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**TABLE OF CONTENTS**

Call For Papers	Page 6
Subscription Information	Page 8
<i>Beyond Judging: Considering the Critical Role of Non-Judicial Actors to a Functioning Legal System</i>	Page 9
Mr Robert J. Ridge Partner Clark Hill	
<i>Evidence, Mischaracterized Insights, and The Nature Of Law</i>	Page 41
Professor Jeffery Johnson Professor of Philosophy Eastern Oregon University	
<i>In the Name of the Father: Compulsion, Tradition, and Law in the Lost History of Women's Surnames</i>	Page 59
Professor Deborah Anthony Associate Professor and Chair, Legal Studies University of Illinois Springfield	

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**Beyond Judging: Considering the Critical Role of  
Non-Judicial Actors to a Functioning Legal System**

Robert J. Ridge<sup>1</sup>

*The remote and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.*  
*Holmes, OW, The Path of the Law, 10 Harv.L.Rev. 457 (1897)*

When Justice Holmes first gave this advice to Boston University law students in 1897, he was obviously encouraging his audience to be aware of and to appreciate the transcendent qualities of the law. In the same speech he warned the young lawyers about the legal community's propensity to explore substantive legal niches so intensely that it failed to appreciate broader legal principles:

Applications of rudimentary rules of contract or tort are tucked away under the head of railroads or telegraphs or go to swell treatises on historical subdivisions such as shipping or equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as mercantile law.<sup>2</sup>

Holmes urged his audience to look beyond "text books and the case system" to gain a broader appreciation for the law; "If a man goes into law it pays to be a master of it, and to be a master of it means to look through all the dramatic incidents and try to discern the true basis of prophecy."<sup>3</sup>

Yet, Holmes had a practical side as well. After all, he is the Justice who explained that "The life of the law has not been logic, it has been experience."<sup>4</sup> He encouraged practicing lawyers to master the art of legal "prophecy" because predicting legal outcomes is precisely why most clients seek out lawyers.

Modern practicing lawyers cannot be faulted for considering incompatible Justice Holmes' directives to cherish the transcendent qualities of law while mastering the art of prophecy. Indeed, modern lawyers might consider Holmes' competing directives to be

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<sup>2</sup> Holmes, OW, *The Path of the Law*, 10 Harv. L.Rev. 457 (1897).

<sup>3</sup> Id.

<sup>4</sup> Holmes, OW, *The Common Law* (1881).

mutually exclusive. On the one hand, the practicing lawyer must ply his trade in such a way as to gain the experience and background to understand the “life of the law.” But, how is one to know which experiences matter? How does the law advance through experience? In short, how does one translate experience to law? More problematic still is Holmes’ invocation of the “universal law”. How does the practicing lawyer gain insight into the “universal law?” How do we recognize the elements of the “universal law?” What is the source of the “universal law?” And, more fundamentally, is there a “universal law?” Holmes admonitions call on lawyers to understand the profession on two levels: the first involves the experiences that make up the practice of law and the second is that combination of factors that makes what lawyers do and the fora in which they do it, important.

Regrettably, Holmes warnings foretold an ever present tension for the practicing modern lawyer: while she longs to understand more broadly how the law operates writ large, she must commit her time to becoming demonstrably expert in a specific practice area in order to assist her clients in navigating an increasingly complex legal landscape. All too often, the tension is resolved when young lawyers abandon their efforts to understand the larger forces at play in the law and resign themselves to pursuing specific knowledge or resolving immediate problems at the expense of deeper understanding.

The tension between specialization and universality is not, however, unique to practicing lawyers. Academic lawyers likewise have grown predisposed to focusing so completely on the particulars of their chosen disciplines that they have hardly a moment to consider how their work fits into a larger picture. At the risk of offending all non-judicial lawyers, one might argue that it is this divide between the specific and the general that renders practicing lawyers less versatile and academic lawyers less relevant than their predecessors. Nowhere is the separation between specialization and universality more pronounced than in the realm of what was once considered “trial practice” but has come to be referred to as “litigation.” While litigators devote countless hours to the nuances of “e-discovery”, “deposition training” and “effective advocacy in mediation”, academic lawyers who study legal systems, particularly legal philosophers, bore deeper and deeper into subjects like judicial decision-making, the ideological bias inherent in judicial systems or the linguistic deconstruction of judicial opinions. As both camps of the legal profession spin themselves into increasingly tighter and less useful orbits, the profession, as a whole, spends very little time analyzing what we do and why it matters to a properly functioning legal system. One worries, that the profession may lose its grasp on those aspects of a legal system that bind it to a society and that bind a society to it.

The press of current events, however, may prompt both practicing and academic lawyers alike to look up from their work and consider the larger context of their efforts. Within the United States, practitioners and legal commentators are trying to describe and react

to post-recession changes to the legal universe that are so broad-based and transformative that they have earned the moniker “The New Normal”. Clients, emboldened by a surplus of lawyers, demand increasingly esoteric specialization from their counsel. Meanwhile, fundamental components of the American Justice system have fallen into disuse and neglect. Jury trials have all but disappeared on the civil and criminal fronts and discovery costs have driven clients to identify dispute resolution processes that are both cheaper and more efficient than participation in the American justice system. Lawyers, especially trial lawyers, are fast becoming obsolete. The trend toward practical, non-judicial problem solving is not lost on law schools. As fewer and fewer clients opt for the ordeal of litigation, demand for young lawyers has atrophied. Law schools have responded by reducing class size, expanding the curriculum to offer more clinical and practical classes, compromising student entrance standards and reducing the size of the faculty. In short, the legal community in the United States is contracting.

Paradoxically, other nations continue to look to the United States legal system as a model for a stable and fair judicial system. Developing nations, both as a condition of receiving US foreign aid and of their own volition, adopt US procedures and practices as well as substantive US law. Our politicians insist that the American jury trial is “The Gold Standard” for administered justice even as participants in US courts prove less and less inclined to avail themselves of the process. The developing world looks to the United States judicial system for practices and processes that may help their national justice systems keep pace with economic and political development. The United States stands more than willing to offer those emerging systems assistance in developing legal systems capable of inspiring fidelity to law even if US policy makers do not truly understand the ingredients of the US system that are likely to generate that fidelity. Remarkably, much of the exporting of US legal doctrines, procedures and practices is ostensibly done to promote respect for the “Rule of Law”, a phrase that Professor Brian Tamanaha points out, is frequently uttered and rarely understood.<sup>5</sup>

This article will identify, from one practitioner’s point of view, some elements of the US justice system that make the US justice system worthy of emulation. The article will argue, however, that the worthy elements of the US justice system are not likely the technical procedures or highly refined substantive law that domestic lawyers identify as the most advanced aspects of the US justice system. To the contrary, the article will argue that the most essential elements of the US justice system are precisely those democracy promoting components of the system that are disfavored as messy and costly. Before exploring those elements, however, we will first examine the paradox of a legal intelligentsia that proselytizes about the US justice system abroad while lamenting its tarnished record at home. Second, we will consider how US legal philosophers’

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<sup>5</sup> Tamanaha, *The Rule of Law* (2009) at 3.

conceptualization of the US legal system has evolved in a direction which actually diverts attention from some of the most unique, fundamental and democratizing aspects of the system. Third, we will consider the origins of those democratizing aspects of the system that are so critical to the maintenance of the bonds which bind the system to society and society to the system. Finally, we will consider whether those democratizing aspects of the US legal system might properly reflect a larger principle favoring the collective wisdom of individuals over the specialized knowledge of a select few.

*A. The Paradox of Promoting Abroad a Justice System That We Choose to Avoid at Home*

It is hardly controversial to note that, in the wake of the economic collapse of 2008, profound changes in the American legal system have emerged that threaten time-honored judicial traditions and further tarnish the standing of the legal profession.<sup>6</sup> It is only slightly more controversial to point out that the profound changes in the US justice system have actually been on the march for several decades. More than a decade ago in remarks to the American Law Institute, Chief Judge Patrick Higginbotham of the Eleventh Circuit described the combination of circumstances that were changing the US justice system. Judge Higginbotham pointed out that a number of factors were combining to create the perception that the US justice system was a fundamentally flawed, costly and unattractive mechanism for the resolution of disputes:

. . .but I realized as I began to look at some data over this 30-year period that something is changing in a fundamental way, because over the past 30 years – and here is the point I want to raise for you – our trial courts are ceasing to be trial courts; that can have fundamental consequences.

You chart the cases that are tried in the United States District Court, and what you will see with all the categories of cases, in each of the categories substantively over which records are maintained, there has been a decline for 30 years. Remarkably, you chart it from the upper left hand corner, it goes right down to the lower right hand corner, on the criminal side as well. . .

Magistrate judges, and I mean no criticism of them as an institution; they do exactly what I would do if I were a magistrate judge: They are writing opinions. Discovery has become an end in itself facilitated by the nigh open access to magistrate judges. That is where the litigation process is. We are not trying cases, the cases are not filed with the expectation that they will be tried, they are filed with the expectation that they are going to be settled. You cannot maintain a standard of relevance that has meaning and content, no matter how you write it or how careful you are. Not even Ed Cooper and our other brilliant Reporters

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<sup>6</sup> McCormack and Bodnar, “Honesty is the Best Policy, It’s Time to Disclose Lack of Jury Trial Experience” (2010) 23 *Geo. J. Legal Ethics* 155, 156-157.

of the rules are able to articulate meaningful measures of relevance when a trial is not a real part of the process. The fact is that it has to be measured against trial and lawyers increasingly don't know what trial is. You are out wallowing around taking discovery, and it is not going to be tried, the people who are taking the depositions couldn't try it, and that is one of the reasons it is not going to be tried (*Laughter*). . .

What consequences does this have on this process? Staffs, growing staffs. We (the Fifth Circuit) have over 40 lawyers in New Orleans who are there processing these cases. My colleagues have four law clerks; the district court, they have law clerks; magistrates, they have law clerks; clerks have lawyers hired to process these things, increasing bureaucracy. This is an administrative agency, and that is what it looks like, and talks like. The United States District Courts shouldn't function like the State Highway Department, because when they do, the quality of the people who are willing to stand for these jobs, which already pay less and will now lack the prestige and the sense of contribution that draws people that you want to the bench; they will not be there. And those courts will not be there when you need them.<sup>7</sup>

Subsequent empirical evidence suggests that Chief Judge Higginbotham's unflattering assessment of the US justice system may be spot on. In particular, the number of cases resolved by jury trial has long been declining at an alarming pace. According to McCormack and Bodnar, the result of the decline is that "there is an entire generation of litigators for whom trial is merely a theoretical concept."<sup>8</sup> Writing primarily on the subject of civil litigation, McCormack and Bodnar echo the voices of numerous commentators lamenting the disappearance of the jury trial.

The days of the trial lawyer are essentially gone. Even the term "trial lawyer" has fallen out of favor over the past four decades as a majority of "trial lawyers" now describe themselves as litigators. Since the 1960's there has been a steep decline in the actual number of civil jury trials and the number of civil jury trials as a percentage of the cases filed in both state and federal courts. While there is no single reason for the decline, the ever increasing costs of trials, the increased availability of alternative dispute resolution ("ADR") methods, and clients' loss of faith in the jury system have all been contributing factors. . .<sup>9</sup>

McCormack and Bodnar recognize that, for practicing lawyers, "[s]ome may view this trend of moving from "antiquated" jury trial skills to "modern" [Alternative Dispute

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<sup>7</sup> Proceedings of the American Law Institute, Annual Meeting, May 15, 2001 at 173-177.

<sup>8</sup> McCormack and Bodnar *supra*, note 6 at 156.

<sup>9</sup> *Id.*

Resolution (ADR)] skills as a natural and beneficial evolution. It certainly appears to be the model of most large civil law firms.”<sup>10</sup> That evolution, however, is not without its consequences for uninformed clients:

A litigator’s lack of jury trial experience can potentially subject a client to numerous and subtle disadvantages regardless of the forum used to resolve the dispute. Specifically, this lack of experience has the potential to negatively affect a litigator’s ability to (1) objectively advise whether to pursue a trial or an alternative resolution forum; (2) effectively and efficiently conduct pre-trial discovery; (3) make accurate ‘jury-value’ predictions; (4) objectively assess a settlement offer, (5) effectively negotiate the best possible settlement for the client; and, (6) effectively assist the client in mediation.<sup>11</sup>

The more troubling fact about the disappearance of the jury trial is that lawyers ascending to the bench frequently have little or no jury trial experience. While Bodnar and McCormack do not take up the issue of an inexperienced bench, as it is tangential to their primary thesis, Judge Higginbotham met the issue head-on in another article describing his concerns about American trial courts:

The decline in trials has another defining characteristic: it has created over time a judiciary and a bar with a new shared culture, which takes as a given that civil cases are to be settled if summary judgment is not granted. With fewer trials there are fewer lawyers with trial experience and, consequently, fewer judges taking the bench with trial experience. When Clyde LaPorte and Attorney General Herbert Brownell set the experience required for appointment to the federal district court, their letter of agreement insisted that the American Bar Association (ABA) should not find a person who lacked “substantial trial experience” to be qualified to preside over a trial court, and that trial experience was also important for a prospective nominee to the court of appeals. This understanding could not practically be enforced today, given that only prosecutors and criminal defense lawyers regularly try cases.<sup>12</sup>

Surprisingly enough, the gradual extinction of the jury trial is as real for the criminal bar as it is for its civil counterpart. In the criminal arena, sentencing guidelines, repeat offender statutes and minimum mandatory penalties have significantly reduced the number of criminal cases being tried.<sup>13</sup>

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<sup>10</sup> Id. 157.

<sup>11</sup> Id. at 157.

<sup>12</sup> Higginbotham, P., *The Present Plight of the United States District Courts*, 60 Duke L.J. 745, 755-56 (2010).

<sup>13</sup> Id. at 756. *See also*, Rakoff, *infra*, note 28 at 3-4.

The bench and bar's aversion to jury trials is not likely to be reversed any time soon. Indeed, once the jury trial becomes something unusual and exotic, lawyers, judges and clients will have to overcome substantial uncertainty before returning to the jury trial as a mechanism for dispute resolution. McCormack and Bodnar note that:

Unfortunately, once developed, a bias against jury trials is likely to reinforce itself in a positive-feedback-system manner: litigators will not risk a jury trial because they lack previous jury trial experience – without trying jury trials, litigators never gain jury trial experience – lack of experience influences future decisions not to pursue a jury trial . . . and round and round the system churns, reinforcing the bias as it goes.<sup>14</sup>

More to the point for present purposes, McCormack and Bodnar identify the consequences of this positive feedback loop on the system as a whole when they observe: “[w]ithout jury verdicts, the public ceases to have a function in determining issues like reasonableness, causation and damages. Questions of evidence are never presented. Jury-value ceases to be known in most categories of claims. Settlements are then controlled by the corporate repeat players in the system on one side and individual participants on the other.”<sup>15</sup> As discussed later in the article, the demise of the jury trial is but one facet of the bureaucratization of the American legal process. While Bodnar and McCormack are principally concerned with the lack of jury trial experience within the practicing bar and the resulting misperceptions of the general public about the central place of the jury trial within the American legal system, they do not frequently turn their attention to the unintended consequence of those developments: namely, that the democratizing aspects of the American legal system are falling victim to the unwillingness of lawyers and judges to use them as they were intended.

Yet, policy makers in the United States certainly believe that there are aspects of the American justice system that warrant replication. As Professor Tamanaha reports, “According to an article in *Foreign Affairs*, several decades and hundreds of millions of dollars have been expended on developing the rule of law around the world with minimal positive results.”<sup>16</sup> What precisely does it mean to export or develop the rule of law in developing countries? In *Exporting U.S. Criminal Justice*, Allegra M. McLeod details US policy to promote the exporting of principles and practices of the United States criminal justice system. McLeod notes that “[i]n the years leading up to and following the end of the Cold War, the US government embarked on a new legal transplant project carried out through the foreign promotion of US criminal justice techniques, criminal

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<sup>14</sup> Id. at 18.

<sup>15</sup> Id. at 24.

<sup>16</sup> Tamanaha at 4 (citing Thomas Caruthers, “The Rule of Law Revival” 77 *Foreign Affairs* 95 (1998)).

procedures, and transnational crime priorities.”<sup>17</sup> McLeod observes about the US policy of exporting criminal justice practices:

In the view of some, this amounts to legal imperialism: an ‘open and declared imposition on the part of foreign powers.’ Others maintain that ‘the core of democracy is the Rule of Law, and the [US Justice Department’s] Criminal Division is its greatest ambassador.’ Alternately celebrated and condemned, US efforts are associated with a ‘revolution in Latin American criminal procedure, the introduction of plea bargaining in Russia, a new rights-protective criminal procedure code in Indonesia, prison construction in Mexico, and new transnational crime statutes in states across the globe.’<sup>18</sup>

McLeod’s writes to inform us of what she suggests is misguided US policy that may actually have negative consequences for the intended beneficiaries:

[m]y central thesis is that US criminal justice export has played a critical role in shaping how states and non-state actors respond to a range of global challenges – namely with reference to US-style criminal justice frameworks – but that this approach suffers from a deep democratic deficit. With little regard for the concerns of the citizens of foreign states, US criminal justice export incentivizes foreign adoption of US crime control priorities, perpetuates US-style legal institutional idolatry (which is often tied to systemic dysfunction) and impoverishes our collective capacity to imagine alternative, more effective and more humane avenues of responding to shared problems.<sup>19</sup>

McLeod suggests that the “democratic deficit” she identifies is the cause of discontent among national actors in countries to which the United States exports criminal justice. She notes that:

In his study of the Latin American procedure reforms, Professor Langer relates anonymous interviewees’ comments that Department of Justice officials were ‘explicitly exporting the US criminal procedure code.’ Interviewees related that it ‘was very difficult to imbue the DOJ officials with the vision that the reason they were going overseas was not to export the US model, but rather to let the country decide the type of justice they wanted to have.’ Even DOJ officials themselves apparently conceded that ‘DOJ pushed the US model on everybody and was very insensitive culturally’ . . .<sup>20</sup>

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<sup>17</sup> McLeod, *Exporting U.S. Criminal Justice*, 29 *Yale L. & Policy Rev.* 83 (2012)

<sup>18</sup> *Id.* at 84.

<sup>19</sup> *Id.* at 88.

<sup>20</sup> *Id.* at 126-27.



The absence of the recipient country's democratic acceptance of reforms advocated by the US missionaries means that there is little reason to believe that the reforms generate the desired advances in adherence to the "rule of law". McLeod notes that:

Nevertheless, no reasoned theory explains how these practices will concretely benefit recipient states or other interests. Rather, US criminal justice export programs merely assume these practices will bring about stability, reduced crime, and economic growth. In some contexts, this adherence to US priorities manifests as an unwavering allegiance without consideration of actual effects on the ground, and wholly lacks any empirically or theoretically substantiated causal story connecting US-promoted reforms to pledged outcomes. In other instances, the confusion of weak association with causation functions as support for uncritical attributions of success to US projects – demanding, in effect leaps of faith.<sup>21</sup>

Aside from the obvious overtones of imperialism, McLeod's observations about US programs that export US criminal justice procedures and practices raise several important questions about whether US policy makers have packaged for export those elements of the US justice system most essential to its operation.

It is hard to reconcile the observations of Higginbotham, Bodnar and McCormack and many other commentators about the withering away of important US justice system institutions and McLeod's observations about the US's enthusiastic export of that system to foreign lands. In the hopes of minimizing the cognitive dissonance, perhaps it is wise to revisit Holmes' ruminations on the subject of how a judicial system's operations impact those "*general aspects of the law . . . which give it universal interest.*". Plowing that field will require us first to consider the substantial contributions of legal philosophers on the subject of justiciable outcomes. As we shall see, considering the work of legal philosophers leads predominantly to the theoretical study of judicial decision-making. We are likely to raise questions about whether judicial decision-making is as central to the work of a legal system as the volume of work devoted to the subject by legal philosophers might suggest. Indeed, in this article I will argue that the legal philosopher's preoccupation with judicial decision-making might actually have detracted from a broader analysis of legal systems as a whole. To fully consider that possibility the article will resurrect some historically significant concepts central to the study of legal systems not the least of which is the notion of reciprocity which was widely championed by Professor Lon Fuller but which traces its roots to ancient Greece and Rome. Finally, the article will discuss how important reciprocity is to the proper functioning of a healthy legal system. In particular, the article will explore how historical notions of reciprocity

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<sup>21</sup> Id. at 139.

translate into modern concepts of “public reasoning” and how important the notion of reciprocity is to the effective operation of legal systems.

*B. Philosophers and Judges*

Academic legal philosophers are prone to consider the effectiveness of a legal system from the perspective of the jurists who preside over it. There are several complimentary explanations for the academic predisposition to study judges; first judges are simply easy targets since they issue rulings that display the quality of their reasoning and typically carry their names. Second, judges are certainly more readily identifiable, in part due to their recurring roles in the legal drama, than jurors, witnesses and other actors who typically recede into the shadows after their singular performance on the legal stage. Third, some of the ground-breaking work of the American Legal Realists established the parameters of the discussion about legal systems and brought the focus of observers to the realities of judicial humanness. Moreover, the academic focus on judicial actors is not surprising since most legal philosophers have been trained as lawyers and analyze the progress of law through reported decisions (usually appellate decisions) that aspire to doctrinal clarity while enjoying the benefits of reasoned reflection.

For all of these reasons, the academic focus on judicial actors certainly permeates the literature of legal philosophy. Indeed, the first sentence of Ronald Dworkin’s seminal work, “Law’s Empire” reads: “It matters how judges decide cases.”<sup>22</sup> At some level, legal philosophers seem to default to the study of judicial decision-making despite their best efforts to the contrary. For example, in his 2003 work on “virtue jurisprudence” Professor Lawrence Slocum posits that “a full account of the implications of virtue ethics and epistemology for legal theory is a very large topic.” He goes on to recognize that the issues raised by virtue jurisprudence include the proper ends of legislation, developments in the law of legal ethics and the impact of virtue jurisprudence on the age-old debate between natural law theorists and their opponents. Having identified such a broad range of issues inherent in the concept of virtue jurisprudence, Slocum proceeds, however, to focus his attention on the “implications of a virtue-centered approach for a normative theory of judging.”<sup>23</sup>

By defaulting to the question of how judges decide cases Dworkin and Slocum are in good company. In the groundbreaking published debate between Professor Lon Fuller and Professor H.L.A. Hart, the two preeminent legal scholars of their day explored some of the issues that have come to dominate legal philosophy in the half century since, including the question of how judges decide cases. In “Positivism and the Separation of

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<sup>22</sup> Dworkin, R., *Law’s Empire*, (1986) at 1.

<sup>23</sup> Slocum, L., *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, Loyola Law School Research Paper no. 2003-2004 (2003) at 181.

Law and Morals,” Hart introduced the concept of judicial decision-making by recounting how the “Legal Realists” of the 1930’s exposed the reality of judicial bias by examining how a judge might decide a case involving a “Legal rule [that] forbids you to take a vehicle into a public park.”<sup>24</sup> Hart pointed out that whether someone may bring an airplane into the park turns on one’s definition of “vehicle”. Hart proceeded to explain that, when interpreting legal rules, “[I]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”<sup>25</sup> Hart called these interpretational conundrums “problems of the penumbra”<sup>26</sup> Using the problems of the penumbra as a stepping off point, Hart turned to the question of whether judges faced with such problems are actually forced to decide not what the law is, but, what the law ought to be. The thoughtful observations set forth in Hart’s work framed many of the doctrinal issues that dominate the jurisprudential debate today.<sup>27</sup>

The evident preoccupation of legal philosophers with the act of judging is, however, detrimental to a full appreciation of the American judicial system for several reasons: First, it inexplicably ignores or at least subordinates disproportionately the roles of non-judicial actors to the role of the judge. The United States Constitution and the Constitutions of most states provide for trial by jury. The Founding Fathers considered the guarantee of trial by jury to be one of the most fundamental protections of individual liberty. As Thomas Jefferson put it “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>28</sup> Professor Landsman has chronicled the central place of the jury system in the evolution of American political principles:

It is not surprising that in the 1760’s, as the disputes between the colonies and the mother country sharpened, the jury was in the thick of the confrontation and often rejected royal decrees. This became so serious a challenge to Imperial authority that London, through a series of acts, sought to shift cases out of colonial courts where juries held sway into forums like the Admiralty Courts where no jury was required. The colonial reaction was swift and challenging. The Stamp Act Congress of 1765 declared: ‘trial by jury is the inherent and invaluable right of every British subject in these colonies.’ The First Continental Congress a decade later echoed the same view: ‘the respective colonies are

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<sup>24</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv.L.Rev.* 593, 606-607 (1958).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> For an excellent discussion of how Hart set the tone of the debate within legal philosophy *See*, Priel, D., *H.L.A. Hart and the Invention of Legal Philosophy*, Comparative Research in Law & Political Economy. Research Paper N0. 17/2011, <http://digitalcommons.osgoode.yorku.ca/clpe/55>.

<sup>28</sup> Rakoff, *Why Innocent People Plead Guilty*, *The New York Review of Books*, <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilt>. . .

entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the law course of that law.” Finally, when the colonies cast off obedience to the Crown in the Declaration of Independence, they listed as a key grievance denial of ‘the benefits of trial by jury.’ In the Revolutionary Era the jury was the voice of the people, the democratic outlet for sentiments otherwise stifled by an Imperial bureaucracy unwilling to heed the opinions of the governed.<sup>29</sup>

Professor Landsman goes on to echo Jefferson’s sentiments about the democratizing role of the jury:

The jury’s development was far from finished but its core role as a democratic counterbalance to government authority in both criminal and civil matters was clearly established. Looking at the American jury some fifty years after the adoption of the Constitution, the celebrated French observer, Alexis de Tocqueville, noted its essentially ‘political’ nature. By this he meant that the jury was a critical attribute of democracy, ‘one form of the sovereignty of the people. . . as direct and extreme a consequence of the dogma of sovereignty of the people as universal suffrage.’<sup>30</sup>

While the declining use of the jury trial is the most frequently cited example of the bureaucratization of the American judicial function, that bureaucratization also has tangential consequences that are equally troubling. For example, evidence is supposed to find its way into courtrooms through witnesses. Percipient witnesses and experts alike inform the process and promote the righteous disposition of disputes. Moreover, in an adversary system, arguments and evidence make their way to the trier of fact only through the thoughtful presentation of advocates. Judges are discouraged from superimposing on the parties their judicial sensibilities of how a case should be tried or what arguments a party should make, even where the judge’s instincts might be beneficial to a party’s position. Indeed, the central role of advocates is nowhere more evident than in a federal criminal case where, arguably, the entire dispute is framed by the prosecutor’s charging decisions.<sup>31</sup> Yet, when we focus disproportionate attention on the decisions of judicial actors we tend to minimize the inputs from other participants. Thus, studying a judicial system by focusing primarily on the decisions of judges is akin to trying to learn how to bake a cake by tasting other cakes: while the observer’s taste buds are tickled and his waistline expands, in the final analysis, despite tasting hundreds

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<sup>29</sup> Landsman, Stephan, *The Impact of the Vanishing Jury Trial on Participatory Democracy*, Pound Civil Justice Institute, 2011 Forum for State Appellate Court Judges at 5 (2011).

