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Article

The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture

Mary Sarah Bilder*

Each generation of lawyers makes its own contribution to the architecture of the law.

— Anthony T. Kronman¹

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1. ANTHONY T. KRONMAN, THE LOST LAWYERS: FAILING IDEALS OF THE LEGAL PROFESSION 380 (1993).

I. INTRODUCTION: THE LOST LAWYERS

Paul C. Kurtz wrote well, spoke and argued eloquently, wore a nice suit, and carried a briefcase.² As an observer noted, “He looked 100 percent like a lawyer and conducted himself as a lawyer.”³ Being an actual practitioner of the law, however, does not make one a lawyer in modern America. Lawyer status is conferred only upon those who satisfy formal definitions based on professional education and bar admission. Not surprisingly, on July 7, 1998, Mr. Kurtz was arrested for passing himself off as a lawyer.⁴

Three hundred years earlier, an English lord similarly refused to confer lawyer status on the legal practitioners of Rhode Island. In September 1699, Richard Coote, the Earl of Bellomont, arrived in Rhode Island to investigate the colony.⁵ Bellomont’s Rhode Island visit did not go particularly well. He found little to praise about the colony. In particular, he condemned the men who practiced law. Bellomont disparaged the General Attorney (the Attorney General), John Pocock, as “a poor illiterate mechanic, very ignorant, on whom they rely for his opinion and knowledge of the law.”⁶ He criticized the former General Attorney, John Greene, as “very corrupt” and “brutish,” with “no principles in religion.”⁷ He added that those men who served as the Governor and Assistants also knew “very little law.”⁸ Bellomont was horrified that such legally illiterate men were elected year after year while “several gentlemen most sufficient for estate, best capacitated and disposed for his Majesty’s service” were “neglected” and “maligned.”⁹

This Article takes issue with Bellomont’s judgment—and with the conventional vision of the seventeenth-century colonial legal world as “Law without Lawyers.”¹⁰ Adding to a growing number of

2. See Arlo Wagner, “*Lawyer*” Had Been Sought Here; Ex-inmates Filed to Get Fees Back, WASH. TIMES, July 18, 1998, at A9; Benjamin Weiser, *U.S. Says a Convincing “Lawyer” Lacked One Thing: His License*, N.Y. TIMES, July 15, 1998, at A1.

3. Wagner, *supra* note 2, at A9 (quoting lawyer H. Elliott Wales). Wales also stated, “If all lawyers acted as well and as competently in proceedings as he did, we would have a great bar.” Weiser, *supra* note 2, at A1.

4. See Wagner, *supra* note 2, at A9.

5. For more on Bellomont (1636-1701), including his representation of the Borough of Dwtwich, his penchant for Madeira wine, and his death from an attack of gout, see FREDERIC DE PEYSTER, *THE LIFE AND ADMINISTRATION OF RICHARD, EARL OF BELLOMONT* at ii, 6, 57 (New York, New York Historical Society 1879).

6. Report of the Earl of Bellomont, on the irregularities of Rhode Island, in 1 RECORDS OF THE COLONY OF RHODE ISLAND 386 (John Russell Bartlett ed., Providence, A.C. Greene and Bros. 1856-65) [hereinafter R.I. RECS.].

7. *Id.*

8. *Id.*

9. *Id.*

10. This is the title of the “Introductory” in CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 3-19 (1913). A similar title, perhaps more appropriately, describes Anglo-

accounts that seek to rethink the ways in which we understand and discuss early legal practice, this Article argues that legal practitioners were a constant—and powerful—element of early Rhode Island legal culture. Moreover, this Article suggests that these Rhode Island legal practitioners operated not in a colonial vacuum but as creative participants in a transatlantic legal culture.

In describing seventeenth-century colonial legal practice, a number of difficulties arise—there were no law schools or bar associations. How do we decide who counts as a lawyer? Once we decide who counts as a lawyer, can we figure out what these lawyers actually did? And, if we are able to figure out what they did, is it possible to begin to understand what they were thinking about the law?

Deciding who counts as a lawyer used to be easy. Traditionally, legal historians used contemporary formal definitions based on requirements such as being a professional¹¹ or possessing formal training.¹² Recent scholarship, however, has raised significant questions about the utility of these categories in discussing early lawyers and lawyering.¹³ As Daniel Coquillette notes, “conventional ideas of professionalism have blinded us” and we “have ignored the widespread role of “amateurs.””¹⁴ In eighteenth-century colonial

Norman England in the twelfth and thirteenth centuries as “a Land without Lawyers.” PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* at v (1992). Anton-Hermann Chroust’s two-volume account, *The Rise of the Legal Profession in America*, summarizes the legacy: There were no early colonial professional attorneys. Chroust states that real lawyers and institutional legal developments occurred with the appearance of “professionally trained and experienced lawyers (educated in England) who arrived in America toward the end of the seventeenth century and made their influence felt only in the course of the eighteenth century.” 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 6-7 (1965).

11. “Professional” almost always involves a nineteenth-century conception of a job: full-time, paid employment accompanied by a sense of identity that requires either organizational meetings or exclusions. For example, Chroust writes: “[A] class of professional—expert, skilled, and properly trained—lawyers cannot possibly flourish until something resembling a distinct and consistent body of laws, a distinct and consistent procedure, and a settled jurisdiction has been developed, including regular courts, manned and advised by trained and competent personnel.” 1 CHROUST, *supra* note 10, at 3.

12. “Properly” or “formally” trained almost always refers to experiences that can be seen as the precursor to the modern law school. A school or group environment (for example, the English Inns of Court) satisfies the requirement, as does any study or apprenticeship which includes the reading of legal texts with a theoretical bent. People lacking such training are dismissed as litigious lay participants—not true lawyers. Borrowing from Charles Warren’s *History of the American Bar*, Chroust comments, “It was the sharp trader or clever land speculator, the man of easy penmanship and clever volubility who, as a rule, ‘practiced law.’” *Id.* at 27. Cf. WARREN, *supra* note 10, at 5.

13. As Paul Brand notes, the “‘professional lawyer’ and a ‘legal profession’” are “notoriously slippery concepts.” BRAND, *supra* note 10, at vii. Brand suggests a fairly expansive definition of the professional lawyer: A “‘professional lawyer’ is someone recognized by others as having a special expertise in legal matters and who is willing to put that expertise at the disposal of others, who is paid for doing this and who spends a major part of his time in this professional activity.” *Id.*

14. Daniel R. Coquillette, *Introduction: The “Countenance of Authority,”* in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800* at xxi, xxv (Daniel R. Coquillette ed., 1984).

legal history, the formal categories have proven easier to abandon.¹⁵ In work on the seventeenth century, however, legal historians continue to struggle to reconcile research that shows substantial evidence of vibrant legal practitioner communities¹⁶ with the traditional belief that there were few lawyers.¹⁷ Although a growing number of scholars have begun to argue for the existence of seventeenth-century legal practitioners, their work has yet to make much of a dent in the conventional wisdom.¹⁸ One recent survey of

15. Eighteenth-century scholarship uses bar association participation or self-identification as “a lawyer” as proxies for lawyer status. See, e.g., Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in *LAW IN COLONIAL MASSACHUSETTS*, *supra* note 14, at 359; David H. Flaherty, *Criminal Practice in Provincial Massachusetts*, in *LAW IN COLONIAL MASSACHUSETTS*, *supra* note 14, at 191; Charles R. McKirdy, *Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession*, in *LAW IN COLONIAL MASSACHUSETTS*, *supra* note 14, at 313.

16. The most often cited evidence is the frequent appearance of the word “attorney” in early colonial court records. See WARREN, *supra* note 10, at 4. Legal historians have interpreted such evidence in a variety of ways. One approach insists that, even if there were “attorneys,” they do not really count because the seventeenth-century laymen “attorneys” were qualitatively different from the real attorneys of the eighteenth-century who had “legal education.” See *id.* at 107. Another explanation argues that these attorneys were actually only attorneys-in-fact: friends or mere stand-ins in the courtroom. For example, Cornelia Dayton states that in New Haven, in “seventeenth-century courtrooms the only attorneys present had been attorneys-in-fact, persons designated through the document of a power of attorney to appear in the stead of a litigant.” CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639-1789*, at 47-48 (1995). She notes that the designation “had been a common practice only among mariners and merchants whose occupations took them away for lengthy periods.” *Id.* at 48. Bruce Mann similarly describes that in Connecticut only after 1700 did litigants bring “attorneys-at-law” along with them who “were professional because they were paid a fee for offering their expertise and pleading the case before the bar.” BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 93-96* (1987). Describing the Delaware Valley, William Offutt notes that people chose individuals to represent them who had knowledge of the law gained from appearing in many cases or serving as court clerks. Yet he states that “[i]n the early years, friends appeared as attorneys for litigants much more often than did those with professional training.” WILLIAM OFFUTT, *OF “GOOD LAWS” AND “GOOD MEN”: LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680-1710*, at 119 (1995). In Virginia, although A.G. Roeber finds an entire list of “attorneys” practicing during this period, he concludes one paragraph later by noting that “the existence of an arguably able bar in late-seventeenth-century Virginia did not produce a stable and socially distinct class of attorneys which survived into the eighteenth century.” A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 53 (1981).

17. The appeal of the traditional belief seems to arise in part from an almost vague disapproval of lawyers. Comments to this effect abound. See, e.g., John Murrin, *The Bench and Bar of Eighteenth-Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 415, 417 (Stanley N. Katz ed., 1971) (“Puritans never allowed their reverence for law to betray them into respect for lawyers, men who profited by the distress of others and who found occupational reasons for encouraging disputes, and hence litigation.”). Or, “it was only natural” that Puritans and Quakers “should distrust lawyers”: those “who acted as lawyers or attorneys often were outright sharpers, spellbinders, and pettifoggers; and they frequently stirred litigation solely for the sake of collecting some exorbitant fees.” 1 CROUST, *supra* note 10, at 27.

18. Thomas Barnes describes Thomas Lechford, a famous early New England legal practitioner between 1638 and 1641, as the “first lawyer” in New England. Thomas G. Barnes, *Thomas Lechford and the Earliest Lawyering in Massachusetts, 1638-1641*, in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, *supra* note 14, at 3. Similarly, Barbara Black studies the Massachusetts career of Nathaniel Byfield, a lawyer at the turn of the seventeenth century.

American legal history states: “In the seventeenth century, there were few lawyers and their status was problematic.”¹⁹

I hope that this Article will help to convince others that if we can leave “behind all modern conceptions of what constitutes a profession,”²⁰ no dramatic shift occurred from a seventeenth-century world without lawyers to an eighteenth-century world with them. To this end, this Article challenges the traditional dichotomy of “lay” or “amateur” versus “professional.” In place of these descriptions, I suggest a functional description that privileges the skills of legal practitioners. I use the term “legal literacy” to describe such abilities. Legal literacy refers to the reading, writing, speaking, and thinking practices that relate to the conduct of litigation. Instead of forcing a binary decision of whether a legal practitioner is a lawyer or not, consideration of legal literacy allows us to identify and to place participants in the legal system along a spectrum of functional skills. Although this Article focuses on legal practitioners with fairly high levels of legal literacy, the concept provides a way to interpret and discuss the legal participation of numerous others—in particular, people who were disenfranchised from full participation in the political system.

Replacing the formal definition with a functional one underscores the importance of understanding what legal practitioners actually did. Legal literacy embeds a legal history of practitioners in the cultural practices in which they participated. The focus on legal literacy begins to resurrect the actual life of the legal practitioner. Not only does the functional focus reveal the daily activities of the practitioner, but it starts to suggest the ways in which practitioners manipulated and altered the legal system to their advantage. Legal literacy thus merges changes in formal legal procedures with functional legal practice.

Through careful research, the answers to “who were lawyers” and

See Barbara A. Black, *Nathaniel Byfield, 1653-1733*, in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, *supra* note 14, at 57.

19. KERMIT L. HALL, *THE MAGIC MIRROR* 22 (1989). Peter Hoffer’s survey acknowledges recent scholarship finding more lawyers, but his analysis continues to state that “[d]espite the flowering of the legal profession in England, the seventeenth-century colonists were wary of lawyers.” PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 45 (rev. ed. 1998). The pervasiveness of this interpretation may also derive from its pleasant trajectory. The seventeenth century confirms that the world would be better without lawyers destroying community by creating litigation. The eighteenth century proves, however, that professional lawyers foisted upon a country by imperialist English policies can redeem themselves by using their legal skills—not for litigation, but for fomenting revolution and writing constitutions. The narrative thus has it both ways: It self-righteously warns of the inherent evils of lawyers while celebrating their contributions to the construction of the country.

20. C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE “LOWER BRANCH” OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND* 12 (1986).

“what did a lawyer do” may become more accessible to the legal historian. A more difficult question remains: What did these lawyers think about the law? These legal practitioners did not write the legal discourses and commentaries of later eighteenth-century lawyers. They did not author long briefs to argue cases or opinions to determine them. What the practitioners left are remnants: book lists, copies of legal pleadings, brief letters of inquiry, obscure marginalia in the occasional book. Despite the limitations of these materials, they nevertheless help us learn what legal practitioners thought about the law.

To answer this question, this Article considers these materials as social and cultural artifacts. In making this turn, this project participates in a rapidly expanding area of cultural studies: the history of the book.²¹ Despite its seemingly archaic name, the history of the book is an interdisciplinary field embracing scholarship that acknowledges differences in the way information is transmitted: writtenness and orality; print and manuscript; book and broadsheet. But beyond recognizing the mere fact of different modes of transmission, this scholarship seeks to understand such modes as historically situated cultural practices. In particular, historians of the book focus on the possession of literacy or illiteracy, reading or writing abilities, the choice of print or manuscript, the transmission by written or oral medium, the self-presentation of the text, and the mode and moment of publication. Their interest lies in how structures of meaning and authority (both ambiguously and amorphously defined) are shaped, conveyed, reflected, and received by these different cultural practices.

This scholarship reminds us that books on book lists, a manuscript version of a colony’s laws, and letters and documents about a case can be understood as something more than ordinary physical objects containing stable sets of substantive ideas and ideologies.²² The

21. This description of history of the book is incomplete. My purpose here is not to write a review essay or to discuss the historiography of the field. I only want to sketch the broad outlines of the area. For the reader interested in the field as it relates to law, one might start with the work of M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND, 1066-1307* (2d ed. 1993); DAVID HALL, *CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK* (1996); WALTER ONG, *ORALITY AND LITERACY: THE TECHNOLOGY OF THE WORD* (1982); MICHAEL WARNER, *LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* (1990); Michael H. Hoeflich, *Legal History and the History of the Book*, 46 U. KAN. L. REV. 415 (1998). I am grateful to Alfred Brophy and John O’Keefe for indispensable conversations about this section.

22. Within the history of the book, scholars have been fascinated with questions of law, legal publishing, and legal authority. Legal historians, however, have been slower to be drawn to the questions and methodology of history of the book. This delay has not been for want of interest in the relationship between lawyers and legal literature. Legal historians have long been intrigued by such questions and have produced excellent interpretations of the historical development of legal literature, detailed descriptions of private and public law libraries, and

Rhode Island legal practitioners lived at a transitional moment in legal publishing. A century earlier few law books existed in English—even in England; a century later, law books and statutory materials were published on both sides of the Atlantic and were increasingly widely disseminated. This transition raises a number of questions. Why were the Rhode Island practitioners even interested in English law books? Why did they select certain books? Were these texts authoritative or was there a gap between the law as it appeared in the books and the law as they interpreted the books? Which meanings were accepted? Which ignored? Was there a community of readers? If so, did it have shared or divergent interpretations? How were interpretations communicated and challenged? Thus we can explore how these legal texts transmit ideas, ideologies, authority, and the very structure of meaning—and we can begin to appreciate how unstable and malleable such texts are.

Because these legal texts were written in England and concerned English circumstances, the Rhode Islanders were not in the first instance authors.²³ Although the dominant trend in history-of-the-book scholarship is to study texts and the authors of texts,²⁴ my interest here is in the Rhode Islanders as readers and recipients who reauthored texts.²⁵ How did these legal practitioners understand, interpret, and employ a legal culture developed and intended for England? This Article suggests that law books and legal ideas from England were not merely borrowed contrivances used to prove cosmopolitan, anglicized identity. Colonial attorneys acquired and used these law books to further their own litigation goals. They manipulated the ideas to adapt to colonial circumstances. In their choice, interpretation, and adaptation of these texts, the Rhode Island practitioners became authors themselves and transformed the

indispensable accounts of lawyers' reading lists. On the colonial American side, see, for example, WILLIAM HAMILTON BRYSON, *CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* (1978); HERBERT A. JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799* (1978); EDWIN WOLF, *THE LIBRARY OF JAMES LOGAN* (1968); Warren M. Billings, *Justices, Books, Laws, and Courts in Seventeenth-Century Virginia*, 85 *L. LIB. J.* 277 (1983); Lawrence Custer, *William Cummings: A Colonial Lawyer and His Library*, 3 *J.S. HIST.* 221 (1994).

23. Throughout this Article, I distinguish a set of beliefs that related to how things were done in England from a broader set of beliefs over how things should be done by people who identified themselves as English. Those in Rhode Island and England both understood themselves to be English.

24. With respect to legal literature, see, for example, Richard J. Ross, *Commoning the Common Law: The Renaissance Debate over Printing English Law, 1520-1640*, 146 *U. PA. L. REV.* 323 (1998); Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity*, 10 *YALE J.L. & HUMAN.* 229 (1998).

25. For another use of this reader approach, see Alfred Brophy, *"Ingenium est Fateri per quos profeceris": Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Legal Literature, 1682-1716*, 3 *U. CHI. L. SCH. ROUNDTABLE* 637 (1996).

legal culture of England into a transatlantic legal culture.²⁶

To demonstrate the ubiquity of these early legal practitioners and their creative interpretation of England's legal culture, this Article focuses on Rhode Island as a case study. In particular, this Article studies the mid- to late-seventeenth century—"a 'mystery' period" about which "we really know very little."²⁷ Why Rhode Island? First, because Rhode Island was a small colony, its trial records can be analyzed in a more comprehensive manner than would be possible in a larger colony. Second, legal historians have often ignored the colony or treated it as outside the norm of colonial development.²⁸ Founded in the early seventeenth century by people who disagreed with Massachusetts's expectation of religious conformity, the colony tolerated a substantial degree of dissent and disagreement. The colony managed to obtain a patent during the Commonwealth period and a generous charter from Charles II. By the end of the seventeenth century, however, the colony had become just as annoying to English authorities as Massachusetts. Nonetheless, the Rhode Islanders managed to avoid losing their charter. The example of Rhode Island—in particular, its success at negotiating a seemingly middle path—may illuminate a greater range of strategies available to the colonists. Third, accounts of Rhode Island legal practitioners parallel accounts of other seventeenth century colonies. The most recent account of early Rhode Island legal history simply states, "It is self-evident that there existed no class of lawyers to preserve any continuity."²⁹

This Article shows, however, that a class of lawyers did exist in Rhode Island. In Rhode Island, legal practitioners were an

26. As one of the foremost practitioners of book history emphasizes, general colonial book history is "recurrently transatlantic." HALL, *supra* note 21, at 1.

27. Coquillette, *supra* note 14, at xxxvi, xxx.

28. See, e.g., HOFFER, *supra* note 19, at 30-31, 171-74, 178-79.

29. John T. Farrell, *The Early History of Rhode Island's Court System*, 10 R.I. HIST. 14, 25 (1951); see also 9 *id.* at 65-71, 103-17 (1950) (same article); 10 *id.* at 14-25 (1951) (continuing same article). Chroust acknowledges, "the presence of some sort [of attorneys] in Rhode Island during the seventeenth century" is apparent from statutes. 1 CHROUST, *supra* note 10, at 135. However, he dismisses these attorneys with the statement that "of the early lawyers in Rhode Island practically nothing is known." *Id.* at 150. Stephen Edwards describes how early Rhode Island "lawyers depended rather upon their ready wit and eloquence than upon their legal learning to win their causes." Stephen O. Edwards, *The Supreme Court of Rhode Island*, in GREEN BAG 525, 527 (1890). Judge Thomas Durfee's account mentions no early lawyers except to emphasize that "the governor and assistants were not lawyers, and therefore they could not preside like the judges of the higher English courts." THOMAS DURFEE, GLEANINGS FROM THE JUDICIAL HISTORY OF RHODE ISLAND 77 (Providence, S.S. Rider 1883). Thomas Bicknell similarly notes that "it is true that legal learning did not abound, but common sense, good judgment and honesty of purpose supplied the deficiency and satisfied the common people in whom the strong passion for justice prevailed." 3 THOMAS WILLIAMS BICKNELL, THE HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 948 (1920). Bicknell somewhat contradictorily suggests that between 1650 and 1745 in Newport "by study and practice, men of ability became competent expositors of English common law." *Id.*

accepted—indeed, ubiquitous—presence in civil law suits, who strove to win cases through pleadings, objections, procedural maneuvers and innovations, and creative interpretations of English law. To support these conclusions, this Article uses the remnants of the written past—the sparse records of early Rhode Island courts, a solitary book list, and a few letters—to begin to reconstruct who attorneys were, how they operated, and what they thought. Building on the social history of literacy, Part II points out the importance of written literacy within the civil side of the court system. Part III turns to the people practicing in the court system and argues that this preference for written literacy ensured that the system would be dominated by legally literate participants who fell within a transatlantic English understanding of a particular type of lawyer, the “attorney.” Uncovering legal literacy in action, Part IV demonstrates that these attorneys actually practiced as lawyers, manipulated existing legal procedures to win their cases, and when existing procedures proved inadequate, developed new ones.³⁰ Part V studies the extraordinary library list of Rhode Islander William Harris and analyzes how attorneys like Harris actually used English law books to create and participate in a vibrant transatlantic legal culture.

II. LITERACY AND LAW

Literacy lay at the foundation of colonial Rhode Island’s civil justice system. The word “literacy” hardly begins to describe the vast spectrum of reading and writing skills that existed among the seventeenth-century populations of England and its colonies. At one end of the spectrum stood those few who could neither read nor write. At the other end stood the few who could read Latin and write in the formal scripts of the law courts. In between these two groups ranged people who could sign only their names, read only printed type, or write only in a simple hand.³¹ Although when compared to

30. These two sections adopt a functional approach, influenced particularly by the work of J.H. Baker, J.G. Gough, J.P. Dawson, and William Twining. Baker and Gough emphasize that, although the vocabulary of the law has remained surprisingly constant, the meanings of terms have subtly, yet dramatically, changed. See J.H. Baker, *The Changing Concept of the Court, in THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS* 153 (J.H. Baker ed., 1986); J.G. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955). Baker argues for functional rather than definitional approaches to law and legal culture. See J.H. Baker, *Counsellors and Barristers: A Historical Study*, 27 *CAMBRIDGE L.J.* 205, 214 (1969). See also JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968) (classic study of the role of judges in legal development). William Twining generously discussed Karl Llewellyn’s “law-jobs” theory with me. See generally WILLIAM TWINING, *BLACKSTONE’S TOWER: THE ENGLISH LAW SCHOOL* (1994); William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 *U. MIAMI L. REV.* 119 (1993).

