TEXTUAL HARASSMENT:

A NEW HISTORICIST REAPPRAISAL OF THE PAROL EVIDENCE RULE WITH GENDER IN MIND

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Abstract

The year 2004 marks the four hundredth anniversary of the Parol Evidence Rule ("Rule"), the rule that dictates that the interpretation of a written contract should be determined solely according to its *text* and not influenced by prior contradictory external information. This article uses this anniversary to offer a fresh interdisciplinary view of the Rule. The analysis presents a unique contribution to the heated debate regarding the desired levels of formalism and textualism in present-day contract law by using New-Historicist tools.

Unexplored aspects of the roots of the Rule are illuminated through an in-depth investigation of the *first* case of the contractual Rule, the *Countess of Rutland's Case* ("Case").[1] To examine the *Case*, this article suggests the use of "Legal New Historicism"—researching both human and non-human "actors" who played a role in the Case, and re-narrating the story of Isabel, the Countess of Rutland. This method reveals rare maps and romantic stories, which lead to a critical look at the Rule's total exclusion of context and helps to expose its gendered nature.

This article further presents a close reading of the most influential paragraph in Sir Edward Coke's report of the Case.[2] Coke's words and phrasing should not be read as incidental choice of language, but rather as carefully planned and reflective of the dominant values of the legal culture within which they were written. The choice to exclude the context is far

1. 77 Eng. Rep. 89 (K.B. 1604).
2. *Id.*

from a mere omission. It can be seen as actively creating and then taking into account a *manufactured* context—one that does not exist—and is deeply patriarchal. An exploration of the political and cultural contexts of Coke's report explains the possible *motives* for establishing the Rule and phrasing it in such a manner. In the face of increasing threats, the Case played an active role in Coke's efforts to strengthen the diminishing status of the Common Law as a component of a marketing project aimed at improving the Common Law's image without significantly changing its content.

The Case is paired with an almost-twin contemporary case, *Clark v. Hannah-Clark*,[3] which resulted from a Hollywood scandal. Based upon the juxtaposition of this new legal narrative of Nicolette (Hannah-Clark) with the older story of Isabel (the Countess of Rutland), this article concludes that the flaws and biases underlying the Rule remain acute and call for a serious reconsideration of its justification. In this way, this article offers an original, and hopefully useful argument against excessive formalist textualism in present-day contract law.

Nicolette

She lost her home.

The judge simply wrote that she "has no interest in that property,"[4] but for her it was not merely "that property." It was home, the place where she had lived for more than ten years, ever since her son was born, and she *did have* an interest in it—the father of her son gave it to her.

So she appealed but failed again.[5] Neither the legal logic of this final decision nor its description of the facts could be reconciled with the full story she knew too well. Yes, of course, she worked "for John and Lynn, husband and wife, taking care of their young daughter,"[6] but that was not the reason she lived at the little cottage nearby their house. Why had the Judge not mentioned the undisputed fact that she lived there because John, who once was her boss, became her lover and the father of her child? Why is there no word about John's manifest insistence that she and their son live close to him while he kept his marriage; no mention of his frequent visits to the cottage?

And what about the period of time when she had to move out from the cottage until "it was improved with a paint job, a new carpet, and a new heating and air conditioning system"[7] due to its "bad condition?"[8] Despite

3. No. B157749, 2003 Cal. App. LEXIS 5058 (Cal. Ct. App. May 22, 2003) [hereinafter *Clark II*].

4. Clark v. Hannah-Clark, No. SC063529, at 2 (Cal. Super. Ct. Jan. 11, 2002) [hereinafter *Clark I*] (quoting Judge John H. Reid's words in this unpublished opinion).

5. *See Clark II*, 2003 Cal. App. LEXIS 5058, at *12 (holding that Nicolette had no interest in her home after she conveyed property to John Clark).

6. *Id.* at *2.

7. *See* Brief for Respondent John Clark at 2, *Clark II*, 2003 Cal. App. LEXIS 5058 (No. B1557749) [hereinafter John's Brief] (quoting John's brief that was submitted to the appellate court on November 22, 2002 in response to Nicolette's opening brief).

8. *Id.*

the decision's phrasing, the period between May 1997 and July 1998 was simply a break in the continuous stay Nicolette and her son had had with John to make an effort to bring Nicolette and his child back. John made a deed transferring the cottage to her in order to bring them back. As his wife Lynn had told the court, and as he had admitted, John transferred the cottage to Nicolette "by grant deed dated July 24, 1998" in order "to continue his contact" with her and their son and "to prevent them from moving out again."[9] Nicolette and her son moved back to the cottage, this time as its owners.

If the cottage was hers, how then did she lose it? Well, as both John and Lynn told the court, gifting the cottage had severe tax consequences for John.[10] Upon realizing his error, John asked for Nicolette's cooperation by requesting that she give the cottage back to him. He promised to transfer the cottage to her by "creating a trust for [their son's] benefit and placing the [cottage] in that trust."[11] Relying on John's promise, Nicolette returned the cottage to him by deed only five months after he had given it to her.

He never fulfilled his promise to create the trust.

She never recorded the promise in writing.

As a result, she lost her home.

INTRODUCTION

There is an ongoing and heated debate in contract law regarding the value of formalism, which entails loud calls for New Formalism.[12] Part of this debate raises the question of *textualism*:[13] to what extent should the

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9. *See* Brief of Respondent Lynn Redgrave at 5, Clark v. Hannah Clark, 2003 Cal. App. LEXIS 5058 (No. B157749) [hereinafter Lynn's Brief] (arguing that the trial court properly quieted title in the name of John Clark and Lynn Redgrave Clark).

10. *See* John's Brief, *supra* note 7, at 3 (stating that when John realized that gifting the cottage created a large gift tax, John planned "to take the house back before the end of the year, and transfer it in the new year to his son Zachary by way of a tax free irrevocable trust.").

11. Lynn's Brief, *supra* note 9, at 6.

12. *See, e.g.*, Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation,* 104 COLUM. L. REV. 496, 499 (2004) (stating that this debate has centered around the language of the "economic analysis of law"). New formalism attempts to "ground formalism in functional terms" by showing how "formal methods of interpretation help to forward practical goals such as efficiency, procedural fairness, and public accountability." *Id.* at 500; David Charny, *Formalism in Commercial Law: The New Formalism in Contract,* 66 U. CHI. L. REV. 842, 842-43 (1999) (observing that we are now in an anti-antiformalism phase which "calls for reflection on the roll of formalism in the current understanding of contract law"); Robert E. Scott, *The Case for Formalism in Relational Contract,* 94 NW. U. L. REV. 847, 851 (2000) (examining the role of courts using a formalist strategy which does not preclude courts from functionally interpreting a contract).

13. *See, e.g.*, Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1229-30 (1999) (arguing that the textualism trend threatens to cast aside from contract interpretation the important tenant of good faith in contractual relationships and relying solely on the contract provides only a "mere snapshot" of surface contractual relationships); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation,* 146 U. PA. L. REV. 533, 534 (1998) (outlining both the arguments favoring the court's reliance on extrinsic evidence when interpreting a contract and arguments favoring the court's exclusive reliance on the contract); Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its*

written version of the transaction be adhered (formalism), and to what extent is there room for considerations of fairness and distributive justice and so forth (anti-formalism).[14] The greater the formalist-textual position, the stronger the belief in adherence to the parol evidence rule.[15]

In this study, I will illuminate unexplored aspects of the parol evidence rule, in a manner that challenges and undermines the formalist-textual position from a new angle, namely a New Historicist one. This unique point of view provides innovative ammunition for the argument that excessive formalism may injure the weak. Therefore, a more flexible and inclusive approach is required.[16]

I first read the story of Nicolette losing her home as it was represented in the "official" judicial texts of both the initial and the appellate decisions. It was a disturbing story, at least for a reader with a chip on her shoulder.[17] Back then, I did not know a thing about the parties involved or about the Hollywood scandal that resulted from these deeds. I did not realize that "Lynn" is actually the celebrated actress Lynn Redgrave, or that "John" is

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Implications for New Textualist Statutory Interpretation, 87 GEO. L. J. 195, 195 (1998) (noting that in considering the legislative intent of a statute, the "New Textualist" movement excludes extrinsic evidence such as floor statements, committee reports, and anything not included in the text of the statute).

14. *See, e.g.*, Van Alstine, *supra* note 13, at 1230 (observing that institutional values in the law of contracts arises from the premise that law should protect fundamental expectations of good faith and reasonable conduct and that performance of a contract in such a manner need not require an express contractual agreement)*;* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts,* 2001 WIS. L. REV. 695, 700-01 (2001) [hereinafter *Rough Justice*] (acknowledging that a tide of formalism is sweeping over contracts scholarship and is reflected in the Restatement (Third) of Restitution, which narrows the coverage of restitution and avoids a general notion of fairness because a legal justification is preferred over a moral justification); Steward Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 779-80 (2000) [hereinafter *Relational Contracts*] (praising the works of Ian Macneil whose approach to understanding contracts reflects the actual positions of parties creating contracts). For example, consumers seldom learn in advance about warranty disclaimers or arbitration clauses, and they may not create contracts to reflect these situations. *Id.* at 780; *see also* John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 871 (2002) (considering whether a new theory such as neoclassicism can better serve the social institution of contracts because case law does not currently reflect such new theories).

15. *See generally* Van Alstine, *supra* note 13, at 1233-34 (illustrating that based on the parol evidence rule, the terms of a written contract are not to be varied or supplemented by extrinsic evidence). In general, the Rule requires courts to determine the intention of the parties based solely on the text of the document. *Id.* However, the Rule is much more complex and this complexity was elegantly captured by J. Thayer more than one hundred years ago. *See* James B. Thayer, *The "Parol Evidence" Rule*, 6 HARV. L. REV. 425, 425 (1893) (noting that "[f]ew things in our law are darker than [the parol evidence rule], or fuller of subtle difficulties"). Despite the broad acceptance of the textualist nature of the parol evidence rule, the rule also excludes textual evidence predating the integration of the written contract.

16. *See, e.g.*, *Relational Contracts*, *supra* note 14, at 800 ("To the extent we ignore custom and courses of dealing and performance, we reinforce the power of the formal written contract. This, in turn, reinforces the power of those who draft those documents, usually the lawyers who represent those with superior bargaining power.").

17. *See* MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 57 (Routledge 1992) (explaining that the female version of a reader with a chip on her shoulder is upset because of the vast mistreatment of women and this makes her read texts suspiciously, constantly looking for clues that women will be denied justice).

the Hollywood producer John Clark.[18] It just sounded rather peculiar, even unbelievable, that according to the law all that happened was the transfer of a $317,000 cottage as a mere gift followed shortly thereafter by the "cancellation and return" of that same gift.[19] Many questions came to my mind, but two of them were truly troubling: (1) was the transfer really a gift, and (2) did she actually intend to return it?

As to the first question, the first deed specifically emphasized that John "received nothing in return."[20] Is this a truthful declaration? It might be true if you are thinking in strictly monetary terms. It might be sincere if you are willing to ignore the value of a beloved son who lives nearby, as part of your family, a son who without knowing of your blood connection was taught to call you "Papa."[21] As the jewel in the crown of the market place, contract law is known for its obliviousness to non-monetary aspects of life. I was, therefore, annoyed but not surprised to learn how easy it was for the judges to embrace this narrow definition of contractual consideration, and as a result, to adopt the wording of the first deed as the whole truth and nothing but the truth—that the transfer of the cottage was an honest representation of a gift. Yet, this might be considered a marginal issue, since neither of the two courts decided the case on the merits of that first deed.[22] They both were willing to assume that, for a short while, Nicolette did indeed become the owner of her home. It is, therefore, my second question and the second deed that turned out to be crucial: had she or had she not intended to return the gift to John?

I read the appellate decision again and found out that Nicolette had tried to argue that the cottage was never meant to be returned to John. I also read how the court immediately silenced her. The legal tool that the court used to silence her emerges in footnote number six of the appellate decision:

> We observe Nicolette's claim that she deeded the property back to John in December 1998 in exchange for his promise to transfer the property in trust to their son raises an issue as to the parol evidence rule. As indicated, the December 1998 deed indicated it was a "cancellation and return of gift," which is inconsistent with Nicolette's position that she deeded the property back to John in exchange for his promise to transfer it to their son.[23]

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18. The much-published Hollywood scandal may make the story more titillating, but it could also give us a clue as to the power disparities between the parties in this case.

19. *Clark II*, 2003 Cal. App. LEXIS 5058, at * 3.

20. *Id.*

21. *See* John's brief, *supra* note 7, at 2.

22. *See Clark II*, 2003 Cal. App. LEXIS 5058, at *12 (concluding the decision by stating, "The [second] deed is dispositive because Nicolette therein reconveyed her interest in the property"). "Therefore, it is *unnecessary* to address any contentions by Nicolette relating [to] the [first] deed." *Id.* (emphasis added).

23. *See id.* at *11 n.6. Note that this application of the parol evidence rule is especially significant in light of the fact that California is most known for what Posner named a "soft parol evidence rule" (roughly that of Corbin and the Second Restatement of Contracts), as opposed to hard parol evidence rule (roughly the Williston, four-corners, plain-meaning approach). *See* Posner, *supra* note 13, at 534-35 (explaining that courts that apply the hard parole evidence rule look at the completeness of the document "on its face" while courts applying the soft parole evidence rule conclude that a document is complete only after

I was startled by the strict way the parol evidence rule enabled the courts since reading the written document narrowly enough to ignore the details of this salacious story. Just as the court interpreted the first deed as a gift for nothing, here again, it strictly followed the written words of the second deed. The result was, to my eyes, a legal tale that was in fact a castrated story. So many details were left out that the court's decision made no sense at all. My response was to search for more information and to try to fill in some of the holes of this "Swiss-cheese" story. This is why I looked for the parties' briefs; this is how I learned that no one, not even John, denied that what the courts viewed as a simple cancellation of a gift was in fact a much more complicated arrangement, one that wholly contradicted the final conclusion that Nicolette "has no interest in that property."[24]

In its use of the parol evidence rule, the court willfully ignored the voices that were trying to tell it what had actually happened. The court disregarded not only the interested testimony of Nicolette but also those declarations that had come from the opposing end of the field, from both John and Lynn. As far as the second deed was concerned, all three sides of this "romantic" triangle repeated the same story. Despite the words of the deed noting a cancellation and return of a gift, it was obvious that at the end of the day, the cottage was not supposed to revert to John but instead to be transferred by trust to Nicolette's and John's son. Naturally, each of the parties had their own explanation as to the motives that caused John to break his promise to create a trust,[25] but *everyone* agreed that the words of the second deed never reflected what was truly happening—everyone but the courts, that is. The courts utilized the parol evidence rule as a means of reshaping reality.

One might think that the use of the parol evidence rule as a legal tool for preferring contractual text over a fuller context is a good idea, and one might say that Nicolette is just a sad instance of a failed litigation. I just could not. I was concerned by the missing and misleading story, and I began to ask myself where and when such a rule was born and decided to "hit the road." My initial intention was to go back in time in order to better understand the past of the parol evidence rule. Ultimately, the journey became much more complex and intriguing. I return with a novel perspective, one which proves how contemporary the far past can be. What comes next is, therefore, a report of my journey—a journey to the roots of the contractual parol evidence rule, a journey not yet taken by others. The

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looking at extrinsic evidence); *see also* Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1, 12-13 (1995) (acknowledging that Corbin's liberal view of the parol evidence rule asks the trier of fact to make parol evidence determinations, whereas Williston's characterizes the rule more conservatively as a rule of substantive law for judges to decide).

