, but a dialectic conversation between colonial legal participants and English officials, and among colonial legal participants themselves. Through books, appeals, replies, reversals, affirmances, and visits to England and the colonies, participants spoke to each other about the boundaries and dimensions of transatlantic legal culture. In fact, as the following chapters will reveal, Rhode Islanders were remarkably self-conscious of how one argued within and took advantage of transatlantic legal culture.

The transatlantic nature of the relationship provided legal options: older English law, newer English law, proposed reforms to English law, another colony's law, or some wholly unique Rhode Island law. Law in Rhode Island bore a relationship to, and simultaneously existed in tension with, developments in England. The transatlantic nature of the relationship, however, provided space in which to develop those options. Rhode Island lawyers, officials, and private parties were constantly aware of their law's position in the larger English legal empire. As a number of historians of empire point out, the colonists had the advantage of being, literally, an ocean away. Divergences from English culture seemed less threatening than they might have had they arisen at home. They could be talked about, explained as misunderstandings or confusions, justified by conditions of people, place, and history different from mainland England. Distance, however, was also a disadvantage. Whereas the English in England were assured that legal developments applied to them, for the English in America, insecurities abounded.

Beyond providing options and the opportunity to develop them, the transatlantic nature of colonial law authorized legitimate choice. The physical reality of the Atlantic

and the history of the creation of England and Great Britain meant that the hierarchical submission of colonies to the crown was balanced by an authorization in charters that each colony be governed in the first instance by resident authorities who recognized specific local needs and circumstances. In essence, equity and history required that there be dual authorities. Colonial and English officials sought to avoid situations which placed these dual authorities in unreconcilable conflict. The Privy Council was careful to try to preserve recognition of its ultimate authority, while acknowledging the reality of colonial governance; the colonial government was careful to try to preserve its ability to self-govern, while acknowledging the Council's theoretical hierarchical authority.

Over the two centuries of imperial rule, the pressure points of the relationship changed. Every aspect of English and colonial legal culture—the right to appeal to the legislature and Privy Council, the nature of the legal profession, the publication of colonial laws, the jurisdiction of equity courts, and laws about property, commerce, religion, and currency—became subjects of this conversation. While the demands of empire required compliance with London in one area, other areas remained securely under local authority. Authority was always persuasive, flexible, and dialectic.

Recognizing colonial legal culture as transatlantic allows us to see the vast array of choices available to colonists in the strategies and negotiations between them and London officials. At the most fundamental level, it restores to the participants in colonial legal culture a sense of intelligence and dignity: they become genuine architects of their world for they understand the available choices. It also allows us to see change occurring on both sides of the Atlantic and restores to the colonists their own belief that they were part of a larger evolving whole. And it allows us to embrace the diversity of colonial law