<sup>30</sup> *Id.* at 6.

<sup>31</sup> See, Jed S. Rakoff, Why Innocent People Plead Guilty, <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>.

of cakes, he knows little more about how to make a cake than when he first set out on his quest.

Accordingly, it is a central thesis of this article that an ordinary citizen's respect for legal processes and her fidelity to law is, at least in the American judicial process, a function of the operation of the process through juries and other mechanisms of citizen participation. In the final analysis, the disposition of a lawsuit is frequently the product of a collection of people, some professionals, some not, who have joined together for the sole purpose of bringing about the orderly resolution of a dispute. Extraordinary focus on the work of the judge misses the point that justice is not the exclusive province of state-sanctioned Solomons. After all, the essential goal of any judicial system is to cultivate non-lawyer commitment to the system; convincing lawyers to accept the binding authority of a judicial decision amounts to preaching to the converted. The real conversion of souls involves convincing the body politic that the judicial branch of government is sufficiently fair, predictable and just to warrant their allegiance. To that end the participation of average people in the disposition of important disputes is instrumental to most common citizen's fealty to the American legal system.

Second, focusing primarily upon the judicial application of legal rules to "hard cases", as Dworkin describes them or "problems of the penumbra" as Hart characterizes them, implies that the body politic will evaluate the legal system on the success of judges in correctly deciding cases that fall beyond the bounds of established authority. The historical evidence suggests otherwise. Few legal historians would argue that decisions such as *Dred Scott v. Sanford*, *Plessy v. Ferguson* and *Korematsu v. United States*, deserve universal approval for the wisdom and reasoning expressed there.<sup>32</sup> Yet, on the same day that the Supreme Court decided those cases it decided other cases, each with its own disappointed litigant, and the system continued to function. Indeed, history suggests that ordinary citizens understand that some cases are simply harder than others. *Gore v. Bush* is perhaps the clearest and most recent example of the American people's evident recognition that judges must decide hard cases – one way or another – and the body politic will accept that decision, even where it disappoints one-half of the population.

Even disagreement with judicial decisions in hard cases that clearly impact the average person's moral sensibilities do not result in wholesale abandonment of the judicial process. Consider for a moment *Roe v. Wade*, arguably the most controversial Supreme Court decision of our time. Whatever one's views on the issue of women's reproductive rights or the quality of Justice Blackmun's opinion, there can be little doubt that a significant portion of the American population believes that the Supreme Court did not decide *Roe v. Wade* correctly. While the same might be said of the Supreme Court's

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<sup>32</sup> For an excellent exegesis on the decision in *Dred Scott*, *Plessy* and *Korematsu*, see Justice Breyer's discussion of those cases in "Making our Democracy Work: A Judge's View, Knopf (2010).

decision in any number of other controversial cases, there is little doubt that *Roe v. Wade* touches on moral and legal issues that have a unique capacity to stir the passions of observers. Yet, opponents of *Roe v. Wade* have not, on the whole, abandoned the American judicial system. To the contrary, in courtrooms all across the nation, on a daily basis, ordinary citizens, legal professionals and jurists committed to the proposition that *Roe v. Wade* was wrongly decided nevertheless lend their time and efforts to assist in the disposition of ordinary disputes and, by most accounts, are just as committed to the justness of those resolutions as they are opposed to *Roe v. Wade*. Thus, experience suggests that the ordinary citizen's sense of obligation to the American legal system is not based upon how judges decide hard cases and certainly not upon judges deciding hard cases correctly.

Another important reason to avoid the legal theorists' trap of over-emphasizing the work of judges is that few actual judges compare favorably with the ideals described by legal philosophers. While Dworkin, Hart and Slocum have done an admirable job of describing the personal attributes we would all like to see in a judge, it is likely that they have missed the mark for at least three reasons: First, there is little reason to believe that most judges will possess the attributes of a virtuous jurist as described by Slocum and certainly not all of the attributes possessed by Hercules as described by Dworkin. In many jurisdictions, judges are elected. They must first decide to throw their hats into the political ring thereby inviting the full weight of public scrutiny attendant to that decision. They also frequently must proceed through the same vetting process that other candidates endure and they must impress the same political operatives that other political candidates set out to impress. Anyone who has closely observed this process recognizes that it favors the ambitious and ego-centered prospective jurist. Moreover, it would be naïve to assume that those political operatives that dole out party endorsements, union or trade association endorsements or solicit political contributions on behalf of a judge will be as deferential to the "judicial virtues" as we might like. Indeed, it is just as likely that judicial candidates, as ambitious and competitive human beings, will kowtow to their political benefactors and assume the perspective, if not the political ideology, of the political collective from whence they came. Appointed judges suffer a less public but no less comprehensive vetting. They are subjected to judicial selection committees, extensive background checks and political log-rolling in the appointment process. While their pathway to the bench is less of a bare knuckle brawl than that of their elected brethren, it is an ordeal nonetheless. Thus, the process of judicial selection is stacked against the egoless, impartial and non-opportunistic candidates preferred by Slocum and Dworkin and favors instead their politically astute, ambitious and ego-centered counterparts.

Finally, emphasizing the role of judges in deciding "hard cases" involving unsettled law has the almost certainly unintended effect of suggesting that cases involving unsettled

law present the greatest challenges facing the American legal system. Yet, anyone who has ever watched a sporting event knows that, as often as not, the hardest decisions are factual. Was the receiver in bounds? Did he have possession of the ball? Was the infielder's foot on the bag? Deciding the vast majority of these "hard cases" has little or nothing to do with interpreting the rules.<sup>33</sup> Rather, the decision-maker must decide what happened and judges are frequently not the finders of fact that resolve the most critical factual issues. In most cases, absent a waiver of the right to a trial by jury, deciding what happened is the exclusive province of a small collection of ordinary citizens. Juries decide that one of their number drove his car negligently to the detriment of another. They decide how much compensation the injured party deserves. They decide whether the government can prove that a citizen committed a crime. In short, they are the conscience of our communities and we have entrusted to them very difficult factual decisions and, on a remarkably grand scale, we are prepared to live with their decisions. But this article is not intended to be just another paean to the jury trial; the disposition of disputes in the US judicial process has historically involved contributions of citizens in numerous ways - take for instance live witness testimony. Witnesses are the actors in our legal passion play. Their stories, motives, biases, indeed their very credibility, provide the central themes for our legal dramas. Without witnesses and juries, the presentation of legal disputes amounts to little more than an empty, stilted recitation of historical events noticeably devoid of any human feeling. Much also can and will be said here about the critical roles of grand jurors, pro se litigants, the press, learned commentators, and others whose roles either parallel or operate a check on judicial behavior.

### C. *Reciprocity and Fidelity to Law*

One of the few preeminent legal philosophers to celebrate the central role of citizen interaction on the operation of the American legal system was Professor Lon Fuller. In

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<sup>33</sup> In his seminal work, *Law's Empire* (1986) at 11-15, Ronald Dworkin anticipates the argument that a legal system—at least one in the American tradition – cannot be entirely understood by dissection of the legal reasoning of its judges. Dworkin acknowledges that a legal system consists of a wider variety of influences than mere judicial reasoning. Yet, Dworkin limits his analysis to the more confined topic of judicial reasoning because he concludes that the broader influences of a legal system are simply too unwieldy to be tamed. To prove the futility of the broader inquiry, Dworkin notes that it was Oliver Wendell Holmes:

[w]ho argued most influentially . . . for this kind of 'external' legal theory; the depressing history of social-theoretic jurisprudence in our century warns us how wrong [Holmes] was. We wait for illumination, and while we wait, theories grow steadily more programmatic and less substantive, more radical in theory and less critical in practice.

The reader will obviously have to decide for herself whether Dworkin's explanation meets the objection. Suffice it to say, that this article will attempt to avoid the pitfall identified by Dworkin by confining itself to the operation of a justice system and not focusing on the operation of law as a whole.

his book, “The Morality of Law,” Fuller criticized the legal positivist movement for its emphasis on a hierarchical conception of law making. Fuller recognized that ordinary people play a role in creating law: litigants, juries and witnesses are all essential to the development of the law in the common law tradition. Employing a critique of “analytical positivism” as a vehicle to introduce the concept of an interactive relationship between lawgivers and citizens, Fuller observed:

. . . the analytical positivist sees law as a one-way projection of the authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply action on the citizen – morally or immorally, justly or unjustly, as the case may be.<sup>34</sup>

Fuller considered the relationship between lawgiver and citizen central to a complete understanding of a legal system. Indeed, he criticized the positivists for failing to recognize the *social dimension* of a legal system.

The positivist sees the law at the point of its dispatch by the lawgiver and again at the point of its impact on the legal subject. He does not see the lawgiver and the citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential ingredient of the law itself.<sup>35</sup>

Fuller saw the interactive aspects of a legal system as a natural extension of the reciprocity of duties exchanged between citizens in a flourishing society. According to Fuller, even the most basic of moral and legal duties are marked by the notion of reciprocal obligation: “What the Golden Rule seeks to convey is not that society is composed of a network of explicit bargains, but that it is held together by a pervasive bond of reciprocity.”<sup>36</sup> Fuller recognized that imbedded in his argument for a role for reciprocity is the “implicit notion of a sort of anonymous collaboration among men by their which their activities are channeled through the institutions and procedures of an organized society.”<sup>37</sup> It is the reciprocal demands that a legal system imposes on lawgivers and citizens alike that *generates fidelity to law*.

Fuller, of course, is not the first thinker to identify the central role that reciprocity plays in the administration of justice. In Book V of the *Nicomachean Ethics*, Aristotle recognized that “the view is also held by some that simple reciprocity is justice. This was the doctrine of the Pythagoreans, who defined the just simply as ‘suffering reciprocally

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<sup>34</sup> Fuller, *The Morality of Law*, Yale University Press (1964) at 192.

<sup>35</sup> *Id.* at 193.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> *Id.* at 22.



with one another.” Unlike Fuller, Aristotle cautioned not to overstate the role of reciprocity in justice and he noted that reciprocity does not coincide with either distributive or corrective justice. Instead, Aristotle noted, in a foreshadowing of Fuller’s thinking, that reciprocity is important because it is inextricably intertwined with the practice of mutual exchange:

But in the interchange of services justice in the form of reciprocity is the bond that maintains the association: reciprocity, that is, on the basis of proportion, not on the basis of equality. The very existence of the state depends on proportionate reciprocity; for men demand that they shall be able to requite evil with evil – if they cannot, they feel they are in the position of slaves – and to repay good with good – failing which, no exchange takes place, *and it is exchange that binds them together.*<sup>38</sup>

Cicero likewise identified notions of reciprocity between law giver and subjects. In Book III of *Laws*, Cicero suggests that:

Command shall be just, and the citizens shall obey them dutifully and without protest. Upon the disobedient or guilty citizen the magistrate shall use compulsion by means of fines, imprisonment or stripes, unless an equal or higher authority *or the people forbid it; the citizen shall have the right to appeal to them.* After the magistrate has pronounced sentence, either of death or fine, there shall be a trial *before the people for the final determination of the fine or other penalty.*<sup>39</sup>

In addition, Brian Tamanaha has identified the reciprocal nature of at least the fundamental laws in Germanic customary laws. According to Tamanaha, under the

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<sup>38</sup> Aristotle, *Nicomachean Ethics*, Book V, translated by Rachman as reprinted in “The Great Legal Philosophers,” Ed. Clarence Morris (1985)(emphasis added). It is no doubt true that the context of reciprocal exchange discussed by Aristotle was much different than the context Fuller likely had in mind. As described by Professor Tamanaha:

Fifth Century BC Athens, at the height of its glory, took great pride in being a democracy governed directly by its citizens. The overarching orientation of Athenians was toward the *polis*, the political community. Every male citizen over thirty years of age, of whatever class or wealth, was eligible to serve (for pay) on juries that decided legal cases; they also served as magistrates, on the governing Council (with a rotating head), and on legislative assemblies, with positions filled by lot. To insure accountability, magistrates presiding over cases could be charged with violations of the law by complaints from private citizens. Owing to these characteristics “democracy was synonymous for the Athenians with the ‘rule of law’”. Athens did not have a class of legal professionals or state officials who monopolized the production of law or the delivery of legal services. Law was – literally – the product of the activities of its citizens.

Tamanaha *supra* at 7.

<sup>39</sup> Marcus Tullius Cicero, *Laws*, Book III, as reprinted in Morris *supra* at 53.

“right of resistance” the king was dependent upon the approval of his subjects in order to retain his crown.

The legendary Germanic “right of resistance” according to which any king who breached the law was subject to abandonment by the people, was a stark manifestation of the belief of the supremacy of law over kings. The king and his people both stood under a mutual obligation to preserve the law from infringement or corruption and in some cases when the king clearly failed to do his duty we find his subjects taking matters into their own hands and deposing him. *The key underlying notion was fealty, in which both ruler and ruled were bound to the law; law imposed reciprocal, albeit unequal, obligations that ran in both directions, including loyalty and allegiance.*<sup>40</sup>

The long intellectual history recognizing the connection between reciprocal exchange and fidelity to law is important when one considers the intellectual moorings of those strains of jurisprudence that would emphasize the consequences of judicial decision-making (at the expense of precedent and predictability) or the ideological or class based analysis (frequently to highlight historical systematic oppression or marginalization). Observers over the centuries have recognized that it is precisely the reciprocity of exchange that imbues a legal system with its legitimacy. Those who favor outcomes based upon consequentialist judicial decision-making models or ideological decision-making models might be hard pressed to identify a unifying principle with as powerful a historical presence as reciprocal exchange.

In light of the long jurisprudential tradition acknowledging the role of reciprocity in law, why have so many legal philosophers abandoned the study of reciprocity in favor of deeper and deeper dives into judicial decision-making, judicial bias and meta-jurisprudence? One possibility, as suggested by Professor Dan Priel and, independently, by Professor Nicola Lacey, harkens back to the competing Harvard Law Review articles authored by Professors Hart and Fuller in 1958.<sup>41</sup> According to Professor Priel, Hart dictated the terms of future debate by focusing primarily on the origin of law rather than the origin of obligation to the law. As Priel explains:

Let us spell this out: Hart’s claim is that one can be under a legal obligation when one treats the law as a threat to be avoided, and someone else treats law as

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<sup>40</sup> Tamanaha at 24.

<sup>41</sup> See, Priel, Dan “H.L.A. Hart and the Invention of Legal Philosophy” (2011). *Comparative Research in Law & Political Economy*. Research Paper No. 17/2011, <http://digitalcommons.osgoode.yorku.ca/clpe/55>, and, Lacey, Nicola, “Out of the Witches Cauldron?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate,” *University of Oxford, Legal Research Paper Series, Paper no 51 Electronic Copy available at <http://ssrn.com/abstract=2126511>*, (2012)

reason for action. Is this not simply people believing that they are under an obligation? I think Hart's response to this question would be: "That's all there is to it. To look for something more than that, for anything deeper, is to maintain remnants of an old 'metaphysical' worldview Hart associated with natural law."<sup>42</sup>

According to Priel, the consequences of Hart's dominance of the field of legal philosophy are substantive:

All this comes at a price: legal philosophy is alive but it owes whatever life it currently has to a kind of Faustian bargain: legal philosophy will continue to live as a distinct discipline, but the price for being alive is that it will be so separate from other disciplines to seem to be existing in its own separate world. Academic lawyers, even those with theoretical inclinations and interests rarely see the point of many jurisprudential debates. Legal philosophers, aware of this, sometimes respond with a sneer: other academic lawyers are not smart and sophisticated enough or sufficiently well-read in philosophy, to understand the issues legal philosophers are dealing with. But the truth is that moral and political philosophers, against whom it is much harder to make these claims, are not much interested either and . . . do not seem to understand the point of what legal philosophers do.<sup>43</sup>

Professor Lacey likewise notes that Hart's initial thrust in the debate left Fuller to reply on Hart's terms and, in the process, to minimize the broader cross-disciplinary approach to legal obligation championed by Fuller:

In essence, my argument will be that Fuller was at an inevitable disadvantage, not only because he was merely responding, and hence drawn into a battle whose terms of engagement were set by Hart, but also because of the very different worldviews with which the two men approached questions of legal theory. Because of Hart's agenda-setting position, the terms of the debate are those of analytic legal philosophy: and the reception of the debate has, understandably, both interpreted and evaluated Fuller's argument largely in terms of criteria internal to that discipline. But while Hart's Holmes lecture can justly be seen as exemplary of his broader contribution, Fuller's most original interventions in legal scholarship originated not so much in a philosophical view but rather in a broader cross-disciplinary interpretation of legal institutions and processes – a set of interests which justifies Summers' assessment of him as 'the greatest proceduralist in the history of legal theory.' Though, as I shall argue, Fuller might have drawn on this broader work to raise questions about Hart's approach, his

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<sup>42</sup> Priel, *supra*, at 10.

<sup>43</sup> *Id.* at 16-17.

detailed interest in legal processes potentially giving him a certain advantage in the debate, he did not do so nearly as effectively as he might have done – an omission which itself proceeds from some interesting aspects of his scholarly approach and personality.<sup>44</sup>

Many judges and practicing lawyers will no doubt consider questions about whether Hart correctly identified the proper domain of legal philosophy as simply too esoteric to have any impact on their daily affairs. We should be mindful, however, of the fact that generations of law students and law professors have looked to the Hart-Fuller debate and the subsequent published works of these two authors as the defining event on the subject of obligation to law. Hart's contention that obligation is a function of law being properly adopted and eagerly enforced undoubtedly shifted attention away from Fuller's thoughts on the question of moral obligation to law that can be traced back to the reciprocal obligations between citizens that arise from their mutual participation in the social venture. When we assume, as Hart did, that obligation is created unilaterally and independent of reciprocal obligation, we can be dismissive of the role of public involvement in the justice system. Law's validity, in that case, stems from its origins and its enforcement. If what Hart envisioned is what law has become, or always was, it is only fitting that we remain preoccupied with judicial decision-making and that courts continue on their inevitable path to "managerial judging".<sup>45</sup> If, on the other hand, Fuller has a point when he tells us that "the creation of an effective interaction between [lawgiver] and [legal subject] . . . is an essential ingredient of the law itself" then we would do well to consider the opportunities for reciprocal interaction within the judicial system.

To be fair, Fuller's notion of reciprocity is central to a theory of law that is both larger and smaller than I will attempt to put forward here. It is larger because Fuller's concern is with *law qua law*. In the "Morality of Law" Fuller explores aspects of the exercise of legislative and executive power as well as judicial power. Thus, Fuller's explanation of reciprocity and fidelity to law transcends the mere operation of a judicial system and seeks to account for the political and philosophical underpinnings of legislative and executive authority. On the other hand, Fuller's theory is smaller than the theory discussed here because he left much of the detail of identifying the circumstances likely to generate fidelity to law to future contributors and it is to this task that we will now turn our attention.

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<sup>44</sup> Lacey, *supra*, note 39 at 5.

<sup>45</sup> Higginbotham, *The Present Plight of the District Courts* at 759 (quoting Carrington and Crampton).

D. *Reciprocity in Practice*

To lawyers who spend a significant portion of their time in a courtroom, the idea that non-judicial actors play a significant role in the practice and procedure of American trial courts is self-evident. While one cannot deny the trial judge's central role in the proceeding, one likewise cannot deny that the judge's role is often largely passive, or at least theoretically so. Trial judges do not examine witnesses, they do not select evidence for admission, they do not formulate arguments, they do not testify and, while they may oversee and enforce the issuance of subpoenas, they do not frequently decide who shall be haled before the court. Instead, the parties, in conjunction with their counsel, determine how an issue will be framed or how a fact will be proved. The presentation and receipt of evidence and argument can only be described as a reciprocal exchange between the finder-of-fact and the myriad of non-judicial actors who contribute to the resolution of a dispute. More importantly, trial judges only decide what they are asked to decide; a vast array of issues affecting the outcome of a dispute are resolved by the parties in the ordinary course of the litigation process. The outcome of each of those strategic decisions will have a profound impact on what the judge must decide and when she will decide it. Non-judicial inputs into the litigation process typically fall into one of three categories: direct participation by litigants; direct participation by non-parties; and, indirect participation by non-parties.

Examples of direct participation by a party in the trial process include:

- **Pro se litigants:** Parties proceed pro se in any number of circumstances. Pro se appearances are quite common in municipal and small claims courts. Representation by counsel is, in fact, unusual in cases such as minor contract disputes, landlord-tenant disputes, traffic offenses and minor crimes. When parties appear on their own behalf, trial courts and their staffs are particularly careful to protect the interests of the parties proceeding without counsel. Procedural rules are often relaxed to pave the way for those untrained in the law to present evidence and make argument. Not all litigants who choose to act as their own lawyers appear in the local courts, however. Defendants in criminal cases will frequently attempt to proceed without the assistance of counsel. In many of these cases, especially where the defendant has a realistic chance of incarceration, courts will appoint monitoring counsel to provide some support to the criminal defendant proceeding pro se. In addition, an increasing volume of cases are filed by prisoners attempting to use the federal courts to vindicate federal or state rights allegedly denied to them by prison officials. The role of pro se litigants in the American justice system is frequently overlooked by legal scholars, social scientists and other observers of the American legal process. Participation by pro se litigants introduces an uncontrolled variable into American courtrooms. Yet, there is no doubt that, for Americans proceeding pro se to resolve minor disputes, their interaction with the American justice system takes place without lawyers in magisterial courtrooms designed expressly to resolve minor disputes between citizens when the amount in controversy or

the prospective punishment makes the formalities of higher level courtroom proceedings unnecessary and excessive.

- Jury selection: Active participation by a party in the selection of a jury is a mainstay of the American jury trial. In many jurisdictions, jury selection provides an opportunity for the party to gauge potential jurors' receptivity to her theory of the case. Other jurisdictions abide by a much more truncated jury selection process. In all events, however, the party has an opportunity to assist in the selection of those peers who will decide her case. It is of some significance that the jury selection process frequently proceeds with little or no active involvement by the judge;
- Testimony and the presentation of evidence: The parties select the evidence to be presented to the court, the order in which it is presented and the form it will take. The court has no duty to request evidence, suggest evidence or compel the production of evidence that a party has not elected to present. Many cases are determined by failures of proof that can be traced to strategic decisions by a party or his counsel about the introduction of evidence. While the trial judge has decisions to make about the admissibility of evidence, he is not charged with ensuring that a trial record contain every possible item of evidentiary value. In short, a trial court is, for the most part, a passive recipient of qualified evidence; and,
- Allocution: Allocution is the right to be heard in a criminal case. It provides the convicted defendant an opportunity to bring to the attention of the sentencing court circumstances that might have a bearing on sentencing, regardless of their relevance to the primary issue of guilt. Allocution is frequently used by convicted defendants to apprise the court of unusual facts or circumstances that might have contributed to the defendants' lapse in judgment or it might be used to apprise the sentencing court of changes in lifestyle or attitude that could favorably impress the sentencing judge

The American justice system also provides opportunities for non-parties to participate directly, frequently as decision-makers in the judicial process:

- Jury service: The most obvious opportunity to participate as a decision-maker in the American justice system is service as a trial juror. Commentators and academics have, from time-to-time, criticized the jury as unwise particularly as increasingly complex matters are entrusted to the judgment of untrained citizens.<sup>46</sup> Indeed, participants themselves frequently grouse about the obligation to sit as a juror, especially if the cases are long or notorious. Yet, by and large, it is the right to have a dispute tried by a jury that most clearly separates the American justice system from most other justice systems. By most accounts, the jury is an integral part of the American justice system and its

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<sup>46</sup> Criticisms that juries lack the necessary sophistication or education to decide complex cases is also contrary to recent developments in the study of collective intelligence. That work, described later in this article, suggests that a jury's collective intelligence is actually quite capable of understanding complex legal principles. Anyone who has observed mock jury deliberations or legal focus groups knows this to be true.

presence as a democratizing force is both its saving grace and the reason it is the bane of the well-heeled or well-connected litigant.<sup>47</sup> Perhaps just as important as the jury's role in protecting fellow citizens from the sovereign is the effect that jury service has on jurors. Professor Landsman harkened back to Tocqueville's observations to emphasize that

Tocqueville discussed not only the systemic implications of jury trial but also its influence on individual citizens as jurors. Tocqueville believed that jury service could “instill some of the habits of the judicial mind into every citizen,” “teach each individual not to shirk responsibility” and serve “as one of the most effective means of popular education.”<sup>48</sup>

In short, de Tocqueville recognized the reciprocal impact of jury service; the parties to the dispute were judged by their peers and the jurors came to understand their role as dispute resolvers. It is the type of reciprocal interaction that is central to Fuller's notion of interaction between the lawgiver and the subject:

- Jury Nullification: Jury nullification is the practice of voting in a criminal trial for acquittal in the face of compelling evidence of guilt. Jury nullification may signify an evolution in communal standards long before the legal machinery can adapt or it may reflect collective wisdom of the jury that, on the facts before them and under the circumstances as they have come to understand them, a finding of guilt is unwarranted. The very real phenomenon of jury nullification reminds us that the disposition of a real dispute is not a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen;<sup>49</sup> and,

- Grand Jury Service: Service on a grand jury is another opportunity to wrest control of the justice process from the sovereign. In the grand jury context, however, the branch of government that is being displaced, or at least supplemented, is the executive branch. Prosecutors in the federal system, in many states, and in most states when it comes to capital cases, must convince grand jurors to authorize charges before a fellow citizen can be arrested and brought before the court. Grand jury service is conducted in secret session. A grand jury typically consists of more jurors than a petit jury and grand jurors can assume a more active role in the investigation of crimes in their communities. While the grand jury process has been the subject of criticism and ridicule, it is undeniable that the grand jury stands between a prosecutor and the accused.

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<sup>47</sup> See, Rakoff, *Why Innocent People Plead Guilty*, *supra* note 29.

<sup>48</sup> Landsman, *The Impact of the Vanishing Jury Trial on Participatory Democracy*, 2011 Forum for State Appellate Court Judges, Pound Civil Justice Institute (2011).