31. “Literacy” describes both reading and writing. People often possessed one skill but not

England and Europe, the New England colonists were surprisingly literate, colonial literacy rates, particularly with respect to the ability to write, were still low. Rhode Island fell within the classic statistics for New England literacy: “60% of men could read fluently, less than 60% could write, 20% were semi-literate, and 20% were illiterate”³² Thus in this world where written literacy was a valued and fairly scarce commodity, the civil system of justice employed written literacy as a precondition for entry.

In Rhode Island, civil cases unfolded according to a civil procedure referred to as the “progress of law” or “legal progress.”³³ The legal progress consisted of only a few steps: (1) the plaintiff filed a declaration; (2) a writ was filed for the defendant’s arrest; (3) the defendant posted bond, promising to appear on the trial date; (4) the defendant answered the declaration and entered a plea; and (5) the trial proceeded before a jury.³⁴ This legal progress occurred within an institutional structure that changed little over the seventeenth century. The Rhode Island General Court of Trials met several times a year throughout the colony to hear cases.³⁵ At this court, the

the other. Even illiteracy meant different things. For example, Harvard College was founded in the fear that without “a school where Latin and the literary culture of the classics were the substance of instruction” the ministers would “leave an illiterate Ministry to the Churches.” DAVID D. HALL, *WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND* 32 (1990).

32. KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND* 15 (1974). I have compiled rough literacy rates based on available printed sources. Lockridge and others point out that women’s literacy lagged far behind that of men. Nonetheless, literacy was an aspiration for many. Roger Williams wrote that he “cherished” his “house hold Servant” John Clawson in his “Naked and Starving Condition,” and became his “School master,” “giving him my Dutch Testament and spending much time to teach him to read.” 15 *EARLY RECORDS OF THE TOWN OF PROVIDENCE* 83 (Providence, Snow & Farnham 1892-1915) [hereinafter *PROVIDENCE TOWN RECS.*] (entry of 1661). Similarly the indenture of Sarah Ryshie stated that her master should teach her “to read English.” *THE EARLY RECORDS OF THE TOWN OF WARWICK* 317 (1926) [hereinafter *WARWICK TOWN RECS.*] (entry of 1666).

33. The same term was used to describe the procedure at the town level. In 1650, Providence noted that “all causes that are by the Law referred to the General Court of Trials may have their Legal progress.” 15 *PROVIDENCE TOWN RECS.*, *supra* note 32, at 34. William Almy was described by the town of Providence as wanting records “touching a Legal Progress in his Cause” against John Smith. 2 *PROVIDENCE TOWN RECS.*, *supra* note 32, at 67 (1652). In 1652, the town ordered that the progress of law be transcribed out of the original copy. *See id.* Three years later the town ordered that the “Progress of Laws in use formerly were in a Loose Paper” and should now be “written in the Book.” *Id.* at 85.

34. These procedures appear in the “1647 Code” under the heading: “Touching Pleadings.” *See THE EARLIEST ACTS AND LAWS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* 52-56 (John D. Cushing ed., 1977) [hereinafter *EARLIEST ACTS*]; 1 *R.I. RECS.*, *supra* note 6, at 200-07. The declaration might be filed after the writ.

35. In seventeenth-century Rhode Island, the word “court” still referred to the actual assembling of people. *See Baker, The Changing Concept of the Court*, *supra* note 30, at 153. Rhode Island had three “General Courts”: a General Court of Election held once a year; a General Court of Commissioners (a unicameral Assembly); and a General Court of Trials. The Governor, Deputy Governor, Assistants, and officials such as the Recorder, General Treasurer, General Attorney, and Solicitor were chosen by all who came or voted by proxy in May at the General Election. The Assistants also sat with the Governor and Deputy Governors in Council. *See 1 R.I. RECS.*, *supra* note 6, at 386. The colony thus remained in the

Governor, Deputy Governor, and other elected leaders of the colony (usually the Assistants) sat with a jury to decide the disposition of civil and criminal matters. Although between 1644 and 1690 the colony's population increased from 1000 to nearly 6000,³⁶ the number of civil cases heard at the colony level over the same period remained relatively constant.³⁷

Hidden within these few steps of the legal progress lay great difficulty for the person who lacked written literacy. Although illiterate defendants were more than welcome in criminal courts in Rhode Island,³⁸ civil plaintiffs had to possess or borrow literacy to bring an action in the colony-wide General Court of Trials. In Rhode Island an action could not begin without written literacy. In this regard, legal procedure in Rhode Island was consistent with the broad demand of literacy required by England's legal culture. In England, by the sixteenth century, "verbal pleadings had given way almost completely to written ones."³⁹ Indeed, literacy in the legal system in England often included the mastery of specialized styles of handwriting.⁴⁰

The legal system only began when a plaintiff "declare[d] his case in writing."⁴¹ Declaring the case required a written description of the

long English tradition in which modern distinctions between judicial and legislative functions were muted if not entirely blurred. See CHARLES H. MCILWAIN, *HIGH COURT OF PARLIAMENT* (1910).

36. See CARL BRIDENBAUGH, *FAT MUTTON AND LIBERTY OF CONSCIENCE: SOCIETY IN RHODE ISLAND, 1636-1690*, at 8, 13, 73 (1974). An additional 3000 people lived in the surrounding areas under the jurisdiction of New Plymouth and Massachusetts Bay. See *id.* at 13.

37. For example, in 1655 the General Court of Trials heard nine cases over three sessions; in 1700 the Court also heard nine cases in two sessions. Compare R.I. SUP. JUD. CT. RECORD CENTER, *RECORDS OF THE GENERAL COURT OF TRIALS (Book A)* 134-37 [hereinafter *Book A*], with 1 RHODE ISLAND COURT RECORDS 8-17 (1920-22) [hereinafter *R.I. CT. RECS.*].

38. The criminal side of the General Court of Trials operated in part as an oral culture in which women and men, literate and illiterate participated. Indictments were read to the parties and pleas were entered orally by the defendant who appeared at court. The jury verdict was orally reported to the court and the defendant's punishment and bonds were orally conveyed. See 1 R.I. CT. RECS., *supra* note 37, at 5-80.

39. BROOKS, *supra* note 20, at 19. With "the aid of the prothonotaries, precedent books, and register of writs, the attorneys of the two parties could plead to the issue simply by exchanging written papers." In many cases, written pleadings had superseded pleading at the bar. See Baker, *Counsellors and Barristers*, *supra* note 30, at 221. Although at one time legal literacy had required the knowledge of Law French or Latin, by the mid-seventeenth century, English law was largely an English language system.

40. See generally M.B. PARKES, *ENGLISH CURSIVE BOOK HANDS, 1250-1500* (1969) (discussing various bookhands). By the sixteenth century, although Secretary with its easier angular letters "became the principal script," Anglicana continued to be used in the law where it became known as Court Hand. *Id.* at xxv. On scribes, see the brief introduction in SCRIVENERS' COMPANY COMMON PAPER, 1357-1628, at vii-xiii (Francis W. Steer ed., 1968). For an excellent account of scribal publication and the varieties of hands in England in the seventeenth century, see HAROLD LOVE, *SCRIBAL PUBLICATION IN SEVENTEENTH-CENTURY ENGLAND* 90-137 (1993).

41. 2 PROVIDENCE TOWN RECS., *supra* note 32, at 86. For examples of declaration and answer in 1650, see 15 *id.* at 29-30. In Providence in 1655, the plaintiff had to declare his "case

parties, the form of action, and the damages. Ascertaining the parties and damages did not require great technical skill.⁴² Even the form of action was not particularly complicated. As in England, most cases “fell into one of the four principal types—trespass, actions on the case, debt, and ejectment.”⁴³ Debt and ejectment actions were relatively simple. Trespass and actions on the case were only slightly more complicated.⁴⁴ The difficult aspect of the declaration remained composing this information in writing.

Although the Rhode Island legal progress required written literacy for plaintiffs, the legal system was cautious in presuming the written literacy of defendants.⁴⁵ In town courts, the progresses explicitly provided for and protected illiterate defendants. In Providence, on the day of trial, the declaration was to be “read them twice.”⁴⁶ The town’s legal progress stated that the defendant had the “Liberty whether he will answer in Writing or no.”⁴⁷

The more formal procedures of the General Court of Trials were similarly altered to protect defendants who chose to answer orally rather than in writing. At the colony level, the problem for illiterate defendants was that the failure to file a written answer opened a defendant to a plaintiff’s motion for a *nihil dicit*—a motion which

in writing” three days before the writ was served and to pay also for filing the declaration which the defendant could see. See 2 *id.* at 85-89. For Portsmouth, see THE EARLY RECORDS OF THE TOWN OF PORTSMOUTH 41 (A. Perry & C.S. Brigham eds., 1901) [hereinafter PORTSMOUTH TOWN RECS.].

42. Parties were identified by name, place of residence, and sometimes profession. In a world where extended family members shared identical names, correct identification was essential.

43. BROOKS, *supra* note 20, at 66.

44. See *id.* Actions of trespass “involved an alleged breach of the king’s peace.” *Id.* For example, common trespass in England was “chasing cattle, knocking down hedges . . . mowing grass.” *Id.* Actions on the case “were used to claim redress for accidental or intentional wrongs which lacked any implication of deliberate violence.” *Id.* at 66-67. Today these would be classified as negligence, fraud, and nonfeasance. Debt was comparatively simple because the burden lay on the debtor to provide proof that the debt had been paid. See *id.* at 67-68. On the advantages of the writ system “to a less than highly skilled population,” see DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, at 114-15 (1979).

45. Jurors in the court of trials were not all literate. People who could not sign their names regularly appeared on jury rosters. For example, between 1647 and 1662, Thomas Hedger, Thomas Layton, John Lippitt, John Sweet, Thomas Thornicraft, John Briggs, William Havens, Thomas Angell, John Field, Henry Fowler, William Hawkins, and Edward Manton sat on juries. There are probably many more but the records are not indexed well for those on the jury. See generally 1-2 R.I. CT. RECS., *supra* note 37.

46. 2 PROVIDENCE TOWN RECS., *supra* note 32, at 87. If a defendant wanted to “see” the declaration against him before court, he could obtain a copy from the clerk. See *id.* at 86.

47. *Id.* at 87. Extant Warwick court records reveal at least one case with an illiterate plaintiff and another with illiterate defendants. Illiterate Peter Buzicott sued and was sued. Illiterate Henry Knowles was sued a number of times and sat on a jury. In one suit he even made a mark in place of a signature on his answer. John Lippitt, Sr., and John Sweet, illiterates, also were sued and sat on the jury. See RECORDS OF THE COURT OF TRIALS OF THE TOWN OF WARWICK, 1659-1674, at 2, 11, 15 (1922) [hereinafter WARWICK TRIAL CT. RECS.].

literally translates as “he says nothing.”⁴⁸ After a *nihil dicit* had been granted, the case went to the jury as if the defendant had pleaded guilty.⁴⁹ To protect illiterate defendants who failed to file answers, the colony passed a law in 1657 declaring that if the plaintiff filed a *nihil dicit* in the Recorder’s office, “yet if the defendant appear in Court and give his answer, the matter shall proceed to trial.”⁵⁰ If the defendant showed up at court, even after failing to file a written answer, the court would prevent a default and hear the defendant.⁵¹

The effect of this bias in favor of written literacy—and perhaps, the social and economic status that accompanied it—will be elaborated in Part III. However, it is useful to point out here that, although this bias did not literally exclude all illiterate defendants, it did exclude illiterate plaintiffs. The written literacy requirement for plaintiffs meant that participation in the colony’s Court of Trials was limited to those who could write or were willing to hire someone to write for them. As for defendants, although a few appeared without representation, the probability of loss ensured that most were unwilling to risk the disadvantage of appearing illiterate in a system favoring literates.⁵²

III. LEGAL LITERATES: THE ATTORNEY

The privileging of written literacy by the legal system provided opportunities for those men who possessed written literacy. A fairly small group of men appear and reappear in the vast majority of civil cases in seventeenth-century Rhode Island. Not only did these men have written literacy, but they also had legal literacy—knowledge of the laws and legal progress. They were often referred to as “attorneys,” a label which had particular significance in England at

48. Rastell defined *nihil dicit* as “when an action is brought against a man, and the defendant appears, the plaintiff declares, and the defendant will not answer, or pleads to the action, & both not maintain his plea, but makes default, now upon this default, he shall be condemned, because he sayeth nothing.” JOHN RASTELL, *LES TERMES DE LA LEY: OR CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON LAW AND STATUTES . . .* 474 (London, John Streater, James Flesher & Henry Twyford, 1667). See also JOHN RASTELL, *AN EXPOSITION OF CERTAIN DIFFICULT AND OBSCURE WORDS* 151 (De Capo Press 1969) (1579).

49. See 1 R.I. RECS., *supra* note 6, at 224 (1650) (permitting the jury to decide the case).

50. *Id.* at 356.

51. When Randall Houlden sued the General Sergeant James Rogers in 1662, Houlden argued that “there is no answer put in by the Defendant.” He “therefore Crave[d] a nihil dicit.” The bench replied that “the law is Clear” that Houlden could take a *nihil dicit*. Such an action, however, was without any force because “the Defendant hath Liberty to put in his Answer” as he was “present and Require[s] the benefit of the law.” Rogers, who will be discussed below as a legal literate, was illiterate for at least a majority of his life. See 2 R.I. CT. RECS., *supra* note 37, at 5-6.

52. See, e.g., *infra* text accompanying notes 80-88 & 169.

the beginning of the seventeenth century.⁵³ Beyond merely establishing the substantial presence of legally literate attorneys in Rhode Island, this discussion indicates the extent to which the civil legal system was dominated by such men.

A. *The Identity of Attorneys*

Rhode Island explicitly embraced “attorneys.” One of the earliest sets of laws, the so-called “1647 Code,” provided for the use of attorneys. The section on “Pleaders” stated that “any man may plead his own case in any court or before any jury” or “may make his attorney to plead for him” or “may use the attorney that belongs to the court.”⁵⁴ The colony’s legal progress referred throughout to the party “or Attorney.”⁵⁵ A 1666 law noted that the parties “or Attorneys who are to plead their cases” could put in lawful exceptions.⁵⁶ Town laws similarly permitted both parties to have an attorney to open the case and debate it.⁵⁷

Such laws authorizing attorneys do not prove that attorneys were appointed. Nor do they prove that the reference to “attorneys” referred to anything other than someone who was a friend or mere stand-in for an absent party. Moreover, even assuming that “attorney” meant someone legally literate, these laws do not establish to what degree legal literates were important in the civil litigation system. The following discussion (and accompanying tables in the Appendix) sets forth the information I have been able to gather about the men who served as “attorneys.” These data indicate that the Rhode Island attorneys possessed written and legal literacy—and that such men overwhelmingly dominated the legal system.

Laws permitting appointment of an attorney were put into practice. Notations to “attorneys” occur throughout the records of

53. Although one author acknowledges the “attorney” as a specific subset of seventeenth-century English lawyers, he states that such “distinctions” were “not, and could not be maintained in the American colonies.” 1 CHROUST, *supra* note 10, at xvii.

54. EARLIEST ACTS, *supra* note 34, at 52.

55. *Id.* There were to be two court attorneys in each town: “[D]iscreet, honest and able men for understanding” who were “not to use any manner of deceit to beguile either court or party.” *Id.* Given my interpretation of the “1647 Code” as compiled closer to 1666, the precise date is indeterminate. See discussion *infra* Part V.C.

56. EARLIEST ACTS, *supra* note 34, at 74. Another law authorized attorneys to pay the jury for the party who bore the costs. See *id.*

57. The Providence town laws stated that the “Plaintiff if he will may open his case more fully, either by himself or by his Attorney.” The defendant could answer by himself or his attorney. The two sides were to “have time sufficient to debate the cause between them” until “the Bench shall say it is enough.” 2 PROVIDENCE TOWN RECS., *supra* note 32, at 86. The town of Warwick noted that notice should be given of an attachment to John Warner so that “he by himself or attorney” could answer at the Court of Trials. WARWICK TOWN RECS., *supra* note 32, at 69 (1669).

the General Court of Trials for 1655-1670. The Recorder appears to have felt the need to indicate that an attorney was present only when the attorney actually acted. Attorneys are only referred to when they join issue, protest some aspect of the case, or when their power of attorney is disputed.⁵⁸ Therefore, attorneys probably appeared in more cases than are listed in the records. Even according to these limited records, however, attorneys appeared in almost half of the eighty-four cases heard by the court. Thirty-six cases (approximately 43%) involved an attorney on one or both sides. Twenty-five of these cases (30%) listed attorneys on both sides.⁵⁹

Who were these attorneys? In most instances, the Recorder did not note their names. Usually he merely wrote that the "attorneys joined issue" or "Mr. Brenton's attorney" did something. On occasion, however, the Recorder did name the attorney. These names, combined with similar instances in the town courts, the General Assembly, and the town records and deeds make it possible to compile an initial list of attorneys. Twenty-eight men can be identified who served as attorneys between 1650-1670.⁶⁰

A quick study of these men indicates that almost all possessed basic literacy skills of reading and writing. Moreover, most appear to have obtained some degree of legal literacy and had easy access to courts.⁶¹ Not all of these men, however, had equivalent levels of legal literacy.

At the center of these legally literate attorneys were the men who had been elected to government positions that directly involved written and legal literacy. Ten men on the list served as clerks or recorders for the town or colony courts and assemblies. Their success as elected officials suggests that such men were perceived by the general voting populace to have a sufficiently fluent handwriting and abilities to record official proceedings.⁶² Indeed, five of the six men on the list who held the position of General Attorney had also

58. See, e.g., 1 R.I. CT. RECS., *supra* note 37, at 20, 31. The Recorder also did not note attorneys in cases that were dropped or that went immediately to arbitration.

59. See *infra* Appendix tbl.1. Attorneys are attributed to a case if a reference to an attorney appears during the litigation. Nine cases are separated in which the case immediately disappears from the record or was initially sent for arbitration. See *id.*

60. See *infra* Appendix tbl.2. The list includes one man who was designated as an "agent." The list is probably not inclusive of all Rhode Island attorney references.

61. Over half of these men wrote or possessed wills: Benedict Arnold, William Carpenter, Caleb Carr, Gregory Dexter, Ralph Earle, William Field, John Greene, Andrew Harris, William Harris, Zachary Rhodes, Edward Richmond, John Sanford, Peleg Sanford, Philip Sherman and William Smiton. See *infra* note 283 and accompanying text.

62. The Recorder was elected by the General Court of Election. See 1 R.I. RECS., *supra* note 6, at 408, 427. Initially the Recorder was considered one of the Assistants and for many years was listed immediately following the Assistants in the list of officials. Between 1656 and 1670 only two men were Recorders: John Sanford and Joseph Torrey. John Greene, Jr., and William Lytherland served as Recorder in the early 1650s.

served as clerks or the colony Recorder.

These men had access to older legal records and official correspondence of the colony. The General Recorder's job description according to the laws was to:

keep a copy of all the Records or Acts of the General Assembly, General and particular Courts of Judicature, Rolls of the Freemen of the Colony, Records, Evidences, Sales and Bargains of Land, Wills and Testaments of the Testators, and orders of the Townsmen touching the Intestate, Records of the Limits and Bounds of Towns, their Highways, Driftways, Commons and Fencing, Privileges and Liberties.⁶³

Not only did the Recorder have physical custody of most documents, but he also had oral knowledge of the court proceedings. The Recorder handled the filing of court actions, wrote writs, made copies of declarations and answers, and provided summons.⁶⁴ Furthermore, because the Recorder also often was the clerk to the Assembly, he knew most of the official business of the colony.⁶⁵ Indeed, the Recorder rewrote each Assembly session to send a record to the towns. At the town level, men who served as town clerks gained similar knowledge through their performance of parallel functions. The town clerks copied and composed documents for their towns and received and copied the copies of the General Assembly's acts and orders. Both the Recorder and town clerks also wrote and copied deeds, wills, and other legal documents for individuals.⁶⁶

Many of the other attorneys on the lists performed functions requiring and producing similar levels of legal literacy. Six of the

63. *Id.* at 195. The Recorder had great power over the laws and records simply by virtue of being one of the only people who had physical custody of the record books. The Recorder kept possession of the "Book of Records of the laws and orders." 2 *id.* at 147. Between 1646 and 1669, records of both the Court of Trials and Court of Commissioners were recorded in one book. See 1 *id.* at iv-v. The General Court records appear today as *Records of the Colony of Rhode Island*. See *id.* at iii-vii. The Court of Trial records appear as in the first two volumes of *Rhode Island Court Records*. See *supra* note 37. Only in 1670 did the colony begin to record the trial records in a separate volume. See 1 R.I. RECS., *supra* note 6, at v. The Recorder kept the key to the room with the chest containing the charter and other important papers. See *id.* at 196. He also carried the charter to the Court. See *id.* at 24.

64. See *id.* at 232. For this work, the Recorder received remuneration from the colony, the towns, and individuals for writing minutes and copying documents. For simple documents under 20 lines of so, the Recorder was paid a shilling. For more complicated writs and longer pieces the fees ranged from one to three shillings. For copying the Court's orders the fees ranged between three and ten shillings. The "1647 code" provided a table of fees. See *id.* at 207. The fees, however, fluctuated. See *id.* at 226-27, 244, 280; 15 PROVIDENCE TOWN RECS., *supra* note 32, at 64.

65. See 1 R.I. RECS., *supra* note 6, at 304, 316, 326. During periods when Rhode Island had a Council, the Recorder occasionally served as Secretary to the Council. See *id.* at 405; 2 *id.* at 192, 563.

66. See, e.g., WARWICK TOWN RECORDS, *supra* note 32, at 68, 98.

attorneys served as the colony's agent to England, an appointment that reflected legal knowledge, literacy, and advocacy skills. Five served as Governor of the colony. Not only was the Governor at all important legal meetings, but he also held many of the records of the colony. At the death of a Governor, one of the first things that the Assembly did was to appoint several people to obtain "the Charter, with his Majesty's letters, and such other writings as concern the colony" from the deceased Governor's house.⁶⁷ Another three men had unusual positions that reflected substantial legal literacy. The two Portsmouth innkeepers, William Baulston and Ralph Earl, both served as colony assistants and town treasurers. Another man, Zachariah Rhodes, also served as town treasurer and a deputy. Although we think of the treasurer as someone involved only with finances, in colonial Rhode Island the town treasurer represented the town in litigation.⁶⁸ The man elected as the town treasurer was someone with legal skills.