24. *Clark I*, No. SC063529, at 2 (Cal. Super. Ct. Jan. 11, 2002).

25. *See* John's Brief, *supra* note 7, at 3 (indicating that John was upset by Nicolette's alleged new amorous relationship with his plumber); *see also* Lynn's Brief, *supra* note 9, at 7 (substantiating that when Nicolette began her relationship with Ernesto in 1998, John was upset and in December 1998, John and Nicolette exchanged a series of "angry 'love' e-mails").

goal of this report is to provoke fresh reconsideration of the aging parol evidence rule.

In Part I, I describe the journey's itinerary and elaborate on my use of New Historicist and feminist methodologies. Having done this, the actual journey begins and Part II focuses on the *Countess of Rutland's Case*[26] that is considered to have established the parol evidence rule four hundred years ago, in 1604. This part tells two versions of the Case's story: first the formal and thin account, and then a thicker description of what appears to have happened. An analysis of the significance of the remarkable disparity between these two versions concludes the section, highlighting the gender bias that is entailed in the legal decision to ignore the thicker version, i.e. the context. Part III offers a close reading of the most influential paragraph in Sir Edward Coke's report of the Case. Coke's words, I suggest, should not be read as incidental choice of language but should instead be seen as carefully planned and, as such, reflecting the dominant values of the legal culture within which they were written. Accordingly, Part IV focuses on the political and cultural contexts of Coke's report. Here, Coke's words are read in light of his broader legacy and in line with his other writings about the law in general and contract law in particular. Considered in this way, the Case plays an active and productive role in Coke's efforts to resist the amassing threats to the Common Law: the admiration of Roman law, the use of oaths, and the need to distinguish law and lawyers from the common people. Building on this idea, I propose that the Case can be viewed as a component of a marketing project aimed at enhancing the Common Law's popularity by offering a new and improved image of the same old product without significantly changing its real identity. This section ends with a comparison between Coke's marketing efforts and the labors of Shakespeare's Portia to gain authority in court. The comparison emphasizes the artificial nature of the parol evidence rule, and the Conclusion calls for a serious reconsideration of the Rule's necessity after four hundred years of an unveiled attempt to exclude real-life from the contractual interpretation process.

I. THE JOURNEY'S PLAN

A. Taking the New Historicist Trail

My vehicle during this journey is going to be a New Historicist one. For most scholars "New Historicism" is a literary practice aimed at interpreting literary texts with culture in mind.[27] Although used outside of the fictional arena and most famously by the anthropologist Clifford Geertz, whose works on "culture as text" inspired the literary New Historicist high-tide,[28]

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26. 77 Eng. Rep. 89, 89 (K.B. 1604).

27. *See generally* STEPHEN GREENBLATT, RENAISSANCE SELF-FASHIONING: FROM MORE TO SHAKESPEARE (University of Chicago Press 1980) (establishing Greenblatt as the founder of "New Historicism" and initiating "New Historicism" into literary studies).

28. Much of this inspiration came from Clifford Geertz's celebrated book, CLIFFORD

New Historicism is seldom used in legal works.[29] While I strongly believe that there is room for "Legal New Historicism,"[30] in promising critical method, I think that its rarity necessitates further development and discussion. Nevertheless, at this stage I will resist the temptation to do so and instead try to better explain my specific choice to apply New Historicism to the contractual parol evidence rule.

First, the Rule seems to the American legal mind as a given, and although many have spent time debating its extent, only a few have questioned its very existence. My turn to New Historicism is therefore an attempt to focus on this latter question of existence. Here, this practice can offer the option of de-familiarizing what is taken for granted by taking a closer look at the times of birth and the critical moments of emergence, the transference from non-existence to existence.[31]

Second, despite its procedural name, the parol evidence rule influences the substantive question of contractual *interpretation*. Such interpretation becomes highly textual as the Rule bans unwritten data, and the interpretative tool of New Historicism therefore seems especially appropriate to the project at hand. Highlighting this linkage between interpretation and the New Historicist practice, Geertz noted in a recent

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GEERTZ, THE INTERPRETATION OF CULTURES (Basic Books 1973). *See also* CATHERINE GALLAGHER & STEPHEN GREENBLATT, PRACTICING NEW HISTORICISM 28 (University of Chicago Press 2000) (indicating that Greenblatt and Gallagher were struck not only by Geertz's method but also by the lived life that he narrated and described with clarity).

29. *See* Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 CARDOZO STUDIES L. & LIT. 520 (2002) (arguing that New Historicism should not be viewed as a new requirement in analyzing the law). *But see* William W. Fisher III., *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1084 (1997) [hereinafter Fisher, *Texts*] (acknowledging that in American legal history, only Hendrik Hartog's two essays conform to the methodology of New Historicism); Ariela J. Gross, *Litigating Whiteness: Trails of Racial Determination in the Nineteenth-Century South*, 108 YALE L. J. 109, 119 n.23 (1998) (comparing the role of law in culture as studied in local cultural rituals and by New Historicist literary critics); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 899 (1985) (exploring the practice of pig-keeping in nineteenth century New York City in developing a study on the legal significance of American customs); Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J.L. & HUMAN. 79, 84-85 (1988) (examining the legal dependency that common law imposes on married women in the nineteenth century).

30. *Compare* Fisher, *Texts*, *supra* note 29, at 1065 (utilizing the name "New Historicist Legal History" as a phrase that encompasses a methodology for studying American legal doctrine and legal thought from a historical perspective), *with* Guyora Binder and Robert Weisberg, *The Critical Use of History: Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1150 (1997) (believing that "cultural criticism of law" and New Historicism merged into the field of "Cultural Studies"). Binder and Weisberg contend that "Cultural Studies" blurs the boundaries between the humanities and the social sciences because phenomena studied by social scientists (including historians) are viewed as social texts available for interpretation and criticism). I prefer to entitle the application of New Historicism to law as Legal New Historicism since I see its *general* critical potential one that is not limited to the legal-history arena.

31. *See* GALLAGHER & GREENBLATT, *supra* note 28, at 26 (demonstrating that this "closer look" has been described as "something akin to what in optics is called 'foveation,' the ability to keep an object . . . within the high-resolution area of perception"). In the cultural interpretation of "foveation," "the interpreter must be able to select or to fashion, out of the confused continuum of social existence, units of social action small enough to hold within the fairly narrow boundaries of full analytical attention, and this attention must be unusually intense, nuanced, and sustained." *Id.*

interview:

> When I work in the field on anything, whether it's something sort of airy-fairy like religion or something more concrete like a market, I start with the notion that I don't understand it. Then, I try to understand it better by tacking back and forth between large and little things. And that's what you really do when you "interpret."[32]

The main object of interpretation in this paper is the Case, where it is believed the parol evidence rule was "born." This Case serves, in New Historicist terminology, as the "textual unit" or as the "cultural text" under investigation. I use the legal report of the Case in a way similar to Geertz's use of his own field reports: as a textual unit, "an imaginative act;"[33] a "made, composed, fashioned" [34] thing, one which is no less suitable to literary criticism than the fictions that are part of the literary western canon. Indeed, the way Geertz, as an anthropologist, interprets his exemplary texts (his notes) is parallel to the way the legal reporter interpreted a legal case in England four hundred years ago. Both the anthropologist and the reporter can be compared to writers and the texts they composed can be read as "embedded in the cultures from which they come"[35] and as texts that "possess within themselves more and more of the culture's linked intentions."[36] My aim is thus to offer a "thick description"[37] of the legal report that brought us the contractual parol evidence rule, and to attempt to understand the imaginative universe within which the act of reporting this case was a sign.

Third, a critical look at the parol evidence rule, with its insistence on the autonomous nature of the contractual text and its rejection of non-textual materials, requires critical tools that address the specific phenomenon of textuality. Again, New Historicism seems apposite, for its roots lie precisely in strong resistance to literal criticism, which rigidly adopts a highly textual approach, namely new-criticism. The New Historicist focus on anecdotes as a powerful vehicle in the search for meanings, in plural, seems extremely useful here. These anecdotes constantly cross and blur the lines of relevancy, lines between inside and outside, center and margins, main and subordinate, lines which the parol evidence rule fiercely tries to establish and maintain.

Fourth, it is meaningful that the parol evidence rule was founded in the

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32. John Gerring, *Interview with Clifford Geertz*, *in* QUALITATIVE METHODS: NEWSL. OF THE AM. POL. SCIENCE ASS'N ORGANIZED SEC. ON QUALITATIVE METHODS 24, 26 (Fall 2003).

33. GALLAGHER & GREENBLATT, supra note 28, at 27.

34. *Id*. at 28.

35. *Id.* at 25.

36. *Id*.

37. *See id.* at 23 (showing that the term "thick description" does not refer to the length of the description). It derives from the philosophical works of Gilbert Ryle who in his essays on thinking used it with regard to description, which "entails an account of the intentions, expectations, circumstances, settings, and purposes that give actions their meanings." *Id.* at 23.

last days of Queen Elizabeth's reign and the first days of King James's reign, the early modern times of Tudors and Jacobeans. This period, with the plays of Shakespeare at its core, served as the nursery for the development of literary New Historicism,[38] and thus could naturally be revisited by the same method—this time with law, instead of literature, in mind.

Last, and apropos Shakespeare, New Historicism gives various texts the ability to converse or to participate in the cultural discourse of their time. It is under this New Historicist umbrella that I offer this kind of conversation between the chief text—the 1604 legal case—and Shakespeare's *The Merchant of Venice*. To use the words of Catherine Belsey, the fictional text of Shakespeare could "offer definitions and redefinitions which make it possible to reinterpret a world we have taken for granted."[39]

These five factors I have just outlined join together in one typical New Historicist desire, which is to explore how the old, long-forgotten textual unit that engendered the parol evidence rule was both culturally produced and culturally productive. This desire is grounded in the belief that New Historicism "entertains the possibility that any social or political document can be read not only instrumentally but also aesthetically, as describing the cultural forces that underlie its production and as reinterpreting cultural forms and norms."[40]

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38. *See generally* THE NEW HISTORICISM (H. ARAM VEESER ed., 1989). *See also* Walter Cohen, *Political Criticism of Shakespeare, in* SHAKESPEARE REPRODUCED: THE TEXT IN HISTORY AND IDEOLOGY 18 (Jean E. Howard & Marion F. O'Connor eds., Methuen 1987) (analyzing the Shakespearean period in terms of feminism, new historicism, and Marxism). *See generally* JONATHAN GOLDBERG, JAMES I AND THE POLITICS OF LITERATURE (John Hopkins University Press 1983); Jonathan Goldberg, *The Politics of Renaissance Literature: A Review Essay*, 49 ELH 514 (1982), Jonathan Goldberg, *Recent Studies in the English Renaissance*, STUDIES IN ENGLISH LITERATURE, 1500-1900, at 157 (1984) (reviewing Renaissance period literature); Stephen Greenblatt, *Invisible Bullets: Renaissance Authority and Its Subversion*, *Henry IV and Henry V*, *in* POLITICAL SHAKESPEARE: NEW ESSAYS IN CULTURAL MATERIALISM 18-19 (Jonathan Dollimore & Alan Sinfield eds., Manchester University Press 1985) (evaluating whether charges of atheism against Thomas Harriet, an Elizabethan mathematician, are true); STEPHEN GREENBLATT, SHAKESPEAREAN NEGOTIATIONS (1988) (analyzing late sixteenth century works); Richard Helgerson, *The Land Speaks: Cartography, Chorography, and Subversion in Renaissance England*, *in* REPRESENTATIONS 16 (1986) [hereinafter *The Land Speaks*] (discussing the historical significance of Christopher Saxton's collection of country maps); Jean E. Howard, *The New Historicism in Renaissance Studies*, *in* ENGLISH LITERARY RENAISSANCE 13 (1986) (explaining "new history" as evaluating literary texts of the English Renaissance in relation to other aspects of social formation in the sixteenth and early seventeenth centuries); Louis Adrian Montrose, *Of Gentlemen and Shepherds: The Politics of Elizabethan Pastoral Form*, 50 ELH 415 (1983); Edward Pechter, *The New Historicism and Its Discontents: Politicizing Renaissance Drama*, 102 PMLA 292 (1987); Don E. Wayne, *Power, Politics, and the Shakespearean Text: Recent Criticism in England and the United States*, *in* SHAKESPEARE REPRODUCED: THE TEXT IN HISTORY AND IDEOLOGY 47 (Jean E. Howard & Marion F. O'Connor eds., 1987).

39. Catherine Belsey, *Disrupting Sexual Difference: Meaning and Gender in the Comedies, in* ALTERNATIVE SHAKESPEARES 190 (John Drakakis ed., Methuen 1985).

40. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 477-78 (Princeton University Press 2000).

B. Turning onto the Feminist Path

In western culture and since the days of the Odyssey, a journey has been a masculine undertaking: Odysseus went away and Penelope, well, she waited at home. So my planned journey is in itself a feminist method. But in what other ways is a New Historicist journey connected to feminist voyages? I think it all starts with the use of "anecdotes" *against* the hegemonic order of things,[41] as a way of producing counter-narratives. To grasp this subversive spirit, listen to the New Historicists describing themselves by saying, "the undisciplined anecdote appealed to those of us who wanted to interrupt the Big Stories. We sought the very thing that made anecdotes ciphers to many historians: a vehement and cryptic particularity that would make one pause or even stumble on the threshold of history."[42] For feminists seeking ways to expose and resist male dominance, which is often so axiomatic by nature, these words represent a powerful potential. No wonder that "[s]ome of the legal scholars most interested in the promise of New Historicism are feminists."[43]

Feminist works[44] and New Historicism share not only the impulse to resist hegemony, but also elements of methodology.[45] Among these are the tendency to avoid grand theories, the attempt to refrain from abstract models and a zealous search for "the touch of the real,"[46] the connection to lived experiences which are patronizingly excluded under the general rules of hegemonic disciplines. These are the methodologies I will now attempt to employ.

II. THE COUNTESS OF RUTLAND'S CASE

A. The Thin Version

The *Countess of Rutland's Case* is considered to be the origin of the contractual parol evidence rule.[47] According to this belief, the rule was

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41. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining "hegemonies" as "[t]he predominant influence, as of a state, region, or group, over another or others"), *available at* http://dictionary.reference.com/search?q=hegemonic (last visited Feb. 13, 2005).

42. *See* GALLAGHER & GREENBLATT, *supra* note 28, at 51.

43. *See* Judy M. Cornett, *Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature*, 4 WM. & MARY J. OF WOMEN & L. 1, 7 (1997).

44. *But see* Linda E. Fisher, *I Know It When I See It, or What Makes Scholarship Feminist: A Cautionary Tale*, 12 COLUM. J. GENDER & L. 439, 440 (2003) (addressing the problem of essentialism using a narrative style).

45. *See* Judith Lowder Newton, *History as Usual? Feminism and the "New Historicism," in* THE NEW HISTORICISM 152, 152-53 (H. Aram Veeser ed., 1989) (defining New Historicism as "a set of assumptions and techniques given different articulation depending on the politics of the practitioners"). Newton also critiques New Historicism for not being attentive enough to gender biases. *Id.* at 155.

46. *See* GALLAGHER & GREENBLATT, *supra* note 28, at 20.