<sup>49</sup> The most representative case of reciprocity through jury nullification involves state juries' nullification of attempts to prosecute people for possession of marijuana. See, Steve Silverman, How Jury Nullification Accelerates the Drug War's Demise, <http://www.flexyourrights.org/jury-nullification-drug-war-demise/> last visited on March 1, 2015.

Anyone who has had the pleasure of attending grand jury sessions as a prosecutor or a defense lawyer (in Pennsylvania, grand jury witnesses may be accompanied by counsel) can attest to the careful thought and deliberation that many grand jurors give to their task. Admittedly, grand jurors' interests are naturally piqued when considering high-profile cases and in particular, those involving political scandal or notorious crimes. On the whole, however, grand jurors are engaged, inquisitive and skeptical even in the most mundane of matters. The grand jurors act as a constraint on overzealous prosecutors and a buffer for anxious and frightened witnesses.

- **Non-Party Testimony:** It is only through witnesses that a court can properly be advised of the facts giving rise to a dispute. Witnesses offer evidence that is either presumptively reliable, in the case of fact witnesses, or demonstrably instructive, in the case of expert witnesses. Witnesses of both types are subject to cross-examination, once described as the "greatest engine for the discovery of the truth known to man." Indeed, Professor Slocum has identified the judicial capacity for human empathy for witnesses and litigants as one of the virtues essential to a virtuous judge.<sup>50</sup> In my own practice, I remind clients before each trip to the courtroom that they are about to engage in a very human endeavor. A witness' appearance, the coherence of her testimony, the confidence in her delivery can all have an impact upon the attitude of the fact finder. Witnesses whose testimony reads well on paper may nonetheless be unable to communicate effectively or may become unglued under the pressure of the courtroom. In short, judicial proceedings are not unlike other forms of human interaction; they bear the imprint of those that participate in the case in very human and nuanced ways. It is not just the judge or the fact-finder that defines a judicial proceeding, it is instead the relationship between the actors and between the actors and the substantive law that set the stage for credible efforts to justly resolve real disputes. The movement away from live testimony in civil and criminal cases is, in light of the importance of live testimony in the common law trial tradition, lamentable. Here, Higginbotham's warnings ring true; one example of the sad state of affairs when it comes to witness testimony is the scene that plays out daily in courtrooms across the county where lawyers strain to present a matter to the court based on affidavits, deposition testimony or declarations when the actual presentation of testimony would not only be more informative, but, it would provide the court an opportunity to evaluate the credibility of the witness that she will be denied on a strictly paper record.

These are but a few examples of the human interactions endemic to the ideal of the practice of law. At some level, these opportunities for citizen participation seem rare or trivial to most observers of the American justice system. We must recognize, however, that these avenues of citizen participation seem rare only because they represent an aspect of the system that has been largely abandoned. The opportunities for citizen participation in the justice system have historically played an important role in raising

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<sup>50</sup> Slocum, *supra*, note 23.



civic awareness, empowering citizens and democratizing the American judicial process. In short, while we typically associate jury trials with citizen participation, there are many other opportunities for citizens to participate in the American justice system. Our failure to embrace and preserve those opportunities is symptomatic of the average citizen's withdrawal from public life.

The system's unwillingness to promote participation is contributing to the evolution of our courts in the direction of what Judge Higginbotham describes as "ministerial judging." Indeed, given this broader perspective of the interactive and reciprocal nature of the historical US legal system, it is no wonder that Higginbotham laments the current state of America's federal courthouses:

On any given day, a walk through a typical federal courthouse is likely to find most of its courtrooms dark. That a courtroom is not to be closed except in the most limited circumstances is a constitutionally footed principle, and these dark courtrooms by definition defy the objective of openness in government. . . . The move toward paper courts has increasingly shrunk the categories of persons appearing in open court – other than federal employees – to defendants being sentenced. District courts have become more remote and more detached from people. With the sentencing guidelines, fewer criminal cases are being tried. And the bar has lost its significant role in court-appointed cases, displaced by federal public defenders. This leaves the criminal side of the docket to federal employees and a narrow range of private counsel who appear for the few defendants who can pay. In the occasional civil jury trial, there will be only six to eight jurors – a reduction from twelve-member juries enacted despite virtually all serious studies finding that changes in jury size alter the dynamics of deliberation in undesirable ways.<sup>51</sup>

One bright note in the area of citizen participation in the judicial process is the evolution of social commentary exploring the processes, outcomes and social impact of case dispositions. In the modern American justice system, reciprocal influences abound in the form of the commentary and criticism that is a by-product of a public proceeding. Litigation outcomes and judicial decisions are increasingly the subject of commentary and review from a wide array of constituencies, both within and beyond the legal system. Of course, the commentary and review with the most direct impact on the behavior of trial court judges is appellate review. Appellate courts, enjoying the benefits of time and distance, engage in a thorough review of the decisions made in the court below. Multi-judge panels engage in the limited, reasoned, consideration of lower court rulings that, in most cases, produce an articulated basis for affirming or rejecting the work of the lower court.

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<sup>51</sup> Higginbotham, *Duke L.Rev.* at 749.

Moreover, the legal profession itself plays an important, if frequently overlooked role, in maintaining reciprocity and balance in a judicial system. Professor Tamanaha points out the role that the organized bar plays as a control on judicial and political power:

Though seldom given detailed attention by liberal theorists, all liberal accounts of the rule of law presuppose the presence of a robust legal tradition. Alex de Tocqueville's, classic study, *Democracy in America*, published a half-century after the independence of the USA, emphasized the danger of populist tyranny posed by democracy. Helping to mitigate this risk, according to de Tocqueville, was the legal profession. With a specialized body of knowledge that emphasized rationality and an orientation to the values of legality, lawyers were a reckonable social force. He wrote: "Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unrelenting passions of the multitude.

Tamanaha concludes his thoughts on the legal professions' role in advancing the 'rule of law' with a tribute and a warning:

The legal profession, then, is located at the crux of the rule of law. In contemporary societies persons trained in law comprise a notable social force that monopolizes legal activities. Given that liberal theorists uniformly allocate a special place for an independent, neutral judiciary as the final preserve of the rule of law, the rule of law could not conceivably function without this group committed to the values of legality. This position, however, also renders the legal profession, judges in particular, uniquely situated to undermine the rule of law.<sup>52</sup>

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<sup>52</sup> Tamanaha, *supra* at 58. Professor Tamanaha expounds on the focus of his warning later in the work:

The ultimate risk of this theme of the rule of law, and the social, political and ideological developments that accompanied it, is that the *rule of law* might become *rule by judges*. Whenever rules of law have authority, and judges have the final say over the interpretation and application of the law; judges will determine the implications of those rules of law. Recall that the theoretical debate over legal indeterminacy expired with a consensus that a degree of indeterminacy coexists with a substantial amount of predictability, at least in the US legal system. Once any degree of indeterminacy is recognized, it follows that the claim that judges merely speak the law is implausible. When, in addition, ignorance, weakness, subconscious bias, corruption, and the desire for power are admitted as human traits, the possibility that rule by law may become rule by judges is no longer a benign possibility but a matter of real concern.

*Id.* at 124.

Beyond participants in the legal system itself, an active and broad based intellectual community routinely reviews and comments on the quality of case outcomes. Indeed, the range of commentators has increased exponentially over the past quarter-century. Law professors, academic lawyers and law students have long engaged in the publication of law reviews and books that explore the bases for case outcomes. The legal-intellectual community's deep interest and comprehensive research on topics offers a valuable counterweight to judicial decisions, especially trial court decisions, that are often influenced by time constraints and other pressures related to dispute resolution. Yet, members of the legal academy no longer have a monopoly on the field of legal commentary; in the past two decades the day-to-day, gavel-to-gavel coverage of notorious trials has become commonplace. The public has the benefit of observing the judicial process aided by the color commentary of professionals who are typically knowledgeable and experienced, while perhaps a bit hyperbolic. Finally, the proliferation of blogs, online publications and internet web-sites has converted the announcement of any meaningful decision to a newsworthy event. In sum, critical analysis of legal outcomes is no longer the exclusive province of trained legal professionals. A multitude of observers now opine on the outcome of legal cases and their voices create a constant and vigilant check on the quality of legal outcomes. The proliferation of social commentary, however, is no substitute for direct citizen participation. While Americans may be better informed as a result of courtroom commentary and criticism, it goes without saying that observation and participation are two different things. Indeed, observation may be personally illuminating, but, both the system and the actor benefit from active participation.

Social commentary aside, it seems self-evident that the vitality and reciprocal exchange that is a product of active courts is lost, or at least greatly diminished, by the "move to paper courts".<sup>53</sup> As Judge Higginbotham explained in the context of United States District Courts:

The United States District Courts are the most vital judicial institution in this country. Their courageous history of protecting the constitutional rights of the disfavored and the downtrodden has earned their great prestige and solidified their venerable role in American governance. Federal trial courts cannot maintain this status if they become indistinguishable from state highway departments; but on the present trajectory, this is their destination. If this bleak picture comes to pass, live tenure cannot be defended, and Article III "trial" courts will become indistinguishable from the thousands of administrative law judges. Civil service is just over the horizon.<sup>54</sup>

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<sup>53</sup> Higginbotham, *The Present Plight of the United States District Courts* at 749.

<sup>54</sup> *Id.* at 762.

Confronted with the fact of diminishing public participation in the judicial system, one might expect younger lawyers, unaffected as they are by the mist of legal nostalgia, to respond by asking “so what?” After all, cases are still being resolved, litigants have grown comfortable with the thought of negotiated settlements and some litigants openly embrace the role that non-party, non-judicial mediators and other ADR actors play in reaching negotiated resolutions of disputes. Accordingly, our younger colleagues might ask, aside from paying homage to legal history, advancing theoretical notions of reciprocity of obligations, and clinging for dear life to antiquated vehicles for public participation in the legal process, why is public participation in the legal process a superior means of dispute resolution? A proper response to this question requires, at least, some exploration of the concept that lies at the heart of democracy: collective wisdom.

E. *Legal Decisions and Public Reasoning*

The give and take within a legal system, when the system is permitted to run its natural course in terms of inputs, outcomes and public review, is consistent with the notion of “public reasoning” described as a central tenet of democratic life by Amartyan Sen in his work “An Idea of Justice”. There, Sen contemplates the relationship of public reasoning to notions of justice in the practice of law. Sen observes that:

It is frequently asserted that justice should not only be done, but also, ‘be seen to be done’. Why so? Why should it matter that people actually agree that justice has been done, if it has in fact been done? Why qualify or constrain or supplement a strictly juridical requirement (that justice be done) by a populist demand (that people in general can observe that it is being done)? Is there confusion here between legal correctness and popular endorsement – a confounding of jurisprudence with democracy?

It is not, in fact, hard to guess some of the instrumental reasons for attaching importance to the need for a decision to be *seen* to be just. For one thing the administration of justice can, in general, be more effective if judges are seen to be doing a good job, rather than botching things up. If a judgment inspires confidence and general endorsement, then very likely it can be more easily implemented. Thus, there is not much difficulty in explaining why that phrase about the need to justice to be ‘seen to be done’ received such ringing endorsement and approving reiteration right from the time it was first uttered by Lord Hewert in 1923 (In *Rex v. Sussex Justices Ex parte McCarthy*, [1923] All ER 233). And yet it is difficult to be persuaded that it is only this kind of administrative merit that gives the observability of justice such decisive importance. The implementational advantages of getting approval all around are not of course in doubt, but it would be odd to think that Hewart’s foundational

principle is based on nothing other than convenience and expediency. *Going beyond all that, it can plausibly be argued that if others cannot, with the best of efforts, see that a judgment is, in some understandable and reasonable sense, just, than not only is its implementability adversely affected, but even its soundness would be deeply problematic. There is a clear connection between the objectivity of a judgment and its ability to withstand public scrutiny . . .*<sup>55</sup>

Thus, Sen suggests that public acceptance of the process of judicial dispute resolution is fundamental to the cultivation of fidelity to law. While academics and practicing lawyers appear predisposed to operate from the premise suggested by Dworkin's axiom that "[i]t matters how judges decide cases," Sen's observations suggest that serious students of the judicial system must acknowledge that judges do not always decide cases and, when they do, they rarely decide them in a vacuum. Indeed, at least in the American legal system, disputes are subject to the influence of judicial and non-judicial actors. In cases that carry weighty social overtones, like the internment of Japanese Americans during World War II, the teaching of creationism, or the impact of prolonged isolation on prisoner mental health, the process of public reasoning undoubtedly plays a role in exposing the nuances and, at times, the error of judicial decision-making. Alternatively, even in cases of high profile criminal or civil trials, public reasoning is at work through the numerous opportunities afforded non-judicial actors, often disinterested citizens, to impact judicial outcomes.

The value of open courts, observable decisions and participation by non-judicial actors is twofold. First, as Sen and others have pointed out, open courts foster transparency, understanding and acceptance of the judicial system and its products. The notion that justice is to be seen to be done is a reflection of the fact that people will more readily accept that which they understand to be the product of an open and impartial process. The second benefit to open and active courts, however, centers on the qualitative benefits of citizen participation. In this context, the premise is that decisions that are influenced by a sufficiently broad cross-section of the America public are more likely to reflect the collective wisdom of American attitudes and prejudices. In her recent article entitled, "*Democratic Reason: the Mechanisms of Collective Intelligence in Politics*," Professor Helene Landemore explores the question of whether a random collection of decision-makers is preferable to an oligarchy of the best and the brightest when it comes to political decision-making.<sup>56</sup> Landemore posits that:

However counterintuitive that claim may sound, an oligarchy of even the best and brightest need not be generally smarter than the rule of the many. This is so because of the crucial role of one component of collective wisdom, namely

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<sup>55</sup> Sen, *The Idea of Justice* (2009) at 393-94.

<sup>56</sup> Landemore, and Elster, *Collective Wisdom: Principles and Mechanisms*, Cambridge University Press (2012).  
(2015) J. JURIS. 37

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“cognitive diversity” or the existence within the group of multiple ways to see the world and interpret it. Applying the theoretical findings of Lu Hong and Scott Page about the relative importance of cognitive diversity and individual ability for collective problem-solving and predictions, I argue that since an ideal oligarchy of even very smart rulers can be assumed to display less cognitive diversity, at least over the long term, than an ideal democracy (direct or indirect), the few can in general and on the long run not match the epistemic competence of many moderately smart but diversely thinking individuals. In other words, to the extent that cognitive diversity is more likely to exist in the larger than the smaller group, I argue that democracy is more conducive to collective wisdom than any version of the role of the few.

Landemore explains that she is building upon important work in collective intelligence, including work by legal philosophers, Cass Sunstein and others, that has led her

. . .to defend that view that as a collective decision-procedure democracy is more epistemically reliable than oligarchy. This is so because, even assuming that we could identify the best few, they would either not be numerous enough and therefore cognitively diverse enough, to compete with the many averagely smart people (in a direct democracy), or they would not be cognitively diverse enough over the long run (in a representative democracy).<sup>57</sup>

Professor Landemore suggests that the problem with oligarchical decision-making is that the oligarchy is, by definition, lacking in the diverse attitudes and opinions necessary to a fully informed decision. By reducing the number of people who decide and review important decisions the US justice system runs the risk that it will deviate seriously from the historical premium attributed to citizen participation in the justice system. Professor Landsman seizes upon a similar idea when criticizing juries of less than a dozen jurors:

First, by halving the size of the jury far fewer citizens will have an opportunity to participate in the adjudicatory process, thereby reducing the democracy-enhancing impact suggested by Tocqueville and demonstrated by Gastil. What society loses is its potential voters and potentially engaged citizens. Perhaps as important, a smaller jury does not offer nearly as much room for minority participation. Where, for example, a minority group represents ten percent of a community’s population, the switch from twelve to six virtually guarantees that there will be no minority presence on a large majority of the juries constituted. When minority group members do sit on a smaller jury they will have few allies who might support their views and they are likely to be overborne. Scientific research indicates that diverse juries engage in longer and more detailed

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<sup>57</sup> Id.

deliberations. A minority presence affects the behavior of all jurors, making for greater sensitivity to minority views. Jury downsizing undermines the quality of democratic exchange as well as the number of citizens who experience it.<sup>58</sup>

The effect of public reasoning on the operation of the judicial system operates to reinforce the bonds of reciprocity that bind society to the judicial system and foster the idea of fidelity to law.

Academics and practicing lawyers must share their views on the impact of public reasoning on the function of judicial systems. There is a richness and complexity to the operation of a well-functioning justice system that goes beyond the endless dissection of judicial biases and preferences and perhaps even eclipses the topic of judicial decision-making. Much of that complexity is lost when we accept, as Hart suggested we must, that all properly enacted laws deserve equal treatment or when our attention is disproportionately focused on the judicial actors who move the system along. As justice systems emerge around the world and foreign observers look to US academics and practicing lawyers to help them understand how the judicial branch of government promotes the rule of law, those observers should see a robust exchange between academic and practicing lawyers that credits not only the fine judges that preside over our courtrooms but the earnest men and women from all walks of life who commit themselves, however briefly, to advancing a just resolution of disputes.

#### F. *Conclusion*

Philosophers from Fuller to Sen have recognized that law is not the exclusive plaything of lawyers and judges. Indeed, the purpose of a legal system is not to create some self-contained collection of rules the defining characteristic of which is its internal logic. To the contrary, a legal system must be a functional apparatus that serves as the mechanism for resolving real disputes for real people. Accordingly, as Sen and Fuller suggest, the legitimacy of a legal system may have less to do with “getting the right answer” and more to do with the idea that justice must “be seen to be done”.

Legal thinkers, in particular legal philosophers, have made assumptions about the nature of a citizenry’s obligation to law that we now have reason to question. As emerging countries develop legal systems and established countries endure the constant evolution of legal principles, it becomes critical that legal thinkers devote serious thought to the time-honored idea that obligation is as much a function of reciprocal obligation as it is of legal provenance. Without due regard for the value of reciprocal interaction in a legal system we cease to value those institutions that serve as vehicles to facilitate that interaction. As a human undertaking, it may be too much to expect that legal systems

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<sup>58</sup> Landsman, *supra*, note 48.

will arrive at the “one right answer”. Indeed, it may be quite enough to ensure that citizens and judges made reasonable choices based upon fair procedures and rational interpretations of substantive law. Perhaps the most important thing to remember is that justice is an aspiration as much as a guiding principle. Flawed decisions are inevitable, but, systems willing to expose those decisions to public reasoning and reciprocal participation are our best hope of correcting historical errors. Holmes suggestion that we try to “glimpse the Universal law” may require us to challenge orthodoxies in our manner of thinking about the law. It may require us to recalibrate when we strike the balance between fairness and efficiency. It may require us to reclaim some part of the legal system from highly specialized lawyers and judges. In the end, we may actually have to recognize that the legal system, to function properly and to maintain the proper balance between citizen and sovereign, may require the active participation of ordinary citizens who accept the responsibility of participation.



**EVIDENCE, MISCHARACTERIZED INSIGHTS,  
AND THE NATURE OF LAW**

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I.

In many areas of life, from hard science to managing one's everyday affairs, explanatory considerations help to guide inference. From the fact that some proposition would explain a given phenomenon we infer that the proposition is true. And when several propositions may explain a given phenomenon we infer the one that best explains it. Quantum mechanics best explains sub-atomic phenomena; evolutionary theory best explains species variations; that George Washington existed best explains the historical record concerning him; and the Cubs won yesterday best explains why today's newspaper reports that they did. These inferences all share the same structure, typically referred to as "abduction" or "inference to the best explanation." Because legal proof falls somewhere between science and managing one's everyday affairs, it should perhaps not be surprising that juridical proof process involves similar inferential practices.<sup>1</sup>

Most legal discussions of evidence focus on the somewhat technical notion of evidence in trials, or what Pardo and Allen call "juridical proof." I completely agree with them that this sense of evidence is perfectly captured by the theory of inference to the best explanation. In the present discussion, however, I want to focus on the methodological question of what constitutes (good) evidence for a jurisprudential theory. I will be arguing that developing and defending a jurisprudential theory is a process of assembling relevant data about legal systems, and then proposing an overall explanation of that data. If the preferred explanation offers the best explanation – if it is a better explanation than all known competitors – then by inference to the best explanation that data will provide good evidence for the jurisprudential theory.

Let's begin with a famous bit of legal evidence from a candidly juridical context.

At first glance, the evidence that O. J. Simpson was guilty of the murder of his ex-wife was overwhelming. Shortly after the time that the murder took place, he caught a plane to Chicago carrying a bag that disappeared, perhaps because it contained the murder weapon and bloody clothes. Police who came to Simpson's house found drops of blood in his car that matched his own blood

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<sup>1</sup> Michael S. Pardo and Ronald J. Allen, "Juridical Proof and the Best Explanation," 27 *Law and Philosophy* 2008, pp. 223-4.

and that of Ron Goldman. In Simpson's back yard, police found a bloody glove was of a pair with one that was found at the scene of the crime, and they found a bloody sock in his bedroom. Simpson had a cut on his hand that might have been caused a struggle with the victims who tried to defend themselves. Moreover, there was a plausible motive for the murder, in that Simpson had been physically abusive to his wife while they were married, and was reported to be jealous of other men who saw Nicole after the divorce.<sup>2</sup>

In the influential jargon of Gilbert Harman, this is an inference to the best explanation.

In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a "better" explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true.<sup>3</sup>

Simpson's guilt beautifully explains all of the relevant evidence.

The hypothesis that he was the killer explains why Nicole Simpson and Ron Goldman are dead, why Simpson's blood was found on a gate at the crime scene, why there was blood in his car, why a bloody glove was found in his yard, and why his sock had blood on it. Moreover, there is an explanation of why Simpson killed Nicole base on his past history of abuse and jealousy.<sup>4</sup>

As Harman notes, however, other rival hypotheses would also explain the relevant evidence.

The first task of the defense lawyers was to generate an alternative explanation of who killed Nicole Simpson and Ron Goldman. Based on Nicole's known history of cocaine use, they hypothesized that she was killed by drug dealers ... In order to explain the circumstantial evidence linking O. J. to the crime scene, including the bloody car, glove and sock, the defense contended that the items had been planted by Los Angeles Police Department officers determined to frame Simpson for the crime.<sup>5</sup>

Most of us agree that Simpson's guilt better explains the evidence than the racist framing by the police rival explanation. According to inference to the best explanation that means that we concede that the original theory is supported by the evidence.

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<sup>2</sup> Paul Thagard, *Hot Thought* (Cambridge, MA: The MIT Press, 2006), p. 136.

<sup>3</sup> Gilbert Harman, "The Inference to the Best Explanation," *The Philosophical Review* 74:1 (1965), p. 89.

<sup>4</sup> Thagard, *op. cit.*, p. 137.

<sup>5</sup> *Ibid*, pp. 138-9.

## II.

There is, of course, a problem about how one is to judge that one hypothesis is sufficiently better than another hypothesis. Presumably such a judgment will be based on considerations such as which hypothesis is simpler, which is more plausible, which explains more, which is less ad hoc, and so forth. I do not wish to deny that there is a problem about explaining the exact nature of these considerations; I will not, however, say anything more about this problem.<sup>6</sup>

Much of the professional literature on inference to the best explanation focuses on the above problem of “judg[ing] that one hypothesis is sufficiently better than another hypothesis.” Harman concedes the depth of the problem, and offers only the most abstract and general criteria for explanatory superiority. But David H. Glass has raised a second problem that is even more serious.

What is the connection between explanation and truth? Is there any reason for thinking that the best explanation is likely to be true? Or to put it another way, does IBE track truth? Of course, no approach should be expected to lead to the truth in every instance, but if IBE is to be accepted as a rational mode of inference, there must be some reason for thinking that it provides a good strategy for determining the truth.<sup>7</sup>

The solution to the Harman’s problem emerges directly from the solution to Glass’s truth-tracking problem.

Larry Wright argues that normal human beings have a skill that he characterizes as perceptual – the ability to diagnose what is going on, or what has happened.

Virtually everyone who has survived past infancy has a more or less well developed set of perceptual skills. These skills may be generally described as the ability to *tell what’s going on* (sometimes) simply by seeing it ... This is ability to tell what’s going on—or what’s gone on—even when we are not confronting it directly. We can often tell what has happened from the traces it leaves. We can tell there was a frost by the damaged trees; we know it rained because the mountains are green; we can tell John had some trouble on the way home from the store by the rumpled fender and the broken headlight. We reconstruct the event from its telltale consequences. It is this diagnostic skill we exploit in the most basic sort of inductive arguments; it is the foundation of our ability to evaluate evidence.<sup>8</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> David H. Glass, “Inference to the Best Explanation: Does It Track Truth?” *Synthese* Vol. 185, No. 3 (2012), p.412.

<sup>8</sup> Larry Wright, *Better Reasoning* (New York: Holt, Rinehart and Winston, 1982), p. 51.

That is precisely the skill at work in the O. J. Simpson case. Why does this skill work? Why does IBE track the truth? The answer I believe is obvious. One might ask whether visual perception tracks the truth. Answers to this latter question have varied within the epistemological literature, but for almost everyone in the scientific community the answer is univocal. Of course vision tracks the truth! And, though our knowledge of how to open our eyes and see a tomato plant remains maddeningly difficult to articulate, we understand full well why, and to some degree how, we are able to do it. Animal and human vision evolved precisely to track the truth of the environment external to the organism. IBE tracks the truth for the same reason. The ability to understand aspects of the world on the basis of evidence, that is to say, to explain things, had obvious survival benefits for our ancestors.

Skills are a kind of knowledge. Great golfers know how to read greens, and they can see where to aim their putts, and how much force to impart. One might be tempted to think that great golfers would make great coaches, but history tells us that is far from the case. Plato, well his character Socrates, clearly articulated the underlying assumption – “[a]nd that which we know we must surely be able to tell.”<sup>9</sup> In contrast Michael Polanyi proclaims, “we can know more than we can tell.”<sup>10</sup>

This fact seems obvious enough; but it is not easy to say exactly what it means. Take an example. We know a person's face, and can recognize it among a thousand, indeed among a million. Yet we usually cannot tell how we recognize a face we know. So most of this knowledge cannot be put into words.<sup>11</sup>

Polanyi introduces the technical term *tacit knowledge* to label knowledge or skills that “cannot be put into words.” Now Polanyi engages in purposeful hyperbole. Most skills can be put into words, but these words are usually vague and general, and at times the words are downright misleading. I take it to be obvious that we have abilities that cannot be adequately described in precise language, rules, or necessary and sufficient conditions.