Beyond these inner circles of legal literates were men appointed as attorneys of whom the records leave only a glimpse of their relative abilities and suggest the varying levels of their legal literacy. Some like William Carpender and John Wickes, who both sat at the Court of Trials as Assistants, likely possessed fairly high levels of legal literacy. On the edges of the list, however, are attorneys whose legal literacy was more limited. At least one was comfortable as an attorney only within his own town: Eliza Collins, a lieutenant and a minor town official, appeared only in Warwick town court. The presence of others—shipmasters, mariners, and sons—suggests that, on occasion, the attorney also referred to a person possessing at least minimal writing and speaking skills who served as the representative of an absent party.⁶⁹

Those with high levels of legal literacy rarely used others to represent them in court. Why pay someone else when one had equivalent, if not superior, skills? Men such as John Sanford, Jr., and John Greene, Jr., consistently sued in their own names. The preference among many legal literates for self-representation and the colony's acceptance of attorney self-representation appears in a

67. 2 R.I. RECS., *supra* note 6, at 151 (1666).

68. In 1659, the law clarified that one could sue the town by arresting the Treasurer. 1 *id.* at 424.

69. Such attorneys with lower levels of legal literacy may have been given explicit instructions. For example, the highly legally literate William Harris left specific instructions to his attorneys. See Letter from William Harris to his Attorneys (Dec. 1, 1679), in HARRIS PAPERS, 10 COLLECTIONS OF THE RHODE ISLAND HISTORICAL SOCIETY 319-20 (1902) [hereinafter HARRIS PAPERS]; Verdict of Court (Mar. 1663/64), in HARRIS PAPERS, *supra*, at 70 (accepting Andrew Harris "as Agent or Attorney in his father William Harris room"). A more refined study could distinguish frequency of participation according to level of legal literacy.

1659 statute. The statute prevented the General Sergeant from being an attorney “in any person’s case,” but it emphasized, however, that the General Sergeant could be an attorney in “his own.”⁷⁰

This tendency towards self-representation suggests that simply counting appearances by “attorneys” underestimates the degree to which the legal system was dominated by legal literates. When men who served at some point as attorneys are included when they appeared as parties, the balance tilts in favor of legal literate participation. Fifty-eight (69%) of the cases involved, at least on one side, an attorney representing either himself or another person. Thirty-seven (44%) of the cases involved attorneys on both sides representing themselves or others.⁷¹

The penchant for self-representation also suggests that some legal literates may have chosen only to act on their own behalf—that is, they were, in essence, attorneys, but only for themselves.⁷² A group of thirteen men can be identified in the records of civil litigation who possessed as least as much legal literacy as the men who acted as attorneys for others.⁷³ Five of these men—William Almy, William Coddington, William Dyer, Samuel Gorton, and Randall Houlden—had journeyed to England to pursue personal and colony affairs. William Dyer had been Recorder for the colony and an agent to England, and was frequently complimented on his scribal abilities on behalf of the colony. John Coggeshall also served as Recorder. William Coddington had been the head judicial and executive office of one of the early settlements and was the author of several pamphlets. Samuel Gorton had also traveled to England, was known to be obsessed with the laws, and was the author of numerous tracts. Both Gorton and Almy had been involved in personal lawsuits in England. Randall Houlden had come over with Gorton in the 1640s and eventually also returned to England on colony business. Two others—Nicholas Easton and Henry Bull—had served as Governor. Easton even had once been referred to disparagingly as “Lawyer Easton.”⁷⁴ Richard Morris’s house served as the location of the General Courts and, when he left the colony, he served as ruler of the New Hampshire settlement. Richard Smith, a trader and farmer in England, served as an interpreter between the colony and local

70. 1 R.I. RECS., *supra* note 6, at 417 (1659).

71. *See infra* Appendix tbl.3.

72. Modern legal culture, with its conviction that only a fool has himself/herself as an attorney, often disregards people who serve only as their own attorneys. *See, e.g.,* Faretta v. California, 422 U.S. 806 (1975) (Blackmun, J., dissenting) (citing the “old proverb that ‘one who is his own lawyer has a fool for a client’”).

73. *See infra* Appendix tbl.4.

74. 2 HOWARD M. CHAPIN, DOCUMENTARY HISTORY OF RHODE ISLAND 164 (1919) (the Aquidneck Quarter Court Records for 1641-1646 appear at 132-65).

Indian groups and became a Judge of the Quarter Sessions. Both General Sergeants—James Rogers and Richard Knight—have been included because they had access to the courts, and served writs and summons. James Rogers, however, may not have been literate during much of the period he served as General Sergeant.

No record remains of these men serving as an attorney for someone else. Their participation in the court system, however, indicates how few non-legal literates ventured into court alone. With these additional, legally literate men included, the Rhode Island court system decisively shifts towards a system dominated by legal literates. Seventy-five (89%) cases involved at least one legally literate party and fifty-four (64%) cases involved legal literates on both sides.⁷⁵

But were the remaining participants without any means of legal literacy?⁷⁶ The loss of records, including almost all early Newport records, leaves a gaping hole in our knowledge.⁷⁷ Moreover, some

75. See *infra* Appendix tbl.5. The dominance of the court system by legal literates may have occurred across the colonies. For example, when Henry Bull was sued by Samuel Eells of Connecticut both sides were more than competent to represent themselves. Bull would become the future governor. Eells had returned to England during the civil war and family genealogists speculate that he was the bodyguard to the two judges who passed on the sentence of Charles I. In any case, after his return to Connecticut, he was selected to transcribe the Milford records and in 1681 was appointed clerk of the New Haven County Court. Indeed, in a picture owned by the family, Eells appears with a number of books on the table. See EELLS FAMILY HISTORY IN AMERICA 3-5 (Earnest Edward Eells ed., 1985).

76. Twenty-eight people in twenty-eight cases appear unrepresented or cannot be easily identified as legally literate. 1655: John Cowdall and John Clawson in *Cowdall v. Clawson* (debt); Bartholomew Hunt in *Gereardy v. Hunt* (case); John Elton in *Cranston v. Elton* (debt). 1656: Ralph Cowland in *Cowland v. Earle* (slander and defamation). 1657: Bartholomew Hunt in *Hunt v. Greene (Treasurer)* (case). 1658: Robert Westcott, Stukely Westcott, and Samuel Crooke in *R. Westcott v. Crooke and Stukely Westcott v. Crooke* (debt); Honorah Saul and John Cowdall in *Saul v. Cowdall* (debt). 1660: Thomas Layton and John Richmond in *Layton v. Richmond, Sr.* (case); Nathaniel Dickens in *Sanford v. Dickens (Treasurer)*; John Gereardy and Robert Westcott in *Gereardy v. Westcott* (debt). 1661: Thomas Layton and John Richmond, Sr., in *Layton v. Richmond (2)* (action unclear); Cocaunaguant (Sachem of the Narragansett) in *Arnold v. Cocaunaguant* (debt); Moeallicke (an Indian) in *Holden v. Moeallicke* (debt). 1663: George Bliss in *Brenton v. Bliss* (debt). 1664: Katherine Mills in *Mills v. Earle* (slander and defamation); John Smith in *Coddington v. Smith* (trespass). 1665: Owen Higgen in *Higgen v. Hart* (debt). 1666: Walter Todd in *Gorton & Holden v. Todd* (debt); Job Hawkins in *Hawkins v. Morris* (account). 1667: James Barker and Peter Easton in *Barker v. Easton (Treasurer)* (debt). 1668: Estate of William Langly in *Cranston v. Estate* (debt); Joseph Holderbee in *Scarborough v. Holderbee* (action unclear). 1669: Ambrose Leach in *Ayres v. Leach* (action unclear); Robert Westcott in *Brinley v. Westcott* (debt); Anthony Low and Thomas Humphreys in *Low v. Humphreys* (debt). 1670: John Carr in *Rogers v. Carr* (debt); Samuel Reape and Robert Westcott in *Reape v. Westcott* (debt). See 1-2 R.I. CT. RECS., *supra* note 37 *passim*.

77. Whether all these people were actually illiterate is difficult to determine. The loss of the Newport records and the unreliability of the Recorder's notation of attorneys leave unclear the status of such individuals as Owen Higgen, Job Hawkins, Bartholomew Hunt, James Barker, and Nathaniel Dickens. Several of the seemingly unrepresented parties had been represented in other actions, for example, George Bliss, John Cowdall, and John Gereardy. At least one of these parties, Joseph Holderbee, may have possessed legal literacy. He objected to the power of attorney and succeeded in having the case dismissed. Similarly, Dickens and Easton were treasurers—jobs which often involved some level of legal literacy.

parties may have had off-the-record access to legal literates.⁷⁸ For example, Francis Uselton, an illiterate, sued Connecticut legal literate Thomas Stanton.⁷⁹ Uselton may not have gone to court unprepared: He may have been assisted by his landlord, the colony Recorder and General Attorney, John Greene, Jr. How many were able to borrow legal literacy because of personal connections remains uncertain.

The need for legal literacy may have also depended on the type of case. Some legal actions may have been comparatively easy for non-legal literates to bring. For example, two cases involve an apparently non-legally literate plaintiff bringing an action for slander and defamation against a legally literate defendant. These actions involved the accusation that the person had said something, often an accusation of a criminal nature designed to produce an indictment. The only defense to the action was that one had not said it, a fact difficult to prove in a case with an accusation on the record. In these cases, a non-legally literate plaintiff who could write or obtain a written copy of the declaration may have felt comfortable appearing in court. Moreover, such cases may simply indicate actions where the plaintiff knew ahead of time that the action would be uncontested. In both slander cases, the legally literate defendant defaulted.⁸⁰

These types of cases also illustrate the effect of relative levels of legal literacy. Five debt cases involved the Westcotts as either plaintiff or defendant. Stukely Westcott, an innkeeper, had arrived in Rhode Island with Roger Williams, was occasionally chosen deputy and Assistant, and held a variety of minor offices. His son, Robert, briefly served as General Sergeant.⁸¹ Although the two men were not highly legally literate and did not represent others, they appear to have felt comfortable in debt actions. Debt was an easy action to bring; the only evidence necessary was the paper with the debt written on it.⁸²

78. See, e.g., WARWICK TOWN RECORDS, *supra* note 32, at 270 (agreement between Uselton and Greene for Greene to defend Uselton in fence disputes as part of lease).

79. Stanton lived in Stonington, Connecticut, served as an interpreter, was appointed a judge for New London County in 1666, and wrote the will for Uncas, the Mohegan Sachem, in 1670. See RICHARD ANSON WHEELER, HISTORY OF STONINGTON 576-78 (reprint 1977) (n.d.).

80. Indeed, the plaintiff may not have needed to appear in court. Katherine Mills, probably the wife of William Mills of Boston, sued Ralph Earle, Sr., for slander and defamation. She may not have had to be there because she won due to a *nihil dicit* entered in the Recorder's office and approved by the Court. The jury awarded her five pounds damages. See 2 R.I. CT. RECS., *supra* note 37, at 33 (Sept. 1664). See also Cowland v. Earle, 1 R.I. CT. RECS., *supra* note 37, at 20 (June 1656) (slander and defamation case brought by unrepresented non-legally literate plaintiff).

81. I have not included the Westcotts as attorneys or legal literates. On Stukely Westcott (1592-1677), see J. Russell Bullock, *Stukely Westcote* [sic], in 5 NARRAGANSETT HISTORICAL REG. 1 (Providence, Narragansett Hist. Pub. Co. 1886).

82. Nineteen cases not clearly involving legal literates were debt actions. Although non-

Against illiterate parties, the Westcotts' level of legal literacy prevailed. In 1658, the two Westcotts sued the illiterate Samuel Crooke for debt. Crooke was concerned less about his guilt than the possibility of being sold as an indentured servant for payment of the debt. He told the court that if anyone took him as a "Servant I will be the Death of him or he shall be the Death of me." The court responded by putting "the lock" on "his leg again."⁸³ The Westcotts won, although only after the court entered into an "agitation" with Crooke to "compose the matters of Difference" and Crooke said "he would work it out."⁸⁴

Suing people with similar levels of legal literacy produced more balanced odds. In 1654, Robert was sued by Jan Gereardy for debt. Gereardy was a Dutch fur trader from New Amsterdam and a less-than-sympathetic plaintiff.⁸⁵ He had been indicted for robbing a Narragansett grave and only saved from prosecution by the nonappearance of the Narragansett. Although Gereardy was not an "expert in English writing,"⁸⁶ his level of legal literacy appears to have matched that of Robert and the case continued for years in the town and colony courts.

But against some legal literates, Robert's skills were simply no match. When Francis Brinley, a legal literate who became a judge during the Dominion period, sued Robert, Robert's defense that he had "tendered pay" by "a Collateral agreement" failed.⁸⁷ The Westcott cases suggest that social standing, demeanor, and a range of variables difficult to ascertain now also mattered in court—and may have been one more reason for certain parties to choose attorney representation.⁸⁸

legal literates could sue relatively easily for debt, the non-legally literate parties were usually defendants. Most of these judgments were default judgments in which the defendants did not even appear. Two persons described as Indians were sued for debt. There is only one case in the record in which an Indian appeared to have a "Counselor." See 1 R.I. CT. RECS., *supra* note 37, at 57 ("Wamsitta's Counselor called by the English Thomas an Indian" consented in court to an order regarding bonds). The two debt cases against Nathaniel Dickins by John Sanford and Richard Knight were actions against the town, presumably for payments that the town owed to the Recorder and General Sergeant. See *supra* note 76.

83. 1 R.I. CT. RECS., *supra* note 37, at 41.

84. *Id.*

85. See 1 R.I. RECS., *supra* note 6, at 274; 1 R.I. CT. RECS., *supra* note 37, at 9-10 (June 1655). See also 2 IRVING BERDINE RICHMAN, RHODE ISLAND: ITS MAKING AND ITS MEANING 25 (1902) (discussing Gereardy). Gereardy's name has been anglicized in numerous ways, e.g. John Garriardy.

86. A true narration of certain proceedings of the Town of Warwick together with the occasion [sic] of them against John Warner, Governor and Council Misc. Papers 1652, Rhode Island State Archives. RISA is the state repository, located in Providence. Gereardy appears as "authorized" to sell lands by Hurmanas Hartoch. See WARWICK TOWN RECS., *supra* note 32, at 230.

87. Similarly, against Samuel Reape, Westcott lost. See 2 R.I. CT. RECS., *supra* note 37, at 99.

88. Demeanor also mattered. In *Ayres v. Leach*, Ayres "retained" Sanford as his attorney.

B. *The Meaning of the Attorney*

This association between the word “attorney” and a legal literate was not unique to Rhode Island or the colonies. Although today we use the word “attorney” loosely and colloquially, in early modern England it represented a specific legal job.⁸⁹ The attorney rose to prominence in late sixteenth-century England and then came under attack a century later as men with greater social prominence and education—barristers—came to dominate English legal culture. Although the attorney emerged only gradually out of the confused history of the early English legal profession,⁹⁰ by the turn of the seventeenth century the number of attorneys had dramatically increased.⁹¹

See 2 R.I. CT. RECS., *supra* note 37, at 76 (May 1669). Leach, who could at least sign his name, appeared in court and “contemptuously expressed himself against the governor and also the Court in general” and “by the motions of his body behave[d] himself so unseemly.” *Id.* at 77. The case was held over for the next session and Leach did not appear and therefore forfeited his bonds. However, the Assembly told the Recorder to “intimate” to the said Leach that “if he can procure favor from the General Assembly” his bond would be restored. *Id.* at 82. The case was dropped completely. *See id.* at 82. *See* also 2 R.I. RECS, *supra* note 6, at 344 (Leach’s signature on a Narragansett murder inquiry).

89. Today we use the words “lawyer” and “attorney” interchangeably. *Black’s Law Dictionary* defines lawyer as “a person learned in the law; as an attorney, counsel, or solicitor; a person licensed to practice law.” BLACK’S LAW DICTIONARY 888 (6th ed. 1990). Figuring out the subtle historical variations in these words is difficult. “Lawyer” often seems to be a general, almost colloquial category—and seems as a cursory impression to have been the more usual choice to use as an insult. *The Oxford English Dictionary* defines lawyer as “one versed in the law; a member of the legal profession, one whose business it is to conduct suits in the courts, or to advise clients, in the widest sense embracing every branch of the profession, though in colloquial use often limited to attorneys and solicitors.” 8 THE OXFORD ENGLISH DICTIONARY 720 (2d ed. 1989). The word “attorney” is trickier to define. The *OED* struggles to sort its definitions into “attorney in fact, private attorney” and “attorney in law, public attorney.” Under the third definition, the dictionary states “attorney-at-law, public attorney”: “This sense slowly disengaged itself from the preceding, as a body of professional legal agents was recognized and incorporated.” 1 *id.* at 772. The dictionary, however, does not suggest when this disengagement occurred.

90. In the medieval period, the job of attorney had been distinguished from another job: the pleader. Pleaders merely spoke on behalf of litigants, who also often appeared in court; attorneys could actually appear in the litigant’s place. *See* BRAND, *supra* note 10, at 12; Baker, *Counsellors and Barristers*, *supra* note 30, at 205; Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998). Over time “sergeants,” “Counsellors,” “apprentices,” “solicitors,” and “barristers” were added to the mix of “varieties of lawyers.” *See* WILFRID R. PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR, 1590-1640*, at 3 (1986).

91. According to Brooks’s comprehensive work on the attorneys, the number of attorneys rapidly rose in the century between 1550 and 1650. In 1560, there had only been 150 attorneys; by 1606 there were 1000 and by 1640 over 1400. *See* C.W. Brooks, *Litigants and Attorneys in the King’s Bench and Common Pleas*, in LEGAL RECORDS AND THE HISTORIAN 41, 53 (J.H. Baker ed., 1978). The growing popularity of the job can be seen in the early seventeenth century publication of books with the generalist legal practitioner identified in the title, for example, THOMAS POWELL, *THE ATTORNEY’S ACADEMY OR, THE MANNER AND FORME OF PROCEEDING PRACTICALLY UPON ANY SUITE, PLAINTE, OR ACTION WHATSOEVER IN ANY COURT OF RECORD WHATSOEVER, WITHIN THE KINGDOM* (London, Benjamin Fisher 1623). The early history of attorneys and the English legal profession does not follow a simple progressive line. Early on, attorneys were regulated by the courts; however, by the sixteenth century, regulation and professional identity had broken down. *See* ROBERT ROBSON, *THE*

In England, being an attorney was one aspect of many men's lives. Men who served as attorneys also tended to be minor gentlemen farmers, scriveners, clothiers and drapers, and sons of practitioners.⁹² The men who acted as attorneys "acted for defendants and plaintiffs involved in lawsuits and were responsible for helping to further the cause by keeping abreast of procedural developments and by framing pleadings so that cases could be considered by the judges."⁹³ Attorneys also served as "advocates" in routine procedural decisions in Common Pleas and Kings Bench, as well as in cases in Chancery, quarter sessions, and municipal courts.⁹⁴ They often held other related positions; in particular, a substantial overlap existed between the attorneys and the clerks of the courts. Clerks wrote writs and interrogatories; however, they also "dealt with individual clients, gave advice, organized litigation."⁹⁵ In Chancery, for example, "the right to act as an attorney was one aspect of the six clerks' monopoly."⁹⁶

The early seventeenth-century attorneys thus stood apart from the lawyers who have attracted greater attention: the barristers of the Inns of Court. The modern division between the attorney and the barrister appeared over the course of the seventeenth century. The division arose as much from perceived social status as from functional differences. A 1614 order barring attorneys from the Inns of Court stated that "the purpose of the inns was the education of the nobility and gentry" and that "there ought always to be observed a difference between a Counselor at law which is the principal person next to Sergeants and Judges in the administration of Justice and attorneys and solicitors w[hi]ch are but ministerial persons and of an inferior nature."⁹⁷ The barristers worked to exclude attorneys because of the attorneys' "supposed inferiority" and the barristers' desire for a "neoclassical idea of a profession of gentlemen, detached from the pursuit of lucre and united in their devotion to a superior vocation."⁹⁸ The attorneys who joined the inns

ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND 3-4 (1959). On attorneys and other members of the legal professions, see J.H. Baker, *The English Legal Profession, 1450-1550, in THE LEGAL PROFESSION AND THE COMMON LAW*, *supra* note 30.

92. See BROOKS, *supra* note 20, at 115-16, 166, 275-76.

93. ROBSON, *supra* note 91, at 3.

94. See PREST, *supra* note 90, at 13.

95. BROOKS, *supra* note 20, at 17. In the seventeenth century, one group of attorneys grew—a "group of men who represented litigants, but who did not necessarily identify with the court officials" and who "did not have a direct vested interest in the established procedures of the courts and the fees which went with them." *Id.* at 24.

96. *Id.*

97. *Id.* at 162 (quoting 1614 order).

98. Baker, *Counsellors*, *supra* note 30, at 224.

of chancery “were generally of lower social origin.”⁹⁹ Yet despite the barristers’ efforts, their rise was slow. Only in the 1640s did barristers begin to gain gradual recognition as “a distinct order of legal practitioners.”¹⁰⁰

During the mid-seventeenth century, the English legal world began to take on many of the characteristics “of the modern legal profession.”¹⁰¹ By the late seventeenth century in England, the rise of the barristers had destroyed the possibility of attorneys pleading in the courts and had doomed the attorney to the endless onslaught of accusations about lack of competence and pettifoggery. The men who ventured to the American colonies in the early seventeenth century, however, left England before the legal profession froze into its modern class and education-based divisions. The first generation of Rhode Islanders departed at the height of attorney prominence. They carried with them these early notions of a legal profession.

For men of their position, acting as an attorney was a respectable activity. Some of the original Rhode Island settlers had training as law clerks or attorneys in England.¹⁰² Others wrote with the “neat ‘clerk-like hand’” to which English clerks and attorneys aspired.¹⁰³ When these men moved to Rhode Island, they found themselves—minor gentlemen farmers and the sons of merchants and clothiers—at the top of the legal and social hierarchy. Not surprisingly, they continued to find the job of attorney a useful and important one.

C. *The Training of the Attorney*

How did these Rhode Islanders acquire an attorney’s training, that is, knowledge of how to act as legal literates? In England, because a large part of the attorneys’ work involved writing and strategizing, attorney training remained diverse and “even by 1650, no single

99. BROOKS, *supra* note 20, at 166.

100. PREST, *supra* note 90, at 5. As late as 1632, the title of barrister was “a word of contempt.” Baker, *Counsellors*, *supra* note 30, at 215.

101. PREST, *supra* note 90, at 9; Baker, *Counsellors*, *supra* note 30, at 223.

102. In Rhode Island, Roger Williams, John Clarke, and William Harris all may have obtained such training. On Massachusetts men with similar backgrounds, see generally Barnes, *supra* note 18.