47. *See* Friedrich Kessler et al., CONTRACTS: CASES AND MATERIALS 823 (3d ed., Aspen Law & Business 1986) (stating that the parol evidence rule was designed to preserve the security of transactions); *see also* Charles T. McCormic, *The Parol Evidence Rule as a*

born in 1604, making it exactly four hundred years old. Now is a good occasion to celebrate, but also a suitable time for reconsideration. Even though the general principal that emerged from the Case was much quoted and is still quoted today,[48] few individuals are aware of its particulars.[49] One main reason for this is that the reports of the Case provide an extremely brief and slim description of what happened, what the parties pleaded, and what the court decided.[50] The first and better known report, written by Sir Edward Coke, is less than two and a half pages long[51] and the second, written by Sir George Croke, is only half a page.[52] However, the length of the texts is not the only problem for someone who seeks the legal story with its specifics. Croke's text does not tell us the facts at all and concentrates only on the legal principals upon which the Case was decided. Yet, even through Coke's longer text—which does state the facts—one finds it hard to grasp what the Case was all about, especially when trying to read this text today, from a distance of centuries. Other than "technical" barriers to the modern reader, such as the use of Law-French, "a totally artificial language,"[53] it seems that the text itself is cryptic to the point of being almost incomprehensible. It is a report of a case that refrains from telling us, perhaps refuses to tell us, a story.

The little that is possible to know from simply reading Coke's report is that Isabel, the Countess of Rutland and the widow of Edward, the third Earl of Rutland, sued Roger, the fifth Earl of Rutland. At the heart of these legal proceedings stood a manor called Eykering House and additional land of unclear nature named the "Lady Park"[54]—both located in "the county of

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Procedural Device for Control of the Jury, 41 YALE L.J. 365, 366-67 (1932) (indicating that one's memory of words spoken several months before is subject to a high degree of error); D. W. MCLAUCHLAN, THE PAROL EVIDENCE RULE 12 (Professional Publications, Ltd. 1976) (stating that the parol evidence rule arose because of the court's respect for the written word); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899-900 (1985) [hereinafter Jefferson Powell] (explaining that at common law, courts construed contracts strictly). Contracting parties were presumed to have understood the cannons of construction when drafting their contracts. *Id.*; *see* MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 138 (Duncker & Humblot 1999) (reporting that courts generally exclude evidence of parol agreements that alter the terms of a deed). *See generally* Lawrence M. Solan, *Theory Informs Business Practice: The Written Contract as Safe Harbor for Dishonest Conduct,* 77 CHI.-KENT L. REV. 87 (2001).

48. *See, e.g.*, Bank of Credit and Commerce Imternational Small v. Munawar Ali, (Appeal to the House of Lords decided on March 1, 2001) [hereinafter *BCCI Decision*], *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldjudgmt/jd010301 /credit-1.htm.

49. One important exception is Prof. Michael Macnair whom I deeply thank for sharing his knowledge with me.

50. *See* J.H. Baker, *Records, Reports, and the Origins of Case-Law in England, in* JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 21 (1989) [hereinafter Baker, *Records*] (demonstrating, as one of the most prominent contemporary authorities on English legal history, the early development of law reporting as a movement from record to report).

51. *See Countess of Rutland's Case*, 77 Eng. Rep. at 89.

52. *Countess of Rutland v. Earl of Rutland,* Croke Jac. 30, 79 Eng. Rep. 23.

53. W. H. Bryson, *Law Reports in England from 1603 to 1660, in* LAW REPORTING IN BRITAIN 113, 121 (Chantal Stebbings ed., 1995).

54. *See Countess of Rutland's Case*, 77 Eng. Rep. at 89.

Nottingham."[55] It appears from the thin description in Coke's report that the Countess blamed the Earl for breaking her house and close,"[56] but no further details are provided regarding this occurrence. There is no hint as to the nature of this breaking, but we are informed that the Earl's response was "not guilty."[57] We are then told (in a very complicated manner) that the dispute between the Countess and the Earl arose from a conflict between two written contracts that were both made by the late Edward Earl of Rutland with regard to the property, i.e. Eykering House and the Lady Park. In the first contract Edward covenanted (contracted by deed) with several trustees that he would convey to them the property in order to ensure his own and his wife's use of the property, during their life together. The covenant went on to say that if he, Edward, died first, then his wife, Isabel, would have the right to use the property for the rest of her life. According to this covenant, it was only after the Countess's death that the property was supposed to fall into the hands of Edward's heirs, who where represented by Roger, the current Earl of Rutland.

More than half a year later, the same Edward made another written contract. This later contract dealt with a much larger parcel of land, which contained many properties including Eykering House. This time the list of trustees was longer and they were supposed to make sure that the specified lands, including the disputed property, were transferred in male-tail only, which means from Edward directly to his male heirs without any rights whatsoever to be given to Isabel the Countess.

With regard to Eykering house and the Lady Park, the question was thus which of the two contracts should govern: the first, which would enrich the Countess, or the second, which would supplement the current Earl's fortune. Importantly, the witnesses' testimony came into the picture not as an independent source of information separate from the writings, but as a support for one of the two rival documents. As Coke's report tells us, "it was proved by diverse witnesses, that the said Earl Edward . . . told them, that the said countess should have the manor of E[ykering] for her jointure."[58] It appears that no one knows for sure whether Isabel, the Countess, or Roger, the Earl, won the Case. What is known through the reports is only the directory to the jury made by the judges. Coke reported that Chief Justice Popham, together with the court, set the general rule that a written deed will bar parol evidence. Coke reasoned that, "it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."[59]

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55. *Id*.

56. *Id.*

57. *Id*.

58. *Id*. at 89-90.

59. *See id.* at 90; *see also* Jefferson Powell, s*upra* note 47, at 948 (applying Coke's reasoning to understanding "interpretive intention" of the framers of the Constitution).

Ironically, the first parol evidence rule case was not decided upon this general rule and in fact the court instructed the jury to hear the witnesses despite the presence of a written deed. The reasoning behind this outcome has its roots in the Early-modern legal way of conveying land and is difficult to explain based on Coke's report alone. In the early seventeenth century, the declaration of a trust was only the initial step in the process of gaining the landowner's control over the future of his properties. In order to finalize the transaction, a further (and crucial) step was needed. Edward, the grantor of the property should have, in Coke's words, "acknowledged" his obligation to the trustees and the beneficiaries by executing a suitable "fine."[60] A fine was an artificial and fictional legal practice in which the people who were supposed to receive land sued the grantor of the land. In practice, such a suit was not litigated but, instead, a settlement was achieved and approved by the courts. In order to constitute a valid contractual obligation, this settlement had to be congruent to the primary deed and that is exactly where the two deeds in our Case failed. Although Edward did "acknowledge" both his first specific deed and his second more general one, on two consecutive days, it seems that "the fines actually levied were *inconsistent with either deed*."[61] Presumably, it was because of these special circumstances that the judges decided to allow parol evidence.[62] However, as I note above, the Case is better known for its setting of the general rule forbidding the parol evidence than for its concrete conclusion to allow such evidence in the dispute resolution at hand.

To sum up the thin version of the story, we could say that Isabel and Roger held contradicting documents that gave each of them the exclusive rights to Eykering House. In addition, Isabel had several witnesses who supported her claim and the court allowed hearing them as an exception to the more general rule that it had just penned: the parol evidence rule. This is indeed a poor story: who are these people, what were they fighting over and why, what is, or at least might be, the explanation for such great inconsistencies between the legal devices? In the next section, I will deal with these questions by sketching a thicker version of the story.

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60. *See id.* at 90.

61. *See* MACNAIR, *supra* note 47, at 139 (emphasis added) (explaining that the inconsistency of the fines made it necessary for parol evidence to be presented). The fine regarding the first deed was levied after the deadline set in the deed, while the fine regarding the second deed was probably levied without mentioning the Eykering house. *Id.* Support for this may be found in Moore's report regarding the Countess's unsuccessful attempt to litigate the same matter in the Wards. *Id.*; *see also* Sir Francis Moore, *Le Countee de Rutland's Cafe* [sic] (K.B. 1592), *in* CASES COLLECT & REPORT 723, 724 (2d ed. 1675) ("Another fine was levied of the other lands, *but not of Eckering* to the persons named in the second indenture . . . .") (emphasis added). Note the French-like name of the case, which nicely demonstrates the Law-French phenomenon. *Id.*

62. These special circumstances also disrupt the chronological order of prior and later between the two written documents, an order which might have been crucial, at least under a modern parol evidence rule.

1. The Main Characters

In constructing a thicker version of the Case, I will first focus on its three main characters. Viewing both humans and non-humans as active "actors" in the emerging plot, I will then continue with the disputed land itself, and conclude the review, briefly, with two additional minor characters. I will open with Isabel, the Countess of Rutland who gave the Case its name. However, it is worth emphasizing that researching a female figure, especially one from the Early-Modern times, is a much more complicated task than collecting information on her male counterparts.

a. Isabel Manners

Isabel was born in Vale Royal in Cheshire on an unknown date, to Julian Jennings and Sir Thomas Holcroft.[63] As such she did not originally belong to the English aristocracy of her time, a fact of great importance to our story. Isabel joined the nobility via her marriage to Edward Manners, the third Earl of Rutland, in 1573, by which she became the Countess of Rutland.[64] While married to Edward, Isabel enjoyed a luxurious life. She resided mostly in the lavish Belvoir Castle at that time—the residence of the Earls of Rutland and the seat of the Dukes of Rutland in our time. Her journey to London with her husband in 1586 involved "forty-one servants, including a chaplain, trumpeter, gardener, and apothecary."[65]

In 1575, Isabel and Edward's only child, a daughter named Elizabeth, could not be the heir to most of the family's estates according to the rules of the period.[66] After Edward's death, the fact that he and Isabel had no male heir to inherit most of the family's properties created a serious and ongoing conflict between Isabel and his male heirs. So bitter were the relationships that Isabel's brother in-law, John, Edward's younger brother, who became the fourth Earl of Rutland, tried to prevent her from receiving what was clearly promised to her under her late husband's will. John claimed that the huge payment for Edward's funeral should first be paid in full out of Isabel's share.[67] Isabel had to sue her brother in-law and seemed

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63. *See* LAWRENCE STONE, FAMILY AND FORTUNE: STUDIES IN ARISTOCRATIC FINANCE IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 173 (Clarendon Press 1973) [hereinafter STONE, FAMILY AND FORTUNE].

64. *Id.*

65. THE DICTIONARY OF NATIONAL BIOGRAPHY, Vol. XII 993 (Sir Leslie Stephen et al. eds., Oxford University Press 1917) [hereinafter DNB].

66. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at 174-75 (explaining that Edward left Elizabeth a total of seventeen manors, two rectories, and a London House in Saint Andrews Undershaft but adding that this property amounted to only one quarter of the total estate).

67. *See* Anastasia B. Crosswhite, *Note: Women and Land: Aristocratic Ownership of Property in Early Modern England*, 77 N.Y.U.L. REV. 1119, 1132-34 (2002) (arguing that John had ill will towards Isabel because she was one of two dowager countesses drawing substantial jointures from the Rutland estate, leaving him considerably poorer than his predecessors).

revenge was to try to take Isabel's custodial rights over her young daughter, maintaining that her bourgeois ancestry made her an unsuitable guardian for a great lady.[68] Evidently, Edward's male heirs were extremely unhappy about his decision to marry Isabel, especially since they had to support her throughout her widowhood after she contributed little, or nothing, to the family's fortunes. However, it is quite clear that it was the lack of a son that required Isabel to fight so desperately for her rights; just as she had to do later—in the Case with which we are dealing—against John's son Roger, the Fifth Earl of Rutland.[69]

b. Edward Manners

Edward Manners, the third Earl of Rutland, was born in 1549 to an aristocratic family and was the eldest son of Henry, the second Earl of Rutland. When he was fourteen years old his father died and he was made one of the Queen's wards under the close charge of Lord Burghley. It was this powerful man who took care of the young boy's fine education in "Oxford, Cambridge, and possibly Lincoln's Inn" and indeed Edward was later described as a learned man and a profound lawyer.[70] His legal talents were so remarkable that the Queen appointed him, on April 12, 1587, to the distinguished position of Lord Chancellor, a title he held for only a few days until his sudden death.[71] During his life, Edward showed both business skills and administrative abilities, and the Earldom of Rutland was described as flourishing under his hands.[72]

A salient feature of Edward's profile was his decision to marry Isabel. In a society obsessed with status and hierarchy, as Tudor England was, marriage was a key issue. Far from contemporary romantic images associated with the idea, marriage had a highly functional and pragmatic role, especially for members of the aristocracy. What was perceived as "good marriage" had little to do with love or with the quality of the relationship of the spouses. Instead marriage was about social rank, political power and, above all, property. The decision of whom to marry was seldom a matter of individual choice but rather a crucial part of a familial strategy. One major objective of marriage was the acquisition of

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68. *See id.* at 1134.

69. *See Countess of Rutland's Case*, 77 Eng. Rep. at 89 (noting that Eykering was to pass to Edward's son, but in the absence of a male heir, pass to his brother). Because Edward's will left a considerable amount of property to Elizabeth, Isabel's only daughter, the will created a hostile atmosphere as the male heirs stood to lose a considerable amount of property. *Id.*

70. STONE, FAMILY AND FORTUNE, *supra* note 63, at 173.

71. *Id.* at 173.

72. *Id.* at 174 (noting that Edward controlled every aspect of his property). He managed the property, he farmed the property, and he modernized the Rievaulx ironworks. *Id.*

property and the creation of political alliances.[73] In other words, in those days of "arranged marriages," the groom and his family married both the bride and the bride's family.

Other than the obvious aspirations to promote the family's status by means of the "proper" wedding, two additional factors played a role in shaping this familial perception of marriage, both of them tightly connected to our story. The first was the *dowry*: the considerable amount of property, or cash money ("portion") that was transferred from the bride's family to the groom's family in order to facilitate the marriage. In return for that fortune the bride was guaranteed an annual sum to support her in the event of widowhood, or a *jointure*—a term which plays an essential role in the Case. The burden of financing the daughter's dowry was heavy enough to make it a rational strategy for the whole family to cautiously choose its recipient. The wealth and the trustworthiness of the potential groom's family were relevant both in terms of the security the jointure would assure the bride and in terms of the ability of the bride's family to pay for the marriages of its other daughters as well.

The second factor was the *primogeniture*, a principal according to which the eldest *son* in each family inherited all its assets. The other children, both daughters and younger sons, were economically dependant on their father or on their father's sole heir, their elder brother. This principal contributed immensely to the importance of the eldest son's marriage since in each family he was the one with the better upward mobility chances—he was more likely to marry a wealthy bride accompanied by a hefty dowry that would add to the family assets and would suffice to cover the portions of his sisters.

It was against this concrete background that Edward decided to follow his heart and to marry Isabel. Taking into account the cultural and economic forces of the period sheds light upon such a decision and enables us to better comprehend its meaning. As the eldest son of his most respected aristocrat family,[74] Edward's marriage was of utmost importance and yet it appears he assumed the freedom not only to marry far beneath his social rank, but also to upset his family's expectations of a substantial dowry. For one thing, this marriage is presumed to have been considered, at the time, a *mésalliance*,[75] "a union between two people that is thought to

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73. LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 42 (Harper Torchbooks c.1977) [hereinafter STONE, FAMILY, SEX, MARRIAGE].

74. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at xv (choosing the Manners as one of the few families with which his book deals, Lawrence Stone writes that "all the examples are drawn from the very topmost ranks of the aristocracy, an élite within élite, members of a group which in France was known as 'Les Grandes'"). Later, Stone goes on to present the Manners as a family that "rose suddenly in the late fifteenth and early sixteenth centuries to become one of the leading members of the country's great landed aristocracy." *Id.* at 165. After describing the massive acquisition of land by Thomas, the First Earl of Rutland, Stone adds, "The result of this gigantic investment in real estate was to make the Manners family a major social and political force both in the north midlands, in Leicestershire, Nottinghamshire and Lincolnshire, and also in the north, in Yorkshire." *Id.* at 167.

75. *Id.* at 173.

be unsuitable or inappropriate."[76] More than that, Isabel's mother claimed that the Earl was so deeply in love that he was willing to marry the girl even *without a marriage portion*."[77]

But Edward's marriage was more than mere noncompliance with the cultural norms of his time.[78] It seems essential to understand that he preferred Isabel to several other brides, far more appealing in terms of money and position, and furthermore, had put his very future at risk (and consequently that of his younger siblings as well). As mentioned earlier, when Edward married, his father was already long dead and his future, as well as all of the family's estate, was controlled by William Cecil, Lord Burghley, the powerful guardian of the Elizabethan aristocracy.[79] Despite his general obedience to his influential guardian,[80] Edward refused Burghley's suggestion to marry his daughter, an offer that few would have dared to decline and many would have loved to accept.[81] The exceptional nature of Edward's decision to marry Isabel should, therefore, be viewed in a multilayered way, taking into account its many dimensions that, combined together, reinforce the impression that this rare marriage could only have been based upon love.[82]

c. Roger Manners

The fifth Earl of Rutland and the defendant in our Case was born in 1576 as the eldest son of John, the aforementioned fourth Earl of Rutland who fought so bitterly against Isabel. When his father died, Roger was still underage but wealthy enough to induce Lord Burghley to engage himself in a fierce contest over the young Earl's ward. This contest was won by Burghley, previously Edward's guardian and now entrusted by the Queen

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76. OXFORD ENGLISH DICTIONARY 2001 [hereinafter OED], *available at* http://dictionary.oed.com (last visited Feb. 18, 2005).

77. STONE, FAMILY AND FORTUNE, *supra* note 63, at 173 (emphasis added) (stating that this claim might be honest since, in Stone's words: "No marriage contract has in fact survived, so there is no means of knowing whether or not the Earl obtained a substantial cash sum on his marriage with Isabel on 1573"). My own correspondence with the representatives of Belvoir Castle supports the above conclusion of Stone regarding the lack of marriage contract.

78. *But see* THE COLLECTED ESSAYS OF CHRISTOPHER HILL (VOL. 3): PEOPLE AND IDEAS IN 17TH CENTURY ENGLAND 203 (1986) [hereinafter HILL] (criticizing the assumption that love before marriage was rare at the end of the sixteenth century).

79. *See infra* notes 123-24 and accompanying text (showing that since Lord Burghley was included in the text of Coke's report, I will discuss his character in more detail below).

80. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at 172-73 (describing Edward as one of the most obedient and grateful wards of Lord Burghley, a fact that makes his refusal to marry his mentor's daughter even more significant).

81. *See* DNB, *supra* note 65, at Vol. XII, 934 (suggesting that Edward married Isabel after negotiating with several other ladies). Years later, Edward insisted his daughter to marry upwardly, a command she obeyed by marring Lord Burghley's grandson, Sir William Cecil, the second Earl of Exeter. *Id.*

82. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at 173 (detailing that Edward, despite disapproval, married Isabel without a "portion"); *see also* Crosswhite, s*upra* note 67, at 1133-34 (noting that Isabel was supposed to inherit Newark Castle, its demesnes, and her own inheritance from her mother).

with the custody over another Earl of Rutland, Roger.[83] One of Burghley's first moves was to send Sir Roger's mother Elizabeth Vol. 13:2 Roger back to Queens' College in Cambridge, where he was educated for many years. The tension between Burghley and Elizabeth was so acute that Roger had to ask his permission to visit his own mother.

So different from his talented late uncle Edward, Roger seems to have been a big disappointment to his mentor, both in terms of education and business skills. While tracking the young Earl's expenses Stone notes: "Though he did buy a Livy, it is noticeable that it was in translation, and his very limited expenditure on books suggest a young man of some natural intelligence but who had failed to master the classics and whose main interests lay elsewhere."[84] Roger was quite adventurous and spent a lot of time traveling the world, probably more than he could afford as the head of the Earldom. When Roger was not even twenty, and shortly after his mother's death in 1595, Lord Burghley approved his journey to the continent—but wrote bluntly that the young Earl knew very little about his estate.[85] It was in Paris, toward the end of his "Grand Tour" in 1597, that he first met the Earl of Essex, an acquaintance that would have enormous influence on his life as well as an interesting effect on our legal story.[86]

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83. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at 177.

84. *See id.* at 179. Titus Livy (59 B.C. to A.D. 17), the famous Augustan historian, was born in the Northern Italian city of Padua and his *History of Rome* was and still is one of the most popular pieces of classical literature. But compare Stone's conclusion to an opposite view of Roger made by those who view him as the actual author of Shakespeare's works. *See* ILYA GILILOV, THE SHAKESPEARE GAME: THE MYSTERY OF THE GREAT PHOENIX (Gennady Bashkov et al. trans., 2003) (offering the most comprehensive work that supports the thesis that the Fifth Earl of Rutland and his wife were responsible for Shakespeare's works and citing earlier works that suggested the same conclusion). The general argument is that Roger was Shakespeare because, among other things, his life parallels that of Shakespeare's life as presented through the Plays. For instance when Roger had studied at Padua University in 1596, two of his fellow students were Danish noblemen named Rosencrantz and Guildenstern "and several years later they lent their names to two inseparable courtiers" in Shakespeare's "Hamlet." *Id.* at 87. Later Roger was sent by King James to Denmark, and after he came back the original version of the same play (known as Quarto 1) was changed and extended. Remarkably, the revised version (known as Quarto 2) reflects a more realistic description of Denmark. *Id.* at 286-89; *see also* JOHN MITCHELL, WHO WROTE SHAKESPEARE 211-22 (1996) (weighing the evidence scholars have presented to support the claim that Roger wrote some or all of Shakespeare's works and concluding that the events in Roger's life give credibility to their theory).

85. *See* DNB, *supra* note 65, at vol. XII, 940.

86. *See id.* at vol. V, 875-90. (showing that Robert Devereux, the second Earl of Essex (1566–1601) was an English courtier and favorite of Queen Elizabeth I). Succeeding to the earldom on the death of his father, he too (like Edward and Roger Manners) came under the guardianship of Lord Burghley. *Id.* When he returned to England after serving as a cavalry officer under Robert Dudley, Earl of Leicester, he soon became a marked favorite of the queen. *Id.* at 876. Essex became a national hero when he shared command of the expedition that captured Cádiz in 1596, but he failed the next year in an expedition to intercept the Spanish treasure fleet off the Azores. *Id.* at 879-81. In 1599, at his own demand, he was made Lord Lieutenant of Ireland and sent there with a large force to quell the rebellion of the earl of Tyrone. *Id.* at 883. Failing completely to accomplish his mission, he made an unauthorized truce with Tyrone and returned to England. *Id.* He was confined by the Council, and it was eight months before he was tried for disobedience by a special council and deprived of his offices (1600). *Id.* at 885. He was soon released but was banned from the court. *Id.* Still popular, Essex planned a coup that would oust the enemy party and establish his own about the queen. *Id.* To this end he sought support from the army in Ireland and opened negotiations with James VI in Scotland, but these efforts failed.

Charmed by Essex, Roger followed him to the Azores and continued to spend the rest of his inheritance in his family's business.

In the years that followed, Roger is described as a reckless spender who would, for instance, pay huge amounts of money for princely clothing. According to Stone, his "rate of expenditure was almost certainly higher than that of any other private individual in the country."[87] That irresponsible attitude, combined with the need to pay for his sisters' marriages led Roger and his dependants into a severe economic crisis that lasted from 1601 to 1606,[88] significant years in the legal fight with Isabel. There can be no doubt that in those years, Roger found himself under heavy financial pressure. He had to borrow large sums of money for a mortgage and was also quoted as requesting Royal help stressing "the weakness of my estate and greatness of my debts."[89]

What had deepened the crisis even more was Roger's involvement in the Essex revolt, for which the Privy Council fined him the enormous sum of £30,000.[90] This incident, further proof of his impulsive nature, was not only an economic disaster but also one of Roger's most serious mistakes. As mentioned above, Roger was one of Essex's admirers and close friends. As a result, on February 8, 1601, when Essex called his supporters for help, Roger did not hesitate and immediately gathered around Essex's house.[91] It is worth mentioning here that Lord Essex's relationship with Queen Elizabeth had just reached its lowest point ever. Only months after Sir Edward Coke—as one of Essex's prosecutors for his Ireland fiasco—dared

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Id. at 886.

87. *See* STONE, FAMILY AND FORTUNE, *supra* note 63, at 180.

88. *See id.* at 184 (explaining that only by 1606 Roger resolved the worst of his financial difficulties which were created during his youth).

89. *Id.* at 184.

90. *Id.* at 182.

91. *See* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 280 (2003) [hereinafter BOYER, SIR EDWARD COKE] (writing that after Essex attempted to conquer Ireland, he returned home to either assassinate the Queen or beg for her mercy but when she realized he had no army, she had him attested). Following Essex's disgraceful failure in Ireland, he was put under house arrest until the Queen released him. *Id.* at 280. Then two major events occurred: the first was the completion of the legal proceeding against Dr. Hayward who wrote a history book about a king who was deposed and murdered for his ill governance. *Id*. at 277-88. It was Coke who forced a confession out of Hayward and who wanted to use his dedication to Essex in order to bring charges against the Earl as well. *Id*. at 279. In the end, no charges were formally brought, but the Queen ordered the renewal of Essex's house arrest. *Id.* at 279-80. The second event was the special performance of Shakespeare's *Richard II*, on Saturday February 8, 1601, an event that was organized on Essex's behalf and paid for by his aides. *Id*. at 286. *Richard II*, written around 1595, is the first play in Shakespeare's second "history tetralogy," a series of four plays that chronicles the rise of the house of Lancaster to the British throne, which closely parallels Essex's life and rebellion against Elizabeth I. *Id.* Richard II, who ascended to the throne as a young man, is a regal and stately figure, but he is wasteful in his spending habits, unwise in his choice of counselors and detached from his country and its common people. When Richard departs to pursue a war in Ireland, his cousin, Henry Bolingbroke assembles an army and invades England. *Id.* The commoners welcome this invasion and Richard's allies in the nobility desert him to defect to Bolingbroke's side as he marches through England. *Id.* By the time Richard returns from Ireland, he has lost control of his country. *Id.* Bolingbroke is crowned King Henry IV while Richard is imprisoned in a remote castle. *Id.* The Queen is known for saying later: "I am Richard the Second, know ye not that." *Id.*at 287.

to blame the Earl for disloyalty, the Queen was ready to follow him and distrust her favorite Earl. New indications arose and she was now even more convinced that Essex was indeed plotting against her.[92] When the Privy Council sent for Essex to question him, Essex claimed to be ill and refused to come.

"No sooner was the messenger gone than the Earl received an anonymous note, warning that he was in danger and had best provide for himself. Essex sent out runners over the city; all night they spread the alarm . . . ."[93] It was in response to this alarm that Roger was waiting at dawn in front of Essex's house, together with several other Earls and hundreds of gentlemen. He was standing there, on this Sunday morning, when a special and much respected mission sent by the Queen arrived at the courtyard. Among them was Chief Justice Popham—the leading judge in our Case. As if to prove the Queen's suspicions, Essex led his honorable guests to his library and . . . locked them in![94] He then left home and ran to the streets waving his swords and yelling "For the Queen, for the Queen!"[95] His aim was the royal palace, but to Essex's grief, not many were willing to risk themselves and join him and his small group of followers, Roger included.[96] After a violent encounter with a few soldiers Essex fled back home by boat, only to discover that his hostages were gone. "By midnight, Essex was in prison and his friends captured: the Earls of Southampton and *Rutland*; the Lords Sandys, Monteagle, Cromwell; Sir Gilly Merrick . . . Desperate men; ruined men, now, scattered in prisons throughout the city."[97]

On May 19, 1601, Essex was brought to trial and his prosecutor was none other than Coke, who bought himself worldly glory through this trial. Preparing himself for his big performance, Coke wrote himself lengthy notes which indicate how central Roger's involvement was perceived to be.[98] At a crucial point in the trial, Coke called Chief Justice Popham as a witness, and "[w]rapped in the majesty of judicial scarlet, Popham stepped from the bench and stood waiting for the first question."[99] Popham testified in detail not only about his traumatic imprisonment, but also about things he heard while crossing Essex's courtyard on the way to his house.[100] It is probable, therefore, that he also recognized our Earl of

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92. *Id.* at 276-80.

93. CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE: 1552-1634, at 132 (1956).

94. *Id.*

95. *Id.*

96. *Id.* at 133.

97. *Id.* at 134 (emphasis added).

98. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 281 ("'*Traitors' names*', Coke writes in the margin of his memorandum, and begins taking examinations. *The Earl of Rutland*, Bridget Paston's cousin, confides in his kinsman.") (second emphasis added).

99. BOWEN, *supra* note 93, at 149.

100. *Id*.

Rutland standing there on this Sunday morning.[101] By the end of this long day of legal wrangling, Essex was found guilty of treason and was beheaded.

The Earl of Rutland was more fortunate. His life was saved, but he suffered a substantial fine, larger than that of any of Essex's other followers, a fact that serves as a further indication of just how seriously his contribution to the plot was perceived. Based on a gloomy description of his financial plight, this fine was later reduced to around £18,000. The remainder was never enforced and was finally cancelled by King James.[102]

d. The Disputed Land—Eykering House and the Lady Park

Bruno Latour has explained how non-human objects may play an important role in a story.[103] Inspired by such theories,[104] it seems valuable to take a detour to Nottinghamshire, England, where the manor over which Isabel and Roger fought once stood. What was named in Coke's report of the Case as "Eykering" is to be found today in *Eakring*—a village in the center of Nottinghamshire.[105] "Eykering" was indeed one of the several spellings of this place's name, a spelling that apparently evolved from the Old Norse origins of the name as "Eikhringr," meaning a *ring of oaks*.[106] It is unclear exactly how and when this property came into the Manners' hands, but in the Doomsday survey of 1086, Eakring was listed as Echering and most of the village and its lands were divided between two manors.[107] One of these manors was handed down through the Eakring family, the Lexingtons, the De Suttons and finally, the De Roos family, which merged with the Manners and became the Earls of Rutland.[108]

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101. This might have influenced his decision against Roger in our Case and could explain the puzzling exception to the newborn parol evidence rule.

102. STONE, FAMILY AND FORTUNE, *supra* note 63, at 183.

103. *See* Bruno Latour, *How To Write The Prince for Machines as Well as for Machinations*, *in* TECHNOLOGY AND SOCIAL PROCESS 20, 28 (Brian Elliot ed., Edinburgh University Press 1988) (suggesting that "it is precisely when turning towards the non-human elements [material artifacts] that the polemical, controversial and strategic discourse should increase, not decrease").