There's a still lot of work to be done in understanding inference to the best explanation. And this lacuna seems to be an obstacle to wider acceptance of the theory. Just as I admire David Marr's path breaking attempts to account for vision in computer simulations, I admire the attempts of philosophers like Paul Thagard to understand IBE, first in computational terms,<sup>12</sup> and lately in neurological terms.<sup>13</sup> But even though I hope all of this research provides understanding, and perhaps even leads to new skills, I doubt

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<sup>9</sup> Plato, *The Collected Dialogues of Plato*, edited by Edith Hamilton and Huntington Cairns, (Princeton: Princeton University Press, 1961), p. 133.

<sup>10</sup> Michael Polanyi, *The Tacit Dimension* (Chicago: University of Chicago Press, 1966), p. 4.

<sup>11</sup> *Ibid.*

<sup>12</sup> See, Paul Thagard, *Computational Philosophy of Science* (Cambridge, MA: The MIT Press, 1993).

<sup>13</sup> See, Paul Thagard, *The Brain and the Meaning of Life* (Princeton: Princeton University Press, 2010).

it will do much to clarify, or improve, the skills we already possess. Golfers make great putts, and major league hitters hit 95 mph fastballs. Admittedly these are skills that are not widely shared. But all of us can recognize a face, or discern the family resemblance between two siblings, or see the sad state of affairs concerning O. J. The fact that we lack complete understanding of these skills in no way mitigates the fact that we possess them. And the concession that we are good explainers is all that is needed for unpacking the lawyer's sense of legal evidence.

### III.

Any educated man might be expected to be able to identify these salient features in some such skeleton way as follows. They comprise (i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones.<sup>14</sup>

I am already on record as claiming that contemporary analytical jurisprudence as an inherently explanatory enterprise, and that I think the structure and quality of evidence presented in defense of the grand theories of law can be usefully analyzed with the tools of IBE. H.L.A. Hart clearly sees philosophical analyses and definitions of law as a data driven process.

- e<sub>1</sub>. Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.
- e<sub>2</sub>. Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.
- e<sub>3</sub>. Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations
- e<sub>4</sub>. Any modern legal system includes courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid.
- e<sub>5</sub>. Any modern legal system includes a legislature to make new rules and abolish old ones.

He argues that all of this shared knowledge about law, both by legal professionals, but also by generally educated citizens, is made sense of, that is explained, by his restatement of legal positivism.

- t<sub>0</sub>. "Law [i]s the union of primary and secondary rules."<sup>15</sup>

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<sup>14</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), p. 3.

<sup>15</sup>This is the title of Chapter Five, *ibid.*, p.79.

But, of course, rival explanations abound. Many come from too narrow a fixation on relevant pieces of evidence, often single isolated pieces of evidence, and result in mischaracterized insights.

[T]hese seemingly paradoxical utterances were not made by visionaries or philosophers professionally concerned to doubt the plainest deliverances of common sense. They are the outcome of prolonged reflections on law made by men who teach or practice law, and in some cases administer it as judges. More over what they said about the law actually did in their time and place increase our understanding of it. For understood in their context, such statements are *both* illuminating and puzzling: they are more like great exaggerations of some truths about law unduly neglected, than cool definitions. They throw a light that makes us see much in law that law hidden; but the light is so bright that it blinds us to the remainder and so leaves us without a clear view of the whole.<sup>16</sup>

All the major jurisprudential theories are guilty of similar, “great exaggerations”, or mischaracterized insights.

t<sub>1</sub>. Every *law* or *rule* ... is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.<sup>17</sup>

t<sub>2</sub>. Law is nothing more than the prophecies of what courts will do.<sup>18</sup>

t<sub>3</sub>. [A]n unjust law is not a law.<sup>19</sup>

Austin’s early legal positivism (t<sub>1</sub>), in addition to having difficulties distinguishing between mobster rule of a neighborhood and legitimate legal statutes, results from an obsessively narrow focus on e<sub>1</sub>, and seems woefully inadequate as an explanation of e<sub>2</sub> through e<sub>5</sub>.

Oliver Wendell Holmes’ early legal realism (t<sub>2</sub>), insists on the addition of relevant data, but then fixates on this new data regarding the law to the exclusion of e<sub>1</sub> through e<sub>5</sub>. Hart also acknowledges these important facts about the law, though I think it is fair to say he does not grant them the seriousness they deserve. He offers an insightful diagnosis of two of the sources of what he calls “rule-scepticism.” The first is quasi-linguistic. Legal rules to be at all useful must be general in two related ways. They must cover an identifiable range of behavior – armed robbery, say – and they must apply to a range of individuals – all adults, say. But general rules, just like the general terms that compose them will always admit of borderline cases.

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<sup>16</sup> *Ibid*, p. 2.

<sup>17</sup> John Austin, *Lectures on Jurisprudence*. First published in 1832. Reprinted in Joel Feinberg, *et. al.*, editors, *Philosophy of Law* (Boston: Wadsworth, 2014), p. 75.

<sup>18</sup> Oliver Wendell Holmes, *The Nature and Sources of the Law* (1902), s. 276. Quoted in Hart, *op. cit.*, p. 1.

<sup>19</sup> Translated and quoted in Hart, *op. cit.*, p. 8.

Whatever device, precedent or legislation is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.<sup>20</sup>

The institution of law must clearly deal with this obvious fact.

e<sub>6</sub>. Legal rules will always admit of borderline cases.

Hart's second source of rule skepticism is structural. Rules, whether stated in legal texts like statutes or constitutional provisions, or illustrated in relevant precedent, must always be interpreted by courts. Thus, courts seem institutionally superior to the rules they interpret. This is easiest to see in the decisions of "supreme tribunals," but really applies to all courts.

A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered. ... Consideration of these facts makes it seem pedantic to distinguish, in the case of a supreme tribunal's decisions, between their finality and infallibility. This leads to another form of the denial that courts in deciding are ever bound by rules: "The law (or constitution) is what the court says it is."<sup>21</sup>

e<sub>7</sub>. Rules must always be interpreted by courts, and ultimately by supreme courts.

Although Hart concedes the relevance of these additional pieces of data about legal systems, he is little deterred from his strong legal positivist faith in rules. This is partly because he remains confident that borderline cases in law are relatively rare, and that the easy cases reinforce the legitimacy of the rules on which they depend. But I fear that Hart almost willfully ignores the obvious empirical fact that underlies most legal realists' skepticism. Law and legal institutions are inherently the constructions of human beings. They are comprised and administered by human beings. The language and precedent must always be interpreted by human beings. And human beings, sad to say, are imperfect, at times irrational, and all too prone to blindness, prejudice, and a host of other cognitive failures.

It is true that when we are unselfconsciously applying rules together, we have an unselfconscious experience of social objectivity. We know what is going to happen next by mentally applying the rule and it comes out the way we thought it would. But this is not in fact objectivity, and it is *always* vulnerable to different kinds of disruption—intentional and accidental—that suddenly disappoint our

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<sup>20</sup> *Ibid*, pp. 127-8.

<sup>21</sup> *Ibid*, p. 141.

expectations of consensus and make people question their own sanity and that of others. The vulnerability of the field, its plasticity, its instability, are just as essential to it as we experience it as its sporadic quality of resistance.<sup>22</sup>

Again, it is obvious that highly relevant data includes:

e.g. The entire legal system is a product of, administered by, and subject to the weaknesses and failures but also the strengths of, fallible human actors.

#### IV.

The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of such regularities, and knowledge of nature is not merely a knowledge of them. Instead, on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good—or *end* appropriate for it.<sup>23</sup>

The concept of natural law means different, though closely related, things to the moral and metaphysical philosopher, to the political theorist, and to the academic lawyer. Hart sees clearly that their origin in all these fields is ancient, and closely connected to metaphysical views long abandoned. The contemporary philosopher endorsing natural law will focus on three incredibly controversial positions. The first is moral realism – the theory that at least some moral questions admit of universal, objectively true, answers. The second is that human reason, apart for religious authority, is capable of discovering some of these normative answers. And the third is that there is a robust content to basic human nature that allows for these discoveries. Most philosophers, though of course not all, writing as Hart's contemporaries would have seen all of these positions as refuted by scientific discoveries, as well as theoretical advances in moral philosophy and philosophical psychology. It is really quite remarkable that in the fifty years since *The Concept of Law* was published how much of a comeback natural law has accomplished. I, for one, believe that a very plausible version of secular nature law can easily be constructed.<sup>24</sup> But little of this will assumed in the present discussion of natural law as a jurisprudential theory.

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<sup>22</sup> Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education*, vol. 36 (1986). Reprinted in Frederick Schauer and Walter Sinnott-Armstrong, editors, *The Philosophy of Law* (Fort Worth: Harcourt Brace, 1996), pp. 68-9.

<sup>23</sup> Hart, *op. cit.*, pp. 188-9.

<sup>24</sup> Jeffery L. Johnson, "Explanation, Human Nature, and Tort Theory," *Georgetown Journal of Law and Public Policy*, Vol. 4, Summer 2006.



The academic lawyer who is sympathetic to the insights of natural law will first need to jettison its traditional metaphysical and theological baggage. Most contemporary natural lawyers welcome such a move.

What I have tried to do is discern and articulate the natural laws of a particular kind of human undertaking which I have described as “the enterprise of subjecting human conduct to the governance of rules.” These natural laws have nothing to do with any “brooding omnipresence in the skies.” Nor have they the slightest affinity with any such proposition as the practice of contraception is a violation of God’s law. They remain entirely terrestrial in origin and application. They are not “higher” laws; if any metaphor of elevation is appropriate they should be called “lower” laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.<sup>25</sup>

Fuller goes on to articulate his suggested natural laws for any legal system. These procedural constraints are beautifully paraphrased by Kenneth Einar Himma.

- (P1) the rules must be expressed in general terms;
- (P2) the rules must be publicly promulgated;
- (P3) the rules must be prospective in effect;
- (P4) the rules must be expressed in understandable terms;
- (P5) the rules must be consistent with one another;
- (P6) the rules must not require conduct beyond the powers of the affected parties;
- (P7) the rules must not be changed so frequently that the subject cannot rely on them; and
- (P8) the rules must be administered in a manner consistent with their wording.<sup>26</sup>

I summarize all of this as a single piece of relevant data about legal systems.

e.g., Any legal system is bound by procedural constraints.

The classic mischaracterized insight of natural law is, with appropriate Latin formality, *lex iniusta non est lex*. Legal positivists have a field day with this one, pointing out that from Nazi laws to the Fugitive Slave Act, lots of patently unjust laws have nonetheless qualified as uncontroversially *real* laws. Contemporary natural lawyers don’t deny that this sentiment, if not the exact wording, comes from Augustine and Aquinas, but they offer a radically different interpretation of what these classical natural law theorists were up to.

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<sup>25</sup>Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 96.

<sup>26</sup> Kenneth Einar Himma, “Natural Law” *Internet Encyclopedia of Philosophy* <http://www.iep.utm.edu/natlaw/>

A more reasonable interpretation of statements like “an unjust law is no law at all” is that unjust laws are not laws “in the fullest sense.” As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: “she’s no lawyer” or “he’s no doctor.” This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is “not really law” may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with “higher law.”<sup>27</sup>

We say these kinds of things all the time. Baseball fans remark without a hint of irony or embarrassment that “he’s not really a shortstop,” knowing full well the manager has penciled him in at shortstop all season long. These fans are merely noting that the player has a build and fielding and hitting statistics that are at odds with a paradigmatic shortstop.

Once the slogan of unjust laws not being laws has been tamed, we discover a lot of agreement between legal scholars, and not just natural lawyers, but positivists like Hart, and even realists like Posner, about data that seems relevant to the support of a modest natural law theory.

e<sub>10</sub>. There is remarkable overlap between, not just the language, but the substantive content of legal rules and moral rules.

e<sub>11</sub>. There are natural, i.e., physiological, psychological, and social, reasons why normative systems, whether legal or moral, will have similar, if not universal, content.

e<sub>12</sub>. The actions of legal actors, particularly of judges, is subject to professional standards that seems inherently normative.

## V.

Understanding another person’s conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making he says the best performance of communication it can be. And the interpretation of data in science makes heavy use of standards of theory construction like simplicity and elegance and verifiability that reflect contestable and changing assumptions about paradigms of explanation, that is, about what features make one explanation superior to another. ... [A]ll

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<sup>27</sup> Brian Bix, “Natural Law Theory,” in Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Cambridge: Blackwell Publishing Co., 1996), p. 226.

interpretation strives to make an object the best it can be, as an instance of be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success.<sup>28</sup>

Ronald Dworkin's jurisprudence builds on all of the data in  $e_1$  through  $e_{12}$ , but places special emphasis on the existence of inherently normative professional standards governing the work of judges. He phrases his theory of constructive interpretation in ways that disguise its affinity to inference to the best explanation. I think this is unfortunate for two reasons. One is that it makes his jurisprudential views seem, at least to many critics, idiosyncratic to the point of radical. The other is that, in accordance to the thesis being developed here, it makes the reasoning of jurists who would adopt the method seem mysterious and relativistic, rather than resting on recognizable cognitive skills and promising a great deal of intersubjective agreement, though not always in hard cases.

Dworkin treats scientific explanation as a subspecies of interpretation. He insists that interpretation is required for purposeful activities like literature and law. Most scholars in the humanities and the social science would agree. This might suggest that interpretative reasoning is different in kind from explanatory reasoning. But that is far from clear. The clearest cases of explanation are deeply causal. What caused the deaths of Nicole and Ron Goldman? Or the blood on the gate, glove and sock? But communication, or potential communication, is often explained in causal terms. I'm distracted and follow the car much too close. The driver raises his left arm to the side of his face. Was that an obscene gesture, or simply an itchy ear? Authors, artists, and legislators desire to do things, and they produce "texts" in order to accomplish these ends. We interpret, that is to say explain, these texts – how did they come to be? What do they mean? Was the driver ahead telling me something? What were the authors of the Fifth, Eighth, and Fourteenth Amendments up to when they produced these texts? Purposes, intentions, and lots of other deeply psychological states are certainly part of the story that makes sense of the texts. But philosophers have long seen reasons as causes.

What is the relation between a reason and an action when the reason explains the action by giving the agent's reason for doing what he did? We may call such explanations rationalizations, and say that the reason rationalizes the action. ... I want to defend the ancient-and-common-sense-position that rationalization is a species of ordinary causal explanation.<sup>29</sup>

Thus, I am suggesting that interpretation – conversational, literary, or constitutional – is better seen as a subspecies of explanation.

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<sup>28</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p. 53.

<sup>29</sup> See, Donald Davidson, "Actions, Reasons, and Causes," *The Journal of Philosophy* 60:23 (1963).

Dworkin imposes some very idiosyncratic and controversial strictures on the inferences that judges make in hard cases. He is adamant that they are value driven exercises. Now it is obvious that value judgments are in one sense at the heart and soul of IBE. We are seeking the *best* explanation, and this is certainly a value laden enterprise. I have argued that it depends on a basic perceptual skill, but this skill, much like jurying an art exposition, judging a figure skating competition, or selecting the best Bordeaux, is perceptual and judgmental at the same time. But Dworkin sees constructive interpretation as much more deeply value laden.

His mythical judge Hercules, and all imperfect human jurists employing law as integrity, are instructed to impose unrealistic, and fundamentally normative, assumptions on the language of the germane legal texts, as well as the substance and justification in the relevant precedents.

Law as integrity asks a judge deciding a common-law case ... to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems, he must think of their decisions as part of a long story he must interpret and then continue, according to his judgment of how to make the developing story as good as it can be.<sup>30</sup>

If all that is meant is that a judge must “make sense” of statutes, constitutional provisions, and previous judges’ thoughts as expressed in their opinions in previous precedent, this looks for all the world to be inference to the best explanation at work. But Dworkin is much more explicit about what counts as making sense, or explaining, of all this. He has judges assume that they are writing a chain-novel.

Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be construed as the work of a single author rather than, as is the fact, the product of many hands.<sup>31</sup>

I find much to admire in this view of law and judging. But I also think that the instructions to assume a single author, or “to make the developing story as good as it can be,” are like the wine critic and author Michael Bettane, being interviewed in the delightful film *Red Obsession*.

As soon as you have to use words to describe your sensation, you use words in a part of your brain which is linked to your memory, to your history, to your taste, to your education. In my brain, because it’s my background, is music. This is like

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<sup>30</sup> Dworkin (1986), *op. cit.*, pp. 238-9.

<sup>31</sup> *Ibid.*, p. 239.

a voice a wine, it's like an instrument with what we call a timbre, which is different – a Steinway is not the same, and that's the difference between Laffite and Latour, between a Guarnerius and a Stradivarius . My perception is like that. I hear the wine, I don't smell. heh, heh.<sup>32</sup>

Mr. Bettabe's self-conscious chuckle at the end says a lot. He is not for a second suggesting that wine critics should be classically trained in music, or even that those who might be should "hear the wine." He is trying to deal with another case of tacit knowledge – trying to put into words something that defies precise articulation. Even Hercules, as superhuman as he may be, is not immune to challenge of tacit knowledge. He knows, because he is superhuman, the right answer to every hard case, but when he assumes that law is a chain-novel, and decides the cases by "mak[ing] the developing story as good as it can be," he should be seen as describing as well as he can how he does it, and not as prescribing a general adjudicative method. Judges, even superhuman judges like Hercules, must trust a basic cognitive skill shared by most other judges, at explaining legal language and precedent. Wise judges, and insightful academic lawyers like Dworkin, may advise and even try to teach their colleagues how to do all of this. But all of this advice and pedagogy will amount to little more than assuming the skill in the first place, and perhaps fine tuning it a bit.

Hercules is constructed to discover the right answer in hard cases. There is a delightful pun in this way of describing law as integrity. The adjective "right" means both correct as a matter of law, and superior as a matter of political morality. Either standard, however, is deeply normative. Dworkin, of course, is unapologetic about any of this.

If ... any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law. ... Suppose this is natural law. What in the world is wrong with it?<sup>33</sup>

But one need not be a moral realist to concede, first, that there are hard cases in the law. e<sub>13</sub>. "[T]here are ... areas of conduct which must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case."<sup>34</sup>

This development of the law in hard cases is not pure discretion – judges don't get to decide these cases on pure whim, who is the best looking advocate, or which party would they would most enjoy a beer with – but according to some recognized standard.

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<sup>32</sup> Michael Bettane, wine critic and author. Interviewed in *Red Obsession*. Dirs. David Roach, Warwick Ross. Lion Rock Films. 2013. Film.

<sup>33</sup> Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* 34 (1982). Reprinted in Patricia Smith, editor, *The Nature and Process of Law* (New York: Oxford University Press, 1993), p. 240.

<sup>34</sup> Hart, *op. cit.*, p. 135.

e<sub>14</sub>. Judges are expected to decide hard cases on the basis of some recognized and widely shared standards.

Hart concedes that English law camouflages the standard.

In a system where *stare decisis* is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body. In England this fact is often obscured by forms: for the courts often disclaim any such creative function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the ‘intention of the legislature’ and the law that already exists.<sup>35</sup>

But though the ‘intention of the legislature’ is a kind of legal fiction, this does not mean that “anything goes” in Hart’s view of judicial discretion.

At any given moment judges ... are parts of a system of rules of which are determinate enough at the center to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of authority to make those decisions which cannot be challenged within the system.<sup>36</sup>

And perhaps most surprisingly, even a strong legal realist like Richard Posner is willing to admit that judges exercising discretion are bound by rules or principles.

You do not play chess unless you are prepared to play by the rules. The rules of the game of which I am speaking with reference to the judicial process are not legal rules... They are rules of articulation, awareness of boundaries and role, process values, a professional culture. Wholehearted compliance with the rules cannot be guaranteed, given judges’ freedom from the kind of external constraints that operate on other game players. If you do not play chess by the rules, you are not doing anything. If you do not play judging by the rules, but instead act the politician in robes, you are doing something, and it may be something you value more than you do the game of judging as it is supposed to be played.<sup>37</sup>

## VI.

My aim in [*The Concept of Law*] was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and

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<sup>35</sup> Hart, *op. cit.*, pp. 135-6.

<sup>36</sup> *Ibid.*, p. 145.

<sup>37</sup> Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), p. 91.

clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.<sup>38</sup>

We have assembled a good deal of relevant data about legal systems, data that legal positivists, legal realists, and natural lawyers will all concede is true.

- e<sub>1</sub>. Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.
- e<sub>2</sub>. Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.
- e<sub>3</sub>. Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations
- e<sub>4</sub>. Any modern legal system includes courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid.
- e<sub>5</sub>. Any modern legal system includes a legislature to make new rules and abolish old ones.
- e<sub>6</sub>. Legal rules will always admit of borderline cases.
- e<sub>7</sub>. Rules must always be interpreted by courts, and ultimately by supreme courts.
- e<sub>8</sub>. The entire legal system is a product of, administered by, and subject to the weaknesses and failures but also the strengths of, fallible human actors.
- e<sub>9</sub>. Any legal system is bound by procedural constraints
- e<sub>10</sub>. There is remarkable overlap between, not just the language, but the substantive content of legal rules and moral rules.
- e<sub>11</sub>. There are natural, i.e., physiological, psychological, and social, reasons why normative systems, whether legal or moral, will have similar, if not universal, content.
- e<sub>12</sub>. The actions of legal actors, particularly of judges, is subject to professional standards that seems inherently normative.
- e<sub>13</sub>. “[T]here are ... areas of conduct which must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case.”
- e<sub>14</sub>. Judges are expected to decide hard cases on the basis of some recognized and widely shared standards.

So what is the best explanation of all of this data? If our only candidates are the recognized schools of jurisprudence we get the following list.

- t<sub>1</sub>. Legal positivism (as exemplified, say, in Hart’s *Concept of Law*<sup>39</sup>)

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<sup>38</sup> Hart, *op. cit.*, p. 239.

<sup>39</sup> *Ibid.*

- t<sub>2</sub>. Legal realism (as exemplified, say, in Posner's *How Judges Think*<sup>40</sup>)
- t<sub>3</sub>. Natural law (as exemplified, say, in Dworkin's *Law's Empire*<sup>41</sup>)

I've already more than hinted that my sympathies lie with Dworkin. It's obvious to me that e<sub>9</sub> through e<sub>14</sub> require that the connection between law and normative standards be seen as structural, not merely the contingent relationships of culture and sociological necessity.

At the same time, however, I continue to believe that positivism and realism contain genuine insights into the nature of law, insights that are to some degree glossed over in Dworkin's (and other natural lawyers') treatment. I suggest a blended explanatory alternative.

t<sub>4</sub>. Law aspires to be a system of rules. These rules are subject to general procedural requirements. The entire system is designed and administered by fallible legal actors. There are situations requiring legal decision that are not clearly covered in the existing system of rules. Judges must make decisions in these situations, but the decisions should adhere to professional, political and moral norms.

t<sub>4</sub>, I fear, will strike many as unparsimonious, and perhaps as a weak-willed failure to take sides. My only response is to remind readers that truth is often messy and complicated. Consider the causes of cancer. It's easy to find champions of three major theories.

- t\*<sub>1</sub>. Environmental causes
- t\*<sub>2</sub>. Genetic causes
- t\*<sub>3</sub>. Viral causes

But I think we now know that the best explanation of, at least some, cancers is "all of the above."

t\*<sub>4</sub>. Environmental, genetic, and viral factors are all causally relevant to some cancers.

## VII.

Internalism is not a facile relativism that says 'Anything goes.' Denying it makes sense to ask whether our concepts 'match' something totally uncontaminated by conceptualization is one thing; but to hold that every conceptual system is therefore just as good as every other would be something else. If anyone really believed that, and if they were foolish enough to pick a conceptual system that

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<sup>40</sup> Posner, *op. cit.*

<sup>41</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).



told them they could fly and to act upon it by jumping out of a window, they would, if they were lucky enough to survive, see the weakness of the latter view at once.<sup>42</sup>

Inference to the best explanation is the preferred strategy of realist metaphysicians. How do we explain our manifest success in perceiving and manipulating the external world except on the hypothesis that there really is a world out there to perceive and manipulate? As with any IBE there are, of course, rival explanations of those perceptions and manipulations, but none of these rivals seem anywhere near as simple(?), plausible(?), lovely(?), as the realist's account. I endorse the spirit of this reasoning, but suspect that it gets the explanatory direction backwards. Metaphysical realism is not so much supported by IBE, as presupposed. And the perceptual version of IBE that I have been defending is unapologetic about this presupposition.

Evidence is important as a device for discovering the truth. That is what almost every scholarly discipline ultimately depends upon. Eventually IBE depends on an assumption about the nature of truth. We have already seen that Inference to the Best Explanation straddles the subjective/objective divide. Individual human subjects, with complex sensory organs and central nervous systems, but also with unique, and culturally influenced, personal histories, seek to understand some part of an "objective world." They maybe police inspectors, jurors in grizzly murder cases, or academic lawyers defending theories of the nature of law. This duality of subjective thinking seeking models of an "objective" reality lies at the heart of the deepest issues in epistemology and metaphysics. I know of no better exposition of all of this than Peter Kosso's melding of the correspondence and coherence theories of truth.

Though truth *is* correspondence with the facts it cannot be *recognized* by its correspondence. We cannot rely on the facts to guide proofs of scientific theories since the facts are irretrievably at the outer end of the correspondence relation. ... So any indicators of truth must be internal. ... The process of justifying, then, is a process of comparing aspects of the system, and the accomplishment of justification is the demonstration of coherence among the aspects.<sup>43</sup>

The problem, of course, is that such correspondence theories of truth fit the evidence in the O. J. Simpson case just fine, but seem to have a much more difficult time with H. L. A. Hart's and Ronald Dworkin's reasoning. There may be no "God's Eye" view of reality that we can inhabit to discover how things really are – independent of cultural and shared understanding – but almost all of us believe that there is something "out there" that limits what we can say and infer about what to Nicole and Ron Goldman. But it is

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<sup>42</sup> Hilary Putnam, *Reason, Truth and History* (Cambridge, UK: Cambridge University Press, 1981), p.54.

<sup>43</sup> Peter Kosso, *Reading the Book of Nature* (Cambridge: Cambridge University Press, 1992), p. 136.

much more problematic to say what that something out there be for debates about the “correct” theory of the nature of law possibly be? It is tempting to say that although the basic structure of inference to the best explanation as a theory of evidence fits criminal law, and jurisprudence with equal elegance, their ultimate appeal to truth seems radically different. The criminal law implicitly endorses metaphysical realism and a correspondence theory of truth, while jurisprudence seems to depend on a coherence theory of truth.