103. BROOKS, *supra* note 20, at 173. For examples of such handwriting, see the hands of William Harris and Philip Sherman. The Harris Papers are available at the Rhode Island Historical Society. See discussion *infra* note 203. Sherman’s handwriting can be seen in PORTSMOUTH TOWN RECS., *supra* note 41. At least one Rhode Islander (probably Samuel Gorton) wrote in the Sheltonian shorthand favored by the famous government clerk, Samuel Pepys. On the Sheltonian shorthand used for Pepys’s diary and appearing in some of the early Rhode Island record books, see WARWICK TOWN RECS., *supra* note 32, at iv-vi. Sheltonian shorthand was sufficiently difficult to decipher that modern codebreakers claimed to be fooled. Shorthand also appears in the Harris documents. See HARRIS PAPERS, *supra* note 69, at 58-59 (depositions of 1661).

method of training was officially specified.”¹⁰⁴ The focus of an attorney’s learning was practical rather than theoretical.¹⁰⁵ After a young man had learned to read and write, he often entered into a clerkship with another attorney or in the courts. In 1633, the first specific rule for qualifications for practicing in King’s Bench and Common Pleas codified the long-standing overlap between attorneys and clerks.¹⁰⁶ An attorney had to have “served a Clerk or Attorney” of the court for six years or have sufficient “education and study in the law.”¹⁰⁷ Although Rhode Island never adopted attorney training requirements, the way in which legal literates learned law in the colony paralleled an English attorney’s training.

Some legally literate attorneys trained in England. A few arrived in Rhode Island with such abilities. Warwick town clerk Edmund Calverly had been involved in acting as an attorney when he was “keeper of the Ely house in London.”¹⁰⁸ Another town clerk, John Porter, had been given a letter of attorney to supervise a Hingham estate as early as 1640, suggesting that he brought legal skills with him.¹⁰⁹ Providence town clerk Gregory Dexter, a prominent London printer, had published a number of petitions to courts and assemblies in England.¹¹⁰

Others learned their legal literacy in Rhode Island. John Sanford, the Recorder for most of the period between 1656 and 1670, grew up in a learned house.¹¹¹ His father, John Sanford, Sr., had been Recorder in the early days of the colony and eventually became the young colony’s President.¹¹² At twenty-three, Sanford, Jr., followed in

104. BROOKS, *supra* note 20, at 152. “The inns of court and inns of chancery played no direct role in the process.” *Id.* at 156.

105. *See id.* at 18-19.

106. *See id.* at 144. The rule appeared after a study noted that “many ignorant persons . . . have been admitted to be attorneys.” *Id.*

107. *Id.* at 142.

108. WARWICK TOWN RECS., *supra* note 32, at 186 (1657). Calverly was a “shoemaker and a soldier” in England during the war and arrived in 1661. *See* 2 CORRESPONDENCE OF ROGER WILLIAMS 544 (Glenn W. LaFantasie ed., 1988). Calverly kept careful records in Warwick and wrote an extraordinary number of letters. He and John Greene were assigned to write the petition that the deputies should sit apart from the magistrates. *See* WARWICK TOWN RECS., *supra* note 32, at 145.

109. *See* 4 WINTHROP PAPERS 296 (Massachusetts Historical Society ed., 1947); *id.* at 330-31.

110. *See* 1 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 231. Gregory Dexter was the London printer who printed Roger Williams’s *Key into the Language of America* before leaving England. *See* Howard M. Chapin, *Gregory Dexter, Master Printer, A Checklist of Books Printed by Gregory Dexter*, 13 R.I. HIST. SOC’Y COLLECTIONS 105-13, 114 (1919) (*Checklist* follows article on Dexter).

111. *See* 2 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 459 n.1; JOHN OSBORNE AUSTIN, THE GENEALOGICAL DICTIONARY OF RHODE ISLAND 171 (reprint ed. 1969) (1887); 1 R.I. RECS., *supra* note 6, at 300 (1655 roll of freemen).

112. Sanford, Sr., received numerous books from John Winthrop and Edward Home, many of them relating to science. On John Sanford, Sr., *see* 3 WINTHROP PAPERS, *supra* note 109, at

his father's footsteps by becoming Recorder. The literary grace of young Sanford appears in his letter to Roger Williams:

My Respectful Salutations to yourself and Mrs. Williams. I have been bold to present unto your self the orders made in May last by the Court of Commissioners, not being acquainted who is your town clerk, therefore intrust yourself to present them to your town clerk and town. So Remain Sir Yours to Be Commanded.¹¹³

Throughout his life, Sanford, Jr., was elected to offices that allowed access to the laws—Assistant and Commissioner—and offices which required legal skills such as General Attorney and treasurer. Another attorney, John Greene, Jr., also learned his legal literacy from his father. John Greene, Sr., had been a surgeon in England and had been the colony's Recorder in its early day.¹¹⁴ Greene, Jr.'s early skills brought him legal prominence; he became Recorder and General Attorney. The subsequent prominence of these sons in colony affairs indicates that the legal literacy learned within the colony was as highly valued as that brought from England.

While men like Greene, Jr., and Sanford, Jr., learned their skills from their families, others learned from observation and participation in litigation. The story of Edward Richmond suggests such learned literacy. By the late 1660s, Edward Richmond was one of the more legally literate members of the colony, serving as the General Solicitor and General Attorney. In the 1650s, however, he was a young man with plans to marry Abigail Davis. For reasons seemingly related to family pressure, Davis entered into an apparent marriage with another man, Richard Ussell. In the subsequent, complicated efforts to win her release, Richmond learned many aspects of legal practice in Rhode Island.

In June 1656, Richmond's attorneys began to sue Ussell in trespass—a choice demonstrating Richmond's perception of himself as the injured party. The action failed, however, because Ussell had done no specific wrong to Richmond.¹¹⁵ Richmond's attorneys then tried and won a perhaps more appropriate action of trespass on the case for breach of covenant against Ussell and Davis's father, John Cowdall, "for forcing Abigail Davis the spoused wife of Edward

112-13. Sanford, Sr., died in 1653.

113. 2 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 459 (1656). I have substantially modernized spelling here.

114. He had also traveled back to England with Williams and Dyre. See LOUISE CLARK, THE GREENES OF RHODE ISLAND 52-58 (1903); 1 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 109.

115. See 1 R.I. CT. RECS., *supra* note 37, at 18-19. In October 1656, Edward Richmond presented a petition to the Court of Commissioners. The Court of Commissioners "suspended" "the business" until "it be heard" in the court of trials. 1 R.I. RECS., *supra* note 6, at 348.

Richmond and for taking, keeping and withholding her from Edward Richmond."¹¹⁶ Although Richmond received six pounds damages, Davis remained married.

At last, the Richmond side turned to a strategy designed to have Davis free herself. A petition in her name was presented to the General Assembly, written most likely by Richmond or his attorneys because Davis was unable to read or write. When the General Assembly sent a committee to talk to her, it "read the petition to the said Abigail."¹¹⁷ She disclaimed Richard Ussell and owned only Edward Richmond, noting that "what she had done with respect to Richard Ussell, was for fear of being forced to it by her father and mother."¹¹⁸ The strategy of letting Davis speak for herself was successful; the Assembly declared the Ussell-Davis marriage "an unlawful marriage."¹¹⁹

Freeing Davis, however, did not legalize her relationship with Richmond. The following spring, the grand jury indicted Richmond and Davis for living together and conceiving a child. After pleading guilty, they each received a forty shilling fine. Still unmarried, in June 1658 Richmond and Davis pleaded to the Court of Trials that "for preventing of the like Temptation," the court should marry them. The court consented and declared them married.¹²⁰ The lessons Richmond learned eventually made him one of the most powerful legal literates in the colony.

IV. LEGAL LITERACY

Legal literacy involved far more than social standing, political office, background training, and access to laws and courts. Attorneys

116. The Court of Trials immediately referred the case to the Court of Commissioners for "their determination." 1 R.I. CT. RECS., *supra* note 37, at 22 (Oct. 14, 1656). On the eighteenth of October the case was presented and then "referred" to the next meeting of the Court of Commissioners in May. *See* 1 R.I. RECS., *supra* note 6, at 349.

117. On May 20, 1657, the Court of Commissioners appointed a committee to go to Abigail "and to carry the petition that was presented to the Court in her name, and to inquire of her if she own it to be hers. They were to "inform themselves of other circumstances from her thereabout." They were then to make a report the following morning. *See* 1 R.I. RECS., *supra* note 6, at 358-59.

118. *Id.* at 360. She also "owned the said petition to be her act." *Id.*

119. *Id.* at 365. "Upon adjitiation" concerning Ussell and Davis, the Court of Commissioners decided "their resolution to consider and debate the matters, as to their sense concerning the marriage of the said Ussell with the said Abigail Davis, whether it were legal or not." But "upon the great disturbance made by standers[-]by in the beginning" of the "adjitiation," the court deferred any debate of the matter. The subsequent proceedings hardly ended the matter. Davis sued Ussell in trespass. In what was most likely a technical complaint against the declaration, Ussell claimed that he did not know of any "Abigail of Newport." The jury could not agree on a verdict and refused to attend the case. *See* 1 R.I. CT. RECS., *supra* note 37, at 31 (Oct. 1657); *id.* at 37-38 (Mar. 1657/58). The printed record reads "joined by the Attorney"; it seems likely that the "s" is missing and both parties had attorneys.

120. 1 R.I. CT. RECS., *supra* note 37, at 45-46.

and legal literates in Rhode Island engaged in many of the same lawyering functions that we associate with modern lawyers. Not only did they represent themselves and others by appearing in court, but they performed other attorney functions such as preparing written pleadings, objecting to procedure and parties, and seeking reconsideration of the case. Moreover, these legal literates were also the architects of their own legal system, developing new legal procedures to further their legal cases.

A. *Practicing Law*

Across the colony people were aware of the advantages of active legal literacy. In 1660, Hannah Taylor wrote to the town of Providence that she was “very unskillful in law matters”¹²¹ but wanted to make some “small progress.”¹²² Therefore, she asked for the town to take her cause “into your hands.”¹²³ Towns similarly knew that legally literate attorneys should handle litigation. Warwick appointed John Wickes as an attorney to “manage” the suit against the town.¹²⁴ Portsmouth appointed William Hall to join Philip Sherman as the “town’s Agent and Attorney” “to prosecute and finish” a suit about laying a highway, and Sanford was “added unto them to Assist in the Matter.”¹²⁵

In managing and prosecuting a suit, the attorney or legal literate engaged in a number of activities. Attorney fee statutes suggest that the work of attorneys was divided into two parts: The first involved preparing the case and filing initial papers; the second involved pleading at trial. In Providence, an attorney received a fee for every court in which “he appears, or Pleads in a case.”¹²⁶ If the case were continued before the jurors were impaneled, the attorney received only half the fee.¹²⁷ Pleading well involved knowledge of the law, as demonstrated by a 1669 statute guaranteeing the right of a person to have an attorney in a criminal case. The preface elaborated the

121. 15 PROVIDENCE TOWN RECS., *supra* note 32, at 80 (1660).

122. *Id.*

123. *Id.*

124. WARWICK TOWN RECS., *supra* note 32, at 117.

125. PORTSMOUTH TOWN RECS., *supra* note 41, at 164 (1671). When William Almy sued Portsmouth (by suing treasurer William Baulston), the town appointed a number of men to serve as attorneys. In 1670, John Sanford “was added to those men that were ordered to assist Mr. William Baulston to implead.” *Id.* at 156; 2 R.I. CT. RECS., *supra* note 37, at 91.

126. 2 PROVIDENCE TOWN RECS., *supra* note 32, at 59.

127. *See id.* In 1649, Providence set attorneys fees “for preparing the cause and for pleading” at six shillings, eight pence. And “if any man will have a Crier he shall pay 1s.” *Id.* at 44. In 1656, the attorney fee was reduced to 3 shilling, 4 pence. *See id.* at 92. In Warwick, “any man shall have liberty to plead his own cause but if he get an Attorney his fee may not exceed 2 shillings, 6 pence.” 4 WARWICK TOWN RECS., *supra* note 32, at 48. In 1677, the colony set new fees and noted that an attorney or counselor who draws up declarations shall have two-thirds of the old fee. *See* 2 R.I. RECS., *supra* note 6, at 590-91.

difficulty faced by a person not knowledgeable in the law:

Any person inhabiting in this jurisdiction, may on good grounds, or through malice and envy be indicted and accused for matters criminal, wherein the person that is so [accused] may be innocent, and yet may not be accomplished with so much wisdom and knowledge of the law as to plead his own innocency, &c.¹²⁸

To solve this problem, the statute declared that it will be the “lawful privilege of any person that is indicted, to procure an attorney to plead any point of law that may make for the clearing of his innocency.”¹²⁹

Knowledge and wisdom of the law often involved appreciating the subtleties of procedure. At the early stages of lawsuits, attorneys objected to technical errors in the pleading. In one case, the attorney for William Coddington challenged a declaration for having the word “plaintiff” written instead of “defendant.”¹³⁰ The attorney for William Brenton knew how one dealt with such technical arguments: One argued that the error had made no substantive difference. The Court concluded that the error was merely a “verbal oversight” because the defendant’s answer showed that he had “clearly understood and answers according to the scope of it.”¹³¹

Attorneys also appreciated how to manipulate the pleadings. When the extraordinarily legally literate John Greene, Jr., sued Mathias Harvey for 500 pounds, Harvey immediately retained Richard Townsend as “Attorney in the Case.”¹³² Greene claimed Harvey had supported his wife in “plucking down” Greene’s fence.¹³³ Greene noted that the fence had been demolished before and although “a man might rather have imagined it to be Indians than English,” Greene insisted that the plucking down had been done “publicly.”¹³⁴ Underlying the dispute over the fence was an issue of ownership of the land on which the fence lay. Townsend attempted to raise this issue by denying that Harvey had plucked down any fence *on Greene’s property*.¹³⁵ Townsend urged therefore that the writ be abated and dismissed. Greene won damages for loss of the

128. 2 R.I. RECS., *supra* note 6, at 238-39.

129. *Id.* at 239. The statute may relate to William Harris’s conduct. It was passed along with another law pointing out the problems of indicting a person elected to office. *See id.*

130. *See* 1 R.I. CT. RECS., *supra* note 37, at 19 (1656). Brenton’s action against Coddington was in detinue for £600. *Id.*

131. *Id.*

132. WARWICK TRIAL CT. RECS., *supra* note 47, at 15.

133. *Id.* at 13.

134. *Id.*

135. *See id.* at 15.

fence, but only a nominal six shillings and eight pence.¹³⁶ The jury and court did not accept the invitation to decide the underlying land dispute.

Once the pleadings were complete, attorneys often attempted simply to avoid trial. One clever tactic was the demurrer, a procedural move used to delay the case.¹³⁷ Legal literate Nicholas Easton used the demurrer to avoid the colony's efforts to recoup money. In 1652 or 1653, Easton had obtained prize money to hold for the King from a boat seizure during the Dutch war.¹³⁸ In 1656, when the colony demanded an accounting, Easton refused. The colony, fearing embezzlement or loss "by any sinister act or accident," passed a law empowering the treasurer to bring an action against Easton.¹³⁹ Subsequently, with a lawsuit looming against him, Easton claimed to have changed his mind and petitioned to have the action withdrawn pending an accounting.¹⁴⁰ The action was not withdrawn. Easton demurred and then failed to show up for trial.¹⁴¹ When the case finally reached trial in May 1660, the jury could not agree.¹⁴² By the following spring, the case had reached the Court of Trials, who "seriously weighed the matter" and "read and considered the colony's order for demand of the estate," but decided that "it is not convenient to prosecute the said action" because there were "very great alterations &c. since the former order was made."¹⁴³ With the restoration of Charles II, the colony was no longer worried that England would demand the prize payment. For Easton, the

136. See *id.* at 1. Harvey had been the Warwick clerk in 1659, but appeared never to have been very comfortable with the position. See WARWICK TOWN RECS., *supra* note 32, at 114.

137. Although colloquial the demurrer had a formal meaning in English law, Rhode Islanders used it in its more colloquial meaning to delay the trial. Rastell defined demurrer: "Demurrer is when any action is brought and the defendant pleadeth a plea, to which the plaintiff sayeth that they will not answer, for that, that it is not a sufficient plea in the law, and the defendant sayeth to the contrary, that it is a sufficient plea, this doubt of the law is called a demurrer." RASTELL, LES TERMES DE LA LEY, *supra* note 48, at 244. See also RASTELL, AN EXPOSITION, *supra* note 48, at 63.

138. See 1 R.I. RECS., *supra* note 6, at 387. For what may be early references to the vessel, see 15 PROVIDENCE TOWN RECS., *supra* note 32, at 59. In May 1655, Christopher Almy, a claimant for some of the money, petitioned the Court of Commissioners. See 1 R.I. RECS., *supra* note 6, at 314. In June, the Assembly concluded that Dyre and Easton "shall bring in their account of the State's part due to his Highness at the next Assembly." *Id.* at 321. By October 1656, Easton, the former President, refused to deliver the 28 pounds, 5 shilling restitution to Almy. See *id.* at 346-47.

139. See 1 R.I. RECS., *supra* note 6, at 387-89.

140. See *id.* at 425 (Aug. 1659).

141. See 1 R.I. CT. RECS., *supra* note 37, at 56 (Oct. 1659) (charges brought); see *id.* (demurred); 1 R.I. RECS., *supra* note 6, at 430 (Easton failed to appear and subsequently asked for a new trial).

142. See 1 R.I. CT. RECS., *supra* note 37, at 67-68 (Oct. 1660); see *id.* at 70-71 (Mar. 1660/61) (another hearing of Easton's case).

143. 1 R.I. CT. RECS., *supra* note 37, at 70-71; 1 R.I. RECS., *supra* note 6, at 440. Although the Assembly authorized the revival of Almy's demand, the case disappears thereafter, perhaps indicating abandonment or settlement.

demurrer had proven successful. Indeed, the demurrer was so frequently invoked that the colony passed laws reducing the number of demurrers permitted.¹⁴⁴

If delay seemed unavoidable, another tactic was to object to the opposing attorney in hopes of either creating a default or at least preventing the attorney from speaking on behalf of the litigant. Litigation between Mathias Harvey and John Greene, Jr., in Warwick town court provides a good example of such objections. Three years after Harvey initially employed Richard Townsend as an attorney, Greene and Harvey were still disputing the title to the land. When Harvey failed to answer a new suit, Greene filed a *nihil dicit*. At trial, William Carpenter appeared “making answer as Attorney” to Harvey. Greene asked Carpenter to show “his warrant of Attorney.” Carpenter apparently displayed some piece of paper. The court, however, concluded that the warrant “gave him no Authority at all as Attorney to this suit.” Carpenter offered to bring in witnesses to testify as to “the intent of the Letter of Attorney.” The court “perused it” and “caused it to be read” to the court. Greene argued, however, that “the Letter of Attorney could not be enlarged by verbal witnesses.” The court accepted Greene’s argument, refused to hear Carpenter, and the case went to the jury without any defense by Harvey.¹⁴⁵

Not only did attorneys object to other attorneys, but they also sought to remove Assistants from the bench whom they feared were partial to the other side. In Providence town court, attorney Hugh Bewitt objected to Robert Williams by noting that his client “question[ed] whether he shall have a fair trial or due progress in the said Cause, whilst the said Robert Williams is one upon the bench deputed.”¹⁴⁶ The alleged lack of fairness often arose from the fact that some of the Assistants also served as attorneys. In one case, the

144. The colony spent a great deal of time altering its law on demurrers. In 1651, Warwick and Providence permitted both plaintiff and defendant to demur even after the jury was impaneled, although the jury then had to be paid. But after the verdict, no “demur” was available. They, however, allowed another demurrer upon the permission of the bench. *See* 1 R.I. RECS., *supra* note 6, at 237 (1651). In 1657, each party could have one demurrer. *See id.* at 356. In 1662, the law clarified that the plaintiff could not demur. If he was not ready before trial, he should withdraw the suit and be nonsuited. A defendant who wanted to demur should do so eight days before court and, if not, then the trial was to proceed. *See id.* at 479. In 1674, another law gave no liberty to demur unless the court judged there to be reasons. *See 2 id.* at 523.

145. WARWICK TRIAL CT. RECS., *supra* note 47, at 7-8. The jury set damages at £7. The action had originally been withdrawn at the consent of both parties. *See id.* at 5. The reappearance of the action may signal failure of settlement. Carpenter’s legal abilities and reliability appear somewhat questionable. The court noted that Carpenter had not asked the court to stay proceedings while he tried to produce any witnesses. Although he promptly entered an appeal to the General Court of Trials, he failed to show up at the court and the case was thrown out. *See* 2 R.I. CT. RECS., *supra* note 37, at 29-30 (1664).

146. 15 PROVIDENCE TOWN RECS., *supra* note 32, at 58 (1652).

Assistant objected to had served as the attorney for the opposing side by posting bond and, in a later phase of the case, actually appeared as the attorney.¹⁴⁷

Even after a case was decided against their clients, attorneys were still useful.¹⁴⁸ They often refused to accept execution of the judgment, or the very judgment itself. If an attorney disliked the decision of a town jury, the case could be appealed from the town court to the General Court of Trials.¹⁴⁹ A defendant had ten days before execution of a judgment “to remove his Case if he judge himself wronged.”¹⁵⁰ Removal involved obtaining a writ from an Assistant.¹⁵¹ But what if one wanted to appeal after the appropriate time had passed? With a good attorney, an appeal was still possible. In 1650, William Cotton of Boston had lost in Providence town court to William Field. Cotton had not immediately appealed. Cotton later retained the assistance of Benedict Arnold as attorney. Arnold noted that he had gone to “Mr. Dexter (who was Attorney in the case for Mr. Cotton) and asked his advice about an appeal.”¹⁵² Dexter had stated that “according to the Town order it was too late

147. See 1 R.I. CT. RECS., *supra* note 37, at 19-20. Attorneys often appear to have posted bond for clients. This practice had its risks. John Greene had acted as an attorney for ship master Mark Ridley in 1670. Ridley eventually lost the case, with damages of £20. Two years later, the judgment had not been paid. The original plaintiff died and his successors wanted to collect against Greene who had given security because Ridley had not been a “free inhabitant” of the colony and had no known estate. The Recorder, noting a “want of a clear law in such case to justify,” asked for advice from the Assembly. See 2 R.I. RECS., *supra* note 6, at 446. He added that

if no way in such case be already provided, that there may a way by this Assembly be provided of the future in cases of that nature, that so justice and judgment may not be hindered from those who legally call for it, and accordingly in the Court of Trials procure it.

Id. at 446. Greene lost when the Assembly concluded that execution could be against the estate of the bondsman Greene if neither Ridley nor his estate were found. See *id.* at 446-47.