104. *See* Thomas F. Gieryn, *What Buildings Do*, 31 THEORY & SOC'Y 35, 35 (2002) (arguing that buildings both stabilize social life and are subject to wrecking balls or discourse); *see also* Pierre Bourdieu, *The Kabyle House or the World Reversed*, *in* ALGERIA 1960, at 133 (Richard Nice trans., 1979) (one of the most renowned works about buildings).

105. There has been a great variation in spellings over the centuries, all of which were pronounced as "Aykering." The pronunciation has changed only in recent years to match the modern spelling.

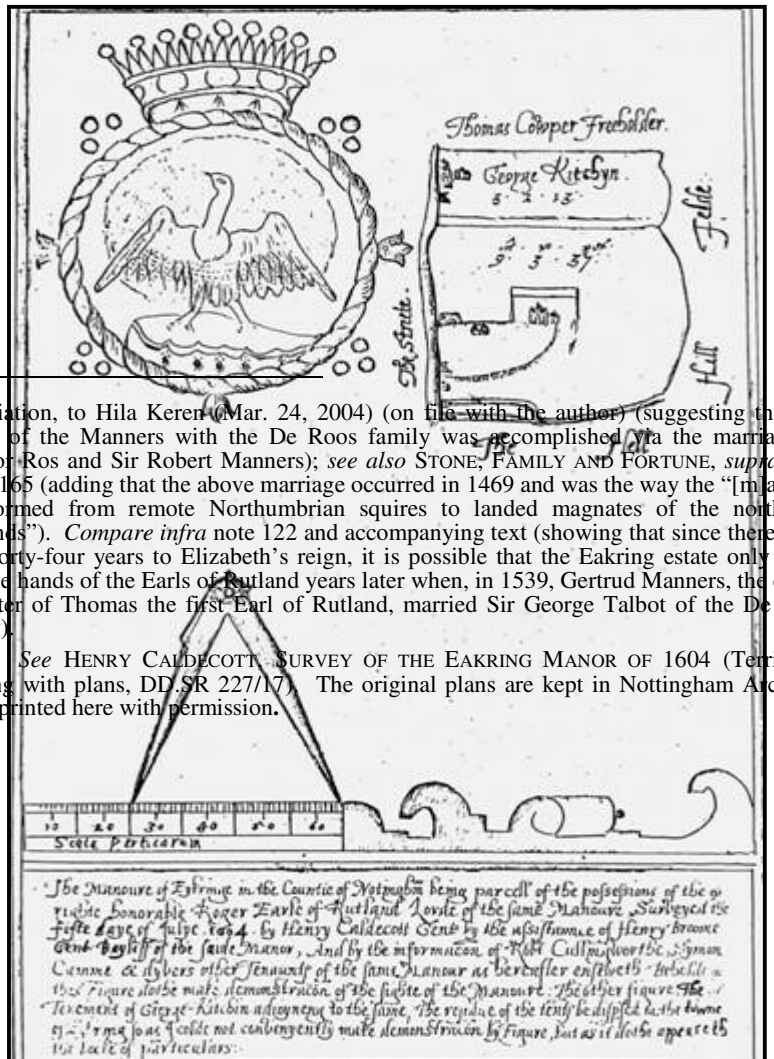
106. Old Norse is the language spoken and written by the inhabitants of Scandinavia around 1000 A.D. and earlier. The modern Nordic languages of Swedish, Danish, Norwegian, Icelandic and Faroese descended from Old Norse. The original Old Norse "Eik-hringr" dates back to the mid-ninth century when the Danish settled in the English Midlands.

107. THE DOOMSDAY BOOK is a great land survey from 1086, commissioned by William the Conqueror to assess the land and resources owned in England at the time, and the amount of taxes he could raise. The information collected was recorded by hand in two huge books which provide extensive records of landholders, their tenants, the amount of land they owned, how many people occupied the land (villagers, smallholders, free men, slaves, etc.), the amounts of woodland, meadow, animals, fish and ploughs on the land and other resources.

108. *See* Email from Mr. Derek Walker, Chairman of the Nottinghamshire Local History

Most attractive for our purposes is the fact that in 1604—the year of the Case—Eakring itself was subject to a detailed survey performed by a gentleman named Henry Caldecott who, with the assistance of some tenants of the same manor, drew beautiful plans of the place and its surroundings.[109] This survey allows us a rare peek at the disputed territory as it looked four hundred years ago. But the survey does much more: it sheds light on the term "Lady Park" as it appears in Coke's report of the Case, and it also gives us a serious clue regarding the unknown result of this Case.

Let us start from *the end*. The plans that resulted from this survey do not mention Isabel, the Countess of Rutland, in any way. Instead, at the bottom of the plan that depicts the manor itself there appear words of explanation:



Association, to Hila Keren (Mar. 24, 2004) (on file with the author) (suggesting that the merge of the Manners with the De Roos family was accomplished via the marriage of Eleanor Ros and Sir Robert Manners); *see also* STONE, FAMILY AND FORTUNE, *supra* note 63, at 165 (adding that the above marriage occurred in 1469 and was the way the "[m]anners transformed from remote Northumbrian squires to landed magnates of the north-east midlands"). *Compare infra* note 122 and accompanying text (showing that since there were only forty-four years to Elizabeth's reign, it is possible that the Eakring estate only came into the hands of the Earls of Rutland years later when, in 1539, Gertrud Manners, the eldest daughter of Thomas the first Earl of Rutland, married Sir George Talbot of the De Roos family).

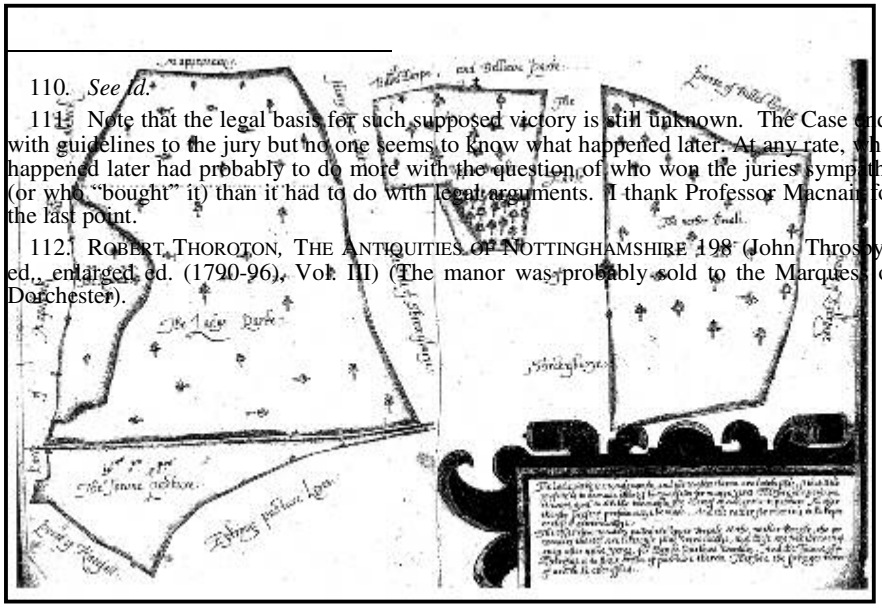
109. *See* HENRY CALDECOTT, SURVEY OF THE EAKRING MANOR OF 1604 (Terrier of Eakring with plans, DD.SR 227/17). The original plans are kept in Nottingham Archives and reprinted here with permission.

> The manoure of Eykringe in the Countie of Notinghm being parcel of the possessions of the righte honorable Roger Earle of Rutland Lorde of the same Manoure. Surveyed the fifte daye of Julye. 1604.[110]

These words, written in the same year as the judicial decision in our Case, suggest that it was Roger who ultimately won the legal battle as well as the disputed land.[111] Further evidence for Roger's victory, albeit less conclusive, is the fact that it was he who sold the manor to others.[112]

Other than "Eykering House," the manor house referred to in the above quote with its associated lands, the dispute in the Case concerned an additional item called the "Lady Park." It is impossible to know why "Lady Park" warranted special reference in the Case and was not simply considered part of the Eykering House, especially since it was close to the manor *house* (or "Hall") itself.

However, the same survey from 1604 provides us with a picture of this mysterious "object." This magnificent illustration of the park portrays an enclosed land full of tiny sketches of trees.



110. *See id.*

111. Note that the legal basis for such supposed victory is still unknown. The Case ends with guidelines to the jury but no one seems to know what happened later. At any rate, what happened later had probably to do more with the question of who won the juries' sympathy (or who "bought" it) than it had to do with legal arguments. I thank Professor Macnair for the last point.

112. ROBERT THOROTON, THE ANTIQUITIES OF NOTTINGHAMSHIRE 198 (John Throsby's ed., enlarged ed. (1790-96), Vol. III) (The manor was probably sold to the Marquess of Dorchester).

As shown in the plan above, the Lady Park was adjacent to what is titled in the plan as "Eykringe pasture Leyes" and lay just over a mile from the manor itself. At the lower right-hand corner of the plan, an economic analysis is offered, reprinted here with no change of spelling:

> The Ladie parke is a woodgrounde, and the wooddes therin are lately solde, so that little profitte is to be made thereof by woodsales for manye yeres. Therfore in my opinion it were good to stubbe the moste p[ar]te thereof & convert it to pasture. So that thereby present profitte maye be made, And the rather for that it is to be kepte enclosed continuallye.[113]

The information provided by this text gives us reason to suspect that due to the sale of all its wood, the Lady Park's value decreased significantly during the years between the making of the indentures and the legal debate regarding their meaning.

Having understood what the "park" was, we now turn to the "lady" that gave it its name. One of the most appealing and symbolic possible explanations is that Isabel was not the first wife to receive this land from her husband and that the park was given to one of the Ladies in past generations as a *morning gift*, a gift given to the bride by her newly wedded husband in exchange for her loss of virginity upon the consummation of their marriage.[114] One possibility may be that this part of the estate was given to Gertrud Manners upon her marriage to George Talbot in 1539.[115] Support for this may be found in an indenture made by Gertrude's father, Thomas the first Earl of Rutland:

> An Indenture between Francis Talbot, Earl of Shrewsbury and Thomas

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113. *See* CALDECOTT, *supra* note 109. The original plan is kept in Nottingham Archives and is reprinted here with permission.

114. *See* Email from Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association, to Hila Keren (Dec. 30, 2003) (on file with the author).

115. *See id.*

> Manners, Earl of Rutland, whereby the former leaves to his son George, Lord Talbot on his marriage with Gertrude, daughter of the latter, the Manor of Rufford, the Lordship of Ekeryng, with lands in Rufford, Ekeryng and Kirketon. Co. Nottingham.[116]

Another charming possible explanation for the "lady" in "Lady Park" concerns female deer hunters. It seems that the term "Lady Park" did not appear until Elizabethan times and may have referred to the Queen herself. It was accepted that the monarch, invariably a man up until the time of Elizabeth's sister, Mary, and Elizabeth herself, took part in the exercise of hunting and particularly in the hunting of deer. But this was a very physical activity for which a woman was notconsidered suited, and so the "Lady Park" developed whereby Elizabeth and her ladies would sit in carriages and the deer would be driven past them, allowing the ladies comfortable aim at the deer. This activity became fashionable in Elizabethan times and could explain why the name does not appear earlier in Eakring. The Eakring Park was quite small and perhaps particularly suitable for this type of hunting. Taking all this into account, it is probable that Isabel hunted in this style in the Rutlands' Lady Park at Eakring.[117]

On a more general note, it is interesting that the findings of the 1604 survey seem to indicate that the overall size of the Eykering House, together with its surrounding lands, was 1,015 acres (including land held by tenants), a relatively modest estate in view of the Rutlands' vast possessions at the time.

2. The Minor Characters

a. Lord Burghley

Lord Burghley appears in our story explicitly in the second written indenture, where Edward names him, among others, as responsible for the transference of a long list of properties to his male heirs. Indirectly, as we have already seen, Lord Burghley was heavily involved with the Manners in many ways and hence it seems worthwhile to try and learn more about him. Born in 1520 as William Cecil, Lord Burghley was highly educated in what was at that time the best college in England: St. John's College in Cambridge. Curiously, in a way that might remind us of Edward Manners's marriage to Isabel, he married a woman of "slender means"[118] against his father's will after the failure of his father's ambitious plan to prevent this by moving him to another university.[119]

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116. *See* Email from Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association, to Hila Keren (Mar. 5, 2004) (on file with the author) (stating that the indenture is dated 32 Hy.VIII (the thirty-second year of King Henry's reign, i.e. 1540/1541). The original document is kept in the Nottinghamshire Archives Office as a *Savile of Rufford* deposit: DD.DR 207/338.

117. Email from Mr. Derek Walker, Chairman of the Nottinghamshire Local History Association, to Hila Keren (Mar. 25, 2004) (on file with the author).

118. *See* DNB, *supra* note 65, at Vol. III, 1315.

119. *Id.*

Cecil became one of Queen Elizabeth's chief advisors for decades. Upon her accession to the throne, she immediately made him Chief Secretary of State,[120] a position he held until 1572, whereupon he was made the Lord Treasurer until his death in 1598.[121] Despite the fact that Elizabeth was not generous in creating new peerages,[122] she raised her loyal advisor to the peerage in 1571 giving him the title of Lord Burghley—a decision that reflects well the power he gained in the days of the Elizabeth's reign. Authors describe Lord Burghley as the most influential man in the Elizabethan era.[123] In the context of our story, it may be enormously important to understand the audacity and impact of Edward's decision to refuse to marry this dominant man's daughter, as well as the extraordinary and high value of the eventual marriage of Edward's daughter to Burghley's grandson.

b. Gilbert Gerard

Sir Gilbert Gerard's name appears on both of the contradictory indentures, a peculiarity that did not escape Coke's attention.[124] Thus, it is important to explore Gerard's connection to the Manners and the legal skills he brought to his responsibilities under these documents. In this regard, it is significant to learn that Gilbert Gerard and Isabel were first-cousins: his mother, Margaret Holcroft, was the sister of Isabel's father. In addition, his co-trustee to the first indenture was Thomas Holcroft, Isabel's brother, which our Case notes as Edward's "brother" with respect to his relation as a brother-in-law.

Furthermore, Gerard received a fine legal education at Gray's Inn and his legal reputation was so exceptional that Elizabeth nominated him to the influential position of Attorney General soon after her accession.[125] Thirty-seven years later she would nominate Coke, the reporter of our Case, to the same influential position.[126] In 1581, Gerard climbed another step up the

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120. *Id*. at 1317.

121. *Id.* at 1319.

122. There were only fifteen new creations in her forty-four years of reign.

123. *See, e.g.*, ANNE SOMERSET, ELIZABETH I, 62-64, 279, 519-520 (Knopf 1991). *See generally* CONYERS READ, LORD BURGHLEY AND QUEEN ELIZABETH (Knopf 1960).

124. In an edition of Coke's Reports from 1826 Coke printed a remark next to one of the appearances of Gilbert's name stating: "note, Sir Gilb. was party to both the indentures." *See* THE REPORTS OF SIR EDWARD COKE, KNT. [1572-1617] IN THIRTEEN PARTS (Butterworth and Son 1826). This rare edition is kept in the Robbins Collection of the Law library of University of California, Berkeley. The Case is included in a chapter titled "Cases of Covenants, Agreements &c. concerning Leases Assurances &c."

125. *See* DNB, *supra* note 65, at Vol. VII, 1097 (stating that Gerard "never took the degree of serjeant-at-law" due to his appointment as Attorney General).

126. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 252-53 Coke described the Attorney-General office as:

> one of the greatest, and largest, concerning the possessions of the Crown, an extraordinary place for the preservation of the King's royal prerogatives, and inheritances, so that by this diligent care, he may increase them, and by the neglect of his duty, he may more diminish them than any of his Majesty's ministerial office.

Id.

legal ladder of the times in attaining the position of Master of the Rolls—an achievement he held until his death in 1593.

3. Wrapping-up the Thicker Story: The Outlawing of Context

The thicker story sketched above adds some context to the slim text of the report of the *Countess of Rutland's Case*, a context so absent from Coke's description. Going back to the central question of the two conflicting indentures made by Edward Manners, it now seems more evident that the context of the Case speaks loudly for the first indenture, which promised the land to Isabel. The indications are numerous, and I will only point out a few. Edward, a very talented and experienced legal professional, took the legal effort of making a specific indenture that was dedicated to Eykering—one relatively small and marginal property among the many assets of the prosperous Manners family. For the purposes of this indenture, he particularly chose respected trustees from his wife's family and entrusted them to make sure that his beloved wife, for whom he was willing to risk so much during his lifetime, should have an adequate jointure for her widowhood. He did so knowing that he had no son and that his wife would most likely be dependent upon the mercy of his male heirs. He calculated that these heirs could not be trusted to care enough for his wife's welfare, not only because the responsibility for jointures was viewed in those times as an economic disaster, but also because of his heirs' antagonism towards Isabel due to her inability to contribute to the family's fortunes upon their marriage. The choice of Eykering of all the family's properties can be seen as a conscious decision on Edward's part. Eykering, being a not-too-important asset, was still an asset that could provide a decent income for his widow through the sale of wood from the Lady Park and the collection of rent from tenants.

We cannot be sure, of course, but Edward may have simply made a mistake when he included the same property of Eykering House and the Lady Park in the two different and conflicting documents. In light of Edward's vast legal and business talents, such an error seems more plausible than the possibility that he consciously created conflicting indentures. All of the above circumstances would seem to support the supposition that he never meant to include this special property in the later and much more general document.

In this same context, we can also find support for the possibility that Roger's fight over Eykering did not necessarily arise from any solid belief in his legal right but from a desperate economic situation and an urgent need to get rid of an excessive burden of jointures.[127] Given all the indications as to Roger's general irresponsibility, it seems plausible to assume that his "breaking" of Isabel's house was a hasty attempt to deal

127. *See* Crosswhite, *supra* note 67, at 1138 (indicating that because Isabel possessed a strong claim to jointure based on Edward's will, Elizabeth used the jointure to reduce the amount owed to Lady Roos and her heirs).

with his financial crisis by making use of the presumed weakness of his allowed rival.

The gap between Coke's version of the story and the thicker version as presented here is remarkable. This gap emphasizes the terse nature of the legal report and suggests that its slimness was intentional. A possible response could point to the general manner in which law reports were written in Coke's time. This kind of response would, of course, explain the fact that Coke's text is oblivious of its context. But, as I will now argue, Coke's text not only *refrains* from the context, but it also consciously and bluntly *resists* it.

Coke's text could and indeed should be read as a *text about texts*: their importance, their supremacy and their desired reign. Of the two reporters of the Case, only Coke reported Judge Popham to say:

"Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."[128]

These words reflect much more than a pro-textual approach, and upon close reading, their anti-contextual attitude is evident. The alternative to the written text is the unreliable "slippery memory" of witnesses, and an apocalyptic warning follows:

"And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted."[129]

From this choice of strong words such as "dangerous" and "nude" it seems that the author's purpose is to elevate the text to sanctity and to eliminate entirely any other contradictory information. We can grasp the deliberate effort made here to outlaw context if we remind ourselves of the facts of the Case, which involved two incompatible documents *and not* a clash between written text and competing (risky) testimony.

One immediate lesson that can be learned from the thicker version of the story, the one that includes context, is that at the beginning of the seventeenth century, the act of establishing a legal rule that crowned text and expelled context was a truly hegemonic act. Back then, the contractual *text* was totally inaccessible to women, and only the wider *context* could disclose their gendered reality and inferiority.[130] Concerning the availability of the contractual text to women in those days, several points are worth mentioning. First, women were in general far less literate and educated than men. Second, women's literacy was confined for the most part to the well-to-do women, and those who were lucky enough to be able to read were usually directed to readings of "female-literature" such as

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128. *Countess of Rutland's Case*, 77 Eng. Rep. at 90.

129. *Id.*

130. Of course, some (but not all) of the limitations were also a product of low socio-economic background, not only gender.

romances, plays and poetry.[131] Third, there was no way an early-modern Englishwoman could receive the legal education that would enable her to comprehend, let alone write, a contract. And fourth, according to the rule of coverture, a married woman could not even be a passive side to a contract, such as signing it without reading it, because she had no legal entity of her own.[132]

This last point brings us directly to the gendered impact of rejecting context. Not only insignificant details were left out by focusing only on the text. Rather, as Isabel's Case beautifully demonstrates, it was for the most part the patriarchal nature of the story that was excluded: Isabel's inability, as any other married woman's inability, to hold or control personal property, necessitating third-party contractual arrangements; the difficulty in enforcing these arrangements and fulfilling the intent of a husband who sought to bypass patriarchal inheritance rules in order to secure the future of his wife; the strong resistance to brides who could not bring along hefty dowries; and finally, the need to fight for jointure lands against powerful male heirs of the patriline. Hence, the Case shaped a rule that decidedly gives the text ultimate control even when the interpretation of the contract/s at issue has, even if unknowingly, a strong patriarchal meaning.

To get a better sense of this patriarchal nature of the Case, we can attempt to track Isabel's voice. She is first silenced due to her absence from the contractual text as a result of her marriage and her mergence into her husband's person. She then gains a distinct voice as a plaintiff through her new status as a widow that allows her to appear in court, and as a result, in the report's text. But still, her voice could not be heard since the English seventeenth century law of evidence excluded the parties themselves from the witness stand.[133] Instead, others, namely the "divers witnesses,"[134] speak for her and represent her voice as coming from *outside* the text. And here is the catch: their voices, which are a poor variation of hers, are ridiculed as the unbelievable result of their "slippery memory."[135]

From a contemporary perspective, the above analysis may produce two chief conclusions regarding the nature of the parol evidence rule. On the one hand, we see how the rule was "born in sin," as Coke's text about the supremacy of contractual texts did indeed create a chauvinistic act. On the

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131. *See* STONE, FAMILY AND SEX, *supra* note 63, at 143 (noting that during the seventeenth century, the traditional feminine activities needed to find a husband such as playing music, singing, dancing, needlework, and embroidery replaced the literary education for noble women).

132. *See id.* at 136 (explaining that by marriage, the husband and wife became one person at law, the husband). The husband acquired absolute control of the wife's assets, but he also became responsible for her debts. *Id.*

133. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 349 (4th ed. 2002) [hereinafter BAKER, INTRODUCTION].

134. *See Countess of Rutland's Case*, 77 Eng. Rep. at 89-90 (indicating that the divers witness said that Earl Edward had told them that Elizabeth should have the manor of Eykering).

135. *See id.* at 90 (stating that to admit the testimony from the divers witnesses would harm purchasers and farmers).

other hand, the historical reality that made the rule so female-excluding to begin with has not changed by the beginning of the twenty-first century, so one might argue that what was born in sin is now purified and, hence, sustainable. But is it?[136] To address this question I feel I should "go smaller" again and analyze the details of the text that supposedly constituted the parol evidence rule while paying attention to the specifics of the rule's creation.[137]

III. CLOSE READING OF THE TEXT

One specific paragraph of Coke's report has been quoted repeatedly through the centuries as constituting the modern parol evidence rule. As these words have remained influential long after the litigation that led to their writing was forgotten, it is important to look at them more closely:

> [I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And, it would be dangerous to purchasers and farmers, and all other in such cases, if such nude averments against matter in writing should be admitted.[138]

Several characteristics of the newborn rule are evident even from its wording alone: the rule's aspiration to separation, hierarchical nature, alleged rationality, claim to certainty, and pro-market orientation. Together, as I will now further explore, these characteristics portray a highly masculine profile based upon common stereotypes of men while alienating traits that are usually (and stereotypically) associated with femininity.[139]

A. An Aspiration to Separation

By *separation*, I mean the assumption that the written text of the contract can and should be separated from all that surrounds it. The above quote from our Case divides the world into two groups: the first is "matters in writing," a phrase which appears twice in this short paragraph, and the second group, "averments," which also appears twice.[140] It is easy to

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136. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 106 (1991) (discussing negative answers from the feminist perspective); Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille,* 89 NW. U. L. REV. 1341, 1412-16 (1995). However, these responses are based on the current American form of the parol evidence rule where mine concentrates on exposing its older English roots.

137. *See generally* MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE (2003).

138. *Countess of Rutland's Case*, 77 Eng. Rep. at 90.

139. By highlighting the correlation between the words used to phrase the parol evidence rule and gender stereotypes, I do not in any way mean to imply that such stereotypes are representative of a true essence of either gender or should be sustained. On the contrary, in doing so I hope to expose more of the rule's biased nature.

140. *See* OED, *supra* note 76 (defining "averment" as the action of proving the truth or genuineness by argument or evidence).

identify "matters in writing," given the tangible nature of the written text; it is much more difficult to grasp what stands against it, under the term "averments." Literally, the last term refers to the action of proving the truth, and etymologically, it comes from Latin (*advērāre*) and French (*avérer*), which emphasize the same search for the truth.[141] Legally, the term was reserved for a formal offer to prove a line of facts, to verify what was pleaded. Confronting "matters of writing" with "averments" suggests that the two groups are indeed separable. There are indisputable facts that are part of the written text and there are other *alleged* facts that need to go through the process of averment. There are "solid" facts that are included in a "matter in writing," and there are "fluid" facts that exist in the "slippery memory" of the witnesses. Since the rule quoted above bans the second type of facts, the fluid facts, it seems that a separation between the solid and the fluid is inherent to it and defines its very essence.

The separation is not that simple. Just consider the fact that the trustees of the first indenture were Gilbert Gerard and Thomas Holcroft. Since these names were written in the indenture itself, they can be seen as "solid" facts that come from a "matter in writing." But what about the family ties of these two trustees to Isabel the Countess of Rutland? As we saw earlier, they were *her* relatives, obviously a fact that might support her claims. But what kind of fact is that? Fluid? Solid? On the one hand, the family ties are not part of the written text, but on the other hand, the name Thomas Holcroft is written and might be connected easily to the Countess's maiden name, which is not written. Are we facing an averment, which is going to be rejected under the new rule, or are we in the realm of "in writing?" Or perhaps, Holcroft's connection is part of the written text while Gerard's ties are only a fluid fact?

The same questions arise regarding the "Lady Park." The name of that property was almost certainly written on the first indenture, but its use as a hunting place for ladies probably was not mentioned. Is it enough that the word "lady" was written to make its special meaning a matter in writing, or is this contextual information too fluid and therefore in need of averment? As these brief examples illustrate, the division at stake is not a natural one, but is more the result of a conscious and somewhat arbitrary effort.

The ability to separate "matters in writing" from other facts that require averment stands at the base of a rule that suggests forbidding such averment. Still, it is worth noticing that it also works the other way around. A legal system that adopts such a rule is aspiring to separation and, thus, is declaring its strong belief in the positive value of separation.

A closer look at the tendency to separate and divide things into disconnected groups might expose a gendered facet of the rule.[142] In general, the very attempt to draw strict borderlines and build high walls

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141. *See id.*

142. Note that this is a contemporary look. It is based on the assumption that even if the early-modern reality has changed in a manner that makes the contractual text accessible to women, still the rule that prefers the text can harm women due to its masculine nature.

between concepts correlates with masculine stereotypes. Such an attempt is based upon a belief that the ability to separate one thing from another is a human achievement and a sign of development. A further underlying belief is that through acts of disconnection, we will find ways to better control our lives, by organizing them into neat and independent categories.

Fundamental ideas that shape western culture support and reinforce the linkage between maleness and the capability of creating a separation. One legendary instance is Sigmund Freud's theory concerning the stages of development of the human personality. According to this theory, boys deal with their Oedipal complex by *separation*. The boy represses his libidinal impulses toward the mother and detaches himself from her. Freud draws a connection between this crucial separation and the boy's competence to develop his super-ego. Problematically, but nevertheless with enormous influence on our culture, he then goes on to claim that boys enjoy a moral superiority over girls who remain entangled in their own Electra complex without a similar separation ability that would enable them to resolve it.[143]

In contrast to this masculine image, women are not identified with the trait of separation. Based on cultural feminism, women do not perceive themselves, their tasks, or their experiences as isolated units. Motherhood, as a leading example, pushes women to do just the opposite—to combine rather than separate spheres of involvement such as career and parenthood.[144] Radical feminism is known to respond sharply to this argument and maintains that such a description of women is not their nature, but rather a symptom of their inferiority.[145] Male power perpetuates its control over women by describing them as incapable of the correct and admired way of thinking—thinking that distinguishes and separates.[146] Despite this disagreement, the scholars of feminist thought unite in their objection to the idea that separation is attainable and valuable.[147]

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143. Naturally, this last part of the theory—the equation of separation and development—has attracted a great deal of feminist criticism. It is important to mention that a strong argument—which supports the feminist criticism—has recently been made from a masculine perspective. S*ee* TERRENCE REAL, I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION (1998) (developing the general thesis of the book that the separation and disconnection model not only deprives women but hurts men as well and showing that the separation process does not advance men or symbolize their development, but is rather a social dictate imposed on men, one which exacts a heavy toll and leads to male depression).

144. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1998) (arguing that women, as opposed to men, define value in terms of intimacy, nurturance, community, responsibility, and care); *see also* Jacquelyn H. Slotkin, *Should I Have Learned To Cook? Interviews with Women Lawyers Juggling Multiple Roles,* 13 HASTINGS WOMEN'S L.J. 147, (2002) (describing—based on interviews—that female attorneys are struggling to combine multiple commitments to their careers and to their families and concluding that hope lies in finding more flexible and creative ways to have it "all").

145. *See* West, *supra* note 144, at 15 (noting that radical feminists believe that women's sense of connection with another person makes them vulnerable to "invasive" and "intrusive" forms of abuse).

146. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 39 (1987) (arguing that women "think in relational terms because [their] existence is defined in relation to men").

147. *See* West, *supra* note 144, at 13-14 (stating that both radical feminism and cultural

Applying this critique to the separation under the parol evidence rule, the attempt to distance text from context and “matters in writing” from “averments” presents a masculine model. Dealing with the messy information that might shed light on the contract’s interpretation by arbitrary categorization of its pieces is not necessarily a sign of intellectual or moral development.[148] Indeed, it is an indication that the chosen model suffers from a lack of feminine qualities.