I remain hopeful, however, that we need not abandon the hope of reconciling evidence evaluation, explanation, and inference to the best explanation under one overarching (internal) realist theory of truth. Analyses of law seek to describe (define, analyze, etc.) something objectively “out there.” This “something,” of course, is inherently human in construction and administration, and varies in important ways from legal system to legal system. But unless language and translation totally mislead us, and ultimately trick us with a simple pun, these different systems have enough in common to warrant the single term **law**. The job of the legal theorist is, therefore, much like the job of ethnographer.<sup>44</sup> There are cultural, in this case legal, practices and documents that invite careful scholarly analysis. The jurisprudential scholar assembles and assesses relevant evidence in the hopes of *correctly*, i.e., *accurately*, characterizing this cross-cultural practice. This is ultimately no different than the physicist seeking to characterize the “ultimate” nature of physical reality in terms, say, of ten dimensional strings, or the jury seeking to discover what really happened to Ron and Nicole.

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<sup>44</sup> See, for example, Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1977).

**In the Name of the Father**  
**Compulsion, Tradition, and Law in the Lost History of Women's Surnames**

Deborah Anthony\*

Abstract

Although surnames are ubiquitous in American society, their origins and development in English history are not well known. Women often held individualized surnames reflecting specific traits, occupations, statuses, or parentage (e.g. Fairwife, Silkwoman, Widow, Robertdaughter), and some passed those names on to their children as well. But women's names have been overridden as a result of changes in naming practices that arose over time; women have largely been written out of history as a result. This paper explores the development of women's surnames as far back as they first appeared in eleventh century Britain. The staunchly gendered contemporary status quo of women's name changes at marriage is a relatively recent historical phenomenon. My research suggests that principles of coverture and female legal impotence in some ways actually became *more* rigid and restrictive over time, rather than less, and that what we consider to be "traditional" when it comes to naming practices was historically nowhere near as unyielding and male-oriented as it later became. These findings shed new light on the ways in which patriarchy becomes enshrined into cultural and legal systems, as well as modern liberal theory coalescing around concepts of liberty and rights which sprouted precisely during the time in which women's freedoms were becoming most vigorously suppressed.

I. Introduction

Surnames are ubiquitous in American society and have existed in Anglo-Saxon culture for about a thousand years. Yet their origins in tradition and law, and their development over time in English history, are not well understood. Even less recognized are the ways in which that development played out for women, who have been essentially written out of history and their names erased as a result of the naming practices that arose over time.

Despite the relative lack of understanding of the institution of surnames, they matter, and they matter plenty. Names are instrumental in the construction and assertion of legal

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and personal identity. They have been used as a mechanism of political and social power, and have been both sought after and forcefully imposed as such. They are integral to the legal conventions of property, ownership, and inheritance. Their use has supported the large-scale erasure of women from history: when their names are gone, so is their historical existence as well as their legacy. Names are a representation of a person's individuality, lineage, family beliefs, religion, and community.

Yet for all of their importance, there has been little critical examination of how and why contemporary surname practices came to exist. Indeed, one would be hard pressed to think of an institution so universal in application and traditional in approach, and yet so critically unexamined, as that of surnames. They are simply taken for granted and mentioned only as a given in the context of other more important issues. However, given both the significance of names and their universal adoption in our society, an investigation into the development of surname usage will reveal a great deal about us, including elements of our history, our culture, our legal system, and how and why we came to be where we are today. Expanding far beyond the use of surnames themselves, it may open our eyes to the foundations of some of our most common practices and ideas, and call those practices into question.

And what of the women? The scholarly work that exists focuses on surnames generally as applied to men, who, after all, are the progenitors, bearers, and harbingers of names and lineage, past and future. While women in British and American culture today generally enjoy *formal* (legal) equality—including the ability to own property, inherit, will an estate, earn wages, and independently determine the course of their lives—older sex-based naming conventions still persist. Why are the surnames of women so much more transient than those of men? When and why did women begin adopting the surnames of their husbands? What effect did that have, and what does that suggest for the contemporary application of that practice? Did alternative surname practices exist at any point for women? I will attempt to begin answering these questions here.

What we consider to be “traditional” when it comes to naming practices was not nearly so consistent or unyielding historically; in fact, the contemporary status quo is a relatively recent phenomenon and is not actually “traditional” at all. What’s more, my research suggests that this same status quo does not seem to represent a steady linear progression of ever-increasing rights for women, but rather evinces some significant tumbles backwards at certain historical periods; principles of coverture and female legal impotence may have in some ways actually become *more* rigid and restrictive, rather than less, through the years. This retrenchment resulted in increasingly limiting property ownership rules for women—and surname practices and expectations followed suit<sup>1</sup>—as

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<sup>1</sup> I do not necessarily mean to suggest that surname changes for women took place as a result of new restrictions on property ownership. In fact, it is difficult to conclusively determine a causal relationship

a mechanism by which gender hierarchy was both reflected and reinforced. The underpinnings of these developments, including the processes by which women's names and identities were erased, along with the legal and theoretical implications of such a wholesale erasure, will be examined. Such an investigation will expose the hierarchical principles still implicit in contemporary marital naming traditions and will reveal ways in which patriarchy is enshrined into practice as both tradition and law.

The framework for this project is one of external legal history, whereby relevant legal concepts are examined in a broader context than the doctrinal developments themselves, in an attempt to develop a picture of the development of surname usage. The practices under investigation here appear to be both socially and legally constructed, such that the history of the law in practice, and the ways in which legal institutions operate in society are relevant, but must be considered in conjunction with other social influences of the time. Statutes focusing on surnames are minimal; case law is virtually nonexistent. Thus, the history must be reconstructed in a more indirect manner, extrapolating data from case law on other topics, marriage statutes, parish records, and family histories. There is much more to be done on this topic, both in terms of research and analysis, so this paper represents the starting rather than the ending point of the inquiry.

## II. Origination of Surnames

With rare exception,<sup>2</sup> both law and custom regarding surnames in the United States originates from England. As such, an investigation into the historical development of surname convention and usage requires an inquiry into English history, and this paper will focus on English history during the mid to late Medieval period, or about 1000 A.D. to 1600 A.D.

While the use of first names has been a universal practice throughout recorded history,<sup>3</sup> what are now known as "surnames" are a more recent phenomenon.<sup>4</sup> Their first use in England can be traced to the time before the Norman Conquest in 1066,<sup>5</sup> but the

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between the two happenings. What is apparent, however, is that they both took place over a period of several centuries at around the same time.

<sup>2</sup> The legal system of Louisiana has French and Spanish roots, rather than English, and largely derives from the Napoleonic Civil Code rather than the common law system of the other states. The state adopted a version of the code shortly before its admission to the Union in 1812. See Vernon Valentine Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LOUISIANA LAW REVIEW 1067 (2003). Indeed, Louisiana law on surnames differs from what is customary in the other states; it is alone in providing that marriage does not change the name of either spouse. LA. CIV. CODE ANN. ART. 100 (2009).

<sup>3</sup> Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 HOW. L.J. 227, 228 (1992).

<sup>4</sup> William Dodgson Bowman, *THE STORY OF SURNAMES* 13 (1932); L. G. Pine, *THE STORY OF SURNAMES* 11-12 (3d ed. 1970).

<sup>5</sup> PH. Reaney and R.M. Wilson, *A DICTIONARY OF ENGLISH SURNAMES* xii (3d ed. 1997).

Normans are generally credited with popularizing and greatly expanding both their use and the types of surnames that existed.<sup>6</sup> The Saxon traditions, including those of names, that were previously in place were replaced by Norman ones,<sup>7</sup> and the conventions, laws, and customs surrounding their use have changed considerably since that time. Today surnames are also called family names, second names, or last names, but they were not known as “surnames” at all, or any variation thereof, when they first appeared or for centuries thereafter. Instead, they were called “bynames,” which functioned as nicknames or second names but were individualized descriptors and were not hereditary.<sup>8</sup> A more detailed discussion of the etymology of the word “surname” and what it suggests about the transformation of women’s status is presented below. Despite historical variations in usage and subtle distinctions in meaning, in this paper I will use the terms “surname” and “byname” interchangeably, and do not intend to limit the meaning of “surname” to “family name,” as it is commonly used today.

Originally surnames were functional and served a number of specific purposes. They operated as a way to align and associate oneself with an estate, and were thus used primarily by aristocracy, knights and gentry in the earlier years<sup>9</sup>. Over the centuries, the use of surnames spread to the lower social classes, until eventually even peasants used them regularly.<sup>10</sup> As populations increased and cities began to swell in size, the number of first names in use was still limited. With the increasing involvement of government in the affairs of the state and its citizenry, there arose a pressing need for a more definitive means of identifying and distinguishing individuals. Surnames therefore became common in Thirteenth and Fourteenth Century England.<sup>11</sup> However, in addition to their function in helping to identify, monitor, and regulate citizens, surnames also served to organize and influence people’s lives. They carried weight, meaning, and power, and were approached intentionally and purposefully.

Just as they were the first to use surnames, the landed classes were also the first to pass down those names in a hereditary way, given that their surnames often reflected their landowner status and associated them with the estate in a way that enabled them to inherit and benefit from it.<sup>12</sup> Their surnames, therefore, ordinarily developed as an indication of that status. The surname of a baron or count would certainly not be Baker, for example, but would represent the location of their estate.<sup>13</sup> William de Loncecastre

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<sup>6</sup> Pine, *supra* note 2, at 19.

<sup>7</sup> Bowman, *supra* note 2, at 30-31.

<sup>8</sup> Talan Gwynek & Arval Benicoeur, *A Brief Introduction to Medieval Bynames* (1999), <http://www.s-gabriel.org/names/arval/bynames/> (last visited March 3, 2015).

<sup>9</sup> Bowman, *supra* note 2, at 8, 9.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> Pine, *supra* note 2, at 11; Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 10 (1996).

<sup>12</sup> Reaney and Wilson, *supra* note 3, at xlvi, xlix.

<sup>13</sup> *See id.* at xlvi.

(William of Lancaster)<sup>14</sup> and Richard de Hamelton' (Richard of Hamilton),<sup>15</sup> for example, would have ancestors who would eventually be known simply as Lancaster and Hamilton respectively.

For the lower classes, names were chosen either by the bearer himself, or her or his acquaintances as a matter of common use, and rarely, according to local laws.<sup>16</sup> A 1465 law issued by King Edward IV, for example, dictated that every Irishman living within specified districts should “take to him an English surname of one town, as Sutton, Chester, Trynn, Skryne, Corke, Kinsall; or colour, as white, black brown; or arte or science, as smith or carpenter; or office as cooke, butler.”<sup>17</sup> The intent was to compel the Irish to integrate into English culture by adopting English surnames in place of their Gaelic ones; they were also ordered to dress like the English in the same law.<sup>18</sup> Interestingly, the law made no mention of patronymics<sup>19</sup> – or a name derived from the father or paternal ancestor<sup>20</sup> – which is an indication of how uncommon patronymic naming still was at that time, if not also the desire of the English to minimize family and clan bonds of the Irish.

Through the 14<sup>th</sup> century, surnames changed quickly and easily, and were less likely to refer to the bearer's paternity than to other factors relating to the person.<sup>21</sup> Because of this fluidity, members of the same family might have different surnames,<sup>22</sup> and the name of an individual could itself change throughout his life.<sup>23</sup> John Cooke might have a daughter known as Alice Draper (seller or maker of cloth)<sup>24</sup> and a son called Henry Johnson, who is also called Henry Short by some, or Henry Bridges if he lived near a bridge.

The hereditary nature of surnames did not exist as we know it today through the Middle Ages, even for the upper class, and exhibited considerable flexibility and nuance during

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<sup>14</sup> Recorded in 1175. *Id.* at 270.

<sup>15</sup> Recorded in 1195. *Id.* at 214.

<sup>16</sup> Pine, *supra* note 2, at 10; Bowman, *supra* note 2, at 8.

<sup>17</sup> Bowman, *supra* note 2, at 8.

<sup>18</sup> Horace S. Meese, *Chronological Outline of Irish History: From Legendary Days to the Early Part of the Twentieth Century* 241 (2007), <http://www.igp-web.com/igparchives/ire/countrywide/history/timeline01.txt> (last visited April 3, 2014).

<sup>19</sup> Bowman, *supra* note 2, at 8.

<sup>20</sup> Throughout this paper I use the word “patronymic” in this sense: specifically, to refer to a name that is of, or relates to, the name of the father. Likewise, “matronymic” will be used to refer to a name that is of, or relating to, the name of the mother.

<sup>21</sup> Doll, *supra* note 1, at 228.

<sup>22</sup> *Id.* (citing *Smith v. U.S. Casualty Co.*, 90 N.E. 947, 948 (N.Y. 1910)).

<sup>23</sup> Pine, *supra* note 2, at 15.

<sup>24</sup> “draper.” *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?size=First+100&type=headword&q1=draper&rgxp=constrained> (last visited April 7, 2014).

that time. Although surnames were occasionally hereditary as early as the 12<sup>th</sup> century,<sup>25</sup> their permanence started to become more common by the end of the 14<sup>th</sup> century, such that names no longer necessarily served as a literal description of a person (i.e., the son of John Cooke could be named Henry Cooke, regardless of his profession). However, the shift happened incrementally, and at different times in different places;<sup>26</sup> some people through the 14<sup>th</sup> century still had no surname at all, and some were still not hereditary even into the 15<sup>th</sup> century.<sup>27</sup> In 1444, for example, one man took the surname Asheby, while his brother was Adam Wilson; Adam Wilson's son was called John Adkynson.<sup>28</sup> In fact, surnames themselves were not universal or firmly established in all parts of England even by the early 1700s.<sup>29</sup> A perusal of any of the multiple parish records held at the British Library, which list births, marriages, and deaths of local citizens, demonstrates this fluidity in surnames: the recording of births often lists the babies with an alias, and occasionally, two of them:<sup>30</sup> Roger Smyth, als. Goldyng (1573),<sup>31</sup> and Ales Fletcher, als. Leadebeater, als. Crowther (1585)<sup>32</sup> are two examples. The practice seems to have largely declined by the early 1600s, though it depends on the parish, and children are sometimes listed with no last names at all.

Surnames generally fell into one of five types. The first was topographical, such as John Attford (from John atte Ford, meaning John at the Ford), or John Hill (John at the Hill). The second surname form was paternal, also known as patronymic, such as John Richardson (John son of Richard), or John Hughes (John son of Hugh). Third, surnames might represent nicknames or individual characteristics, such as John Fox (crafty like the animal), John Smallman (small in stature), John Fairfax (fair face, complexion), or John Goodman (good man). Fourth, surnames reflected place names, such as Brian of Durham or John of Warwick (becoming Brian Durham and John Warwick, respectively). Such locational surnames include nearly anything ending in “ton,” (town, e.g. Hampton) “ham,” (village, homestead, e.g. Graham) “wick” (abode or village, e.g. Brunswick), “den” (valley, e.g. Snowden), “don” (hill, e.g. Bragdon), “stow” (place, e.g. Bristow),

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<sup>25</sup> Reaney and Wilson, *supra* note 3, at xlvi.

<sup>26</sup> Gwynek and Benicoeur, *supra* note 6. [See also](#) Reaney and Wilson, *supra* note 3, at [xlv-xlvi, li](#) (“It is abundantly clear that in the north surnames became hereditary much later than in the south.”).

<sup>27</sup> Reaney and Wilson, *supra* note 3, at xlix.

<sup>28</sup> Bowman, *supra* note 2, at 9.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> It is unclear the reasons for so many alias names. Illegitimacy may be one possibility, but is almost surely not the only one, since many babies are identified as “bastard(e)” in their listing, and while a few “alias” babies are called “bastard,” many are not. Because most of the parish records do not record the names of both parents, and sometimes neither parent, it is difficult to determine the origins of the surnames given these children.

<sup>31</sup> Parish of Leyland, THE REGISTER BOOK OF CHRISTENINGS, WEDDINGS, AND BURIALS WITHIN THE PARISH OF LEYLAND, IN THE COUNTY OF LANCASTER, 1653 TO 1710, p. 40 (Walter Stuart White ed., 1890).

<sup>32</sup> *Id.* at 84.



“stead” (place, e.g. Almstead), “leigh” or “ley” (clearing or meadow, e.g. Ackley), or “chester” (site of an ancient Roman fort, e.g. Rochester). Finally, surnames could be represent an occupation, such as John Fletcher (maker of arrows) or John Clarke (cleric, secretary), in addition to the more obvious Baker, Taylor, Cook, Smith, Miller, Potter, etc. Many occupational surnames that survive today are not recognized as such, either because they reflect a vocabulary that has since changed, or because they represent occupations that no longer exist, thus creating a picture of what life was like at the time at which the names became hereditary and thus solidified into the cultural fabric. An “ackerman” was a ploughman; a “barker” tanned leather (also called a “tanner” at the time); a “chamberlain” tended to the master bedroom (chamber); a “chandler” was a maker or seller of candles; while a “draper” made or sold woolen cloth. A “foster” made scissors, while a “fuller” softened course material by pounding or walking on it, and was therefore also known as a “walker” or “tucker”; a “garnett” made hinges, a “mercier” was a trader, a “porter” was a doorkeeper, a “reeve” was a sheriff; a “ryder” was a mounted forest officer (rider); and a “sawyer” was someone who sawed wood. Someone who covered roofs with slate was called a “slater” or a “tyler” (tiler); a “snider” stitched clothing; a “spencer” dispensed a manor Lord’s provisions to those who lived on the estate; a “stoddard” was a horse keeper (stud herder); a maker of string or bow strings was a “stringer;” a “sumner” was an official who called people to appear in court (summoner); the person who gathered taxes was called a “toller” (from toll, or tax); a “turner” worked with a lathe; a “ward” was a guard or watchman (a “woodward” thus was a guardian of the wood, while a “hayward” protected an enclosed forest;); a “wright” was a maker of machinery; a wagon maker was a “wayne,” a “wainwright,” or a “cartwright;” and a “wheeler” made the wagon’s wheels. Such a cursory sampling as this demonstrates just how many modern surnames descend from medieval occupations. Some of these surnames are represented with multiple spellings (i.e., Taylor/Tailor, Ryder/Rider), while others are found only in forms that reflect archaic spelling of occupational words (i.e., Tyler). This is evidence of the pervasive variation in the English language at the time at which surnames were becoming hereditary and thus firmly established, as well as the fluctuations the language has undergone since then.

Because the surnames of women in particular have not been well documented, their ancestry is quite difficult to trace, which effectively eliminates them from the historical record. The standard discourse – to the extent that there even exists a discourse which considers the history or development of women’s surnames – is that women have always been given the surnames of their fathers at birth, and their husbands at marriage. That is of course why, we say, women today still overwhelmingly do the same unquestioningly – it is “tradition;” it’s what’s always been done.<sup>33</sup> This research, however, serves to

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<sup>33</sup> Recent data suggests that more than 80% of American women change their names when they get married. Diana Boxer, *American Women, Changing Their Names*, NPR (June 13, 2006), <http://www.npr.org/templates/story/story.php?storyId=5482928>.

deconstruct the concept of “traditional” when it comes to surnames – and perhaps the status of women beyond their surnames. Setting aside the fact that a plethora of surname practices have abounded worldwide which differ from ours,<sup>34</sup> even within Anglo-Saxon and English culture, systems have varied significantly over time. The ways in which this process has played out for women has implications for the foundations for our current practices, as well as an analysis of gender rights more broadly conceived.

### III. Women’s Names

In my investigation into the holdings at the British National Archives and the British Library, I sought to answer the question of whether and when female-specific surnames ever existed in England, and if so, what form they took, and what mechanisms served to eliminate them from history. As such, I searched for evidence of women’s surnames as independent from men’s; for indications that, if not now, women did at one time have individualized surnames that perhaps did not strictly follow the name allocation and inheritance systems that we take for granted today. What I discovered was somewhat different than I had anticipated, and carries with it broader implications about the state of patriarchy and the historical progression (and regression) of the status of women. I not only found a multitude of examples of women’s unique names, but I also discovered that they haven’t all disappeared; many of them remain in use as surnames in some form today, largely unrecognized for what they signify.

As discussed above, existing work on surnames rarely discusses women beyond perhaps a cursory mention in a short section of a book, as though surnames involving women are ancillary to the real issue—the names of men. Work that does focus on women’s surnames typically investigates modern practices rather than historical ones, focusing on whether women should and do adopt the surnames of their husbands at marriage, how they might go about rejecting that practice, and the implications of doing so.<sup>35</sup> Alternatively, work that investigates more generally the historical status and rights of women typically approaches the question from the unexamined and unstated foundational assumption that the further back in history one looks, the worse it was for women: in other words, the status and rights of women proceeded on a trajectory that generally improved over time – perhaps unevenly, in fits and spurts and stalling out at times, but always increasing when broadly conceived.<sup>36</sup> As I suggested above, this assumption is not true – at least in some important respects.

It should be noted that in Middle English—the English in recorded documents between the 12<sup>th</sup> century and the end of the 15<sup>th</sup> century—the spelling of words was functionally

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<sup>34</sup> Kelly, *supra* note 9, at 7 (noting the wealth of possible naming systems worldwide).

<sup>35</sup> See, e.g., Patricia J. Gorence, *Women’s Name Rights*, 59 MARQ. LAW REV. 876 (1976); Julia C. Lamber, *A Married Woman’s Surname: Is Custom Law?*, 1973 WASHINGTON UNIVERSITY LAW REVIEW 778 (1973).

<sup>36</sup> A few notable exceptions are discussed below.

different than in Modern English (beginning in the 16<sup>th</sup> century to present, though this period is also divided into Early Modern and Modern English and evidenced further changes as well).<sup>37</sup> Words were written as they were pronounced and there was no standardized spelling, which resulted in multiple spellings of a single word and considerable variation from document to document, person to person, and region to region. Even a single document written by a one person could contain multiple spellings of the same word. Fixed spelling began with the advent of printing, around 1475, but this standardization was a gradual process that lasted several centuries.<sup>38</sup> The spelling of surnames therefore varies as well (e.g., Cook/Cooke, Thomson/Thompson/Thomasson, Forrester/Forester/Forster). In addition to spelling variations, surnames have been altered, condensed, chopped, mispronounced, eccentrically written by scribes and clerks, or altered by dialectical usage over time in ways that significantly impact their representation over the centuries.

Surnames related specifically to women existed in various forms, which will be discussed separately and defined below. These names could be patronymic (from the father), matronymic (from the mother), or neither; the specific relevant categories consist of patronymic female-specific, matronymic female-specific, matronymic male-specific, matronymic gender-neutral, and female-specific but neither patronymic nor matronymic. (Additional categories exist which are not specific to women, and therefore are not relevant to or included within this discussion, including patronymic male-specific, patronymic gender-neutral, and non-patronymic gender-neutral names.) All of the surname types relating to women are in evidence in England beginning as early as the 11<sup>th</sup> century, and continued for hundreds of years. Such occurrences became much less common by the 17<sup>th</sup> century, which will be discussed below. However, the incidence of female-specific surnames was widespread,<sup>39</sup> and cannot be thoroughly expounded upon here. The following represents a decidedly incomplete sampling of the usages that existed and the modern surnames to which they have evolved.

a. Patronymic Female-Specific Surnames (Father-Daughter)

A patronymic female-specific name is one that identifies or is passed down from the father, but must be held specifically by a female by virtue of the name itself. The name identifies the holder as the daughter of a particular man: Albertsdaughter (using modern spelling) is an example. It is patronymic because it identifies the father, Albert, and

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<sup>37</sup> T.H. Howard-Hill, *Early Modern Printers and the Standardization of English Spelling*, 101 MODERN LANGUAGE REVIEW 16, 17 (2006).

<sup>38</sup> Edmund Weiner, *Early Modern English Pronunciation and Spelling*, OXFORD ENGLISH DICTIONARY (2013), <http://public.oed.com/aspects-of-english/english-in-time/early-modern-english-pronunciation-and-spelling/>.

<sup>39</sup> “The frequency of metronymics cannot be doubted.” P.H. Reaney, THE ORIGIN OF ENGLISH SURNAMES 77 (1967).

female-specific because the name was created to identify a female, his daughter. A *male*-specific patronymic surname equivalent would be the more familiar Albertson, identifying the son of Albert.

A number of names can be found where a woman's surname indicates her status as the daughter of a particular man. All such names take the same basic form: identification of the father (by name or occupation), followed by some version of "daughter" (though rarely spelled that way, as that is a more modern form of the word). Some of the examples found include Margaret Starkbayndoghter (1379),<sup>40</sup> Joan Tomdoutter (1379),<sup>41</sup> Emma Rogerdaughter (1381),<sup>42</sup> Esolda Peersdoghter (1430),<sup>43</sup> Magota Stevendoghter (1379),<sup>44</sup> Johanna Robyndoghter (1379),<sup>45</sup> Alice Saunderdoghter (1379),<sup>46</sup> Alice Gefdoghter (1379);<sup>47</sup> Emma Nicoldoghter (1379);<sup>48</sup> Emma Watdoughter (1381);<sup>49</sup> Alice Wilkynsondoghter (1379),<sup>50</sup> and Margareta Wallerthwaytdoghter<sup>51</sup> (daughter of a man bynamed Wallerthwayt, from the town of Wallerthwaite).<sup>52</sup> Katheryn Doctor (1570) is also from the Old English "dohtor," meaning daughter,<sup>53</sup> but the name does not indicate whose daughter she is. Some "daughter" names indicate not the father's name, but some other characteristic: a nickname or his occupation, for example. Matilda Foxdoghter (daughter of fox, a nickname), Isabella Shephirddoghter (daughter of the shepherd), Agnes Taylourdoghter (daughter of the tailor), all in 1379, are examples,<sup>54</sup> as well as Margery le Revedouctur (1335)<sup>55</sup> (daughter of the reeve, a local official), and Johanna Prestdoghter (1379) (daughter of the priest),<sup>56</sup> as well. None of the above "daughter" surnames have survived to modern times,<sup>57</sup> although a number of modern surnames

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<sup>40</sup> *Id.* at 425.

<sup>41</sup> *Id.* at 127.

<sup>42</sup> *Id.* at xviii.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at li.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 83.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Reaney and Wilson, *supra* note 3, at 127.

<sup>51</sup> *Id.* at li.

<sup>52</sup> P.H. Reaney, A DICTIONARY OF ENGLISH SURNAMES 3284 (1991), <http://books.google.com/books?id=5sVq7VQINwC&pg=PA3284&lpg=PA3284&dq=Wallerthwaytdoghter&source=bl&ots=hPsNcHtCPl&sig=d9ijNwi5wcMuvyXp-XkclxZeKNQ&hl=en&sa=X&ei=bwkzU5GcE-ewyQGjtoDQCg&ved=0CDUQ6AEwAg#v=onepage&q=Wallerthwaytdoghter&f=false>.