148. In 1656, William Coddington successfully petitioned the Commissioners to suspend the execution of a judgment for slander. He apparently argued that the judgment related to matters about disunion of the colony and the colony had already reached reconciliation on such matters. The Commissioners agreed that “no such acts should be meddled withall, except by a special order from England.” 1 R.I. RECS., *supra* note 6, at 357. For proceedings related to the Commissioners’ statement, see 1 R.I. CT. RECS., *supra* note 37, at 18 (June 1656); 1 R.I. RECS., *supra* note 6, at 349 (Oct. 1656). See also *id.* at 321 (June 1655); 1 R.I. CT. RECS., *supra* note 37, at 11 (Oct. 1655); *id.* at 16 (Mar. 1655/56) (initial proceedings).

149. Three appeals are recorded from town courts. Garriardy [Gereardy] v. Westcott, 1 R.I. CT. RECS., *supra* note 37, at 69 (Oct. 1660); Field v. Carpenter, 2 R.I. CT. RECS., *supra* note 37, at 20 (Oct. 1663); Harvey v. Greene, *id.* at 29 (Dec. 1663). A 1652 law stated that in appealing to the General Court of Trials, no more evidence could be used than in the particular (town) court. See 1 R.I. RECS., *supra* note 6, at 242 (May 1652). On the history of the appeal in Rhode Island, see Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

150. 2 PROVIDENCE TOWN RECS., *supra* note 32, at 88.

151. See *id.* See also 1 R.I. RECS., *supra* note 6, at 266-67 (Providence and Warwick to have an appeal to the General Assembly).

152. 15 PROVIDENCE TOWN RECS., *supra* note 32, at 49.

to Appeal.”¹⁵³

Arnold, however, was not persuaded that the passage of time should bar the appeal. He wrote to the plaintiff William Field. Field also happened to be the Assistant with “power to grant Appeals.”¹⁵⁴ Arnold argued that major disruptions in the colony excused the delay. Because there had been “no certain court, place, nor time to appeal unto,” no appeal could have been granted.¹⁵⁵ Quietly threatening Field, Arnold noted that if Field refused to grant the appeal, Arnold would show his request at the town meeting “for upon the sight hereof I doubt not but the Townsmen will so far agitate the thing that it shall be so ordered.”¹⁵⁶ Against such clever lawyering, Field probably relented. Once again, an attorney had shown his skillfulness in law matters.

B. Developing Law

These attorneys and legal literates did more than merely play within existing rules; they also developed new variations on English legal procedures.¹⁵⁷ One dramatic variation, the rehearing of right, was in part a response to the very presence of attorneys in the system. The idea of a rehearing was not new in Rhode Island. Before 1655, however, rehearings were only granted at the discretion of the bench.¹⁵⁸ These discretionary rehearings provided opportunities for attorney objections.

The concern over discretionary rehearings was not theoretical. In 1656, two of the wealthiest and most powerful men in the colony clashed over arrangements to export horses to Barbados. William Brenton and William Coddington had more than adequate legal representation. The two sides ferociously engaged in legal attacks over the technicalities of the declaration and the composition of the

153. *Id.*

154. *Id.* at 50.

155. *Id.* at 49.

156. *Id.* at 49-50.

157. Other variations include the demurrer and the appeal discussed above. *See supra* text accompanying notes 137-144 & 149-156.

158. In 1650, the colony acknowledged rehearings by clarifying that once execution had been granted, a case could not be reheard. *See* 1 R.I. RECS., *supra* note 6, at 222. During the colony’s division in the 1650s, Providence and Warwick continued the tradition by providing for rehearings at the “discretion of the bench.” *Id.* at 237. The law stated that one had 10 days after the judgment for “review” in the same court or an appeal from the particular court to the General Court of Trials. A party had one review at the “discretion of the bench” in the General Court. *Id.* In October 1655, when the towns reunited, two men serving as attorneys who had access to the old record books both referred to discretionary rehearings. William Lytherland, the former Recorder, requested a rehearing for Jan Gereardy. *See* 1 R.I. CT. RECS., *supra* note 37, at 11-12, 13-15. John Cranston, the General Attorney, when representing Mrs. Francis Vaughan, noted that the other party could request a rehearing if necessary. *See id.* at 13.

bench.¹⁵⁹ An attempt by the jury to split the difference between the parties proved unsatisfactory. Coddington and his attorney obtained a discretionary rehearing.¹⁶⁰ Brenton's attorneys challenged the grant of rehearing by a petition to the Assembly.¹⁶¹ Although the Assembly stated that the grant was legal, it was sufficiently concerned about the threat to order posed by such a dispute that it explicitly noted that the towns could disannul the decision to uphold the rehearing.¹⁶²

By the time the case reappeared in the General Court of Trials in March 1657, the court had concluded that granting rehearings on a case-by-case basis merely created one more opportunity for lawyering maneuvers that did not move towards resolving the case. After persuading the parties to agree to arbitration,¹⁶³ the court stated that "a motion shall be presented from this court to the next general Court of Commissioners" for "a method and Rule to be given touching a rehearing of causes."¹⁶⁴ The Assembly responded in May with a new law providing that plaintiffs and defendants would each "have liberty of one rehearing."¹⁶⁵ To obtain a rehearing, a party needed only to give a double bond within ten days after judgment.

With the establishment of the rehearing of right, the colony developed one of its most interesting departures from the traditional common law system. Instead of only twelve jurors deciding a case, parties could obtain eventually the decision of twenty-four or thirty-six of their peers. After May 1657, rehearings abound in the records. Between 1655 and 1670, there were twenty-two rehearings filed in

159. William Brenton presented a petition to the Commissioners stating that Coddington had "unjustly obtained" Brenton's horses and was planning to ship them to Barbados. The Court "after full debate and mature consideration" ordered a "special writ of attachment" to keep the horses on the island "until a due trial of such a challenge shall be had, according to the law and orders established amongst us." 1 R.I. RECS., *supra* note 6, at 337-38. Brenton was represented by Dyre and Baulston. Both sides apparently had attorneys because a third action was withdrawn by "the Attorneys of both Parties." 1 R.I. CT. RECS., *supra* note 37, at 20.

160. The jury gave one-third of the horses to Coddington, and to Brenton, 16 horses and mares "proved upon evidence alive & dead beside this year's increase," and six pence damages and costs. 1 R.I. CT. RECS., *supra* note 37, at 20. The court then considered an assault and battery charge by Brenton against Coddington for £100. The action was withdrawn by both parties "never to be renewed again." *Id.* at 20.

161. The reasons remain unclear, but they appear to have involved the nature of the relationship between Coddington and John Coggeshall, the Assistant who granted the rehearing. See 1 R.I. RECS., *supra* note 6, at 348.

162. The towns did nothing. See 1 R.I. CT. RECS., *supra* note 37, at 22-23.

163. See 1 R.I. RECS., *supra* note 6, at 361. Emphasizing their concern to put the matter to rest, the Commissioners noted that if the arbitrators did not agree "upon the full and final determination" no court or officer could grant execution, *nihil dicit*, or nonsuit on any matters to either one "without a special authority from the law making Court of this Colony." The Commissioners declared that the arbitrators could agree on an award "to take of the visible estate in horsekind or sheep, or other cattle of either of the parties." *Id.* There is no record of the outcome of the arbitration.

164. 1 R.I. CT. RECS., *supra* note 37, at 24.

165. 1 R.I. RECS., *supra* note 6, at 357.

the Court of Trials, of which seventeen were eventually heard. Of the twenty-two rehearings filed, sixteen were brought by attorneys and four by other legal literates. The two cases that did not include previously identified legal literates involved the fight between two men on the edges of legal literacy: Robert Westcott and Jan Gereardy.¹⁶⁶ Not surprisingly, attorneys and legal literates embraced the rehearing as another weapon in their procedural arsenal.

The strategic advantage of the rehearing lay in the opportunity for a second chance at argument and a jury. In some cases, a change in the presentation of the case or the introduction of new evidence may have led to a different result. For example, when Jan Gereardy sued the estate of Virginian Colonel Scarbrough in May 1669, the jury found for Gereardy in the amount of 72 pounds, 11 shillings, and a penny.¹⁶⁷ At the rehearing of the case in October, the attorneys no longer agreed on the issues and the court redefined them for the jury. This redefinition of the issues was decisive; the jury now found for Scarbrough.¹⁶⁸

More often, however, the strategy turned on the hope of a different jury. A jury with members favorable to one side or the other could alter the outcome of the case.¹⁶⁹ The Gereardy-Westcott dispute provides an example. On initial hearing in 1660, a Warwick jury had been very sympathetic to Gereardy's debt case against Westcott and awarded Gereardy the astounding sum of 150 pounds—although a rehearing in the town court reduced the sum to 81. At the General Court of Trials, a jury less dominated by Warwickers reversed the judgment to no debt owed. Westcott

166. See *infra* Appendix tbl.6.

167. See 2 R.I. CT. RECS., *supra* note 37, at 76.

168. The court stated that the first issue was whether the tobacco attached was in Scarbrough's estate and second how much he was indebted. *Id.* at 80 (Oct. 1669).

169. Merely challenging the jury decision through a rehearing may have communicated to the jury the strength of the defendant's belief in his or her innocence. Attorneys for losing defendants dominated the requests for rehearings, with eleven defendants in all moving for a rehearing. Defendants' attorneys were surprisingly successful in such cases. Of all the cases in which a defendant's attorney moved for a rehearing, in eight, the attorney succeeded in having the sentence reversed completely or the damages reduced. Reductions ranged. William Arnold's successful rehearing had the sum reduced by more than half. John Greene, Sr., had originally been awarded £150; in rehearing the sum was reduced to £60. See 1 *id.* at 48, 52. At Henry Hobson's rehearing, the jury merely subtracted 10 shillings—an amount which probably came close to his combined court costs. See *id.* at 62-63, 68. One case was sent to arbitration. Three cases were dropped before rehearing, probably because the damages awarded against the defendants were less than the cost of paying the court costs for the rehearing.

Not all plaintiffs accepted a defendant's success on rehearing. After losing the second trial, some took the same opportunity to request a rehearing. Such persistence could pay off. Joseph Torrey, for example, won at trial, lost on the first rehearing, but won on the second. See *id.* at 41-42, 52. On balance, however, plaintiffs' attorneys appear to have been less successful. In three of the six cases in which a plaintiff's attorney requested a rehearing, the plaintiff lost again.

retained this judgment even after a rehearing.¹⁷⁰ Gereardy managed through procedural maneuvering to continue the case until 1663, when the Court of Trials heard the case for a third time, noting that it had had “long patience” with the case.¹⁷¹ On this fifth jury, Warwickers sided with Gereardy. The jury contained Richard Burton, a Warwick man who had sat on the first two trials in the Warwick town court. At some point in the deliberations—probably with the jury verdict once again going against Gereardy—Burton and a fellow Warwick juror rebelled. When the bench sought an explanation for the return of only ten responses, the jury stated that they had invited “two of their Company” (Burton and Thomas Greene) to “agitate” with the others. Burton and Greene, however, responded that “it was time for Travelers to go to Dinner” and therefore left without dissenting or agreeing.¹⁷² The hungry jurors did little good to Gereardy; as plaintiff, he did not recover the debt.

Rehearings rapidly became a matter of course in Rhode Island for anyone willing to bear the potential court costs. As one legal literate later noted, a rehearing was obtained by law in Rhode Island “without showing any reason, error, or attain.”¹⁷³ This legally literate culture continued into the 1670s. Younger men who began to serve as attorneys followed the path that others had marked. Sons like Thomas Olney, Jr., and John Whipple, Jr., became clerks and learned the law.¹⁷⁴ These young clerks represented increasing numbers of parties. The men who served as General Attorney—John Pocock and John Williams—continued to represent others. The connection between written literacy and legal literacy became

170. See *id.* at 69 (Oct. 1660). The court judged it “lawful” that Westcott could have a rehearing.

171. 2 R.I. CT. RECS., *supra* note 37, at 14.

172. *Id.* at 14-15, 18-19. *Elles v. Bull* involved a similar situation of a hung jury. See *id.* at 42. In October 1665, Samuel Elles of Milford, Connecticut, sued Henry Bull of Newport for detainer with £500. Henry Bull was a deputy in 1666. See 2 R.I. RECS., *supra* note 6, at 139. The jury found for the Rhode Island defendant. The plaintiff filed for rehearing. See 2 R.I. CT. RECS., *supra* note 37, at 42. At the rehearing in May 1666, the jury noted that the foreman, William Almy, had “absented himself” and they could not bring in the verdict. The court found “no Law obstructing and a necessity by the statute for us to expedite Justice for the avoiding such damage” and called another jurymen to stand in his stead. The Governor and Baulston protested. The court then dismissed the jury. See *id.* at 43-44. Almy was indicted at the October session for absenting himself. He made a number of exceptions. The court viewed the bill and judged “that it was not formal according to law” but was sufficiently concerned that they referred it to the General Assembly. *Id.* at 48-49. The assembly did nothing. In May 1668, Elles petitioned the General Assembly. The Assembly noted that the jury had not brought in a verdict according to the “record” and therefore noted that Almy should return all the papers to the Recorder to go back to the parties. See 2 R.I. RECS., *supra* note 6, at 224.

173. Letter from William Harris to King Charles II (June 11, 1675), in HARRIS PAPERS, *supra* note 69, at 150, 153.

174. Providence clerk Thomas Olney was the son of a Baptist shoemaker who arrived in Rhode Island after leaving Salem. See 2 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 518. On Olney, Sr., see 1 *id.* at 231.

complete in 1671 when the colony passed a law that “for the future” no person shall be elected or employed as General Sergeant “unless such a one as can read and write.”¹⁷⁵

V. LEGAL LITERATES AND LEGAL LITERATURE

Attorneys and legal literates trained and practiced law in Rhode Island courts. But what did they actually think about law? How did they learn the substance of the law? In particular, how did they understand laws and law books intended for England? To glimpse this mental world is difficult. In a colony without law schools or inns of court, the paths of transmission of legal knowledge have largely disappeared. We cannot hear conversations or whispers of advice. We cannot see a legally literate jury member or court watcher mentally noting the tone of another attorney’s voice or style of narrative. For most of these men, notebooks and correspondence have long since disappeared. Yet, in extant materials, glimpses appear of a legal community comfortable with the creative interpretation of the laws of England.

In Rhode Island, the man at the center of this world was William Harris. Although many of Harris’s papers are extant, no Harris biography exists and surprisingly little is known about him. That a major figure in Rhode Island history could be so avoided says quite a bit about the dead hand of the far more famous Roger Williams. Williams, who traveled to New England and then to Rhode Island with Harris, had an intense dislike of the man. In 1668, Williams wrote of Harris:

[H]e hath tacked about, licked up his vomit, adored (like Saul as some have told him), the Witch at Endor, the Laws and Courts and Charters which before he damned; and turned his former traitorous practices into 10 years vexatious plaguing and tormenting both Town and Colony and the whole Country with Law, Law Suits and Restless Fires and Flames of Law Contentions.¹⁷⁶

Yet, as editors and commentators note, Harris retained friendships with and respect from a number of prominent Rhode Islanders. He loved his wife, Susan, and his two children; indeed, when he sailed

175. 2 R.I. RECS., *supra* note 6, at 400. Ascertaining Rogers’s literacy at the end of his life is difficult because he also was from Newport where the records are no longer extant.

176. Letter from Roger Williams to the Governor and Council (Aug. 31, 1668), in 15 PROVIDENCE TOWN RECS., *supra* note 32, at 122 (punctuation added). See also R.I. RECS., *supra* note 6, at 121; HARRIS PAPERS, *supra* note 69, at 77. For attribution to Williams, see 2 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 583. For a modern history adopting Williams’s perspective, see SYDNEY V. JAMES, COLONIAL RHODE ISLAND: A HISTORY 88-89 (1975).

for England in 1678, he left a power of attorney which appointed both his son and his daughter to act in his name, sue, and be sued.¹⁷⁷

Of the details of Harris's prior life in England, there is only speculation. The editors of *The Papers of the Providence Proprietors* suggested that Harris "might have had the training of an attorney, or of an attorney's clerk."¹⁷⁸ His careful handwriting certainly suggests as much. His knowledge of the law was widely recognized throughout Rhode Island. He served as an Assistant throughout the 1660s and was named General Solicitor in May 1671.¹⁷⁹ In 1666, when the colony appointed a committee to revise its laws, Harris was asked to look over the revision. Indeed, his training as an attorney may have been what led his oft-adversary Edmund Calverly to write: "We much marvel how he escaped being indicted for a common barrator."¹⁸⁰

Whatever legal knowledge Harris brought to the colony increased in the course of his long lawsuit to retain lands for a group of landholders known as the Pawtuxet Proprietors. The suit stretched in its many guises from the 1650s beyond Harris's death in 1681.¹⁸¹ In later legal documents relating to the suit, Harris signed himself an "attorney"; indeed, he closed one 1678 document on his lengthy lawsuit: "A long & great sufferer therefore complainant and demandant And Attorney &c."¹⁸² The case brought him before the General Court of Trials and the General Assembly. It led him to the visiting English commissioners. It resulted in the convening of an inter-colonial court in Plymouth. It even took Harris to England on three occasions, and sent others in Rhode Island scurrying after him to counter his suit. Indeed, the suit literally killed him when he was captured by pirates on the way to London to seek help obtaining execution of a judgment. After being sold in Algerines, Harris was ransomed—only to die shortly after reaching London in 1681.¹⁸³

Despite the loss of many of the Harris papers, the extant collection hints at the legal knowledge, reading and writing, and

177. See HARRIS PAPERS, *supra* note 69, at 266-67.

178. HENRY C. DORR, THE PROPRIETORS OF PROVIDENCE AND THEIR CONTROVERSIES WITH THE FREEHOLDERS, 9 COLLECTIONS OF THE RHODE ISLAND HISTORICAL SOCIETY 7 (Providence, 1897).

179. See 2 R.I. RECS., *supra* note 6, at 375.

180. HARRIS PAPERS, *supra* note 69, at 90-91.

181. On the Harris lawsuit, see 2 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 57, 62-66 (1934).

182. Letter from William Harris to the Court (Oct. 1, 1678), in HARRIS PAPERS, *supra* note 69, at 250, 259.

183. Harris was also the agent for the Atherton Associates, a group including the Winthrops, Simon Bradstreet, Elisha and Edward Hutchinson, Richard Wharton, both Richard Smiths, and Francis Brinley. See J.M. SOSIN, ENGLISH AMERICA AND THE RESTORATION MONARCHY OF CHARLES II 255 (1980).

communication practices of Rhode Island attorneys. Harris's documents reveal a community of attorneys and legal literates who acquired and shared legal knowledge by buying and borrowing books, copying and composing legal records and documents, and traveling and talking. As an English colony, this legal community was particularly interested in English legal knowledge. These attorneys, however, did not strictly follow the laws of England. The 1663 charter received from Charles II had set forth a more subtle and creative path for the legal community. The charter declared:

[T]he laws, ordinances and constitutions [of Rhode Island], so made, be not contrary and repugnant unto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there.¹⁸⁴

The charter established an interpretive role for the Rhode Islanders in applying English law. It authorized a dynamic conversation about English law in Rhode Island. It suggested that England's legal culture was merely the starting point for a complicated transatlantic legal culture.

A. *The Library of William Harris*

The legal literature of England informed the background legal knowledge in the Rhode Island legal community. The range and scope of the Rhode Islanders' interest in this literature appears in the books collected by William Harris.¹⁸⁵ By the time of his death in 1681, Harris had accumulated a sizeable library. The contents appear in an inventory composed by his wife and daughter, Susan and Howlong Harris.¹⁸⁶

The careful inventory provides a wealth of information. First, rather than merely listing "law books," the Harris women copied down the short titles of each book. This fact suggests that the larger community perceived his collection to be a library worthy of cataloguing.¹⁸⁷ Second, the women included an approximate value for each book. A comparison of likely editions of Harris's books

184. 2 R.I. RECS., *supra* note 6, at 9.

185. See *infra* Appendix tbl.7. There are no publication dates given in the inventory. Dates and publishers given in the footnotes refer to volumes I have consulted or to similar volumes available on microform.

186. See 6 PROVIDENCE TOWN RECS., *supra* note 32, at 76-86, 88-89. Two additional books, *The Lawes Resolution of Women's Rights* and *The Book of Artillery*, are listed in a receipt given to John Whipple, Jr., from Susan and Howlong Harris (June 1682). See Rhode Island Historical Society, 1 Rhode Island Historical Society Manuscripts 34.

187. For a similar inventory, see E.W. IVES, *THE COMMON LAWYERS OF PREREFORMATION ENGLAND* 432, 445-47 (1983). On seventeenth-century attorney libraries, see BROOKS, *supra* note 20, at 173-81.

suggests that many of the books were valued according to size.¹⁸⁸ Third, and most importantly, at the time of his death, many of Harris's books had been lent out to other attorneys. The two women recorded who had which books and invested substantial time attempting to reclaim these books. The interest in carefully inventorying the estate may have been out of respect for Harris. It may also have helped that Howlong had fallen in love with attorney John Pocock, a user of the Harris's library.¹⁸⁹

Harris's library reflects the life of a colonial Rhode Islander. He owned two Bibles and several other religious books. Were he to become sick, he had four books best referred to as pop-medical, filled with home diagnoses and remedies. Given the heavy trade in horses, possession of a farrier's handbook, *The Gentleman's Jockey*, is not surprising. And books on artillery and navigation or surveying similarly reflected necessary skills. Harris also showed an interest in his new home and in supporting local production of books. He owned a copy of what was likely the Cambridge, Massachusetts printing of Nathaniel Morton's *New England's Memorial*.

The bulk of the library, however, consisted of law books.¹⁹⁰ The inventory lists eleven separate legal titles. One additional title—*The Lawes Resolution of Women's Rights*—was later returned by Joseph Whipple, Jr. Related materials owned by Harris included a dictionary, a book on how to learn Latin, and two other books by legal authors: Matthew Hale's book on contemplations and a volume apparently on war. But Harris owned even more law books. The inventory notes that "several" books had been lent to legal literates such as John Pocock and Francis Brinley. The titles of these books are unascertainable. Although many of Harris's books appeared elsewhere in colonial America, in 1681, the sheer size and breadth of his library was impressive.¹⁹¹

188. Books examined at Harvard Law School, Special Collections.

189. See 15 PROVIDENCE TOWN RECS., *supra* note 32, at 231-33 (Testimony of John Whipple, Jr., regarding Howlong Harris (Aug. 1681)). Susan Harris wrote that no one should join John Pocock and Howlong together until she received permission from her husband. See *id.* at 233. Pocock never married Howlong Harris for reasons unclear today. Howlong instead married Arthur Fenner, one of Harris's bitter adversaries in the land litigation. See AUSTIN, *supra* note 111, at 74.