B. A Hierarchical Nature

The dichotomies of text/context or “matters in writing”/“averments” entail not only a dubious separation but also an evident hierarchy. The written text is placed high above the “other” pieces of information.[149] Such positioning is made clear by the previously quoted text in two ways: by praising the superior term, and by condemning its lower counterpart.[150]

As to the praise, the text symbolizes clearly which of the dichotomized possibilities we should trust. The most conspicuous signifier is the association of the “matter of writing” with and not just a simple truth, but with a “certain” truth.[151] Indeed, the uplifting label of “certain truth” is so powerful that it is almost unnecessary to look for other signifiers. However, the characterization of writing as “made by advice and on consideration” powerfully suggests how thoughtful the process of writing is and hence how clever is its result.[152]

The element of condemnation of “averments” involves several signifiers. The first is quite hidden and might work unconsciously. The inferior end of the hierarchy does not even have a name. As we saw earlier, the term “averments” covers something ambiguous that is defined only as the negation of what was put in writing. “Averments,” in other words, connotes something still waiting to be proved.[153] The lack of a name is meaningful when the question of dependability is at stake. The fact-finder is likely to ask how can one trust that which has no name? The namelessness is a representation of nonexistence and it directly leads to the desired conclusion, i.e. that the decision-maker should ignore these

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feminism recognize women’s capacity for “connection to human life”).

148. *See* Arthur L. Corbin, *The Parole Evidence* Rule, 53 YALE L.J. 603, 609-10 (1944), *reprinted in* FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 654 (Little, Brown & Co., 2d. ed. 1970) (suggesting that the parol evidence rule has caused, rather than prevented, excessive litigation and has “done more harm than good”).

149. *See* MACNAIR, *supra* note 47, at 136 (asserting that the parol evidence rule’s insistence on written, as opposed to oral, modifications demonstrates a clear preference for documentary evidence).

150. *See id*. (noting that the parol evidence rule is grounded in ancient theories that viewed written evidence as “being of higher nature” than witness testimony).

151. *See id*. at 138 (observing that Coke, in his report on the *Countless of Rutland’s Case*, excluded an agreement because the issue had been settled by the terms of the deed).

152. *See id*. (noting Coke’s evidentiary preference for documents).

153. *See Countess of Rutland’s Case*, 77 Eng. Rep. at 90 (cautioning that the admission of “nude averments” against written documentary evidence would have dangerous consequences).

"averments." Second, the text seems to verify our understanding of the hierarchy by using descending signifiers as Poullain contrasts the "certain truth" which produces the "matters of writing," the averments are "uncertain" because they result from uncertain testimony.[154]

Even though this would be more than enough to clarify the order of things to the reader, the text provides a third indication by stressing that the uncertainty derives from "slippery memory."[155] This is a disparaging term particularly when compared with the term "matter in writing."[156] In Coke's lexicon, as well as in others' texts, scholars frequently used "slippery memory" as an antonym of fine legal writing and as a means for advocating writing as well as printing and publishing.[157]

The fourth "hint" regarding the bottom of the hierarchy emerges from the use of the word "nude" to describe the averments.[158] In legal archaic language, "nude" meant unattested, unconfirmed, or unproved.[159] In a narrower contractual context, it bore the worse meaning of being *void* due to lack of consideration unless made by *written* deed.[160] In any case, to say that the averments are "nude" clearly adds to their characterization as undependable.

Finally, the vertical view of the relationship between the written and the unrecorded is further strengthened by the less general expressions that precede the words that were analyzed so far. These expressions clearly portray a ladder: "if other agreement . . . be made by writing, or by other matter *as high or higher*, then the last agreement shall stand; for every contract or agreement ought to be dissolved by matter of *as high a nature as* the first deed."[161] That a hierarchical rule is of a hegemonic nature needs little elaboration.

As many feminists from different strands of feminism have claimed before, women tend to be the systematic victims of hierarchal thinking, and men in positions of power and authority usually associate women with the lower end of each fundamental dichotomy that constitutes western culture.[162] In leading dichotomies such as normal/strange, subject/object,

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154. *See id.* (juxtaposing documentary evidence with averments presented by "uncertain testimony").

155. *Id*.

156. *Id.*

157. *See* RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND 80-81 (1992) [hereinafter FORMS OF NATIONHOOD] (noting that Coke viewed written, printed legal reports as a way of preserving the law's certainty); *see also* Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J.L. & HUMAN. 229, 273 (1998) [hereinafter Ross, *Memorial*] (stating that Coke recommended that legal scholars commit decisions to writing rather than trusting "slippery memory"); Dowman's Case, 9 Co. Rep. 7b, 77 Eng. Rep. 743, 745 (reasoning that parties would never have left details to the "sliding and slippery memory of men" because individuals' memories fade in a short period of time).

158. *See Countess of Rutland's Case*, 77 Eng. Rep. at 90.

159. *See* OED, *supra* note 76 (defining "nude" as "not formally attested or recorded").

160. *Id.*

161. *Countess of Rutland's Case*, 77 Eng. Rep. at 90 (emphasis added).

162. *See* West, *supra* note 144, at 13 (noting that cultural feminists recognize the

main/marginal, active/passive, culture/nature, rational/emotional, public/private, concrete/abstract, and mind/body, the female stereotype is echoed by the second, less appreciated side of each pair.[163] Whenever one separates the two elements of a dichotomy, the human instinct responds with a vertical arrangement of its parts. Furthermore, creating such a vertical arrangement and defining the supremacy of one of the items in each pair is often the initial motivation for distinguishing the favorite item from its surroundings.[164] Applying this analysis to the dichotomy at hand, we can instantly observe the phenomenon in action in Coke's text. In the dichotomies of certain/uncertain, truthful/deceitful, solid/fluid, written/oral and covered/nude, as in the many other dichotomies mentioned before, the female stereotype correlates with the less valued and less trustworthy second item in each pair.[165]

C. An Alleged Rationality

What did Coke mean when he wrote that it would be "inconvenient" to let matters in writing be controlled by averment? To address this question, it is important to realize how frequent and intentional the legal use of this word was.[166] Coke used *inconvenient* to mean *inconsistent* and preached for a consistent rule of law, a rule that adheres to its internal logic.[167] Ideally, such a rule would be based upon general reason, would offer a broad solution that applied to most cases and would better serve the public interest.[168] The use of *inconvenient* thus represented flinching from reasonableness. It also worked the other way around to signify that avoiding such inconvenience would lead to a continuous possession of reason as well as to its preservation.[169] In a world which defines rationality as "the quality of possessing a reason; the power of being able to exercise

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powerlessness of women in a male-dominated culture).

163. *See* Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, in* SOURCEBOOK ON FEMINIST JURISPRUDENCE 176, 180-81 (Hilaire Barnett ed., Carendish Publishing 1997) (arguing that men have structured legal language to include numerous dichotomies in which the stronger, more valuable element is associated with masculinity).

164. *See id.* at 181 (observing that a language of dichotomies creates a language of conflicts in which "one side has to be preferred, . . . [leading to] winners and losers").

165. *See* KESSLER & GILMORE, *supra* note 148, at 653 (quoting the *Countess of Rutland's Case* and equating written evidence with "certain truth," and witness testimony with "nude averments").

166. *See* Allan D. Boyer, *Understanding, Authority, and Will*: *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 72 (1997) [hereinafter Boyer, *Understanding*] (stating that the theme of avoiding inconvenience appeared throughout the Coke Reports). Although the term was quite common no other reporter of the time seemed to use it more than Coke who—according to the English Reports Online at www.jutastat.com—used it forty-two times throughout his thirteen volumes of reports.

167. *See id.* (describing Coke's belief that the law "cannot suffer anything that is inconvenient"). It is worth noting that here, again, coping with either Latin or Law-French is needed since Coke's phrasing was "*Nihil quod est inconveniens, est licitum*." *Id.*

168. *See id.* (explaining that Coke believed that the public interest was best served by decisions that avoided inconvenience).

169. *See id.* (noting Coke's theory that reason perfects the law).

one's reason," staying away from the inconvenient meant appearing to uphold rationality.[170]

It is quite clear that Coke was aware of the risk to concrete justice that is involved in such an approach. His response was that it is better "that a private person should be punished or damnified by the rigor of the law, than a general rule of the law should be broken to the general trouble and prejudice of many."[171] The use of *inconvenient* thus represented a fairly rigid devotion to abstract rationality at the conscious expense of individuals' concerns.

To say that it would be inconvenient to let messy reality influence the interpretation of a written contract is to say that dedication to the written is logical and rational. This raises a gender issue that numerous feminist works address.[172] In a nutshell, such a critique denounces the logo-centricity of law and its artificial mask of rationality. From a feminist perspective, these traits tend to silence and frustrate many women by denying the value of other means of expression and other sources of knowledge, which are not a product of lingual analysis.[173]

Even at the lingual level, the search for the antonym of "rational" is a telling one. Apart from the obvious "irrational," such a search would produce words such as illogical, unreasonable, foolish, crazy, ridiculous, absurd, silly, unfounded, and groundless. Evidently, those are all disapproving ways of describing what is not rational. However, studies have suggested that irrational methods of communication are an integral part of women's lives, as women are more sensitive to non-lingual symbols such as body language, tone of voice, or facial expression, and indeed tend to use such symbols much more than men.[174] While one might resist the essentialist flavor of these findings, as I do, if only because there cannot be one "women's way of thinking," there is still a disturbing point that is worth making here. To reject proof of unwritten facts as "inconvenient" and irrational is to discard what is perceived as "feminine" knowledge together with ways of communication that are more associated with women.[175] It is almost needless to note that this was an especially biased

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170. *See* OED, *supra* note 76.

171. *See* Boyer, *Understanding*, *supra* note 166, at 72 (quoting Coke's words from 1635 in his A LITTLE TREATISE OF BAILE AND MAINPRIZE).

172. *See* Finley, *supra* note 163, at 181 (arguing that the conflict-centered nature of written legal language causes women and their concerns to be devalued or excluded).

173. *See id.* at 182-83 (explaining that legal language eliminates all possibility of expressing pain, rage, elation, love, fear, and other emotions).

174. *See, e.g.*, JANET SHIBLEY HYDE, HALF THE HUMAN EXPERIENCE: THE PSYCHOLOGY OF WOMEN 93 (D.C. Health and Co., 4th ed. 1996) (observing that women tend to use emotional verbs and supportive language more frequently than their male counterparts who often use "hostile" verbs); *see also* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style,* 66 N.Y.U. L. REV. 1635, 1658-61 (1991) (noting that interactions between female lawyers and female clients tend to be more expressive, exploratory, and contextual than in similar meetings between men).

175. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 976 (1991) (supporting feminist modes of communication by claiming that "[f]eminist narratives present experiences as a way of knowing that which should occupy a respected, or in some

move in early-modern times, when the official way of performing rational (i.e. legal) thinking was for men.[176] Critiques of this kind challenge the dominance of rationality in the legal discourse and call to open legal space for extra-rational knowledge.[177] It seems to me that it is exactly the creation of such a space that the formation of a contractual parol evidence rule prevented so effectively back in 1604.

D. A Search for Certainty

One reason why scholars consider adhering to the written text as rational or "convenient" is because writings entail or even promote certainty.[178] According to our quoted text, the written document carries the "*certain* truth," while the averments consist of "*uncertain* testimony."[179] Positioning "certain truth" against "uncertain testimony" not only suggests a preference for what is written, referred to in the earlier discussion of "hierarchy," but can be seen as a representation of the sincere nature of certainty, as well as a barrier against the deceitful nature of uncertainty. The question would then be, is this really the case? Assuming that certainty is achievable, which is doubtful, is it necessarily better? Is it in fact truthful?

From a feminist perspective, as well as from a post-modern viewpoint, the answer seems quite negative. To assume that certainty is so desirable means to believe that we should struggle to maintain the status quo. But who is most interested in maintaining the status quo if not the powerful who are best served by it and feel comfortable with it? For the weaker members of a given society, those who yearn for change, it is the status quo that prevents hope.[180] For such members, their inferiority is certain, and they dream of the uncertain transformation.

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cases a privileged position, in analysis and argumentation").

176. *See* Finley, *supra* note 163, at 176 (asserting that, throughout the history of Anglo-American jurisprudence, men have shaped, defined, and read the law in accordance with their world view).

177. *See, e.g.*, Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 254-55 (1988) (describing a law professor's successful attempts to engage his students by telling them a parable illustrating the value of emotion and extra-logical forms of communicating); *see also* Kate Green, *Being Here—What a Woman Can Say About Land Law*, *in* FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 102 (Anne Bottomley ed., 1996) (reinforcing the case for nonscientific approaches to legal decision-making by noting that "[l]aw comes from the whole of human life, not only from a disembodied intellect").

178. *Compare BCCI Decision*, *supra* note 48, at para. 78 (emphasizing that "[t]he meaning of the agreement is to be discovered from the words which they have used . . . ."), *with* Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 838-39 (2002) [hereinafter *Comfort of Certainty*] (rejecting arguments that the formalism of plain meaning and an "objectivist" parol evidence rule is a desirable or effective way to interpret words).

179. *See* KESSLER & GILMORE, *supra* note 148, at 653 (quoting the relevant portions of the *Countess of Rutland's Case*) (emphasis added).

180. *See, e.g.*, Abrams, *supra* note 175, at 975-76 (arguing that the "neutrality" of the law reflects the perspective of the powerful and oppresses the powerless).

Certainty, in other words, is valuable for some but not for all. It is valuable not necessarily because of its "truthful" nature but because of the service it provides for the "haves" at the expense of the "have-nots."[181] As a representation of a concrete interest, certainty is not *the* truth, but rather a partial version of truth, namely the part that was well documented in legal written terms.[182] From the standpoint of those with no access to the written text, there is nothing attractive about the "certainty" that others gain from adopting the text. The tone that praises certainty is thus quite masculine. It holds no acknowledgement of doubt or equivocation and it does not reflect what the English poet Keats termed "Negative Capability:" the capacity to *remain* in situations of uncertainty, mystery, and doubt.[183]

One may find support for this position by deconstructing the juxtaposition of written texts to averments. When Coke's text links writing with certain truth and connects averments with uncertain testimonies (lies) as reasons for preferring the written agreement, we could try a Derrida-like reversal.[184] We could consider the possibility that the virtue of the certain could be seen as the virtue of the uncertain and vice-versa. This "upside-down" view exposes that the certain is no more truthful than the uncertain.[185] Indeed, if anything, the certain is potentially more misleading. As a written artifact, the certain is usually more tangible than any other source of information, but it is exactly this "black and white" nature that allows for manipulative planning through editing and revising.[186] The human control of the written distances it from the authentic happening until it can no longer represent a truth, let alone a certain truth.[187] Indeed, the very technique of law reporting in which Coke was engaged while creating the dichotomy of certain/uncertain confirms this post-modern view: the written report was not the truth but the uncertain version of the truth, a late interpretation of a specific reporter.[188] As I will show later, this "late

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181. *See* Finley, *supra* note 163, at 179 (arguing that law's emphasis on objective and neutral written language can "silence the voices of those who did not participate in its creation").

182. *See id.* (noting that the legal language's preoccupation with "neutrality" fails to include the "alternative voices," that experience and perspective provides, which also informs good decision-making).

183. *See* FRUG, *supra* note 17, at 117-19 (criticizing Posner and Rosenfield's article that praises the "certainty" of specific performance and rejects the uncertainty of equitable approaches).

184. *See generally* JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakrarorty Spivak trans., 1976) (exploring the opposition of speech to writing and arguing that modern, western culture prefers the former over the latter).

185. *See* J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 755 (1987) (describing Derrida-like reversals and their justification).

186. *See Comfort of Certainty*, *supra* note 178, at 837 (declaring that any judge who asserts that the written word is "immutable" is "build[ing] on clay").

187. *See id.* at 838 (asserting that non-written elements of a contract, such as the identity of the parties and the nature of the agreement, are as essential as the "words used" in correctly interpreting the context of the contract).