<sup>53</sup> Reaney and Wilson, *supra* note 3, at 127.

<sup>54</sup> *Id.* at li.

<sup>55</sup> Reaney, *supra* note 34, at 83.

<sup>56</sup> Reaney and Wilson, *supra* note 3, at 361.

<sup>57</sup> Reaney and Wilson, *supra* note 3, at xviii-xix.

derive from the word “daughter” alone: Daughter(s), Dauter, Darter, Dafter(s), Daftor(s), and Doctor.<sup>58</sup>

Interestingly, such surnames were not limited exclusively to women; there are examples of men who were known by surnames ending in “daughter” – Robert Felisdoghter (1379),<sup>59</sup> John Jakdoghter (1381)<sup>60</sup> and Richard Wryghtdoghter (1379) are examples.<sup>61</sup> This suggests that, at a time when surnames were not necessarily hereditary, these men nevertheless inherited their surnames from a *female* ancestor, perhaps a mother or grandmother, in the same way that many women inherit “son” surnames from a male ancestor. This is remarkable, because the fluidity of surnames of the time means that there were likely a plethora of possible surnames for the men in question, and yet they are listed with “daughter” surnames. It is a clue to the status of 14<sup>th</sup> century women that this could be the case.

b. Matronymic Female-Specific Surnames (Mother-Daughter)

A matronymic surname is one that identifies the mother, and could be either female- or male-specific. A female-specific example would be Mabelsdaughter, identifying the mother and indicating that the holder of the name is female, and the daughter of Mabel. Matronymic or matronymic-like surnames in general were actually fairly common in early English history, and some of their derivatives are still in use today.

However, despite the frequency of matronymic surnames, there are relatively few examples of matronymic *female-specific* surnames, identifying the bearer as the daughter of the mother; for some reason it appears more common for matronymic surnames to apply to sons<sup>62</sup> or to be gender-neutral (see below). Rose Anotdoghter (1379),<sup>63</sup> (daughter of Annot, diminutive of Ann),<sup>64</sup> and Ameria Ibbotdoghter (1324)<sup>65</sup> (daughter of Ibb-ot, diminutive of Isabel),<sup>66</sup> are a few of the examples found that are both matronymic and female-specific. None have survived to modern day.

c. Matronymic Male-Specific Surnames (Son)

A matronymic male-specific surname identifies the mother and indicates that the bearer of the name is male. There are many instances of such surnames; the most typical form

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<sup>58</sup> Reaney, *supra* note 34, at 81.

<sup>59</sup> Reaney and Wilson, *supra* note 3, at 127.

<sup>60</sup> Reaney, *supra* note 34, at 83.

<sup>61</sup> Reaney and Wilson, *supra* note 3, at 127.

<sup>62</sup> *Id.* at 12.

<sup>63</sup> *Id.* at 127.

<sup>64</sup> *Id.* at 12.

<sup>65</sup> *Id.* at xviii.

<sup>66</sup> *Id.* at 247.

begins with the woman's given name and ends with "son." Robert Mariorison (1379) and Richard Margison (1683) both mean son of *Margery*.<sup>67</sup> From *Margaret* we see Richard Margretson (1381),<sup>68</sup> Thomas Margetson (1425),<sup>69</sup> and Thomas Magotson (1379).<sup>70</sup> *Elizabeth* brought rise to John son of Libbe (1298);<sup>71</sup> *Isabel* resulted in Robert Ibbotson (1374-5),<sup>72</sup> John Ibbeson (1324)<sup>73</sup> (son of Ibbot/Ibb, pet form of Isabel). *Mary* and *Marie* resulted in Ælric Meriete sune (1066),<sup>74</sup> Willelmus filius Marie (1292),<sup>75</sup> William Marysone (1298),<sup>76</sup> and Walter Mariesone.<sup>77</sup> John Letesson (1327)<sup>78</sup> is the son of *Lettice* (Leticia),<sup>79</sup> John Sibson, Sibbeson (1314) and William Sibbison (1327)<sup>80</sup> each have surnames meaning "son of Sibb," which is a pet form of *Sibyl*.<sup>81</sup> William Mabbeson's name (1332) means son of Mabb, short for *Mabel*.<sup>82</sup> James Madison, one of the original framers of the U.S. Constitution and the country's fourth President, himself held a matronymic surname; Madison means son of Maddy, a pet form of Maud, and is seen early on with Thomas Madyson (1425).<sup>83</sup> *Maud*, from the Norman personal name *Matilda*, also resulted in Ralph Maldesone (1327) and John Maltson (1438).<sup>84</sup> Other examples include Richard Elynoreson (1375);<sup>85</sup> Edric' Modheuesune (1137);<sup>86</sup> and Henry Emmesone<sup>87</sup> (Emme's son or Emmot's son, both of which are feminine given names of the time),<sup>88</sup> Allison means son of *Alice*: William Alisun (c. 1248) John Allison (1332), and John Aliceson (1324)<sup>89</sup> are examples. Dyson means "son of Dye," short for *Dionysia*, and appears with Richard Dysun (1275)<sup>90</sup> and John Dyson de Langeside (1369), whose mother was

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<sup>67</sup> *Id.* at 298.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 293.

<sup>71</sup> *Id.* at 278.

<sup>72</sup> Reaney, *supra* note 34, at 88.

<sup>73</sup> Reaney and Wilson, *supra* note 3, at 247.

<sup>74</sup> *Id.* at 306.

<sup>75</sup> *Id.* at xx.

<sup>76</sup> *Id.*

<sup>77</sup> Peter Franklin, *THE TAXPAYERS OF MEDIEVAL GLOUCESTERSHIRE: AN ANALYSIS OF THE 1327 LAY SUBSIDY ROLL WITH A NEW EDITION OF ITS TEXT* 112 (1993).

<sup>78</sup> Reaney and Wilson, *supra* note 3, at 277.

<sup>79</sup> *Id.* at 276-77.

<sup>80</sup> *Id.* at 408.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 290.

<sup>83</sup> REGISTER OF THE FREEMEN OF THE CITY OF YORK: FROM THE CITY RECORDS. VOL. I, 1272-1558, at 138 (1897) (hereinafter REGISTER OF THE FREEMEN).

<sup>84</sup> *Id.* at 303.

<sup>85</sup> *Id.* at 153.

<sup>86</sup> *Id.* at xix.

<sup>87</sup> Franklin, *supra* note 72, at 27.

<sup>88</sup> Bowman, *supra* note 2, at 100.

<sup>89</sup> Reaney and Wilson, *supra* note 3, at 7.

<sup>90</sup> *Id.* at 147.

Dionysia de Langeside.<sup>91</sup> That one is an interesting case, because he took his mother's full byname "de Langeside," and also incorporated her first name into his byname with "Dyson." A number of surnames of this type are still in use, including Dyson, Sibson, Emson, Emmeson, Alison, Margison, Ibson, Mabson, Maudson, Mawson, Maryson, and Letson.<sup>92</sup> *Cecilia*, often shortened to Sis and Cis, lead to the modern Sissons, Sysons, and Sisselson,<sup>93</sup> and is seen in John Sisson (1379).<sup>94</sup>

Occasionally a name refers to a female family member not the mother: Thomas Janekynes<sup>95</sup> means kinsman of Jane; John Letmore (1682)<sup>96</sup> means a kinsman of Lett (Leticia); William Marekyn (1390)<sup>97</sup> means Mary's kin; John Maggekin (1396)<sup>98</sup> means kin of Magge (pet form of Margaret). Osbert Lovekin (1275) and Robert Lufkyn (1524)<sup>99</sup> both mean kinsman of Love, a female given name, and both represent modern surnames Lufkin, Lukin and Lovekin as well.<sup>100</sup> It speaks to the prominence of many women in their communities that the chosen way to identify many men was by reference to their connections to these women.

Also present but uncommon are matronymic surnames that do not include the woman's name at all: William filius Richefemme (1148) means son of a noble or rich woman,<sup>101</sup> while surnames reflecting a man's status as a son of a widow crop up as well: William Wideweson (1327);<sup>102</sup> Richard Wyduesone (1309);<sup>103</sup> John la Wydewesone (1326);<sup>104</sup> and William le Wydusone (1332)<sup>105</sup> demonstrate this. Widdowes sometimes also means "the widow's son,"<sup>106</sup> and the surname survives today as Widdows, Widders, and Widdas.<sup>107</sup>

#### d. Matronymic Gender-Neutral Surnames

Gender-neutral matronymic surnames identify the mother or other female ancestor, but

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<sup>91</sup> Reaney, *supra* note 34, at 88.

<sup>92</sup> Death record searches for the U.S. conducted at <http://search.ancestry.com/search/db.aspx?dbid=3693>. Death record searches for the U.K. conducted at <http://www.findmypast.co.uk/search/all/deaths>.

<sup>93</sup> Reaney & Wilson, *supra* note 3, at 411; Bowman, *supra* note 2, at 99.

<sup>94</sup> Reaney & Wilson, *supra* note 3, at 411.

<sup>95</sup> Franklin, *supra* note 74, at 115.

<sup>96</sup> Reaney & Wilson, *supra* note 3, at 277.

<sup>97</sup> *Id.* at xxxix.

<sup>98</sup> *Id.* at 293.

<sup>99</sup> *Id.* at 285.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 377.

<sup>102</sup> Franklin, *supra* note 72, at 107.

<sup>103</sup> Reaney & Wilson, *supra* note 3, at 491.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Reaney, *supra* note 34, at 83.

could apply equally to males or females and are therefore held by both sons and daughters. They are the most common type of matronymics, and typically come in the form of female given names used as surnames, without the addition of “son” or “daughter.” There are countless examples, with a number of them surviving as modern-day surnames. In addition to the highly popular names *Elizabeth*<sup>108</sup> and *Isabel*<sup>109</sup> *Margaret*,<sup>110</sup> and *Mabel*<sup>111</sup> giving rise to a great many historical and modern surnames with various representations, a number of other women’s names are represented as well.

The female given name *Agnes* was used as a surname, with Robert Agnes (1230)<sup>112</sup> as an example, and it is still present today along with alternate versions Annas, Anness, Annis(s).<sup>113</sup> From *Emma* we get the surnames Emmot (a popular nickname),<sup>114</sup> Emmett, Emmes, and Emm(s);<sup>115</sup> early examples include John Emote (1327)<sup>116</sup> and Ranulph Emmot (1332).<sup>117</sup> *Susan* gave us Thomas Susanne (1327)<sup>118</sup> and Eustace Susanne (1327),<sup>119</sup> and both Susan and Susans are in current use as surnames. Multiple surnames arose from the female given name *Constance*,<sup>120</sup> Matilda Custaunce<sup>121</sup> and Alice Cunstance<sup>122</sup> both show up in 1327. Modern derivatives of this matronymic name include Cusson(s), Cussen(s), Cussan(s), Cutson, Cuss, and Cust.<sup>123</sup> *Beatrice* is still in use today, and is also responsible for the modern Beaton, Beton, and Beatson.<sup>124</sup> It was

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<sup>108</sup> The modern names Libbe/Libby come from *Elizabeth*. Water Bethel (1279) (diminutive of *Elizabeth*) is another example. Reaney & Wilson, *supra* note 3, at 41, 250.

<sup>109</sup> *Isabel* has resulted in pet forms Ib and Ibbott, and early uses of the name include William Isabelle (1202-16); John Isbel (1379); Adam Ibbe (1334); William Lybbe (1506); John Lybet (1332); and Simon Lybbett (1642). *Id.* at 247, 250, 278.

<sup>110</sup> Maggot/Magot/Magote/Margetts, all derived from Magge, a pet form of *Margaret*. Reaney, *supra* note 34, at 132; Reaney & Wilson, *supra* note 3, at 293. For example, see John Margaret’ (1275); John Marget (1524); Nicholas Margrete (1327); and Simon Marges (1327). Magg-ot is a diminutive of Magge, and is seen with Robert Maggote (1279); and Henry Magot (1327). Reaney & Wilson, *supra* note 3, at 293, 298; Franklin, *supra* note 72, at 62, 106.

<sup>111</sup> Mabb/Mabbs, Mabbet, Mabbot, Mabe, Maby, Mabey all derive from *Mabel*. Reaney & Wilson, *supra* note 3, at 290; Bowman, *supra* note 2, at 100. Early examples include Arnaldus Mabilie (1185) and John Mably (1279). Reaney & Wilson, *supra* note 3, at 290.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> Reaney, *supra* note 34, at 76.

<sup>114</sup> Reaney & Wilson, *supra* note 3, at 155.

<sup>115</sup> Bowman, *supra* note 2, at 100; Reaney, *supra* note 34, at 132.

<sup>116</sup> Reaney & Wilson, *supra* note 3, at 155.

<sup>117</sup> *Id.* See also Joan Damemme (1327) (lady Emma). Franklin, *supra* note 72, at 58.

<sup>118</sup> Franklin, *supra* note 72, at 44.

<sup>119</sup> See also William Susann’ (1279) & Wilson, *supra* note 3, at 435.

<sup>120</sup> *Id.* at 107.

<sup>121</sup> Franklin, *supra* note 72, at 54.

<sup>122</sup> *Id.* at 57.

<sup>123</sup> Bowman, *supra* note 2, at 101; Reaney, *supra* note 34, at 81.

<sup>124</sup> Bowman, *supra* note 2, at 101.



present early on in Geoffrey Beatriz (1210)<sup>125</sup> and John Baytrise (1662).<sup>126</sup> *Tiffany* (from Tephania) gave rise to several surnames as well: William Tyffen (1524) and Nicholas Tiffin (1674) held the name,<sup>127</sup> with modern surnames Tiffany, Tiffen, Tiffin as their progeny.<sup>128</sup> The Greek name Sibyl leads to the surname Sibley,<sup>129</sup> and Geoffrey Sibilie (1275) and Richard Sebely (1327) were early holders of the name.<sup>130</sup> The female given name *Rose* gives us Rose and Royce,<sup>131</sup> with both showing up in the 14<sup>th</sup> century in Peter Rose (1302) and Richard Roys (1327).<sup>132</sup>

The female given name *Anastasia* resulted in the name William Anastasie (1222).<sup>133</sup> We see surname representations of the feminine *Edith* as early as 1188; Henry Edith (1327)<sup>134</sup> represents the name. Ellen, Hellen and Ellenor are all variants of the earlier English name *Helen*,<sup>135</sup> and we see representations of it in Robert Helene (1275)<sup>136</sup> and William Elene (1327).<sup>137</sup> Ann-ot is a diminutive of Ann, and is found as a surname with Robert Anot (1275)<sup>138</sup> and John Annot (1327).<sup>139</sup> *Love* was a popular woman's given name, and was in use as a surname as early as the late 11<sup>th</sup> century: Gilbert Luue (1177) and Peter Love (1255)<sup>140</sup> are early manifestations. The woman's name *Matilda* was also popular and is still found in surnames Maude, Mahood, Mald, Mault, and others.<sup>141</sup> From pet names for Matilda also come Mott,<sup>142</sup> Tills, Tilson, Tillett, and Tillotson.<sup>143</sup>

*Marie* and *Mary* have had a lasting influence on surnames: John Marie (1279)<sup>144</sup> and John Mariun (1279)<sup>145</sup> originate from the name.<sup>146</sup> Modern surname derivatives include

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<sup>125</sup> Reaney & Wilson, *supra* note 3, at 34.

<sup>126</sup> See also Richard filius Beatrice (1212). *Id.*

<sup>127</sup> See also Christina Typhayn (1327) *Id.* at 447.

<sup>128</sup> *Id.*; Bowman, *supra* note 2, at 101.

<sup>129</sup> Reaney, *supra* note 34, at 76.

<sup>130</sup> Reaney & Wilson, *supra* note 3, at 408.

<sup>131</sup> *Id.* at 383.

<sup>132</sup> *Id.*

<sup>133</sup> Reaney, *supra* note 34, at 134.

<sup>134</sup> Franklin, *supra* note 72, at 63. See also Ralph filius Edihe (1188) and Everard filius Edithe (1210) Reaney & Wilson, *supra* note 3, at 151.

<sup>135</sup> Reaney & Wilson, *supra* note 3, at 153.

<sup>136</sup> See also Walter Eleyrn (1279) and William Helyns (1332). *Id.*

<sup>137</sup> Franklin, *supra* note 72, at 34.

<sup>138</sup> Reaney & Wilson, *supra* note 3, at 12.

<sup>139</sup> See also Thomas filius Anot (1357). *Id.*

<sup>140</sup> See also Galfridus filius Love (1208). *Id.* at 285.

<sup>141</sup> Reaney, *supra* note 34, at 76. Examples include Smale Mautild (1199), Gilbert Maughtild (1327), and William Matild' (1327). Reaney & Wilson, *supra* note 3, at 302-303.

<sup>142</sup> Reaney & Wilson, *supra* note 3, at 315.

<sup>143</sup> Reaney, *supra* note 34, at 76. The pet form of the name is represented in William Mot (1221), Robert Motte (1298), and Geoffrey Maude (1279). Reaney & Wilson, *supra* note 3, at 309, 315.

<sup>144</sup> Reaney & Wilson, *supra* note 3, at 298.

<sup>145</sup> *Id.*

Marion, Marians, Maryan, Marrian, and Marrion.<sup>147</sup> J.W. Marriott, founder of the Marriott hotel chain, owes his name to a woman: Mari-ot was a common diminutive of Mary,<sup>148</sup> and leads to the surname Marriott as well as Marritt, Merrit, Merioth (and multiple additional spellings). Early examples abound, including Hervicus Mariot (1185),<sup>149</sup> Richard Meryet (1297),<sup>150</sup> and William Mariet (1327).<sup>151</sup>

There are multiple representations of the female given name *Caterine* (Catherine), also seen in the popular form *Catelin*: Robert Caterin (1247)<sup>152</sup> and Robert Kateline (1327)<sup>153</sup> illustrate the name, and modern surnames *Catell* or *Cattle* represent diminutives of *Cat* (short form of *Catelin*) (Geoffrey Catel (1275))<sup>154</sup>. Modern surnames *Claris*, *Claricia*, *Clericia*, *Claritia* all come from the feminine *Claritia*, a derivative of *Clara*.<sup>155</sup> Walter Clarice (1327)<sup>156</sup> and Robert Clarice (1327)<sup>157</sup> bore the name early on. The surname *Dwight*, as masculine as it sounds to the modern observer, is actually from the medieval feminine name *Diot*, a diminutive of *Dionysia*.<sup>158</sup> John Dwight (1524)<sup>159</sup> and Josiah Dwight (1665)<sup>160</sup> represent such a use.

*Jane* and *Joan* were both very common female given names. Because they so closely resemble *John*, and were pronounced the same and often even shared the same spelling, it is difficult to distinguish the masculine from the feminine versions of the resulting surnames. It is likely that *Joan* is responsible for at least some of the *Johnsons* in existence, from the merging of the surnames *Johnson* and *Joanson*.<sup>161</sup> Furthermore, surnames such as *Janes*, *Joanes*, *Jeanes*, *Jennings*, and *Jennison* could come from matronymic naming as well.<sup>162</sup> We see multiple *Jannes* in 1327: no less than twelve representations of it can be found in Gloucestershire county alone that year,<sup>163</sup> with

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<sup>146</sup> See also Godfrey filius Marie (1189); William Marye (1367); and Richard Marioun (1350). *Id.*

<sup>147</sup> *Id.*; Bowman, *supra* note 2, at 103.

<sup>148</sup> Reaney & Wilson, *supra* note 3, at 299.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* See also Ralph, Symon Meriet (1202); John Meryet (1316); John Meryatt (1375); and John Meryatt (1375). *Id.* at 306.

<sup>152</sup> *Id.* at 87.

<sup>153</sup> Franklin, *supra* note 72, at 118. See also William Caelin (1198); Robert Catyln (1441). Reaney & Wilson, *supra* note 3, at 87.

<sup>154</sup> Reaney, *supra* note 34, at 3; Reaney & Wilson, *supra* note 3, at 87.

<sup>155</sup> Reaney & Wilson, *supra* note 3, at 98.

<sup>156</sup> Franklin, *supra* note 72, at 44.

<sup>157</sup> *Id.* at 63.

<sup>158</sup> Reaney & Wilson, *supra* note 3, at 147.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 256; Bowman, *supra* note 2, at 99.

<sup>162</sup> Reaney, *supra* note 34, at 132; Bowman, *supra* note 2, at 99.

<sup>163</sup> Franklin, *supra* note 72, at 44, 47, 48, 58, 62, 68, 69, 81, 92, 93, 98.

alternate spellings present there as well.<sup>164</sup>

The list of matronymic names goes far beyond what can be thoroughly developed here. A very large number of surnames – both existing and historical – come from female given names. It is remarkable to note just how many of these names survive today.

e. Female-Related Names Neither Patronymic nor Matronymic (Occupation, Characteristics, Relationship)

Names that are clearly specific to women but follow neither a matronymic nor patronymic form are found regularly as well. These names identify the bearer's occupation, personal characteristics, or relationship with others.

i. Characteristics

Individual characteristics sometimes turned into nicknames, which sometimes then turned into the byname by which a person was known. Such names could vary considerably, and many of them did not survive the centuries for being so specific to the individual and therefore so uncommon. The more frequently used nicknames are still around; modern surnames such as Small, Short, Long (tall), Swift, Smart, Wise, Thicke, Stern, Fairchild, and Armstrong represent what were once individual characteristics describing the bearer of the name, which went on to become nicknames, bynames, and eventually family names. Sometimes those names refer specifically to female characteristics; Cecilia le Fairewif (fair wife) (1254)<sup>165</sup> and Nota Godwyf (good wife) (1311)<sup>166</sup> are examples. Much like names identifying a man as the son of a widow, a descriptive surname might also identify the widow herself: Christine la Wedewe (1327),<sup>167</sup> Millicent la Wydewe (1327),<sup>168</sup> and Agnes la Wedewe (1327),<sup>169</sup> are examples. A woman's status as a mother appears to have at times been noteworthy enough to earn her a surname: Vlfgiēt Moder (1162) and Alicia le Moder' (1279) are both examples.<sup>170</sup> Several people have surnames that are female-related rather than female-specific, held by men but related to women: Hugh Moderles (1198-9); Walter le Moderles (1275); and Adam Moderless (1327)<sup>171</sup> each had a surname meaning "motherless," while the names of Henry Mariman (1296) and Robert Marimon (1332) mean "servant of Mary."<sup>172</sup>

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<sup>164</sup> William Janes; John Jaynes. *Id.* at 72, 105.

<sup>165</sup> Reaney & Wilson, *supra* note 3, at 160; Reaney, *supra* note 34, at 84.

<sup>166</sup> Reaney, *supra* note 34, at 109.

<sup>167</sup> Franklin, *supra* note 72, at 62.

<sup>168</sup> *Id.* at 63.

<sup>169</sup> *Id.* at 65.

<sup>170</sup> Reaney & Wilson, *supra* note 3, at 315.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 298.

ii. Occupation

Although occupation names in modern English typically have no gender (a “cook,” for example, could refer to a man or a woman), Old English sometimes contained grammatical gender more akin to the early German which contributed to its development. With occupational nouns, the suffix “ster” (often “stere” or “stre”) was sometimes added to words as a feminine form.<sup>173</sup> Thus, where a spinner spun thread, a female spinner would be a spinnestre (spinster).<sup>174</sup> Spinster could therefore be used as a female-specific occupational surname.<sup>175</sup> Likewise, a feminine sewer of cloth was a sewster, as represented by Alice Sewstere (1301), and the name survives today as Souster.<sup>176</sup> There are several feminine form occupational surnames still existing today whose masculine counterparts also exist. Where “baker” is masculine in form, “bakestere” was at one time the feminine version, and it became Baxter<sup>177</sup> – with both versions of the surname still in use today. Similarly, where a male weaver was a “webber,” a female weaver was a “webster,” which gives us two corresponding surname versions as well.<sup>178</sup> A male brewer would be called Brewer, and the female would be Brewster.<sup>179</sup> A “dyer” was a person who dyed cloth, while both “dyster” and “dexter” were used to describe women with the occupation.<sup>180</sup> A male tailor or sewer would be called Seamer, while a female would be Seamester;<sup>181</sup> both names are still represented.<sup>182</sup> Less common today than the others, Malster (female malt maker),<sup>183</sup> Tapster (female ale seller),<sup>184</sup> and Folster (from fullestre, the feminine form of fuller, one who treated raw

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<sup>173</sup> Paul Peterson, *An Old Problem in Etymology Revisited: The Origin of Germanic Nouns with the Suffix –STER*, 70 *Amsterdamer Beiträge Zur Älteren Germanistik*, 1, 13-14 (2013).

<sup>174</sup> “spinnestre.” *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED42228> (last visited April 7, 2014).

<sup>175</sup> While the word appears to have been used as a surname historically, I could locate no one who held the surname in the U.K. since 1909, and none at all in the U.S. record (though that record begins in 1936). This may be partially due to the fact that the word’s meaning shifted to become a pejorative reference to an older unmarried woman, and was therefore undesirable as a surname. See Bridget Hill, *WOMEN ALONE: SPINSTERS IN ENGLAND, 1660-1850* p. 4 (2001).

<sup>176</sup> Reaney & Wilson, *supra* note 3, at 418.

<sup>177</sup> J.R. Dolan, *ENGLISH ANCESTRAL NAMES: THE EVOLUTION OF THE SURNAME FROM MEDIEVAL OCCUPATIONS* 20 (1972).

<sup>178</sup> Reaney & Wilson, *supra* note 3, at 480.

<sup>179</sup> Emma le Breustere (1279), Margaret Brewster (1381). *Id.* at 63.

<sup>180</sup> *Id.* at 133, 147.

<sup>181</sup> Alicia Semester (1376); Julia Semster (1380); Margaret Sembster (1381). *Id.* at 410.

<sup>182</sup> Now Simester and Simister. *Id.*

<sup>183</sup> *Id.* at 133, 147, 296. See also “maltere.” *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED26691> (last visited April 7, 2014); “maltester.” *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED26693> (last visited April 7, 2014).

<sup>184</sup> Alicia Tapstere (1384) is an example. Reaney & Wilson, *supra* note 3, at 439.

cloth)<sup>185</sup> are feminine forms which have also survived.