190. See *infra* Appendix tbl.7.

191. Many of these books were not unusual for the seventeenth-century colonies. As early as 1647, the Massachusetts government had ordered a copy of *Coke upon Littleton* and Dalton's *Justice of the Peace*. See WARREN, *supra* note 10, at 71. Arthur Spicer of Virginia, who died almost twenty years after Harris in 1699, had 53 law books, "of these 46 were treatises, 6 statutes, but only 4 reports." BRYSON, *supra* note 22, at xx. Included in Spicer's library were a Brownlow's *Declarations, A Complete Clerk, A Layman's Lawyer*, Rastell's *Les Termes de la Ley*, and Wentworth's *Office and Duty of Executors*. Later Virginia libraries included similar books: Duncombe's *Tryals per Pais*, Meriton's *A Touchstone of Wills*, and *Layman's Lawyer*. See *id.* at xv-xvii. For discussion of other seventeenth-century libraries, see BRYSON, *supra* note 22, at xx; WARREN, *supra* note 10, at 7 (claiming that "not more than ten

Many of the law books confirm Harris's identity as an attorney. His library was dominated by small practitioner books.¹⁹² In addition, Harris had several larger practitioner books: *The Compleat Clerk*, *The Countrey Justice*, and Brownlow's *Declarations and Pleadings*.¹⁹³ These books were intended, as the author of *Tryals per Pais* noted, for "the Practicers of Law (especially Attorneys, Solicitors, Clerks, etc.)."¹⁹⁴ *Justice Restored* also indicated its practitioner emphasis. The introduction states that it was published "so that such *Clerks*, as were not acquainted with matters of that Nature in the time of the late *King*, may be fully instructed."¹⁹⁵ Brownlow similarly described his book as "useful for all practicers and students of the law, of what degree soever."¹⁹⁶ The substantive material addressed by these books covered the basic functions of the attorney. Two books—*Office and Duty of Executors* and *Touchstone of Wills*—explained wills and executorship. The *Lay-man's Lawyer* and *Justice Restored* listed criminal and indictable offenses. The *Lawes Resolution of Women's Rights* concerned "points of learning in the law, as do properly concern women."¹⁹⁷ *Tryals per Pais* elaborated the structure and procedure of the English jury system. It began by explaining the derivation of the word "jury" and then explained what types of cases went to juries, who could be on a jury and the challenges available, types of evidence, the difference between special and general verdicts, and when jurors were allowed to eat and drink during deliberations. *The Compleat Clerk* offered "exact draughts of all manner of Assurances, and Instruments, now in use"¹⁹⁸ and, for the ease of the reader, was arranged alphabetically: "Annuity, Assignment," etc. *Declarations and Pleadings* offered models of pleadings. Dalton's *The Countrey Justice* provided the background

or fifteen" titles of English law books, excluding reports, were known in the colonies at the end of the seventeenth century).

192. Books like the *Touchstone of Wills*, *The Office and Duty of Executors*, *The Lay-mans Lawyer*, *Tryals per Pais*, *The Lawes Resolution of Women's Rights* and *Justice Restored* were small books approximately three to four inches wide and five to six inches high. The inventory prices for all these books range between 1.6 and 2 shillings indicating their small size. I use real measurements rather than bibliographic references based on paper size.

193. THE COMPLEAT CLERK, THE COMPLEAT CLERK, AND SCRIVENERS GUIDE (London, Thomas Roycroft 1655) MICHAEL DALTON, THE COUNTRY JUSTICE (London, G. Sawbridge, T. Roycroft & W. Rawlins 1677); RICHARD BROWNLOW, DECLARATIONS AND PLEADINGS IN ENGLISH (London, Thomas Roycroft 1652). These books were all valued between three and eight shillings and were six to seven inches wide and eight to nine inches high.

194. [GILES DUNCOMBE], *Introduction to TRYALS PER PAIS* (London, John Streater, James Flesher & Henry Twyford 1665).

195. *Introduction to JUSTICE RESTORED: OR GUIDE FOR HIS MAJESTIE'S JUSTICES OF THE PEACE* (London, John Streater 1671).

196. BROWNLOW, *supra* note 193, at title page.

197. JOHN MORE, THE LAWES RESOLUTION OF WOMEN'S RIGHTS, at title page (London: 1632) (printed by the assigns of John More).

198. THE COMPLEAT CLERK, *supra* note 193, at title page.

knowledge and forms needed by a justice of the peace or any other practitioner. For the occasional confusing word or concept, Rastell's *Termes de la Ley* briefly explained legal vocabulary.

Harris had also invested in a few expensive books. Harris's copy of *Coke's Commentary on Littleton* was appraised at one pound—close to the price of a young cow—in the inventory.¹⁹⁹ *Coke's Commentary* was the classic text of English land law. Given the importance of land law in the colonies, it was a crucial reference, explaining in detail the history and current state of England's property law. *Coke's Commentary*, however, was unusual in being one of the few law books in Harris's library first published before the English Civil War. The vast majority of Harris's law books had been published in the 1650s and 1660s. Harris's library was thus a contemporary one, containing the latest in legal thought prevalent in Commonwealth and Restoration England. Indeed, the presence of Hale's *Contemplations*, published only in 1676, just five years before Harris's death, demonstrates his interest in reading the latest legal publications.

This desire to own the latest and most fundamental law texts appears most dramatically in Harris's acquisition of his most valuable book: *Pulton's Sundry Statutes*. His large 1661 copy sits today at the Rhode Island Historical Society. *Pulton's Sundry Statutes* was not an abridgment; it contained much of the text of English statutes beginning with Magna Carta. Its appearance in the collection reminds us that English law by the seventeenth century was as much the story of statutes as it was of the common law. When the 1663 Charter referred to “the laws of this our realm of England,”²⁰⁰ the Rhode Islanders did not ignore the large body of statutory law.

Pulton's Sundry Statutes was not Harris's only book about an area other than English common law. He also owned Lambarde's *Perambulation of Kent*, which described the importance and legitimacy of local custom in English law.²⁰¹ In particular, Lambarde described the county of Kent's departure from general English practices such as primogeniture. Lambarde associated Kent's divergent practices with the history of its people, land and institutions—and its charter. If *Pulton's Sundry Statutes* informed the law-of-England clause of the charter, *Perambulation on Kent* provided a model for the first clause—that Rhode Island could

199. See *infra* note 290 and accompanying text.

200. 2 R.I. RECS., *supra* note 6, at 9.

201. WILLIAM LAMBARDE, *THE PERAMBULATION OF KENT* (London, Mathew Walbanke 1656).

depart “considering the nature and constitution of the place and people there.”²⁰² The two books reinforced the distinction between strictly following the laws of England and being English.

One last book held by Harris might not even be considered a book by some. The Rhode Island Historical Society holds a small, six-inch copy of the 1663 charter, copied in Harris’s handwriting.²⁰³ Harris could not obtain a printed copy of the document; however, he—and perhaps others—took the time to copy it by hand. Standing beside the imported, purchased books, this domestic, hand-copied volume testifies to the importance of the charter to legal literates.

B. Interpreting the Knowledge of the Law

Although the very choice of books goes far to indicate Harris’s understanding of English law and the possibilities for interpretation, extant documents provide additional evidence of how Harris actually used the library. He did not simply possess the books. He acquired them to solve particular legal problems and further his lawsuits.²⁰⁴ Throughout his legal work, he selectively incorporated material drawn from his readings.

Some connections are speculative. Harris probably used the many books on executors and women’s property in his attempt to gain control over his sister’s estate.²⁰⁵ The book on juries appears to have been the source for his careful documentation of how juries would be selected in the innovative intercolonial commission that would hear his complaint. The books on wills may have provided him with the format for what became his highly personal introduction to his 1678 will: He was 68 years old and “must die ere long”; small pox and fevers lay “not far off”; and his impending voyage raised “the danger of the sea by storms, leaks, and enemies.”²⁰⁶ His will also

202. 2 R.I. RECS., *supra* note 6, at 9.

203. See [William] Harris Papers, Rhode Island Historical Society, Box 1, Fol. 16 [hereinafter [William] Harris Papers]. The charter could have been used either by Harris for reference or prepared for litigation. In a similar style, Harris copied relevant records from the Town Book. *Id.* at Fol. 21. On scribal publication of colonial laws, see HALL, *supra* note 21, at 97-115.

204. Dating Harris acquisitions is difficult. Harris may have brought some books with him when he first arrived. He may have acquired others from England by friends or booksellers. He also traveled to England three times: in 1664, 1675, and 1679. See HARRIS PAPERS, *supra* note 69, at 25-42.

205. Letter from William Harris to Newport Town Council (July 3, 1676), in HARRIS PAPERS, *supra* note 69, at 161.

206. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 48; Harris Family Papers, Rhode Island Historical Society Box 1, Fol. 2. His will then very precisely made null and void all earlier wills and appointed his wife, son, and daughter as executors. Attorney Francis Brinley kept the will. Harris’s son Andrew declined to serve as executor. See SECOND REPORT OF THE RECORD COMMISSIONERS RELATIVE TO THE EARLY TOWN RECORDS 31-32 (Providence, J.A. Reid & R.A. Reid 1893).

demonstrates the basic knowledge of English law found in *Coke's Commentary* and the *Lawes Resolution*. He promised that if his female descendants were to marry and have children, "by the law of the Curtesy of England," their husbands could still enjoy the land.²⁰⁷

Harris's creative incorporation of the legal knowledge of England into Rhode Island circumstance appears in his will's provisions regarding entail and gavelkind. Like several other Rhode Islanders,²⁰⁸ Harris entailed his land—in his case "to my said fourth Generation."²⁰⁹ In England, entail resulted in land passing among male heirs, usually first-born sons, without their ability to sell or otherwise alienate the land. Harris's explanation of his choice of entail combined traditional rationales with peculiarly Harrisian ones. Harris included the traditional reason of debt for entail: that his grandchildren might prove "prodigals and spend and sell my said land."²¹⁰ He modified another classic reason in light of his experience of being accused of treason: He noted that if he were accused of a crime, then his grandchildren would still inherit.²¹¹ But two additional reasons were idiosyncratic. Harris believed that Williams and others had altered documents, so he noted that the entail would protect against fraudulent grants or wills by parties, by "town councils," or "by feigned witnesses as we frequently see."²¹² The final reason grew out of his lawsuit: "[U]pon Consideration of my great diligence laid out to obtain, cost to keep by law, and continual charge to defend" his "true title" to his land against "so many Evil Adversaries," his "posterity [would] reap the fruit of my labor to my fourth generation."²¹³ His desire to protect the land through his children's grandchildren was itself a recognition of the problems of unlimited entails.

Beyond Harris's reasons for the entail, the actual provisions demonstrated his creative application of English precedents to the circumstances of his life. In England, entail was most often used to limit the land to male heirs. *Coke's Commentary* specifically pointed

207. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 51. In the *First Part of the Institutes of the Lawes of England*, Coke discussed dower. Harris ensured that all widows descended from him would be given dower. See EDWARD COKE, 1 FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND 30-41 (reprint ed. 1979) (1628); 6 PROVIDENCE TOWN RECS., *supra* note 32, at 51.

208. As early as 1653, John Sanford, Sr., had entailed to his male heirs. See Will of John Sanford (June 22, 1653), in *Sanford v. Wood & Allen* (Mar. 1726), at R.I. Sup. Jud. Ct. Record Center. See also Will of John Coggeshall, in *Coggeshall v. Coggeshall* (Mar. 1737), at R.I. Sup. Jud. Ct. Record Center.

209. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 52.

210. *Id.*

211. *See id.*

212. *Id.* at 53.

213. *Id.*

out that in the usual male entail, the female issue would not inherit. Harris, however, did not share English law's traditional bias against women. He included the possibility of female inheritance. If his son Andrew had no male heirs, then the land would descend to "his female heirs lawfully borne to him." At each generation, Harris provided that if there were no male heirs, the land would go to female heirs.²¹⁴

Not only did Harris alter England's law to include both male and female heirs but his will also included the unusual land division of gavelkind. Unlike primogeniture, under which land passed to the eldest son, gavelkind allowed the land to descend to all male sons equally. Lambard's *Perambulation* described Kent's use of gavelkind. As he had done with entail, Harris explained his choice of gavelkind. His will stated that the heirs would enjoy their parts:

according to the custom of gavelkind land, (as in the law expressed) and as by the Kings patent to this his Colony (saith according to the custom of his manor of East Greenwich in Kent) which by Lambath preambulations &c, are intended Custom of Gavelkind (that is to say) if male heirs, then the land to be equally divided among them.²¹⁵

Harris's justification of a land division outside of traditional English common law came from the charter. It stated that the company in Rhode Island and their heirs and assigns held "as of the Manor of East Greenwich, in our county of Kent, in free and common socage."²¹⁶ This passage had most likely been designed to ensure that the colonists did not pay rent for the land—hence the reference to socage. Harris, however, emphasized the custom of Kent clause. He reasoned that if the Company held land as in Kent, then those holding from the Company held as if they were in Kent, and therefore gavelkind applied. He then modified the traditional male-only form of gavelkind by adding: "[if] no male heirs, then to be Equally divided among the female heirs."²¹⁷ Once again, Harris had further changed England's law to include women.

The most extensive creative use of English law appears in Harris's interpretation of *Pulton's Sundry Statutes*.²¹⁸ The flyleaves of the

214. The Harris litigation was never completely successful and the land was eventually settled by arbitration, so the legality of the entail remained questionable. His son, Andrew, died intestate and his estate "by the clear incontestable law of the colony in the 96 page of our lawbook descended in equal proportion to his relations in equal degree." [William] Harris Papers, *supra* note 203, at Box 1, at 98 (Aug. 18, 1727). According to later family genealogists, Andrew's son, Toleration, "forgot the entailment and made a will." *Id.* at 105.

215. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 51-52.

216. 2 R.I. RECS, *supra* note 6, at 19.

217. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 52.

218. FERDINANDO PULTON, A COLLECTION OF SUNDRY STATUTES FREQUENT IN USE,

volume are covered with careful notations by Harris.²¹⁹ These notes consist of a statute citation and a short sentence on the point of the statute. How and when Harris acquired the volume is unknown. But, by September 1673, the book had appeared in Rhode Island in Harris's collection.²²⁰

The first Harris document with extensive statutory citations is an undated document objecting to a new tax to pay for an English agent to address the Connecticut claims, which the editors of the *Harris Papers* date to February 1672. In the document, Harris cited no less than ten English statutes, often quoting the entire statute.²²¹ The lengthy quotation of the statutes was designed, as Harris noted, to "lay down" "the law and clauses of the law of England supposed to be the rule of judgment (in such cases)."²²² The word "supposed" emphasized Harris's awareness of the gap between the laws of England and Rhode Island. Moreover the quotations demonstrated the relative absence of law on the question; most of the statutes applied only by clever analogy and extension.

Of course, not all statutes needed to be creatively interpreted. Sometimes it was sufficient merely to cite repeatedly a statute. Harris was particularly fond of the English statute of limitations for land actions—21 James 16 (basically an adverse possession statute).²²³ In a grouping of statute excerpts entitled, "the court to be held at Providence the 3d of October 1677," he wrote about 21 James 16 and noted "that no demand by any suits, by any person hath been commenced against us this forty years . . . our title justified."²²⁴ He later referred again to the statute in his declaration

WITH NOTES IN THE MARGENT, AND REFERENCES TO THE BOOK CASES, AND BOOKS OF ENTRIES AND REGISTERS . . . (London, J.J. Bill & C. Baker 1661).

219. As was typical of trained clerks, Harris used two different types of scripts for the excerpts.

220. The first possible document in which Harris relied on the volume is a December 1669 letter to the Providence town meeting in which he refers to the "law of England" stating that "no Corporation may make any law in diminution or dishertion [sic] of the rights or prerogatives of any of the king's liege subjects and people" and "trespassers against Magna Charta shall by the law of England be inquired into." Letter from William Harris to Providence Town Meeting (Dec. 15, 1669), in HARRIS PAPERS, *supra* note 69, at 93, 94. This letter, however, bore no citations.

221. See Harris, concerning Connecticut (Feb. 1672), in HARRIS PAPERS, *supra* note 69, at 104-18. Harris cited to 6 Hen. 8, ch. 15 (relationship among charters); 13 Car. 2, ch. 15 (orders of parliament void without royal consent); 18 Hen. 6, ch. 1 (petitions to the king in cases of patents); 34 & 35 Hen. 8, ch. 21 (favorable construction given to grantees); 21 Jam., ch. 3 (monopolies void in certain cases); 13 Rich. 2, ch. 2; 7 Eliz., ch. 1; 1 Edw. 6, ch. 1, and 5 Eliz., ch. 1 (statutes relating to English law contrary to Rhode Island patent); 9 Hen. 3, ch. 1 (Magna Carta). See also *id.* at 107-17 (additional discussion of statutes). The passages quoted in the letter match the version in PULTON, *supra* note 218.

222. HARRIS PAPERS, *supra* note 69, at 105.

223. See An Act for Limitation of Actions, and for Avoiding of Suits in Law (1623) in 7 THE STATUTES AT LARGE 273 (Danby Pickering ed., Cambridge, Joseph Bentham 1763).

224. PULTON, *supra* note 218, at end of volume flyleaf i (recto) (citing 21 Jam., ch. 16).

against an entry made by John Towers, stating that the entry was against “the law of England that giveth title to the possessor if not demanded by action within twenty years 21 K James & 16.”²²⁵ In Rhode Island’s world of uncertain and continual land claims, such a limitation was an essential addition to Harris’s statutory vocabulary.

Yet more often the statutes of England failed to address precisely Harris’s situation. He was constantly combing the book and combining statutes to support his point. This practice appears all over the flyleaves. He excerpted six statutes about the types of suits that executors could bring—no doubt, for reference in his suit on behalf of his sister.²²⁶ Another six statutes on the duties of the sheriff may have served as the basis for his suit against the General Sergeant for failure to execute a judgment.²²⁷ He cited statutes relating to forcible entries, the action that he brought against one of the defendants in his land suit.²²⁸ Gathering material for his letter suggesting an intercolonial court, Harris noted statutes relating to the holding of sessions and special commissions.²²⁹ Other citations on juries and judgments related to the formation of an inter-colonial jury and Harris’s later desire to have it reconvened to explain its judgment.²³⁰ These statute citations demonstrate Harris’s belief in the importance of English statutes as a starting point—and his awareness that they were rarely directly applicable to his situation.

Harris’s comfort with creative interpretation may have arisen from his understanding of the foundations of English law, in particular, the importance of Magna Carta and principles of equity. Harris viewed Magna Carta as fundamental law. He wrote down a list of statutes that related to the relationship between Magna Carta and other types of law. He noted that the “great charter” could be pleaded in all courts. Citing statutes of Edward I, III, and Henry III, he wrote that “all statutes contrary to magna charta are void” and that “all laws, statutes, or customs contrary to the great charter shall

Harris noted a related statute at the beginning of the volume. *See id.* at ii (verso) (citing 21 Jam., ch. 14).

225. Harris’s Declaration against John Towers (Nov. 17, 1677) in HARRIS PAPERS, *supra* note 69, at 205-06.

226. *See* PULTON, *supra* note 218, at end of volume flyleaf i (recto) (citing [#] Edw. 3, ch. 14; 13 Edw. 1, ch. 19; 4 Edw. 3, ch. 7; 9 Edw. 3, ch. 3; 13 Edw. 1, ch. 23; 25 Edw. 3, ch. 5).

227. *See id.* at ii (verso) (citing [#] Edw. 3, ch. 7; 27 Hen. 8, ch. 24; 13 Edw. 1, ch. 19; [#] Hen. 3, ch. 3; 3 Edw. 1, ch. 28; 13 Edw. 1, ch. 2).

228. *See id.* at [ii recto] (matching the citation in 2 R.I. RECS., *supra* note 6, at 513 with one reversal in order).

229. *See id.* at end of ii (verso) (6 Rich. 2, ch. 5; Rich. 2, ch. 11; 14 Hen. 6, ch. 3) (sessions); end of volume flyleaf ii, (recto) (4 Hen. 4, ch. 9; 7 Hen. 4, ch. 11; 42 Edw. 3, ch. 4; 28 Hen. 8, ch. 15) (special commissions).

230. *See id.* at end of volume flyleaf i (verso), ii (recto), iii (recto), verso of title page, end of volume flyleaf ii (verso), end of volume flyleaf iii (recto) (many of the citations are at edge of pages and have been torn).

be void.”²³¹ Harris’s belief that Magna Carta voided *all* laws, statutes, and customs, and his repeated references to it as “the great charter” hint that Harris saw it almost in the modern understanding of a written constitution. Harris viewed the great charter, not as a historical document, but as the one ultimately authoritative document in English law. This emphasis on the great charter as fundamental law may have reinforced Harris’s understanding of the importance of the Rhode Island charter.

If the Magna Carta served as fundamental law for Harris, then equity served as a fundamental operating principle. Harris noted a number of statutes that suggested that equity would permit flexibility in the application of statutes. For example, 28 Henry 8, chapter 15, showed that “by the equity of the said statute” a special commission could decide.²³² And 23 Henry 8, chapter 3, suggested that “by the equity of the said statute” if there were not enough competent jurors in one place, the case could be removed to another place and court.²³³ This belief in the equitable interpretation of statutes reinforced Harris’s proclivity to apply the law of England creatively to particular problems.

C. Transmitting Legal Interpretations

1. Borrowing Books

Harris was not the only Rhode Islander interested in English legal literature. Other Rhode Islanders shared the knowledge in Harris’s library. As Harris himself noted, there was little elsewhere for a lawyer to learn: At the only college, the College in Cambridge, “many Preachers, Physicians, & Indians (but no Lawyers) are bred.”²³⁴ At Harris’s death, over half his books were no longer in his house. They had been borrowed by Thomas Olney, Jr., Nathaniel Waterman, John Whipple, Jr., Francis Brinley, and John Pocock. Olney, Waterman, and Whipple all served as town clerks. Brinley and Pocock had been active as attorneys and both served as General Attorneys. Olney and Whipple borrowed books on basic legal

231. See *id.* at iii (verso) ([#] Edw. 1, ch. [#] (“the great charter, the common law, all courts . . . to be pleaded”); [#] Edw. 1, ch. 3 (“all indictments contrary to the great charter or points thereof void”); 42 Edw. 3, ch. 1 (“all statutes contrary to magna charta are void”); 52 Hen. 3, ch. 5 (“all offenders against the great charter are to be dealt with as offenders”); 28 Edw. 1, ch. 1 (“the great charter to be read . . . and 3 sworn justices appointed to hear offenses against it”); Tempore Edw. 1, ch. 4 (“all laws, statutes, or customs contrary to the great charter shall be void”).

232. *Id.* at end of volume flyleaf i (recto).

233. *Id.* at end of volume flyleaf i (verso).

234. Harris’s Account of New England (Apr. 29, 1675), in HARRIS PAPERS, *supra* note 69, at 142, 146.

knowledge: Olney had *Coke on Littleton*, the *Compleat Clerk* and the *Touchstone of Wills*; Whipple took *The Executors Office*, *Pulton's Sundry Statutes*, and a number of others. Waterman, whose interests were more varied, borrowed medical and religious texts. Brinley appeared interested in refining his legal knowledge; he borrowed Lambard's *Perambulation*.

These men were not the only legal literates to borrow from Harris. Both of the Sanfords, Peleg and John, Jr., were noted in the records to be at one time in possession of the statute book, presumably *Pulton's Sundry Statutes*.²³⁵ Moreover, the legal community as a whole borrowed the book. In 1673, the Assembly noted that the "Statutes, or Book of Statutes" was not at the Assembly. It added that the book containing many statutes of England should always be in the Assembly and also in "every Court of Trials" so that "proceedings in the said Courts may be guided thereby, and in conformity thereto."²³⁶ Whether attorneys and legal literates stopped proceedings to refer to the book remains lost in history.

Some indications of the readings of the statute book appear in local legislation. Some influences of the library were subtle. In 1678, the Assembly decided that it had used "executor" in statutes where "administrator" was the correct word.²³⁷ This correction may have led the Assembly in 1679 to appoint a committee because of a "great necessity for the more full and clear stating of the laws of this Colony, concerning the probate of wills and intestate."²³⁸ Other influences were direct. In the flyleaf, Harris had noted the statutes relating to forcible entry. In October 1673 when he sat as an Assistant, the Assembly enacted a law relating to these statutes. The law acknowledged the wisdom of the English statutes on forcible entries—"the laws of England concerning the same were enacted after hundreds of years' experience of the need of the said laws."²³⁹ The statute provided that "5 R ii 7, 15 R ii 2, 4 H iv 8, 13 H iv 7, 8 H vi 9, 19 H vii 13, 23 H viii 14, 31 El 11 & 21, Jac xv, shall stand in full force."²⁴⁰ Yet, as always, the Rhode Islanders emphasized their right to interpret the statutes. A parenthetical noted that these laws were

235. See 2 R.I. RECS., *supra* note 6, at 522 (noting that "the Statute Book, appointed to be in the General Court" was demanded of Peleg Sanford).

236. *Id.* at 504-05. Although the colony could have had two statute books, the more likely interpretation is that Harris's book was borrowed by the Assembly. The inventory states that the statute book belonged to Harris and its descent through Harris's family supports this conclusion. See handwritten notation of descent on frontispiece of *Pulton's Sundry Statutes* at the Rhode Island Historical Society.

237. See 3 R.I. RECS., *supra* note 6, at 13-14 (calling "executor" the "improper term").

238. *Id.* at 75-76.

239. 2 R.I. RECS., *supra* note 6, at 513.

240. *Id.*

in full force under the charter “so far as the nature and constitution of this place and people can admit.”²⁴¹ Although the statutes applied, the possibility of creative interpretation remained.

The greatest influence of the Harris library and this community of creative, legally literate readers may appear in the “1647 Code.” The “1647 Code” is a group of founding documents and laws, dated to 1647 by Bartlett’s edition of *The Records of the Colony of Rhode Island*. Bartlett drew the 1647 date from the heading of the first document in the collection in the record book.²⁴² The 1647 Code has interested scholars because of its numerous references to English statutes. The current interpretation of these citations is that they were “no more than window dressing.”²⁴³

The drafting of the Code, however, likely occurred in 1666, not 1647. It reveals neither obsessive imitation of the English law nor the prevalence of local law, but the ongoing efforts of Rhode Islanders to merge creatively English law and their understanding of their local constitution. In the original records, the Code does not appear with material from the 1640s. As G.D. Warden points out, the manuscript version of the Code appears following the entry of a record for the year 1666.²⁴⁴ The Code is written in the hand of John Sanford, the Recorder for the colony during 1666. Moreover, most of the citations—both in the text and in the margins—are also written in his hand.²⁴⁵ At several places, handwriting that looks suspiciously like Harris’s appears in the margins.

These clues suggest that the document referred to as the “1647

241. *Id.*

242. See 1 R.I. RECS., *supra* note 6, at 147. On the Code, see the editorial note by John D. Cushing in EARLIEST ACTS, *supra* note 34, at vii.

243. HOFFER, *supra* note 19, at 173. This interpretation comes from G.B. Warden’s essay, which argued that the English appearance of the code is deceptive because passages were drawn from Dalton’s *Country Justice* and many of the English statutory citations were a later addition to the drafted and approved 1647 Code. See G.B. Warden, *The Rhode Island Civil Code of 1647*, in SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 142-49 (David D. Hall et al. eds., 1984). John Farrell made a similar argument in 1950, also accepting the 1647 dating of the Code. Farrell described much of the material in the Code as influenced by Walter Young’s *A Vade Mecum and Cornu Copia. An Epitome of Master Stamford’s Pleas of the Crowne . . .* (1642). See Farrell, *supra* note 29, at 107.

244. See Warden, *supra* note 243, at 144 n.9. The Code appears in 1 Rhode Island Colony Records pt. 2, at 161-92 (manuscript edition), Rhode Island State Archives. Page 159 (May 1665) is in the handwriting of Joseph Torrey. See 2 R.I. RECS., *supra* note 6, at 127. Page 160 is in the handwriting of John Sanford and is dated September 1, 1666. Page 193 begins a section of records from the 1640s in the hands of recorders from that period. Page 222 contains records of 1665. This suggests that empty spaces in the books of the colony were gradually being filled. When the first book of records for the colony needed to be replaced, the colony chose to purchase two books: one for the records of the Court of Trials; the other for the records of the General Assembly. In 1671, the colony noted that they should buy two more books, one for the General Assembly acts and one for the Court of Trial acts. See *id.* at 400.

245. I disagree with Warden’s conclusion that the margin citations are in a different hand. A few examples of other hands appear; however, the bulk of the citations are in Sanford’s hand. See Warden, *supra* note 240, at 142-49.

Code” is actually the product of the 1664-1666 revisal committees. In 1664, a committee comprised of legal literates had been appointed to try to order the laws and to discover “inconsistent” laws.²⁴⁶ In 1666, another committee was appointed to finish the project. John Clarke was “to compose all the laws of the colony leaving out what may be superfluous, and adding what may appear unto him necessary, as well for the regulation of Courts as otherwise.” John Sanford was to “help with perusal of the Book of Records.” And “after the composure” of the laws, Harris and John Greene were to “have the view of them, and give their thoughts thereupon.”²⁴⁷

Understood as the 1666 “composure,” the set of documents that compose the Code make more sense. The first documents are the founding documents of the colony—a copy of the laws passed at the 1647 Assembly meeting, followed by a copy of the Providence agreement.²⁴⁸ The 1647 dating on the Assembly meeting, however, was meant to refer only to that specific document, not the entire sequence of substantive laws. With respect to the laws, despite reliance on Dalton’s *Countray Justice* (a book in the Harris library), the composure is highly original. Dalton appears to have been used to provide a quick definition of a crime or a specific example of an application to which the Rhode Islanders agreed. But the selections from Dalton are merely a few sentences out of a much larger section of the book. The decision to include sections from Dalton obscure other, more numerous, decisions to exclude most of the book. Moreover, other parts of the “composure” appear to have been drawn from other texts. For example, the sections on crimes against women and those involving women resemble sections in *Lawes Resolution*.²⁴⁹ Other sections—“archery,” for example—relate to the circumstances of Rhode Island life: the presence of indigenous peoples.²⁵⁰

Perhaps most significantly, the composure directly references the 1663 charter. This charter represents the Rhode Island legal literates’

246. The October 1664 committee was to review the laws “to put them in a better form for finding of them when there is occasion to look for any law, &c.” and to look for inconsistent laws. 2 R.I. RECS., *supra* note 6, at 64.

247. *Id.* at 184. The Committee was composed of John Clarke, who had been the colony’s agent in England, Roger Williams, John Sanford, Joseph Torrey, and John Greene, who was Clerk and General Attorney. The 1666 commission was continued in May 1667. *See id.* at 191.

248. The 1647 acts and orders are specifically labeled as such and the laws are numbered: “Acts and Orders made and Agreed upon at the General Court of Election . . . 19, 20, 21 of May anno 1647. . . .” The second document is entitled “For the Province of Providence” and is the Providence agreement. Further support for this interpretation is given by a notation in the 1647 section of the “composure” (in what appears to be Harris’s handwriting) that these laws were confirmed in “1657/58.” 1 Rhode Island Colony Records pt. 2, *supra* note 244, at 164.

249. *Cf.* MORE, *supra* note 197, at 381-82 (discussion of rape involving 6 Rich. 2, ch. 6).

250. *See* 2 R.I. RECS., *supra* note 6, at 186-87.

understanding of the basis for their own legislation. In the manuscript version of the “composure,” John Sanford wrote in a margin notation at the beginning of the section detailing substantive legal provisions: “Laws as made according to the Laws of England or near as the constitution of the place will bear.”²⁵¹ The Rhode Island legal community knew perfectly well where they agreed with and differed from the law of England. In local statutes—as in individual wills, legal arguments, and cases—the charter’s phrase became the foundation and justification of Rhode Island law.²⁵²

2. Conversation, Copies, and Correspondence

Beyond the exchange of books, legal knowledge and creative interpretation were transmitted by oral and handwritten communication. Conversations remain the most difficult mode of transmission to rediscover. While legal literates no doubt gained knowledge from conversations when they went abroad to England, little evidence remains of such exchanges.²⁵³ Public proclamations appear more readily in records. In 1667, for example, John Whipple, Jr., testified that one of the clerks, Gregory Dexter, had taken “a roll of papers out of his pocket, declaring unto the people that they were there met together and therefore the first thing they would do should be to read their agreements. Gregory Dexter then set to reading of one of the papers.”²⁵⁴

Legal knowledge and interpretation were also transmitted by copies. One of the facts that confronts anyone who reads colonial legal documents is the enormous time that was devoted to the copying of material. Records from town and colony books were copied for lawsuits. Deeds were copied as evidence of land transactions. Wills were copied for purposes of inventories and probate. Assembly meetings were copied to testify to the acts passed. And even private correspondence was copied to testify to the

251. 1 Rhode Island Colony Records pt. 2, *supra* note 244, at 166.

252. No mention appears in the records as to whether the compilation was accepted by the Assembly. Whether the Code actually ever operated as a series of laws or whether it merely represents a draft remains uncertain. In the 1680s, the colony appointed a committee “to take view of the laws and acts of this Colony, and to put them into such a method that they may be put in print” 3 R.I. RECS., *supra* note 6, at 86. The next compilation of laws was not made until 1705. Contemporaries referred to this compilation as “Major Coddington’s Abstract” and at least two early eighteenth-century lawsuits disputed whether the “Abstract” had the force of law. This unpublished compilation was printed by SIDNEY S. RIDER, LAWS & ACTS OF HER MAJESTY’S COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, MADE FROM THE FIRST SETTLEMENT IN 1636 TO 1705 (Providence, S.S. Rider & B. Rider 1896).

253. Harris went back to England three times. Williams traveled back twice. John Clarke, Randall Houlden, John Greene, Christopher Almy, and perhaps others, traveled back at least once. See *infra* notes 283-284 and accompanying text.

254. [William] Harris Papers, *supra* note 203, at Box 1, Fol. 2 (testimony, Oct. 16, 1669).

exchange of information.²⁵⁵ The existence of so many of the Harris papers is itself a testimony to this commitment to copying.²⁵⁶

Copies not only recorded substantive information but could also transmit individual legal interpretations. Through copies, Harris could offer his understanding of the original document. In 1677, each of Harris's bills against the defendants in the inter-colonial court included a charge for "obtaining writings."²⁵⁷ Harris made full use of the possibilities of the explanatory endorsement written on the back of documents. He carefully wrote the endorsement to explain the document to another reader. A set of 1661 depositions stated: "showing that such as now in 1669 deny A. Harris to be a purchasor did in 1660 grant it."²⁵⁸ Another long paper bore the words:

255. All of Harris's letters to his family preserved in the *Harris Papers* are actually copies made by John Whipple, Jr., Providence clerk, for Andrew Harris. Whipple attested to each copy. See, e.g., HARRIS PAPERS, *supra* note 69, at 325, 329, 331.

256. Harris was obsessed by copying because copies served numerous functions. Copying allowed people to learn of public facts. Upset by Williams's aspersions against him in 1666, Harris wrote to Captain Dean asking that Dean get an answer from Williams and give him "a copy of what he sayeth." Wm. Harris's Letter Giving a Sorrowful Account of Roger Williams (Nov. 14, 1666), in *Some William Harris Memoranda*, [William] Harris Papers, *supra* note 203, at Box 3, Fol. 131. Harris noted that he had "an Indictment of three sheets of paper" in which Williams had accused him of high treason. Copying permitted careful consideration of public statements. When Edmund Calverly complained about Harris in 1669, Harris wanted a copy, which was granted "provided, he would leave a copy of his proposals." 2 R.I. RECS., *supra* note 6, at 269. Copying allowed for the private study of public documents like the charter or town records. Copying also compensated for the perils of physical transmission of documents. Harris often sent duplicates overseas in case one ship sank. See, e.g., Wm. Harris's Letter Giving a Sorrowful Account of Roger Williams (Nov. 14, 1666), *supra*. Copying addressed concerns about fraudulent deeds. Harris believed that many of the struggles over his land litigation arose from a fraudulent deed by William Arnold. In a 1670 letter to arbitrators, Harris noted that William Arnold had delivered writings "defaced and raced." HARRIS PAPERS, *supra* note 69, at 101. In another situation, Benedict Arnold denied that the signature on the document had been made by him. See *id.* at 56. Copying also made a party less vulnerable to political partisanship at a time when the party in power controlled the books. Harris was only too well aware of this possibility. When the town dissolved into two separate factions, Harris, "having got the table," "denied the books" to the opposing faction and "dared the Company to touch the books." *Id.* at 80-81. The colony's concern about the possibility of changes to official documents can be seen in the inventorying of documents after changes in political power. After the Indian war, the town of Providence inventoried the documents to ensure that they knew what was missing. The little book with parchment covers with the entry of actions was missing. Twenty-three of the General Assembly acts were there, but a number were missing. William Harris's account of the rates was missing. Some of the court acts were there; but other court acts "sewed up in the manner of a Book" were wanting. Several wills and inventories were missing. Some Indian deeds were there but others were wanting. Beyond noting missing documents, the town noted which pages were written on to prevent the addition of fraudulent material. Thus, the Town Old Book had only seventy leaves with sixty-five missing and the book was quite defaced. The long book with deeds had sixty-nine leaves and seven pieces written on, and twenty leaves were missing. The new book with brass clasps had 164 pages written, so only one page was missing. See 15 PROVIDENCE TOWN RECS., *supra* note 32, at 172-74; FIRST REPORT OF THE RECORD COMMISSIONERS RELATIVE TO THE EARLY TOWN RECORDS, at 22-23, app. A (Providence, 1892). Appendix A and B to this Report list the 1677 inventory.

257. Harris's Bill against Calverly and others (Nov. 17, 1677), in HARRIS PAPERS, *supra* note 69, at 213. See *id.* at 208-09, 211, 212-13.

258. Depositions (Mar. 16, 1660/61), in HARRIS PAPERS, *supra* note 69, at 58.

A copy of a paper sent to William Arnold & the Rest, opening the true intent of the agreement of the arbitrators . . . about Patuxet. Showing & reasoning a difference with W. Carpenter, Z. Rhoads, & Will. Arnold about an arbitration or the award which they will not truly but fraudulently understand.²⁵⁹

Another stated that “Toleration Harris witness that John Harrod, Wickes, &c. resisted execution at Meshauntatack 21 April 1670.”²⁶⁰

Copies also helped others to reconstruct legal arguments of cases. When Harris was kidnapped by the Algerines, he wrote to obtain copies of his legal documents.²⁶¹ In April 1680, he wrote to his wife and children, “my papers being lost, if I live to come to London shall lack.”²⁶² He directed them to obtain copies from friends among the legal literates. John Whipple was to find “all the affidavits, and protests against the only pretended Executions.”²⁶³ Francis Brinley was to “endeavor a recruit of all other papers for all lost.”²⁶⁴ In an August letter, Harris added a postscript: “I forgot, but get me Thomas Wards and others protests against their pretense of unlawful execution, or as they call it.”²⁶⁵ When Whipple and Brinley found the documents and copied them, they added to their repertoire the types of legal claims brought by Harris and others.

These copies and their accompanying correspondence created a written conversation through which legal knowledge was transmitted across the colonies. Harris had written to Colonel Nichols in July 1667 requesting an opinion on the legality of fines placed upon Harris.²⁶⁶ Nichols, who was then Governor of New York, wrote back to the Rhode Island Governor regarding the fine: “you will not find in any one law book of England a precedent for so doing, but the contrary.”²⁶⁷ Harris then presented the Nichols opinion to the

259. Letter from William Harris to William Arnold and others (Dec. 25, 1657), in HARRIS PAPERS, *supra* note 69, at 49.

260. Testimony of Toleration Harris (May 1, 1670), in HARRIS PAPERS, *supra* note 69, at 95-96.

261. See Letter from William Harris to his Family (1680), in HARRIS PAPERS, *supra* note 69, at 329, 330.

262. Letter from William Harris to his Family (Apr. 6, 1680), in HARRIS PAPERS, *supra* note 69, at 322, 324.

263. *Id.* at 324.

264. *Id.* at 325. Harris added, “I have wrote to the Governor of Connecticut and mentioned some profes [sic] to main points.” A month later, Harris was still worrying about copies and noted that Brinley should remember to get “the copies of the protests against the proceedings as to execution.” Letter from William Harris to his Family (May 10, 1680), in HARRIS PAPERS, *supra* note 69, at 327, 328.

265. Letter from William Harris to his Family (Aug. 22, 1680), in HARRIS PAPERS, *supra* note 69, at 335, 336.

266. See Letter from William Harris to Richard Nicolls (July 1667), in HARRIS PAPERS, *supra* note 69, at 83-86.

267. Letter from Richard Nicolls to Gov. William Brenton (July 24, 1667), in 2 R.I. RECS., *supra* note 6, at 233-34.

Assembly as a “person skilled in the law.” The Assembly reversed itself.²⁶⁸

Correspondence also allowed Rhode Islanders to explain the relationship between the laws of England and local Rhode Island circumstances to those across the Atlantic. When Harris was puzzling over gavelkind in 1678, he wrote to Sergeant Steele in England for a “clear answer in writing.” After noting the sentence from the charter, Harris asked whether the land should “descend as gavelkind to all male heirs equally (if that be) &c or the eldest male heir or how else.”²⁶⁹ Harris emphasized the importance of the question: “[H]ere is great need of a resolution in the said case for here is no certain knowledge of the full and certain meaning of the said words.”²⁷⁰ In 1675, Harris similarly wrote “his worthy friend,” Fleetwood Shephard, an attaché to the court of Charles II, and carefully laid out statutes that related to the rights of people living under a corporation, as in Rhode Island.²⁷¹

Copying, correspondence, and conversation permitted creative interpretation of English statutes to spread. The transmission of Harris’s unique interpretation of 13 Edward 1, chapter 25, serves as an example.²⁷² In April 1678, Harris wrote to Thomas Hinckley, in Barnstable, who had been the President in charge of Harris’s intercolonial civil trial. Harris cited statute after statute to persuade Hinckley that he had the power to recall the intercolonial jury to determine the precise line of land division.²⁷³ As always, the statutes and Harris’s description were not precise. Harris described 13 Edward 1, chapter 25, as justifying that “where there hath been a verdict and judgment yet if he that had judgment against him can produce record or rolls” in his favor, the court could require the juries to return.²⁷⁴ The statute actually related to the technical request for a writ of *venire facias de novo* and to a series of

268. See *id.* at 236-37 (remitting fine).

269. Letter from William Harris to Sergeant Steele (Aug. 15, 1678), in HARRIS PAPERS, *supra* note 69, at 249.

270. *Id.* at 250. Harris described how the practice of each colony differed and wrote that Rhode Island did it “according to their pleasure.” *Id.*

271. Letter from William Harris to Fleetwood Shepherd (Apr. 26, 1675), in HARRIS PAPERS, *supra* note 69, at 122 N.B. (background on Shepherd), 126 (citing 3 Car. 1, ch. 1 and 19 Hen. 7, ch. 7).

272. See *Of what things an Assize shall lie* (1285), in 1 STATUTES AT LARGE, *supra* note 223, at 199-201. The original statute allowed the assize jurors to be recovened to see the defendant’s previously unavailable deeds or releases. See *id.* at 201.

273. See Letter from William Harris to Thomas Hinckley (Apr. 15, 1678), in HARRIS PAPERS, *supra* note 69, at 231-32. Harris had earlier persuaded colonial and English authorities to take unprecedented actions, culminating in the convening of an inter-colonial court to hear Harris’s actions. For Harris’s draft of the inter-colonial court order, see *id.* at 129-42.

274. Letter from William Harris to Thomas Hinckley (Apr. 15, 1678), in HARRIS PAPERS, *supra* note 69, at 232.

procedures involving assizes, one of which permitted a previously absent defendant to obtain the reconvening of jurors of an assize.²⁷⁵ Hinckley then spread this interpretation when he wrote to jurors in Connecticut asking that they reconvene to clarify “divers and dubious interpretations” about the division line. He justified the court’s actions on “the Law made the 13th of Edward the first: 25th whereby Justices in Cases shall send for the same Jury that hath before given verdict and after judgment granted.”²⁷⁶ In a letter to the inter-colonial court in June, Harris relied completely on the “equity of the 13 Edw. 1, ch. 25.”²⁷⁷ Harris’s interpretation then spread to England when legal literates Peleg Sanford and John Coggeshall cited the statute in subsequently writing to the King.²⁷⁸ A statute intended for England had been transmitted across the Atlantic by statute book—and now returned to England accompanied by a new interpretation.

CONCLUSION: THE LOST LAWYERS

Harris’s lending library closed after he died in England in 1681. Over the next two decades, the colony’s legal culture changed little. After the brief interruption caused by English policies related to the Dominion of New England, the colony returned to its General Court of Trials and its bench of elected officials,²⁷⁹ its rehearings and appeals,²⁸⁰ its legal literates and attorneys.²⁸¹ The presence of so many

275. See *id.* at 232 n.4.

276. Letter from Court to Connecticut Jurors (June 19, 1678), in HARRIS PAPERS, *supra* note 69, at 244-45.

277. Letter from William Harris to the Court (June 18, 1678), in HARRIS PAPERS, *supra* note 69, at 242-43.

278. See Return of the Commissioners to the King (Oct. 5, 1678), in HARRIS PAPERS, *supra* note 69, at 261-63.

279. See Book A, *supra* note 37, at 118. Of course, there were minor alterations, mostly for reasons of convenience. The Court of Trials was held apart from the General Assembly. By 1680 it had become apparent that the Court of Trials was interfering with the General Assembly, which moved the Court to the last Tuesday in March and the first Tuesday in September. See 3 R.I. RECS., *supra* note 6, at 88. The rising number of exceptions to the bench resulted in a law that assured that only four assistants were necessary to constitute a court.