A number of medieval surnames indicating the bearer's occupation and her female status have not survived. Alice la Selkwimman (female dealer in silk) (1334),<sup>186</sup> Ysabelle la Lauendere (laundress) (1253),<sup>187</sup> Alice le Pesteresse (female baker) (1270),<sup>188</sup> Juliana le Peyneresse and le Pineresse (1281) (female comber of wool or flax),<sup>189</sup> Sarah la Bredmongstere (1311)<sup>190</sup> (feminine form of bread monger, or dealer/maker of bread); Alicia Bredsellestere (1317)<sup>191</sup> (feminine form of seller of bread), are all examples. In addition to these names which clearly take a feminine form within the name itself, there are also examples of occupational bynames which are presented in a feminine form by virtue of the article *la*, which is a French feminine form of "the" sometimes used in early English (*le* is the male form). Alice la Sopere (1327);<sup>192</sup> Emma la Sapere (1301),<sup>193</sup> as well as Emma la Sapere (1301),<sup>194</sup> all mean seller or maker of soap<sup>195</sup> and are feminine by virtue of the *la*. Other examples include Isabel la Politer<sup>196</sup> (1327) (polisher),<sup>197</sup> Matilda la Swon (1327)<sup>198</sup> (swineherd),<sup>199</sup> Malyna la Roperes (1311) (servant of the roper or of a man named Roper),<sup>200</sup> and Alice la Brewes,<sup>201</sup> (brewer)<sup>202</sup> (or more likely a servant of the brewer, given the "s" at the end).<sup>203</sup>

"Husewyf," or housewife, indicated that someone was the mistress of a family or the wife of a householder, and has led to modern surnames Hussey, Hussy, Husey, and Hosey. Margeria Hosewyf (1327)<sup>204</sup> is an early holder of the name. Roger Huswyffe

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<sup>185</sup> Dolan, *supra* note 171, at 128-129; Reaney, *supra* note 34, at 184-185; Reaney & Wilson, *supra* note 3, at 179.

<sup>186</sup> Reaney & Wilson, *supra* note 3, at 409.

<sup>187</sup> *Id.* at 273.

<sup>188</sup> *Id.* at 347.

<sup>189</sup> *Id.* at 352-353.

<sup>190</sup> Reaney, *supra* note 34, at 84.

<sup>191</sup> *Id.*

<sup>192</sup> Franklin, *supra* note 72, at 56.

<sup>193</sup> *Id.* at 417.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Franklin, *supra* note 72, at 28.

<sup>197</sup> "polite." *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED33929> (last visited April 7, 2014).

<sup>198</sup> Franklin, *supra* note 72, at 55.

<sup>199</sup> "swon." *Middle English Dictionary*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED33929> (last visited April 7, 2014).

<sup>200</sup> Reaney & Wilson, *supra* note 3, at xxxiv.

<sup>201</sup> Franklin, *supra* note 72, at 82, 83.

<sup>202</sup> Reaney & Wilson, *supra* note 3, at 63.

<sup>203</sup> *Id.* at xxxv-xxxvi.

<sup>204</sup> *Id.* at 245.

(1435), as a man, either held the name derogatorily or inherited it from his mother.<sup>205</sup> Some surnames also ended in “woman,” indicating that the bearer was the female servant of the person indicated. Emma Parsonwoman and Isabella Vikerwoman (both 1379) were likely servants of the parson and the vicar respectively, while Johanna Prestewoman (1379) probably served the priest.<sup>206</sup> Saliwymman means female servant of Sely (1276),<sup>207</sup> where Sely was a female given name that also shows up in modern surnames Sealey and Seeley.<sup>208</sup> “Mayden” functioned much like “woman,” also indicating a female servant, and can be seen in Matilda Marschalmaydyn, Alice Gibmayden, Alice Martynmayden, and Johanna Hurlemayden (all 1379).<sup>209</sup>

### iii. Relationship

A number of female-specific names can be found that identify a woman’s relationship with another person. A woman’s status as someone’s wife is often identified, either in terms of the husband’s name or his occupation. Examples from 1379 include Matilda Hanwyfe, Elena Hobsonwyf, Beatrice Clerkwyf, Alice Caresonwyf, Dionisia Raulynwyf, Johanna Jackewyf; Alice Odsonwyf; Agnes Milnerwyf; and Elena Wrightwyf,<sup>210</sup> among others.<sup>211</sup> In other years we see Amabilla Hannewyf (1327),<sup>212</sup> Johanna Raweswyf (1332),<sup>213</sup> and Matillis Medewif (wife of mead maker/seller) (1327).<sup>214</sup> Nicholas Snypewife (1309)<sup>215</sup> means wife of a man from Snipe, but as a man he cannot be himself a wife; this is another indication of a man inheriting a female-specific surname from a female ancestor.

Other types of relationships are represented as well; Agnes Vikercister (1379)<sup>216</sup> (vicar’s sister), Alice Prestsyster (1379)<sup>217</sup> (priest’s sister), and francisca Motherinlawe (mother-in-law) (1638),<sup>218</sup> are instances of such surnames.

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at li.

<sup>207</sup> *Id.* at 400.

<sup>208</sup> Reaney, *supra* note 34, at 76.

<sup>209</sup> Reaney & Wilson, *supra* note 3, at li.

<sup>210</sup> *Id.*

<sup>211</sup> Joan Tomwyf, Alice Lawranswyf, Matilda Diconwyf, Margaret Gudsonwyf, and Alice Smythwyf. Reaney, *supra* note 34, at 83.

<sup>212</sup> Reaney & Wilson, *supra* note 3, at xviii.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 304.

<sup>215</sup> *Id.* at 416.

<sup>216</sup> *Id.* at li.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 315.

## f. Frequency of women's names

Assessing the surname practices of Medieval England and identifying the frequency of use of various forms is not an easy task. For one thing, records are sparse, and much of what exists focuses exclusively on the upper class and nobles, whose lands and inheritances were often the subject of legal actions, and early records are specific to this group.<sup>219</sup> The lives and customs of peasants are difficult to pin down with any certainty as the documentation is less consistent, especially on a large scale.<sup>220</sup> For another thing, there is some evidence that both men's and women's individual surnames as recorded in official documents may not have always been the ones actually used by the individual, in which case the surnames put to common use are exceptionally difficult to determine on a mass scale with any certainty. For example, one woman recorded as Agnes de Humet bore the seal Agnes de Bellomonte.<sup>221</sup> In 1299, another woman named Agnes was recorded as "Agnes daughter of Regerus piscator of Coventre," yet her seal identified her as Agnes filia Petronille<sup>222</sup> (Agnes daughter of Petronille, a woman's given name). Her officially recorded name referred to her father, but her personal seal referenced her *mother*. Such an incongruity is significant, particularly if it happened in other cases, as it may indicate that personal preference and usage were not only different than the official, but may have also revealed a greater matronymic influence in daily life than government recordings would indicate. However, given the scarcity of examples to investigate,<sup>223</sup> we must be satisfied with the more limited conclusion that daily name usage may have varied from what is recorded. Indeed, surnames recorded as "filius" (son of) or "filia" (daughter of) were used for documentary purposes rather than common usage,<sup>224</sup> so when such a surname is indicated, we can determine nothing about how the person was known by her peers. Still, the officially recorded surname, even if it may not be universally consistent with the common use surname, can nevertheless tell us a great deal about surname usage and convention. Finally, both matronymic and patronymic surnames represent the minority of surname types,<sup>225</sup> and a great many surnames were neither female- nor male-specific. Although some descriptors must necessarily have referred only to men—such as Gildynballokes (1316) (golden testicles)<sup>226</sup> and Whytpintel (1232) (white penis)<sup>227</sup>—many could logically be applied to either women or men, especially names which are topographical (Hill, Ford); characteristic (Bellamy "fair

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<sup>219</sup> *Id.* at xii, xxii.

<sup>220</sup> *See id.* at xxii.

<sup>221</sup> *Id.* at xiii.

<sup>222</sup> *Id.*

<sup>223</sup> I did not search original records for such a phenomenon, instead relying on the examples cited by Reaney & Wilson, *supra* note 3.

<sup>224</sup> Reaney & Wilson, *supra* note 3, at xxi.

<sup>225</sup> *Id.* at xx.

<sup>226</sup> *Id.* at 25.

<sup>227</sup> *Id.* at 353.

friend,” Goodchild); place-related (Durham, Huntington); and some occupational names (Chandler, Draper). It is impossible to determine how much of an effect women had on the existence and perpetuation of these types of surnames, but the frequency of female influence in other name types suggests that they likely had an impact in this area as well.

The records that do exist indicate that matronymic surnames were quite common at one time. In the Sussex Subsidy Rolls in 1332, there are 13 examples of surnames ending in “son” – but *every one of them* is a matronymic name.<sup>228</sup> Surrey that year had 4 out of 6 “son” names as matronymic; the same thing is seen in 7 of 23 cases in Lancashire, and 7 of 22 in Cumberland. Overall, about half of the “son” names that year came from the mother, but it seems to be a phenomenon that is more common in some locations than others. Records from other years show similar results. In 1327, Worcestershire had 4 of 11 “son” names as matronymic; along with 5 out of 8 cases in Somerset, 6 of 17 in Cambridgeshire, 3 of 7 in Suffolk, and 3 of 10 in Yorkshire.<sup>229</sup> Considering the virtual nonexistence of active matronymic naming<sup>230</sup> today – and largely based on tradition, no less – this is remarkable, and it reinforces the widespread use of matronymics in the 14<sup>th</sup> century.

#### IV. Modern Developments

A number of developments affected surname usage over time. Middle English saw the loss of grammatical gender,<sup>231</sup> so in the 14<sup>th</sup> century, the female suffix “ster” began to be replaced by the French suffix “eresse,”<sup>232</sup> (e.g., seamster became seamstress) and previously feminine words ending in “ster” often either disappeared or began to be used for both males and females. Female occupational bynames ending in “ster” (Webster, for example) therefore began to be used for both sexes interchangeably as well. While Baxter, Dexter, and Webster would have originally referred to women, by the Middle English period they appear to have been used for men as well.<sup>233</sup> Nicholas le Baxter, for example, is found in 1327,<sup>234</sup> Ralph le Dextere shows up in 1262,<sup>235</sup> and John le Webestere was recorded in 1275.<sup>236</sup> By the 1300s it appears that grammatical distinctions were generally no longer made on the basis of sex, but rather than the female version disappearing, both the feminine and masculine suffixes were used for both sexes.<sup>237</sup> In

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<sup>228</sup> *Id.* at xx.

<sup>229</sup> *Id.*

<sup>230</sup> As opposed to the modern remnants of matronymic naming whereby women’s names are used as surnames only by virtue of being passed down by men.

<sup>231</sup> Peterson, *supra* note 168, at 12.

<sup>232</sup> *Id.*

<sup>233</sup> Reaney & Wilson, *supra* note 3, at 33.

<sup>234</sup> Franklin, *supra* note 72, at 63.

<sup>235</sup> Reaney & Wilson, *supra* note 3, at 133.

<sup>236</sup> *Id.* at 480.

<sup>237</sup> Dolan, *supra* note 171, at 20-21.



fact, it appears that only Sewster (now Souster),<sup>238</sup> Seamster (now Simister/Simester),<sup>239</sup> and Spinster remained exclusively feminine<sup>240</sup> and were never used to refer to men, although Spinster did not endure as an occupational surname.<sup>241</sup> Thus, although the female form of many of these “ster” occupational names surnames still exist, because the change toward their use for both men and women happened before surnames became solidly hereditary, it cannot be said with absolute certainty that many of these names would have survived had they not begun to be used by men. However, the fact that two of these surviving female occupational names were used *exclusively* for women provides an additional strong indication of not only the existence but the common historical usage of matronymic naming. At some point, one or more of the women Sewsters would have had to pass the name to a son, who then passed the name to his children, in order for the name to survive the modern period.

Many of the women’s surnames discussed herein have disappeared, or appear to have done due to significant changes in form, whether their existence came about as a matronymic name or a female-specific nickname or descriptor. Yet the same can be said for male-specific surnames as well as sex-neutral ones in Medieval England: a great many of those no longer exist either.<sup>242</sup> Fivepeni,<sup>243</sup> Godbiemidus (“god be with us”),<sup>244</sup> Mytehare (mid the here, or ‘with the hair’),<sup>245</sup> Swetalday (sweet all day)<sup>246</sup> Welifed (well fed),<sup>247</sup> and Welshapen<sup>248</sup> all once existed but have long since vanished. Uncomplimentary names are especially likely to have disappeared;<sup>249</sup> surnames such as Malclerk (bad clerk),<sup>250</sup> Sourale (sour ale),<sup>251</sup> Malenfant (naughty child),<sup>252</sup> Lenealday,<sup>253</sup>

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<sup>238</sup> Reaney & Wilson, *supra* note 3, at 418. However, I located four examples of the original “Sewster” in U.K. records between 1853 and 1907. None were found in the U.S. since 1935.

<sup>239</sup> Reaney & Wilson, *supra* note 3, at 410.

<sup>240</sup> Peterson, *supra* note 168, at 11.

<sup>241</sup> According to the U.S. Social Security Death Index 1935-present. [http://search.ancestry.com/cgi-bin/sse.dll?db=ssdi&rank=1&new=1&so=3&MSAV=0&msT=1&gss=ms\\_db&gsln=spinster&dbOnly=\\_F00032DD%7C\\_F00032DD\\_x&uidh=000](http://search.ancestry.com/cgi-bin/sse.dll?db=ssdi&rank=1&new=1&so=3&MSAV=0&msT=1&gss=ms_db&gsln=spinster&dbOnly=_F00032DD%7C_F00032DD_x&uidh=000), and U.K. Death Records 1796-2006, [http://www.findmypast.co.uk/search/all/results?recordCount=-1&forenames=&\\_includeForenamesVariants=on&surname=spinster&\\_includeSurnameVariants=on&fromYear=&toYear=&region=&county=&dobYear=&dobYearTolerance=2&sortOrder=RK%3Atrue&\\_performExactSearch=on&event=D&recordType=ALL&route=](http://www.findmypast.co.uk/search/all/results?recordCount=-1&forenames=&_includeForenamesVariants=on&surname=spinster&_includeSurnameVariants=on&fromYear=&toYear=&region=&county=&dobYear=&dobYearTolerance=2&sortOrder=RK%3Atrue&_performExactSearch=on&event=D&recordType=ALL&route=) (last visited April 7, 2014).

<sup>242</sup> *See, e.g.*, Reaney & Wilson, *supra* note 3, at xliii, discussing the rarity of the survival of surnames which came about from nicknames. *See also* Reaney, *supra* note 34, at 234.

<sup>243</sup> Bowman, *supra* note 2, at 148.

<sup>244</sup> Reaney & Wilson, *supra* note 3, at 194.

<sup>245</sup> Reaney, *supra* note 34, at 234.

<sup>246</sup> Reaney & Wilson, *supra* note 3, at 436.

<sup>247</sup> Reaney, *supra* note 34, at 244.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 256.

<sup>250</sup> *Id.* at 243.

<sup>251</sup> Reaney & Wilson, *supra* note 3, at 418.

(lean/rest all day), Liggebiyefyre (lie by the fire),<sup>254</sup> Overdewe (overdue),<sup>255</sup> Paynot,<sup>256</sup> Spilblod<sup>257</sup> (spill blood), Drunkard,<sup>258</sup> Half-naked,<sup>259</sup> Losewit,<sup>260</sup> and Dringhe-dregges<sup>261</sup> (drink the dregs) were used at one time but cannot be found today. Foulweather, Rowedder (rough weather), Coldwedre (cold weather), and Ilwedyr (ill weather), all likely referring to a bad temperament, did not survive, but Merryweather, indicating a happy person, did.<sup>262</sup> (A few uncomplimentary names have endured, however, such as Savage,<sup>263</sup> Gulliver (glutton),<sup>264</sup> Greedy,<sup>265</sup> Mallory (unlucky),<sup>266</sup> Giddy (insane or possessed),<sup>267</sup> Dolittle (do little; lazy),<sup>268</sup> and Treacher (deceiver, cheat).<sup>269</sup>)

What is notable in this mass of lost names is the number of matronymic surnames that do still exist in some form. As discussed above, many of the surnames that are adaptations of female given names are still represented in modern surnames. A quick search of the U.S. Social Security Death Index<sup>270</sup> and U.K. death records<sup>271</sup> confirms the current existence of many of these surnames, including Agnes, Elizabeth, Isabel, Mary, Jane, Joan, Lettice, Custance, Constance, Alice, Love, Catharine, Cecilia, Margaret, Susan, and many other female given names which were popular in Medieval England, both in their original forms and a great many adapted ones.<sup>272</sup>

When bynames became regularly hereditary around the 15<sup>th</sup> century, women's names over time were largely superseded by men's—but not so much by the advent of hereditary naming as by the stricter customs surrounding *whose* names got passed down and whose names survived marriage. The convention of women taking the name of the husband at marriage developed, which became more and more common until it was all

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<sup>252</sup> Geoffrey Malenfant (1205). Reaney, *supra* note 34, at 242.

<sup>253</sup> Henry Lenealday (1336). Reaney, *supra* note 41, at 78; Jan Jönsjö, STUDIES ON MIDDLE ENGLISH NICKNAMES 21 (1979).

<sup>254</sup> Geoffrey Liggebiyefyre (1301). Reaney, *supra* note 34, at 78; Jönsjö, *supra* note 246, at 121.

<sup>255</sup> Oliverus Overdewe (c. 1445). REGISTER OF THE FREEMEN, *supra* note 78, at 163.

<sup>256</sup> Willelmus Paynott (1360-61); Thomas Paynott son of Willelmi Paynott (1517-18). *Id.* at 55, 240.

<sup>257</sup> Willelmus Spilblod (1349). *Id.* at 43.

<sup>258</sup> Bowman, *supra* note 2, at 147.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 152.

<sup>262</sup> Reaney, *supra* note 34, at 259.

<sup>263</sup> *Id.* at 256; Reaney & Wilson, *supra* note 3, at 393.

<sup>264</sup> Reaney, *supra* note 34, at 256; Reaney & Wilson, *supra* note 3, at 208.

<sup>265</sup> Reaney, *supra* note 34, at 256; Reaney & Wilson, *supra* note 3, at 204.

<sup>266</sup> Reaney, *supra* note 34, at 257; Reaney & Wilson, *supra* note 3, at 295.

<sup>267</sup> Reaney, *supra* note 34, at 257; Reaney & Wilson, *supra* note 3, at 189.

<sup>268</sup> Walter Dolittle (1219). Reaney & Wilson, *supra* note 3, at 138.

<sup>269</sup> Robert Trechour (1301). Reaney and Wilson, *supra* note 3, at 453. Reaney, *supra* note 34, at 257.

<sup>270</sup> 1935-present. Accessible at <http://search.ancestry.com/search/db.aspx?dbid=3693>. =

<sup>271</sup> 1796-2006. Accessible at <http://www.findmypast.co.uk/search/all/deaths>.

<sup>272</sup> The name Mary alone is responsible for well over twenty modern surnames.

but universal, and it resulted in the elimination of many women's names. When women began to universally relinquish their individualized names, and their children likewise took the husband's name, then "surnames" as we know them today were born: women's names represented their status only as a certain man's wife rather than identifying any individual characteristics of their own. The family unit was created with the male as head of the household, unified under his name. Furthermore, although women were permitted to own and inherit property through medieval times, that practice diminished as well, and even distant male relatives were often preferred for inheritance over immediate female family members. Surnames, for the upper classes at least, were strongly tied to property, so when women's property ownership was prohibited, their individual surnames were thereby erased right along with it. The only reason that names which were once matronymic are still represented is that they were passed from mothers to children – becoming hereditary but not necessarily patronymic – *before* this "traditional" usage of marital names developed whereby women lost their names to their husbands and children always took the name of the father. What remains are the remnants of that time when women were still represented in names and retained some naming rights, if not officially and legally, then certainly unofficially and in practice. Mary may have had a son who was bynamed Marriott after her, who then later passed that name on to his wife and children, and down again and again through males in the family to the present day. To the extent that women's names were able to take hold in men before the new rigidity occurred, those names were able to survive. The fact that so many of them have done so is remarkable. The developments in marriage law and practice, as well as women's inheritance and property ownership, are critical to the understanding of what happened with women's names, but require more investigation and analysis than there is space for here.

Today, "tradition" has it that women still overwhelmingly adopt the surname of their husbands at marriage.<sup>273</sup> Yet, while it is currently not a legal requirement for them to do so, it has actually never been legally required. The English common law allowed individuals to adopt a surname of their choosing, which meant that even after names became hereditary and standardized, a person had the right to change the name she or he was given at birth to something else entirely, for any reason other than fraud. That allowance applied to both men and women alike, and necessarily meant that a woman could retain their birth name at marriage if she so chose. Yet, although as a technical matter the common law tradition would allow women a choice in surnames, during certain historical periods it was all but universal in practice for them to adopt the name of the husband, and it would not have been a simple matter for a woman to do otherwise. The practice became so universal, in fact, that it brokered no exceptions, which in effect gave it the force of law. For example, a 1957 English legal treatise stated, "When a woman on her marriage assumes, as she usually does in England, the surname

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<sup>273</sup> Over 80%. See Boxer, *supra* note 29.

of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is *in fact, rather than in law*, a consequence of the marriage."<sup>274</sup> She begins with her father's name, and then acquires her husband's name, her exclusive identity shifting from "the daughter of this man" to "the wife of that man." It is simply a fact – whether or not it is the law. But it was not always the case.

If we consider surname usage and conventions to be an indicator of the practice of coverture and the way in which it was manifest, then coverture may have in some ways actually become more rigid, rather than less, over time. This history suggests that what we consider to be "traditional" when it comes to naming practices was not at all consistent, and depends on the specific time period to which we refer. At one time naming practices were not nearly so unyielding as they remain today. Modern structures became so entrenched that courts jumped on board to coerce compliance with them, clearly contrary to the common law right to choose one's name, all under the guise of "tradition."<sup>275</sup> Well into the 1970s, U.S. courts were still holding that a woman must adopt her husband's surname; the underlying principle of male naming rights was deep-rooted, and courts were eager to enforce it.<sup>276</sup> Courts litigating naming issues talked of the "fundamental," "primary," "natural," and "time-honored" right of a father to the naming of his family,<sup>277</sup> the presumption being that a practice so universal must somehow be based in the laws of nature.<sup>278</sup> Recent cases have discussed these male rights in terms of the naming of men's children, which has likewise fallen under the patriarchal dictates of the male line. For example, an Oregon trial court in 2006 granted an unmarried father's demand to have his child's last name legally changed from the mother's to his, for no other reason than that he was the father.<sup>279</sup> Under the current naming scheme, women's heritage and legacy is minimized or rejected outright. But historical naming practices verify that this was not always the case.

Little empirical research has been conducted on the modern name choices of men and women. Studies are difficult to conduct because data sets often do not contain

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<sup>274</sup> 19 HALSBURY, LAWS OF ENGLAND 829 (3rd ed.1957) (emphasis added).

<sup>275</sup> See Lamber, *supra* note 31, at 779.

<sup>276</sup> There is even some evidence that courts considered this not just a right of individual men, but of men collectively. In one case a trial court refused to allow a woman's name change even when the husband had consented, as if allowing it in one case would taint the right of men in general. *In re Erickson*, 547 S.W.2d 357, 358-60 (Tex. Civ. App. 1977).

<sup>277</sup> *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *In re Trower*, 66 Cal. Rptr. 873, 874 (Ct. App. 1968), *overruled by* *In re Schiffman*, 620 P.2d 579, 583 (Cal. 1980) (rejecting the "common law and custom, which have given the father a 'primary right' to have his child bear his surname...").

<sup>278</sup> *Rio*, 504 N.Y.S.2d at 961.

<sup>279</sup> *Doherty v. Wizner*, 150 P.3d 456, 457 (Or. Ct. App. 2006). The court overturned the trial court decision, and granted the father's request for name change of the child. *Id.* at 466.

information on birth names and married surnames of women, much less of men.<sup>280</sup> Some expectations and traditions are apparently so entrenched that we fail to even think to ask questions about them. In fact, the term “maiden name” itself highlights this phenomenon. Today in the U.S. it is still the primary method of denoting “birth name” or “name before marriage” for women; “maiden” simply means an unmarried woman.<sup>281</sup> After marriage, a woman is no longer a maiden, so her “maiden name” is lost. Yet the word “maiden” is no longer used in common parlance to refer to an unmarried woman in any context other than with women’s names.<sup>282</sup> For that, we have held on to the term as well as the practice, indicating further that our naming conventions have largely escaped critical analysis. There is no male equivalent to the term, other than perhaps the French *né* (meaning born), which is unfamiliar to most Americans and rarely used. The term, and all of the official documents employing it, acknowledges and thereby reinforces only the established naming structure consistent with dominant cultural ideals that were solidified four centuries ago. Although the formal gender inequality brought about by the system of coverture has almost entirely disappeared from the law, it is still present in our collective conscience; our language and naming, and what we consider to be normal and acceptable, continues to instantiate women as objects, as property of the husband, as contingent and dependent beings.

## V. Analysis

As discussed above, the importance of names cannot be overstated; they play a central role in the construction of individual personhood and legal identity. Today they operate at the cornerstone of one’s life, and serve as a symbol of individuality, religion, community, lineage, and family structure, making them central to one’s identity. They provide connections to family and a sense of legacy. Beyond their individual and family implications, names also function as “linguistic correlates of social structure”<sup>283</sup> and have been used throughout history as a means of oppression and control by stripping groups of their right to self-determination and self-identification.<sup>284</sup> Compulsory name changing has been associated with cultural domination or assimilation. The Privy Council of Scotland passed an Act in 1603 banning the use of the surname MacGregor, on penalty of death, after conflicts between the clan and agents of King James VI.<sup>285</sup> Nazis in the

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<sup>280</sup> Claudia Goldin & Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 143 (2004).

<sup>281</sup> “maiden.” Merriam Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1994).

<sup>282</sup> And, perhaps, to a few other marriage-related conventions, as in “maid of honor” and “old maid.”

<sup>283</sup> Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 10 (1997).

<sup>284</sup> Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 330-331 (1998).

<sup>285</sup> James Finlayson, *SURNAMES AND SIRENAMES* 23 (1863), <http://books.google.com/books?id=5U9NAAAACAAJ&printsec=frontcover#v=onepage&q=veto&f=false>.