280. By 1698, practically every court session began by rehearing cases. See Book A, *supra* note 37, at 122, 123, 126. Attorneys appealed to the Assembly for equity. See John Warner for Abraham Lockwood, in Book A, *supra* note 37, at 125.

281. The borrowers of Harris’s books took their position within the legal culture, and John Pocock became the General Attorney. The repeated failures of legal literates to produce a printed version of Rhode Island laws until 1705 meant that for the remainder of the century only the small group of legal literates had easy access to the laws. In 1680, a committee had been appointed “to take a view of the laws and acts of this Colony, and to put them into such a method that they may be put in print.” 3 R.I. RECS., *supra* note 6, at 86. By 1699, nothing had been done and Rhode Island statutory law remained only the province of the manuscript books held by the recorders and clerks. Only in 1718 did Rhode Island manage to collect and publish its laws. See ACTS AND LAWS OF HIS MAJESTIES COLONY OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS IN AMERICA (1718), *reprinted in* EARLIEST ACTS, *supra* note 34, at 135-239.

legal literates seemed to have decreased the court's sympathy for defendants lacking in legal literacy. In 1698, in a case against Thomas Durfee, the court noted that Durfee had not filed an answer; nevertheless, it concluded that "with the advice of the court" the "defendant could put his answer in court." The court, however, emphasized that this action "shall not be a precedent for the future."²⁸²

Although Rhode Island legal culture remained close to the early seventeenth-century legal culture of England with its acceptance of the role and importance of the attorney, in England, legal culture had changed dramatically. By the late seventeenth century, English legal culture had become obsessed with a belief in the superiority of barristers. This obsession had grave consequences for the Rhode Island attorneys' reputation.

When the Earl of Bellomont arrived in the fall of 1699, he brought with him England's late seventeenth-century belief in the superiority of educated barristers. He missed the many practicing attorneys and legal literates, proud of their competency in the courtroom. He overlooked the possibility of a legal education obtained through self-help and observation. The Earl noticed only that the men acting as lawyers and judges lacked a university education, great wealth, and the training of the Inns of Court. Equally importantly, he failed to see that the Rhode Island legal literates understood English law. Their differences arose not from ignorance but from creative legal interpretation.

Bellomont's vision, however, became the future of legal education and the legal profession. His biting criticism—not the seventeenth-century practitioners' legal literacy—would become the most known aspect of seventeenth-century colonial legal culture. For over a century, legal historians often have quoted his condemnation as truth, never pausing to consider the historical developments from which it arose. Today, legal literates like Mr. Kurtz have no hope of recognition as legitimate legal practitioners. Perhaps, however, the pages of history can be more forgiving and more appreciative of the legal knowledge and creative interpretations of yesterday's legal literates.

282. Samuel Stibbins v. Thomas Durfee, Jr., in Book A, *supra* note 37, at 126.

APPENDIX

Table 1: Attorneys Listed in Court Records, 1655-1670

Year	Attorneys Listed for Both Sides	An Attorney Listed on One Side	No Attorneys Listed	Case Dropped or Arbitrated Without Mention of Attorney
Total (n=93)	25	11	48	9
1655	0	4	2	1
1656	6	0	4	2
1657	2	0	5	2
1658	5	0	3	0
1659	1	0	0	0
1660	3	1	7	0
1661	0	0	3	1
1662	1	0	1	0
1663	0	1	3	0
1664	1	2	6	0
1665	0	0	2	0
1666	0	0	2	0
1667	3	1	1	1
1668	0	1	3	0
1669	2	1	2	0
1670	1	0	4	2

Table 2: Attorneys Listed in Records, 1650-1670²⁸³

Attorney	Retained by	Other Functions
Benedict Arnold	William Cotton	President; Governor; English Agent

283. Only selected biographical and employment information is listed. Benedict Arnold (1615-1678): Of Newport, son of William Arnold of Cheselbourne, Dorset County; went first to Boston and then to Providence; also an Algonquin translator. *See* AUSTIN, *supra* note 111, at 242; 1 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 253; 2 PROVIDENCE TOWN RECS., *supra* note 32, at 60 (refers to Arnold as the “agent or bailer”). William Baulston (1600-1678): Of Portsmouth. *See* AUSTIN, *supra* note 111, at 16-17; 1 R.I. CT. RECS., *supra* note 37, at 9. Hugh Bewitt. *See* 15 PROVIDENCE TOWN RECS., *supra* note 32, at 58. Edmund Calverly (d. 1687): Of Warwick; shoemaker; served in English army. *See* AUSTIN, *supra* note 111, at 35; WARWICK TOWN RECS., *supra* note 32, at 186. William Carpenter (d. 1685): Of Providence; Baptist. *See* AUSTIN, *supra* note 111, at 36; 2 R.I. CT. RECS., *supra* note 37, at 29-30. Caleb Carr (1624-1695): Of Newport; left London at age eleven with brother. *See* AUSTIN, *supra* note 111, at 37-38. Elizur Collins (1622-1683): Of Warwick; committed suicide. *See* AUSTIN, *supra* note 111, at 51-52; WARWICK TOWN RECS., *supra* note 32, at 174. John Cranston (1626-1680): Of Newport; son of the parson of St. Mary Over’s Church, chaplain of Charles I; he apparently traced his family to kings through the Earls of Crawford. *See* 2 RICHMAN, *supra* note 85, at 7; AUSTIN, *supra* note 111, at 60, 447. Gregory Dexter (1610-1700): Of Providence; previously of Olney, Northampton Co.; Baptist. *See* AUSTIN, *supra* note 111, at 288; 15 PROVIDENCE TOWN RECS., *supra* note 32, at 49. Ralph Earle, Sr. (d. 1678): Of Portsmouth. *See* AUSTIN, *supra* note 111, at 69; WARWICK TOWN RECS., *supra* note 32, at 224, 274-75. William Field (d. 1665): Of Providence; involved in the Barbados trade. *See* AUSTIN, *supra* note 111, at 77; 15 PROVIDENCE TOWN RECS., *supra* note 32, at 59-60. John Greene, Jr. (1620-1708): Of Warwick; his father, John Greene, Sr. (1597-1658), was a surgeon from Salisbury, Wilts Co., who arrived in Boston, moved to Salem and then to Providence; Greene, Jr., traveled back to England with Roger Williams in 1644. *See* AUSTIN, *supra* note 111, at 88; WARWICK TOWN RECS., *supra* note 32, at 209. Andrew Harris (1635-1686): Of Providence. *See* AUSTIN, *supra* note 111, at 312. William Harris (1610-1681): Of Providence; came from England with brother and Roger Williams; moved from Boston to Salem and then to Providence. *See* AUSTIN, *supra* note 111, at 312; HARRIS PAPERS, *supra* note 69, at 240, 259. Thomas Hart (d. 1671): Of Newport; son of Edward Hart. *See* AUSTIN, *supra* note 111, at 314. Hart was described by Roger Williams in 1656 as “a young shipmaster (who now maketh Love to my Second daughter Freeborne).” 2 CORRESPONDENCE OF ROGER WILLIAMS, *supra* note 108, at 474 & 475 n.11. William Lytherland (1608-1684+): Of Newport; returned to Boston. *See* AUSTIN, *supra* note 111, at 126; 1 R.I. CT. RECS., *supra* note 37, at 13. John Porter (d. 1674+): Reddocks. *See* 15 PROVIDENCE TOWN RECS., *supra* note 32, at 67; WARWICK TOWN RECS., *supra* note 32, at 95, 147. Zachariah Rhodes (1603-1665): Of Rehoboth, Providence; Baptist. *See* AUSTIN, *supra* note 111, at 364; 15 PROVIDENCE TOWN RECS., *supra* note 32, at 28. Edward Richmond (1632-1696): Of Newport. *See* AUSTIN, *supra* note 111, at 163. John Sanford (1633-1687): Of Portsmouth. *See* AUSTIN, *supra* note 111, at 171. Peleg Sanford (1639-1701): Half-brother of John Sanford; in the early 1660s, moved to Barbados and established a shipping trade. *See* THE LETTER BOOK OF PELEG SANFORD OF NEWPORT MERCHANT (LATER GOVERNOR OF RHODE ISLAND), 1666-1668, at iii-iv (1928); AUSTIN, *supra* note 111, at 171. Philip Sherman (1610-1687): Of Portsmouth; previously of Dedham, Essex Co.; moved to Roxbury and then Portsmouth. *See id.* at 178. William Smiton (d. 1671): Of Portsmouth. *See id.* at 186. Joseph Torrey (1621-1676): Of Newport; from Rehoboth, Providence. *See id.* at 206. Richard Townsend: no information available at this time. John Wickes (1609-1675): Of Warwick; originally from Staines, Middlesex Co.; came over at age 26 with wife and daughter. *See id.* at 420. Roger Williams (1599-1683): Of Providence; graduate Pembroke College B.A.; father was a merchant and tailor in London. *See id.* at 430.

William Baulston	William Brenton John Hull (Boston)	Assistant; Town Treasurer
Hugh Bewitt	William Almy	General Solicitor; General Sergeant
Edmund Calverly	John Horrod Lawrence Pimnocks	General Solicitor; General Attorney; Warwick Clerk
William Carpenter	Mathias Harvey	Assistant
Caleb Carr	Thomas Deane (Boston) James Tennant	Governor; Assistant; Justice of Quarter Sessions
Elizur Collins	Thomas Humphrey	Deputy
John Cranston	William Brenton Mrs. Francis Vaughan	General Attorney; Governor; Physician
Gregory Dexter	William Cotton	Providence Clerk; London Printer; Pastor
Ralph Earle, Sr.	Margaret Helme	Treasurer; Judge on Special Court for Trial of Indians; Innkeeper; Williams mentions his paper
William Field	John Smith	Assistant; English Agent for Connecticut
John Greene, Jr.	John Gereardy Mark Ridley William Witherington John Greene	Recorder; Secretary to the Council; Warwick Clerk; English Agent; General Attorney
Andrew Harris	William Harris	Deputy
William Harris	William Field Nathaniel Waterman Thomas Field Proprietors	Assistant; General Solicitor; Asked to peruse laws; English Agent
Thomas Hart	Henry Underwood	Mariner
William Lytherland	Jan Gereardy	Recorder; Clerk
John Porter	Horod Long	Clerk; Assistant
Henry Reddocke	Providence	Warwick Clerk
Zachary Rhodes	William Arnold	Deputy; Town Treasurer
Edward Richmond	Thomas Hart Thomas Gould	General Attorney; General Solicitor; Clerk of Court Martial

John Sanford	Ambrose Leach Providence	Recorder; General Attorney; Comm'r on Connecticut boundary dispute
Peleg Sanford	Humphrey Hodgis (Boston) William Brown (Salem)	Governor; English Agent; Mariner; Judge of Admiralty Court
Philip Sherman		Clerk; Recorder
William Smiton	Edmund Scarbrough (VA)	Mariner
Joseph Torrey	Peleg Sanford Mrs. Sarah Davis Henry Wolcott (CT)	Recorder; General Attorney
Richard Townsend	Mathias Harvey in Warwick Court	Unknown
John Wickes	Warwick	Tanner; Assistant; Providence Magistrate
Roger Williams	Philip Read	Governor; English Agent; Comm'r on Connecticut boundary dispute

Table 3: Court Cases Involving Attorneys or Men Who Served as Attorneys

Year	Both Sides Involving Attorneys	One Side Involving an Attorney	No Attorneys
Total (n=84)	37	21	26
1655	2	3	1
1656	7	2	1
1657	3	2	2
1658	5	0	3
1659	1	0	0
1660	3	5	3
1661	0	1	2
1662	1	0	1
1663	3	1	0
1664	5	1	3
1665	0	1	1
1666	0	0	2
1667	4	0	1
1668	0	2	2
1669	2	1	2
1670	1	2	2

Table 4: Other Legal Literates²⁸⁴

Name	Other Jobs
William Almy	Comm'r; Listed as "gentleman" in England; Defendant in court in England
Francis Brinley	Comm'r on Connecticut boundary dispute; Assistant; Justice of Quarter Sessions
Henry Bull	Assistant; Governor
William Coddington	Two English trips; Portsmouth/Newport Judge; Governor; Author
John Coggeshall	Recorder; Assistant; Treasurer for Providence
William Dyer	Milliner; Clerk, Recorder; General Attorney; General Solicitor; Two English trips
Nicholas Easton	Tanner; Wrote Henry Vane; Assistant; President/Governor
Samuel Gorton	Clothier; Author; Assistant; Comm'r; English trip and lawsuit in Chancery
Randall Houlden	Assistant; Twice English Agent; Miller; Justice of Court of Common Pleas and Quarter Sessions; Comm'r on Connecticut boundary dispute
Richard Knight	Carpenter; General Sergeant
Richard Morris	General Courts held at his house; Member of General; Court of Trials; "Ruler" of New Hampshire settlement
James Rogers	Miller; General Sergeant
Richard Smith	Merchant, Assistant; Justice of the Quarter Sessions; Comm'r on Connecticut boundary dispute

284. William Almy (1601-1675): Of Portsmouth; went back to England in 1635; his son, Christopher, would be an Assistant, elected Governor and serve as the agent for Rhode Island. *See* AUSTIN, *supra* note 111, at 236. Francis Brinley (1632-1719): Of Newport. *See id.* at 25-57. Henry Bull (1610-1694): Of Newport; originally from London; moved to Boston and then to Portsmouth; Quaker. *See id.* at 264. William Coddington (1601-1678): Of Newport; originally from Lincoln Co.; moved to Boston; probably Quaker; son of prosperous yeoman. *See id.* at 276-78, 462. John Coggeshall (1618-1708): Of Newport. *See id.* at 49. William Dyer (d. 1677): Of Newport; originally from London; moved to Boston; wife was the famous Quaker martyr Mary Dyer. *See id.* at 290. Nicholas Easton (1593-1675): Of Newport; originally from Lymington, Herts Co.; moved to Massachusetts and New Hampshire, and then to Rhode Island; Quaker. *See id.* at 292. Easton had been President in May 1650 prior to the breakup and was President in 1654 upon reunification. *See* 1 R.I. RECS., *supra* note 6, at 220, 273. Samuel Gorton (1592-1677): Of Warwick; originally from Gorton, Lancaster Co. *See* AUSTIN, *supra* note 111, at 302, 463. Randall Houlden [Holden] (1612-1692): Of Warwick; originally from Salisbury, Wilts Co. *See id.* at 100-01. Richard Knight (d. 1680): Of Newport. *See id.* at 330, 465. Richard Morris (d. 1674+): Of Newport; originally of Roxbury and then Portsmouth. *See id.* at 134, 461. James Rogers (d. 1676): Of Newport. *See id.* at 368. Richard Smith (1630-1692): Of Kingstown; his father also had come over in 1637. *See id.* at 185. Almy, Brinley, Bull, Coddington, Coggeshall, Easton, and Smith died with wills.

Table 5. Cases Involving Legal Literates

Year	Both Sides Involving Legal Literates	One Side Involving Legal Literates	No Legal Literates Listed
Total (n=84)	54	21	9
1655	2	3	1
1656	9	1	0
1657	6	1	0
1658	5	0	3
1659	1	0	0
1660	7	2	2
1661	0	2	1
1662	2	0	0
1663	3	1	0
1664	7	2	0
1665	1	1	0
1666	0	2	0
1667	4	1	0
1668	2	2	0
1669	2	2	1
1670	3	1	1

Table 6: Rehearings and Attorneys, 1655-1670

Date	Attorney Requests ²⁸⁵	Legal Literates Requests ²⁸⁶	Others ²⁸⁷	Rehearings Heard ²⁸⁸
Totals	16	4	2	17
1655	2	0	0	0
1656	1	0	0	1
1657	0	0	0	1
1658	4	0	0	1
1659	0	0	0	2
1660	3	1	1	2
1661	0	0	1	2
1662	0	0	0	0
1663	1	0	0	1
1664	1	2	0	3
1665	0	1	0	0
1666	0	0	0	1
1667	0	0	0	0
1668	0	0	0	0
1669	2	0	0	2
1670	2	0	0	1

285. 1655: Vaughan v. Elton; Gereardy v. Hunt. 1656: Coddington v. Brenton. 1658: Torrey v. Bliss; Greene v. Arnold; Gereardy v. Stanton; Torrey v. Bliss. 1660: Field/Harris v. Warwick; Field/Harris v. Warwick; Blunt v. Hobson. 1663: Greene v. Rhodes. 1664: Harris v. Horrod; Harris v. Horrod. 1669: Gereardy v. Scarbrough; Sanford v. Underwood. 1670: Almy v. Baulstone; Hart v. Ridley. *See generally* 1-2 R.I. CT. RECS., *supra* note 37.

286. 1660: Cranston v. Knight. 1664: Carpenter v. Greene; Rhodes v. Greene; 1665: Elles v. Bull. *See generally id.*

287. 1660: Gereardy v. Westcott. 1661: Gereardy v. Westcott. *See generally id.*

288. 1660: Gereardy v. Westcott. 1661: Gereardy v. Westcott. *See generally id.*

Table 7: Library of William Harris²⁸⁹

Short Title in Will	Bibliographic Title	Possible Dates of Publication	Type	Borrower	Estate Valuation ²⁹⁰
Dixionary					00-06-00
The London Despencetorey	Nicholas Culpeper, <i>Pharmacopoeia Londinensis, or The London Dispensatory</i>	1653, 1657, 1661, 1667	Pop-medical		00-08-00
The Chururgions mate			Pop-medical		00-10-00
Norwoods Tryangles	Richard Norwood, <i>Trigonometrie, or The doctrine of the triangles</i>	1631, 1659, 1661, 1667	Navigation		00-05-00
Bible			Religion		00-02-06
Contemplations, Morall, & devine	Matthew Hale, <i>Contemplations moral and divine</i>	1676	Law		00-02-06
a great Bible			Religion		00-05-00

289. Bibliographic information has been taken from 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955). In a few instances, spelling has been changed to match the editions consulted.

290. 6 PROVIDENCE TOWN RECS., *supra* note 32, at 79, 82, 83, 84, 85-86. For equivalent values, for example, three pewter plates were valued at 00-06-00. A copper candlestick was valued at 00-01-06. A pistol was valued at 00-04-00. Six bushels of Indian corn were valued at 00-12-00. A gray mare and a colt were 02-10-00. A young cow was 01-18-00. The time remaining on the indenture of "Jacob Clark the Apprentice boy" was 10-00-00. For London values, see THOMAS BASSETT, AN EXACT CATALOGUE OF THE COMMON AND STATUTE LAW BOOKS OF THIS REALM (London, 1684).

Cookes Comentarey upon littlton	Edward Coke, <i>First Part of the Institutes of the Lawes of England: or, Commentarie upon Littleton</i>	1628, 1629, 1630, 1633, 1639, 1656, 1664, 1670	Law	Thomas Olney, Jr. (Clerk)	01-00-00
The Compleat Clarke	<i>Compleat Clerk; containing the best Forms of all sorts of Presidents for Conveyances and Assurances, etc.</i>	[1655], 1664, 1671, 1677	Law	Thomas Olney, Jr.	00-08-00
The Touchstone of wills	[George] Meriton, <i>Touchstone of Wills, Testaments, and Administrations; a compendium of Cases and Resolutions</i>	1668, 1671, 1674	Law	Thomas Olney, Jr.	00-02-00
Natures Explecation	George Starkey, <i>Natures Explication and Helmont's Vindication or a short and sure way to a long and sound life</i>	1657	Pop-medical	Nathanial Waterman (Clerk)	Valued with the next two at 00-01-06
Treatise of faith	numerous titles		Religion	Waterman	
Treating of the Effect of war				Waterman	

The Gentleman jocky	John Halfpenny, <i>The gentlemen jockey, and approved farrier: Instructing in the natures, causes, and cures of all diseases incident to horses</i>	1676 (4 th ed.)		Howlong Harris Trunk	Valued with the next four at 00-06-00
The Gospell preacher	Numerous titles		Religion	Trunk	
New Englands Memoriall	Nathaniel Morton, <i>New-Englands Memoriall</i>	Cambridge, Mass., 1669	Account of New Plymouth	Trunk	
The Method of Phissick	[Phillip Barrough], <i>The Method of Physick: containing the causes, signs, and cures of inward diseases</i>	1583, 1617 (5 th ed.), 1652	Pop-medical	Trunk	
A short Introduction of the Grammer	[William Lilly], <i>A Short Introduction of Grammar</i>	1549, 1669, 1673	How to learn Latin	Trunk	
Lambaths preambulations	William Lambarde, <i>Perambulation of Kent: Containing the description, Hystorie, and Customes of that Shyre</i>	1576, 1596, 1640, 1656	Law	Francis Brinley (General Att'y)	No value given
another book				Brinley	

Several books ²⁹¹				John Pocock (General Att'y)	
The Statute booke by poulton (1661)	[Ferdinando] Pulton, <i>Collection of sundrie Statutes frequest in use, with notes and references</i>	1661 (RIHS has his copy)	Law	John Whipple, Jr. (Clerk)	01-15-00
Declerations & pleadings	Richard Brownlow, <i>Declarations and Pleadings in English; the Forme of Proceeding in Courts of Law</i>	1652, 1653, 1659	Law	Whipple	00-03-00
The Exsecutors office	Thomas Wentworth, <i>Office and Duty of Executors; or treatise of Wills and Executors directed to Testators in the choice of their Executors and contrivance of their Wills</i>	1641, 1656, 1663, 1668, 1672, 1676	Law	Whipple	00-02-00

291. This same language was used to describe the eight books in the hands of John Whipple, Jr.

The Exposition of termes of law	William Rastell, <i>An Exposition of the termes of the lawes of England</i>	editions from 1563-1618 (later editions as <i>Les Termes de la Ley</i>)	Law	Whipple	00-02-00
The lay mans laywer	Thomas Forster, <i>Lay-Mans Lawyer; or, Second Part of the Practice of the Law. Relating to the Punishments of Offences committed against the public peace, with presidents</i>	1654, 1656, 1658	Law	Whipple	00-02-00
The law Concerning juryers	[Giles Duncombe], <i>Tryals per Pais: or Law concerning Juries by Nisi Prius, etc.</i>	1665, 1666	Law	Whipple	00-01-06
Justice restored	<i>Justice restored: or Guide for His Majestie's Justices of Peace, both in Sessions and out of Sessions, according to the antient Laws of the Kingdom</i>	1660, 1661, 1671	Law	Whipple	00-01-06

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Dallons Country justice	Michael Dalton, <i>The Country Justice, the Practice of the Justices of the Peace out of their sessions</i>	1618, 1619, 1622, 1626, 1629, 1630, 1635, 1643, 1655, 1661, 1666, 1677	Law	Whipple	00-05- 00
The Lawes Resolution of Women's Rights	<i>Lawes Resolution of Women's Rights: or, Lawes Provision for Woemen; a methodical collection of such statutes and customes, with the case, opinions, arguments, and points of learning in the law as doe properly concerned woemen</i>	1632		Whipple	
The Book of Artillery				Whipple	