1930s required Jews to add Sarah or Israel to their names to mark them as "other."<sup>286</sup> Immigrants were regularly renamed at Ellis Island in order to assimilate them into American culture, sometimes involuntarily.<sup>287</sup> Slaves in America were often given no last names at all because, as property themselves, they could not have an independent surname. When they did have last names, they were given the master's surname, and renamed each time they exchanged owners.<sup>288</sup> Although this concept of a surname as signifying ownership (of wife, children, and property) is no longer overt, it is still undoubtedly present in more subtle ways within our social schema and naming framework. Throughout the past four or five centuries at least, society has accorded the surnames of men more importance than those of women.<sup>289</sup> The common conception is that only men have "real" names, and their permanency is one of the rights of being male;<sup>290</sup> women's names are more fleeting and relationship-dependent and they must therefore be less psychologically connected to them. Men today still tend to hold more steadfastly to their names as a permanent, solid symbol of their identity.<sup>291</sup> That notion managed to insert itself into the American legal system, where the courts have upheld men's naming "rights" with respect to their wives and children, because women's names are contingent and impermanent and women "merely inhabit names which actually belong to their husbands."<sup>292</sup> Yet research found that, even within these conditions, both women and men identified strongly with their last names.<sup>293</sup> Names are therefore important for their own sake, yet they also speak volumes about broader issues within the dominant culture, including the status of women vis-à-vis their husbands, their children, and their society.

Any contention that female-specific or matronymic surnames ever existed was at first met with tremendous resistance and derision. When Canon Bardsley in 1901 first pointed out the existence of matronymics in English history, the suggestion was not only rejected outright but considered offensive, for the assumption was that the only possible reason for the existence of any matronymics would have been the birth of illegitimate children; his contention thus suggested the moral degradation of English culture.<sup>294</sup> Yet Bardsley was quite clearly correct, and later scholars agree that the reasons for the

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<sup>286</sup> Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 770 (2007).

<sup>287</sup> Kelly, *supra* note 9, at 16-17.

<sup>288</sup> *Id.* at 12-14.

<sup>289</sup> Doll, *supra* note 1, at 229.

<sup>290</sup> Dale Spender, MAN MADE LANGUAGE 24 (1980).

<sup>291</sup> *Id.*

<sup>292</sup> Doll, *supra* note 1, at 235 (analyzing *Burke v. Hammonds*, 586 S.W.2d 307, 309 (Ky. Ct. App. 1979), in which a mother's attempt to change the child's surname to hers was actually an attempt to change the child's name to that of his stepfather).

<sup>293</sup> Leissner, *supra* note 276, at 363.

<sup>294</sup> Bowman, *supra* note 2, at 94.

existence of matronymics could not have been limited solely to illegitimacy.<sup>295</sup> The fact that so many of these names have survived over centuries, generation after generation, raises serious doubts as to whether there could have been quite *that* much illegitimacy. Later scholars suggested that other factors were at play, including the adoption of children by (presumably single) women, the death of the father, distinguishing of children after a second marriage (also after the death of the father), and the distinction of villagers of the same name.<sup>296</sup> Such scholars also suggest that in cases where the mother was strong-willed and the father was not, her name might take precedence over his.<sup>297</sup> Yet these suggestions itself belie an assumption of their authors: that the default must necessarily be towards a patronymic system and there must be some anomaly in the family in order to deviate from that system. Patronymics was certainly more common, but it was not always clearly the default naming configuration. To assume it was, and that there must be some unusual explanation for any deviation from it, only reinforces exactly how far (backwards) we have come in our naming strictures. Why must it necessarily be the case that a man known as Robert Margretson must have a lazy, weak-minded, do-nothing father, or else a dead one? Is it inconceivable that there might be some other reason his mother might be recognized in the adoption of his surname? The frequent appearance of such names seems to suggest that something more (or less, depending on one's perspective) was in play in such situations.

The system of coverture seems to have begun in England around the 11<sup>th</sup> century, and it gained a strong hold in the late Middle Ages (1300-1500). In such a system, the husband and wife became one person upon their marriage – a lofty ideal, but in fact, that person was the husband alone, making the union less a merger than an annihilation. A woman's legal rights and obligations – indeed, her entire legal existence – were subsumed by her husband upon marriage. She lost her right to own or use property, and any property she owned prior to the marriage became the property of the husband. He became entitled to her company, her labor, and her services, including sexual ones, for the marriage constituted her irrevocable and permanent consent to sexual intercourse at the husband's whim. He was permitted the use of physical force against her for reasons he saw fit. In short, she was his property.<sup>298</sup> The practice of the wife assuming the husband's surname reinforced this legal and social absorption. "Custom said . . . that man owned what he paid for, and could put his name on everything for which he provided money . . . . [H]is land, his house, his wife and children, his slaves when he had them, and on everything

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<sup>295</sup> *Id.* at 95; Reaney, *supra* note 34, at 77.

<sup>296</sup> See Bowman, *supra* note 2, at 95; Reaney, *supra* note 34, at 78.

<sup>297</sup> Reaney, *supra* note 34, at 78; Bowman, *supra* note 2, at 95.

<sup>298</sup> Some scholarship suggests, however, that the reality of women's practical lives and economic practice, as opposed to their technical legal existence, during the 18<sup>th</sup> and 19<sup>th</sup> centuries may have been more complex; some wives may have "exerted considerable economic autonomy as property owners" during that period. Margot Finn, *Women, Consumption and Coverture in England, c. 1760-1860*, THE HISTORICAL JOURNAL 703, 706 (1996).

that was his."<sup>299</sup>

Where the wife as a legal individual no longer exists independently from the husband, it might seem natural, even necessary, for her to adopt the husband's surname, and for children of the marriage to take his name. Yet that development happened some time after the institution of coverture apparently became established in English law; there exist numerous examples of women retaining their birth names at marriage, passing their names to their children, and even to their husbands, as late as the 17<sup>th</sup> century. This suggests that coverture was not exactly what we presume it to have been, or it did not take the full measure of its chokehold as early as we think. There is some evidence to support the latter.

William Blackstone, an 18<sup>th</sup> century pioneer of legal commentary who was a professor of law at Oxford, wrote the four-volume *Commentaries on the Law of England*, a treatise on the common law published in 1765-1769. The work categorized English law in an unprecedented way; it influenced the development of the American legal system and has been frequently referenced by United States courts. Of coverture, Blackstone explains:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law – French a feme-covert;...and her condition during her marriage is called her coverture.<sup>300</sup>

Blackstone worked to present the English legal system as superior and unassailable, such that his approach was congratulatory rather than critical. But he may have been rather misguided regarding some of his views of women. The principle of coverture became a part of the common law of England during the Middle Ages, but my research suggests that some of its manifestations became increasingly rigid through that time and into the early modern period. Indeed, an anonymously authored book published in 1777 called *The Laws Respecting Women* points out that women in ancient England actually enjoyed “rank an eminence” and their rights were considerable.<sup>301</sup> Æthelberht's code, written in about 600 A.D., supports such a contention.<sup>302</sup> Under that law, the fine for killing a woman was the same as a man;<sup>303</sup> women could inherit as well as men; and in the event

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<sup>299</sup> Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91, 138 (1985) (quoting Ruth Hale, *But What About the Postman?*, 54 THE BOOKMAN 560, 561 (1922)).

<sup>300</sup> William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 442 (1768).

<sup>301</sup> Anonymous, THE LAWS RESPECTING WOMEN p. x (1777), <http://babel.hathitrust.org/cgi/pt?id=hvd.rsmctf;view=1up;seq=9>

<sup>302</sup> Available at <http://www.earlyenglishlaws.ac.uk/laws/texts/abt/>

<sup>303</sup> David C. Douglas, Ed., *Laws of Ethelbert*, ENGLISH HISTORICAL DOCUMENTS 359, par. 74 (1968).



of divorce or death of the husband, the wife was entitled to half of the marital property.<sup>304</sup> The morning gift paid by the husband to the wife at marriage was hers to control alone.<sup>305</sup> But this all changed with the Norman invasion, which was extremely damaging to women's rights, especially their right to hold property. In fact, Arianne Chernock argues that the principle of coverture itself originates in the Norman influence brought to the region after the invasion in 1066 and the subsequent rise of feudalism, rather than a traditional "English" practice; the Saxons had in fact not only allowed, but encouraged women to own property individually.<sup>306</sup>

An historical tracing of English law indeed shows that, where the Anglo-Saxon wife enjoyed autonomy with most of her property,<sup>307</sup> that began to change around Glanvil's time in the 12<sup>th</sup> century.<sup>308</sup> Courtney Kenny, writing in 1879 about marital property rights in English history, agreed. He discussed the deterioration of rights for women through the centuries, and similarly attributed it to the Norman influence. That influence resulted in the wife sinking to the state of being a "puppet of her husband's will;" Kenny called this a "revolution in the law of marriage."<sup>309</sup> Given that we know that the system of coverture did not exist through time immemorial in England, but rather developed in the late Middle Ages,<sup>310</sup> it is reasonable to conclude that such a system did not take over immediately – with women one day having certain rights, abilities, and status, and the next day, coverture smacking them in the face and leaving them with almost none the next. In fact, a more gradual implementation and development of coverture and its attendant principles, including a more prolonged reining in of women's rights, is the more likely scenario given the ways in which change in general was protracted and older traditions died hard: in medieval life, "...ideas and information spread only slowly, and against great resistance, from one district to another; custom determined everything, and the type altered little from age to age."<sup>311</sup>

The evidence concerning surnames discussed herein also clearly supports such a

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<sup>304</sup> *Id.*, par. 78, 79.

<sup>305</sup> *ANGLO-SAXON WOMEN*, HULLWEBS HISTORY OF HULL [HTTP://WWW.HULLWEBS.CO.UK/CONTENT/C-ANGLO-SAXON/HOME-LIFE/ANGLO-SAXON-WOMEN.HTM](http://www.hullwebs.co.uk/content/c-anglo-saxon/home-life/anglo-saxon-women.htm).

<sup>306</sup> Arianne Chernock, *MEN AND THE MAKING OF MODERN BRITISH FEMINISM* 91 (2010).

<sup>307</sup> Courtney Stanhope Kenny, *THE HISTORY OF THE LAW OF ENGLAND AS TO THE EFFECTS OF MARRIAGE ON PROPERTY AND ON THE WIFE'S LEGAL CAPACITY (BEING AN ESSAY WHICH OBTAINED THE YORKE PRIZE OF THE UNIVERSITY OF CAMBRIDGE)* 10 (1879).

<sup>308</sup> Ranulf de Glanvil was Chief Justiciar in England under Henry II in 1180, and was most likely the author of *TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND*. John Hudson, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: C.900-1216*, p.872 (Vol. II, John Hamilton Baker ed. 2012).

<sup>309</sup> Kenny, *supra* note 299, at 11.

<sup>310</sup> Alina Semo Kofsky, *A Comparative Analysis of Women's Property Rights in Jewish Law and Anglo-American Law*, 6 *JOURNAL OF LAW AND RELIGION* 317, 337 (1988).

<sup>311</sup> Charles Homer Haskins, *The Spread of Ideas in the Middle Ages*, 1 *SPECULUM* 19, 20 (1926).

conclusion. The development of surname practices as applied to women provide evidence that the subsumation of women by the systems of patriarchy and coverture neither remained consistent over the centuries, nor gradually improved: the status of women in many respects worsened over time as their acknowledgment in surnames vanished. What's more, although Blackstone's work provides the foundation of modern English law, incredibly, he appears to have relied on a mistranslation to draw some of his conclusions about women's property rights in ancient England, which he then used as support for his own assertions about the foundations and justice of the contemporary treatment of women.<sup>312</sup> Those mistakes were repeated for centuries.<sup>313</sup>

It is sometimes difficult to conceive of the idea that the progression in years brought with it a regression in thinking—that earlier ages were in any way more enlightened or more advanced than the present. This insistence on a flawed vision of history that assumes continual progress and advancement can be called “chronological ethnocentrism.”<sup>314</sup> In other words, we want to believe that the present always represents the pinnacle of enlightenment and progress, that human advancement is constant and unrelenting, and that wherever we are today, it is always better than where we were yesterday. Whatever mistakes we are making, at least we're doing it better than those of the past did. We always represent the most enlightened society human history has ever known—surely none has ever been more advanced, more progressive, more civilized. Such a view may be a natural tendency, but that does not make it any more accurate. It colors the ways in which we perceive the modern world and study the past. We tend to avoid searching for evidence to the contrary, and reject as implausible or anomalous what we do happen to come upon. It obfuscates the complexities of a nuanced history, and it is a delusion. Ironically, despite the tendency to think of our modern society as eminently more advanced than any prior ones, we nevertheless refer to that deficient past to justify and validate our own questionable practices.

The etymology of the word “surname” is worth a brief discussion as it sheds some light on the development of the practices surrounding the word and their application to women. The word “surname” is sometimes said to originate from “sir” name<sup>315</sup> (a man

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<sup>312</sup> See, e.g., Kenny, *supra* note 299, at 35-36.

<sup>313</sup> It may also be the case that Blackstone's description served as more of an attempt to *reinforce* the principle rather than as a strict description of it. This may have obscured later scholarship on the legal status of women, ignoring the complexities, exceptions, and common practice to the extent that they conflicted with Blackstone's account. See Finn, *supra* note 290, at 705.

<sup>314</sup> I first encountered this term in a Salon article by Jim Loewen: chronological ethnocentrism allows the writers of history to “sequester bad things, from racism to the robber barons, in the distant past.” As such, we always “know” that everything turned out for the best.” Jim Loewen, *Our Real First Gay President*, Salon.com (May 14, 2012), [http://www.salon.com/2012/05/14/our\\_real\\_first\\_gay\\_president/](http://www.salon.com/2012/05/14/our_real_first_gay_president/).

<sup>315</sup> Surnames “were for the knights and gentry who bore heraldic devices on their shields, and stamped documents with private seals...” Bowman, *supra* note 2, at 9.

of rank or position<sup>316</sup>), or “sire” name<sup>317</sup> (meaning father, although an archaic definition also includes a man of rank or authority, especially a lord<sup>318</sup>). Both have obvious masculine connotations and implications, and they make sense given modern usage of the word – it must refer to a “man” or “father,” because that is how surnames operate, after all. In fact, however, the word “surname” does not actually have anything to do with “sir” or “sire” at all; it originates from the Old French *surnom*, from *sur* “upon” and *nom* “name”<sup>319</sup> and generally translated as “nickname.”<sup>320</sup> The word was adapted from the French, Anglicized as “surname,” and used to refer to bynames beginning around the 14<sup>th</sup> century.<sup>321</sup> The definitions of the word have shifted somewhat over time in a way that mirrors the changing use of the convention itself. The University of Michigan’s online Middle English Dictionary, which defines words used in Middle English (1100-1500) by the ways in which they were used, provides the first definition of “surname” as follows: “(a) An additional name, usually derived from a quality, an achievement, or a place and attached to one’s given name;... also, an epithet; a suffixed name-element [quot. a1387],” while “a last name, surname; a family name, cognomen”<sup>322</sup> is presented as an alternate definition. But by the 18<sup>th</sup> century, “surname” had come to be known first and foremost as a *family* name, suggesting its hereditary nature from the male line; Johnson’s 1768 dictionary defined it as “The name of the family; the name which one has over and above the Christian name.”<sup>323</sup> A number of other 18<sup>th</sup> and 19<sup>th</sup> century dictionaries similarly defined “surname” primarily as a family name, rather than an individualized nickname, with varying degrees of nuance.<sup>324</sup> This serves as an additional indication that the exclusively masculine orientation and function of surnames did not solidify until well after surnames came into regular use. The word was eventually

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<sup>316</sup> “sir.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 10<sup>th</sup> ed. 1994.

<sup>317</sup> Spender, *supra* note 282, at 25.

<sup>318</sup> “sire.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10<sup>th</sup> ed. 1994).

<sup>319</sup> “surname.” James Stormonth, *DICTIONARY OF THE ENGLISH LANGUAGE, INCLUDING A VERY COPIOUS SELECTION OF SCIENTIFIC TERMS FOR USE IN SCHOOLS AND COLLEGES AND AS A BOOK OF GENERAL REFERENCE* (6th ed. 1881), <https://archive.org/details/etymologicalpron00storrich>.

<sup>320</sup> “surnom.” Reverso French to English Translator, <http://www.reverso.net/translationresults.aspx?lang=EN&direction=french-english> (last visited March 4, 2015).

<sup>321</sup> “surname.” *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* (2nd ed. 1987).

<sup>322</sup> “surname.” *MIDDLE ENGLISH DICTIONARY*. 2013. <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED43906> (last visited March 4, 2015).

<sup>323</sup> The second definition provided is: An appellation added to the original name. Samuel Johnson, *A DICTIONARY OF THE ENGLISH LANGUAGE* (3rd ed. 1768), <http://books.google.com/books?id=bXsCAAAQAAJ&pg=PT7#v=onepage&q&f=false>.

<sup>324</sup> For example, Stormonth defines “surname” as a name added to, or over and above, the baptismal or Christian name...; the family name.” Stormonth, *supra* note 311, at 632. Webster in 1828 defines it as “An additional name; a name or appellation added to the baptismal or Christian name, and which becomes a family name...originally designated occupation, estate, place of residence, or some particular thing or event that related to the person.” Noah Webster, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 711 (Vol. 2. 1828), <https://archive.org/details/americandictionary02websrich>

appropriated by patriarchal systems to mean “sire” name quite literally, as being owned by and situated with the male alone, and passed down by the father exclusively. In the process, the word itself was sometimes distorted to reflect that current understood meaning and usage. Multiple references to “surnames” and “sirenames,” while clearly incorrect given the French origins of the word, can be found in documents beginning in 17<sup>th</sup> century England.<sup>325</sup> “Surname” became legitimized enough that it even appeared in some dictionaries as a (less correct) version of “surname,”<sup>326</sup> and “surname” can be found 19 different times in definitions within Bailey’s 1736 dictionary.<sup>327</sup> Tradition had reshaped the definition of surnames – and even the structure of the word itself – to fit the changing strictures surrounding the convention, and then referred back to the adapted definition to support those new strictures.

There is more to be said about surnames than that women once held their own individual names and that children sometimes took their surnames from their mothers. Even after surnames had become more consistently hereditary, their use reflected a status different still than modern expectations would have it. Women sometimes retained their birth names after marriage. Men sometimes adopted the surnames of their wives at marriage if the wife had inherited property or expected to. A woman would sometimes pass her family name to her children instead of the man. Such flexibility left women with some independent identity, until those options were eventually foreclosed to them as well via imposed legal impotence. It is evident that the increasingly restrictive rules of coverture and property ownership eventually eliminated any independent women’s names. Indeed, one might say that surname usage is a reflection of women’s rights more generally, especially with property and inheritance rights, and as those rights disappeared, so did their names.

The law has been fundamental in the historical subordination of women. But as the case

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<sup>325</sup> See, e.g., Finlayson, *supra* note 277; Samuel Clarke, *The lives & deaths of most of those eminent persons who by their virtue and valour obtained the surnames of Magni, or the Great. Whereof divers of them give much light to the understanding of the prophecies in Esay, Jeremiah, Ezekiel, and Daniel, concerning the three first monarchies. And to other Scriptures concerning the captivity, and restauration of the Jews.* (2d ed. 1675); J. H. Lawrence-Archer, *An Account of the Surname Edgar: And Particularly of the Family of Wedderlie in Berwickshire* (1873); *Memorial for those of the Surname of Fraser* (1729); *A Bill to Enable John Freston, Esq; and the Heirs of his Body, to Take and Use the Surname and Arms of Scrivener* (1754); *A Brief Account of S. upon A. with ... a Description ... of the Collegiate Church, the Mausoleum of Shakspeare ... to Which is Added, Some Account of the Lives of Three ... Prelates who Derive their Surnames from Stratford, etc.* (1800).

<sup>326</sup> “surname.” Noah Webster, *An American Dictionary of the English Language* 600 (Vol. 2 1828), *available at* <https://archive.org/details/americandictionary02webstrich>.

<sup>327</sup> Ironically, although Bailey uses the word “surname” to define words like Bartley or Morris, the word “surname” is not itself defined in the dictionary. The word “surname” appears 12 times, and is defined as “a name added to the proper or baptismal name to denominate the person of such a family.” Nathan Bailey, *DICTIONARIUM BRITANNICUM OR A MORE COMPLEAT UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY THAN ANY EXTANT.* (2d ed. 1736).

of surnames demonstrates, the law interacts heavily with society, culture, and tradition, and these institutions are intertwined so extensively that the law cannot be seen to operate separate and apart from them or analyzed independently. Where formal law created new restrictions and disabilities for women in Medieval England, those restrictions influenced the ways in which surnames were culturally adopted and used, even though no law directly addressed it. The law imbued the husband with a superior legal status as head of household and gave him legal ownership of his wife and children and control of all marital labor and property. That ownership seemed to include, eventually, the convention of the wife and children adopting the surname of the husband. Those cultural adaptations became so deeply entrenched that it was unthinkable to flout them; the “tradition” tolerated no exceptions, and it began to unofficially enjoy the force of law. Despite the lack of a formal legal requirement, by the early 18<sup>th</sup> century women and children took the name of the husband and father almost universally. In that sense, formal law reaches beyond the topics it is created to address and extends in practice to other related areas. In fact, even in the 20<sup>th</sup> Century United States it was so commonly believed that women were legally required to take the husband’s name at marriage that numerous pamphlets and articles were written to dispel the myth. Yet when some women began to reject the traditional practice, they were hauled into court where battles were fought to maintain it, and at that point some courts actually decided that the “tradition” was so fundamental and absolute that it deserved legal sanction and support, thus overturning a millennium of common law principle in favor of a recent cultural practice that was considered critical to maintaining the dominant social status quo. The rejection of tradition had brought the force of the law to bear, so that the unofficial practice became an official requirement. It wasn’t until the 1980s that courts had uniformly rejected the justification of such disparate treatment based on tradition alone, as there was no legal leg to stand on given the abolition of coverture.<sup>328</sup> The symbiotic relationship between culture and law subtly shifts over time, while the two reinforce each other and address cultural phenomenon from different stations.

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<sup>328</sup> See, e.g., *In re Erickson*, 547 S.W.2d 357, 358-60 (Tex. Civ. App. 1977) (overruling trial court's rejection of name change request). Remarkably, the trial court refused to allow the wife's name change even when the husband had consented, as if allowing it in one case would taint the right of men in general, suggesting that naming rights belong to men collectively, not just individually. See also *May v. May*, 6 Kan.App.2d 24 (1981) (reversing trial court denial of wife's request to restore her maiden name upon divorce, holding that such a restoration must always be granted when requested); *Malone v. Sullivan*, 124 Ariz. 469 (1980) (holding that a woman is not required by common law, statute, or rule to adopt her husband's name upon marriage, thus reversing trial court's refusal to consider wife's petition for dissolution of marriage due to her filing of the petition under her maiden name.)

## VI. Conclusion

Names are central to our lives and our identities; our current practices cannot be analyzed without an understanding of the history that brought them to bear. The existence and frequency of female-specific and matronymic surnaming in England through about 1600 would today fall in the realm of the extraordinary. In our belief that the modern system represents age-old tradition, we fail to recognize the number of today's surnames that originated from women. What happened to those surnames at marriage and the birth of children during the pre-modern era reflected not only a marked flexibility, but also a certain standing of women, providing them with an independent identity represented in a way that is still not seen today. While it would be disingenuous to argue that the historical use of women's surnames conclusively proves that English women had more rights and status in the 14<sup>th</sup> century than they do in the 21<sup>st</sup> – many laws and customs from the period clearly put women on unequal footing with men – the fact that medieval women were so commonly represented and acknowledged in the surnames of not only themselves, but also their descendants, means that their status was probably much more complex than we tend to presume. They were not systematically and thoroughly denied any legacy or condemned to the total eradication of their identities, as was the case later; they had names specific to them as women; they were able to retain those names after marriage; they independently inherited and owned property; and they passed both their property and their names down to their daughters, sons, and other descendants. The frequency at which these practices occurred varied depending on the period, the location, the social class, and other circumstances of the individuals involved. But it was the strict reining in of those rights and that status, and the eventual elimination of any matronymic naming and female property ownership, which makes the earlier system so hard to imagine. Surnames provide a vantage point from which to evaluate the status of women, and that status saw a very long period of decline beginning around the 11<sup>th</sup> century and not reversing again until the women's property acts of the 19<sup>th</sup> century began to emerge in both the United States and the United Kingdom.<sup>329</sup> The rigidity in naming we know today is one of the last vestiges of the old system of coverture, and we are just beginning to reject it. It is a product not of abiding and ancient tradition, but rather of new strictures instituted most firmly during modern period, ironically during the "Age of Enlightenment" of the 17<sup>th</sup> and 18<sup>th</sup> centuries. When names stopped signifying individual attributes, they came to signify ownership instead; as such, they became closely connected to property and inheritance. The development of gendered rules in those areas supports this observation—with profound and negative effects on women.

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<sup>329</sup> The Married Women's Property Act of 1870 was the first to allow married women in the U.K. to inherit and retain property and money (at a capped amount), as well as to retain her own wage earnings. In the U.S., similar laws were passed by individual states, the first being Mississippi in 1839.

Future research on this topic would expand upon the history developed here in a few ways. First, it will be enlightening to investigate the ways in which surnames in particular, and gender more broadly, became closely tied to the concepts of property and inheritance. The legal recognition of personhood is implicit in the concept of property ownership. Given that the law regarding female property ownership shifted over time, there are considerable implications for women's standing in other areas, including their surnames. Second, an in-depth analysis of the relationship between culture, tradition, and law, seen through the lens of surname usage, will shed light on the underlying ways in which patriarchy became more firmly enshrined into cultural and legal systems. Surname usage and adoption was strictly a traditional practice, yet it became so entrenched that it eventually garnered legal backing when it encountered resistance. This was accomplished by virtue of a deceptively appropriated "tradition" that was not, in fact, traditional at all. The mechanisms by which this took place warrant further analysis. Third, a theoretical investigation into the reasons for the constriction discussed herein will be important; if coverture in fact became more restrictive over time, what reasons underlie such a fundamental shift? I believe these manifestations may be tied to political developments in the 17<sup>th</sup> through the 19<sup>th</sup> centuries, including theoretical concepts of citizenship, rights, exclusivity, and conquest, as well as imperialism and the building of the modern nation-state.

While many archaic notions regarding gender have been eradicated from modern American culture, we have been unable to fully, or even largely, shed the relics of the strict male-dominated naming systems that took hold in the past few centuries. This reinforces a patriarchal regime which deceptively claims that tradition, founded on the natural order, common sense, and divine right, support the current system, and the results have been profound and expansive. Increasingly strict surname rules for women served as a mechanism by which patriarchy was both reflected and reinforced. The system itself, not just its residues, is still with us today. We are left with a tradition that is not traditional. We would do well to recognize it for what it is and what it represents, in this, the most enlightened age the world has ever known.