188. *See* Boyer, *Understanding*, *supra* note 166, at 86-90 (noting when Coke added a disingenuous explanation of his controversial stance in publishing his report of the *Bunham's Case*, a case of first impression).

interpretation" was heavily dependent on and reflective of the reporter's personal views and agenda. To sum up, we can say that we view the quest for certainty with suspicion—as reflecting hegemonic motives in portraying something as universally beneficial when it actually benefits only a few.

E. Pro-market Orientation

Coke's much-quoted text warned that "it would be dangerous to purchasers and farmers" to admit "nude averments."[189] The word "purchasers" probably referred to people who acquired "land or property in any way other than by inheritance," while "farmers" were most likely those who rented or leased such property.[190] Since neither purchasers nor farmers were directly involved in this Case, it seems that the use of these words was more metaphoric, reflective of a greater concern.[191] What danger did Coke have in mind? Who or what was he trying to defend?

The authentic answer to these questions may not be clear, but it appears that Coke was making a policy point: things will work better if we adhere to written words and not let other pieces of knowledge subvert them. Exactly which things will work better is answered by the formula of "purchasers and farmers"—and indeed, it seems that their concerns and businesses were Coke's focal point.[192] Plainly, he was not interested in the way noblemen or their heirs received their property due to their *status,* but rather in those who used *contracts* or contract principles for exchanging property. While society as a whole was perhaps taking the first steps of what Sir Henry Sumner Maine would much later describe as a long journey from status to contract,[193] Coke seemed interested in the contractual tool itself, the one used by purchasers and farmers. The danger he visualized was in all likelihood the danger of chaos—of never-ending clashes and contradictions between written contracts and oral promises, between legal texts and the human contexts that threaten to change their meaning. To enable commercial activity, to let purchasers and farmers bargain, Coke must have believed it crucial to have law and order, law that maintains order, and law that embraces the written and knowingly chooses to ignore

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189. *Countess of Rutland's Case*, 77 Eng. Rep. at 90. It is meaningful to realize that Coke frequently used the same words in the commercial context. *See, e.g.*, Dillon v. Freine 1 COKE REPORT 120a, 76 ER 270; Smith v. Mills 2 COKE REPORT 25a, 76 ER 441; Green v. Balser, 2 COKE REPORT 46a, 76 ER 519; Mildmay's Case, 6 COKE REPORT 40a, 77 ER 311; Burrel's Case, 6 COKE REPORT 72a, 77 ER 364.

190. *See* OED, *supra* note 76 (defining "purchaser" and "farmer").

191. Note that the Countess of Rutland herself might be considered a potential purchaser, but from her point of view, there was certainly no danger in admitting averments. To the contrary, she was offering these averments herself.

192. *See* Boyer, *Understanding*, *supra* note 166, at 54 (noting that Coke tended to equate "right and law with the protection of individuals' lives, property and honor").

193. *See* SIR HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 165 (Ashley Montague ed., University of Arizona Press 1986) (1861) (noting that "progressive societies" exemplify this shift).

the surrounding circumstances. This last point is strongly connected to the above-mentioned value of certainty and it suggests that the first version of the parol evidence rule should be seen as a "pro-market" act, one that aspires to advance the embryonic market and to facilitate its operation.[194]

The view that this was a period of critical transformation, from a feudal regime to a more contractual economy, has been argued and contested at length and needs little exploration here.[195] It is important to realize that, from a gender perspective, such commercial motives as represented by the terms "purchasers" and "farmers" are truly and highly problematic. The placement of women outside the admirable spheres of commerce/business/market and within inferior realms, namely domestic spaces, is a phenomenon that a number of scholars have explored in varied contexts.[196] Yet, it is worth repeating the point: purchasers and farmers, who contracted at the core of what was then "the market," might have been better off relying on the written words which they could probably write and control. Women at the time, however, were most likely not better off. For them, as the *Countess of Rutland's Case* neatly demonstrates, the chances of finding the right interpretation of the contract within the four corners of the written document were very slim.

F. Textual Adaptation of a Masculine Image

To sum up the above five points, it seems that the text itself speaks in a gendered language, winking at the masculine stereotypes while emphasizing a deterrence from association with feminine ones. Whether Coke was aware of this impact is highly doubtful, but it may also be less important. Two other points seem more imperative here. First, the fact

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194. *See* MACNAIR, *supra* note 47, at 136-39 (observing that the earliest uses of the parol evidence rule involved wills of real property, followed soon after by the parol evidence rule's application to contracts and deeds). The term "market" should be read with caution as it is extremely doubtful that a "market" in its current sense was even beginning to rise. What I mean by "market" simply refers to "business-like" activity, which is executed by contracts.

195. *See generally* LAWRENCE STONE, THE CRISIS OF THE ARISTOCRACY: 1558-1641 (1965) [hereinafter STONE, CRISIS] (describing the lives of the English "elite" and the effects of a crisis among this class on English political institutions); KARL POLANYI, THE GREAT TRANSFORMATION 163-77 (1964) (documenting the role of men—but not women—in the establishment of a labor market); A.W.B. Simpson, *Land Ownership and Economic Freedom, in* THE STATE AND FREEDOM OF CONTRACT 13-43 (Harry N. Scheiber ed., Stanford University Press 1998) [hereinafter Simpson, *Land Ownership*] (exploring the evolution of the common law of property and land transfer); ANDREW MCRAE, GOD SPEED THE PLOUGH: THE REPRESENTATION OF AGRARIAN ENGLAND 1500-1660, at 14 (1996) (noting that the sale of church land in the mid-sixteenth century gave the real property market a "modern" shape); HILL, *supra* note 78, at 102 (maintaining that "in the late sixteenth and early seventeenth centuries, as agriculture was being commercialized, so the Common Law was being adapted to the needs of capitalist society and the protection of property."). *See also* LUKE WILSON, THEATERS OF INTENTION: DRAMA AND THE LAW IN EARLY MODERN ENGLAND 70-71 (2000) (suggesting that emerging contractual fears occupied the dramatic imagination of the period).

196. *See, e.g.*, Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1560-61 (1991) (finding that the "economic marginalization of [female] caregivers" plays a part in many women's decisions to have an abortion); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUDIES 93, 98-102 (2000).

that this text survived through the centuries and has been quoted repeatedly 2005 markable.[197] For Evidence Rule Coke's phrasing "made sense" for generations to come. I think that the reason has much to do with the structuring of gender in our society. The oppositions that Coke used, as well as his way of putting things "in order" and under control, probably correlated to and resonated with what was encrypted in developing modern legal minds.[198] Saying that the rational approach is better than the irrational one, to use only one example, probably felt natural and axiomatic. Preferring a rational to the irrational was a way of reflecting how things *are* without the need to claim how they *should be*, just as men are viewed as more dominant than women.[199]

The second point concerns legitimacy and authority. For reasons that I will discuss in Part IV, Coke's goal appears to have been to build a better image for the common law. If one is engaged in such a mission, then describing the law as more masculine and less feminine is a fruitful and powerful rhetoric, one that has the ability to establish authority and legitimacy.[200] It is, to use Stanley Fish's words, an "amazing trick" that is done by the law—"its ability to construct the (verbal) ground upon which [it] then confidently walk[s]."[201]

Nicolette

She lost her home.

The year was 2003 and she enjoyed legal personhood with the ability to be a party to the contract with John. And yet the contractual texts only described how she received her home as a gift from John and how, only a few months later, she gave it back to him.[202] The judges treated every other part of her story as irrelevant.[203] But, the decision as to what is relevant and what is not is seldom a neutral one. The exclusion of the context, by means of adherence to the text necessarily involves the creation and

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197. *See* MACNAIR, *supra* note 47, at 138-39 (explaining the *Countess of Rutland Case* by noting that the decision may be the earliest common-law authority applying the parol evidence rule to agreements and deeds).

198. *See* Boyer, *Understanding*, *supra* note 166, at 72 (observing that Coke believed that all uncertain matters must be decided by reason, and that law was "the perfection of reason").

199. *See* Finley, *supra* note 163, at 176-77 (asserting that the "universal and objective thinking" that defines legal reasoning is entirely patriarchal and excludes women's own definitions of legal concepts).

200. *See infra* notes 211-341 (elaborating on this idea in the fourth section by comparing Coke's efforts to Portia's efforts).

201. I thank Kathryn Abrams for this way of putting the point and for referring me to Fish's helpful metaphor. *See* Kathryn Abrams, *Review Essay: The Unbearable Lightness of Being Stanley Fish: Reviewing Stanley Fish, There's No Such Thing as Free Speech and It's a Good Thing, Too,* 47 STAN. L. REV. 595, 602 (1995).

202. *See* Clark v. Hannah-Clark, No. B157749, Cal. App. LEXIS 5058, at *3 (stating that in December of 1998, Nicolette reconveyed the property to John by a "grant deed" describing the transfer as a "cancellation and return of gift").

203. *See id.* at *11 n.6 (disregarding Nicolette's argument that her reconveyance of property to John was conditioned upon his promise to transfer it to their son, and reasoning that "the parties have not briefed the issue, and . . . we affirm on other grounds").

inclusion of a *different* context—one that does not exist in reality. This new, imaginary context is loaded with monogamist patriarchal values.

The opening sentence of the appellate decision presents Nicolette as a nanny and declares that she worked for "John and Lynn, *husband and wife*."[204] The rest of the judicial text diminishes the ongoing relationship Nicolette had with John, acknowledging only the most necessary facts regarding their joint son. Furthermore, the judges tell us how she "and the boy moved into the . . . [cottage] . . . located near John and Lynn's home."[205] Notice the sense of invasion and penetration created by this phrasing. Is it not obvious that as a single mother with a *newborn child* (and not a "boy," as described by the court) she could not do such a thing without, at a minimum, John's invitation and Lynn's silent consent?

Of course, the unusual arrangement of a married couple and their children living together with the husband's lover and their illegitimate child, for years, could have been seen as a real challenge to the stereotyped monogamist patriarchal model. These special circumstances, however, were "translated" by the court into the standard patriarchal terms. In the thrifty judicial text it was emphasized—twice—that Lynn did not know of Nicolette and John's relationship, portraying her mainly as the betrayed wife.[206] As part of this naïve description we are told that during all these years Lynn "*adored*" Nicolette and John's son and treated him as her own *grandson.*[207] What an amazing image this extraordinary choice of words creates: the whole unorthodox situation is normalized by a serene depiction of an even bigger, "normal" patriarchal family, consisting in its adapted state of *three* generations: grandchildren, parents and grandparents. In this way, the image of a "warm-hearted granny" enriches Lynn's portrait and further strengthens the need to protect her from her younger rival; that is, the need to protect traditional family values.

By suggesting this reading of the judicial decision, I intend to call attention to the manipulative potential of the textual approach,[208] and especially its patriarchal content. Just as a judge in Isabel's times knew very well that women like her could not influence the contractual words that controlled their lives, so are judges in Nicolette's times fully aware of the disparity of power between a famous and wealthy Hollywood couple and their daughter's nanny.[209]

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204. *Id.* at *2 (emphasis added).

205. *Id.*

206. *See id.* at *2-3 (explaining that "Lynn did not know that John was the father of the child," and noting that Lynn was "unaware" of the original deed transferring the cottage property to Nicolette).

207. *See id.* at *2 (stating that "Lynn adored the child and treated him as grandchild") (emphasis added).

208. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1731 (1997) (explaining that the parol evidence rule is used in a manipulative way because it "is used mainly as a rhetorical device, aimed at disguising the active role courts play in contract interpretation").

209. *See Clark II*, 2003 Cal. App. LEXIS 5058, at *2 (describing Nicolette as the woman who worked for John and Lynn as a nanny for their young daughter).

The nature of life dictates that the professionals who deal with contracts interpretation do have the context, or at least a part thereof, in mind. As a result, the refusal to even consider the context, the conscious choice to ignore it, is more than an omission. De facto it can be seen, somewhat post-modernly, as actively creating and then taking into account a *manufactured context*—one that does not exist. This context assumes, however implicitly, a reality which all knows to be fictitious: as if Nicolette sat in front of John and, utilizing her own rich legal and business experience, carefully negotiated, on an equal basis, the words of her contracts.[210]

I imagine that it is still possible to dismiss this disturbing contemporary example, perhaps by seeing the gendered results of rigid textuality as a mere coincidence. It is this last argument that pushes me to revisit early-modern England and to revert from Nicolette to Isabel, in search of an even deeper level of analysis. What follows, then, is a closer examination of the ideas, theories, impulses, and intuitions that informed the establishment of the parol evidence rule by Coke's report of the Case.

IV. COKE'S REPORT

To hold Sir Edward Coke responsible for the establishment of the contractual parol evidence rule requires some justification. After all, he was only the *reporter* of the Case and as such might be regarded as merely repeating what the King's Bench judges, led by Judge Popham, had said.[211] Yet several reasons suggest that such a narrow view of Coke's report of this Case is inadequate.

In the first place, Coke was not just another reporter, he was *the* reporter, and the only reporter who did not need to attach his name to his volumes of reports. Considered to be the prototype, they were simply called "*The Reports*."[212] Coke served as a Member of Parliament, Solicitor General, Attorney General, Chief Justice of Common Pleas, and Chief Justice of the King's Bench.[213] Add to this his comprehensive writings about the rules of England, the four volumes of the *Institutes of the Laws of England*, and it becomes evident how he came to be known as the supreme oracle of English law,[214] "what Shakespeare has been to those who write in

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210. *See id.* at *11 (concluding, somewhat mechanically, that "Nicolette is bound by the December 1998 deed and is not entitled to rescind it for an alleged failure of consideration").

211. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 300 (stating that Coke was privy to secret deliberations among the judges, since Chief Justice Popham would disclose to Coke what the judges had considered in private).

212. *See* BAKER, INTRODUCTION, *supra* note 133, at 183 (observing that Coke's volumes have been "perhaps the single most influential series of named reports").

213. *See* BOWEN, *supra* note 93, at ix-x (giving a brief overview of Coke's career).

214. FORMS OF NATIONHOOD, *supra* note 157, at 85; *see* BOYER: SIR EDWARD COKE, *supra* note 92, at ix (opining that Coke "remains a subject for heroic treatment").

English."[215] In other words, no other English jurist of his time had the authority needed to establish new rules of law.

Secondly, we are fortunate enough to have another report of the same legal episode made by a different reporter of the period, Sir George Croke.[216] According to Croke's report, the ruling of the Case was based on the more traditional idea of estoppel and not on the novel idea of the parol evidence rule.[217] Contrasting these two reports suggests that it is Coke, more than the Judges of the King's Bench, with whom we should credit with the construction of the parol evidence rule. Indeed, based on a similar method of comparison—i.e., to an alternative report regarding the same case—it was argued that the rule which was established in the prominent *Shelly's Case* "owes its authority to Coke, not to the decision."[218]

Thirdly, many consider Coke to have been the kind of reporter who would liberally insert his own comments in his reports while "not distinguishing . . . his own views from those he was reporting."[219] And finally, and even more generally, Coke was a zealous representative of a generation of reporters who believed that the historical accuracy of the report and its faithfulness to the original were less important than the publication of the "correct" legal doctrine for the purposes of future use.[220] As part of this "liberal" concept of reporting, it was argued that while "reporting" Coke made an effort to place a "substantive gloss" on the Common Law.[221] One of his techniques was to emphasize a general principle that did not actually serve as the basis for the judgment in the particular nuanced case but was—at best—part of its *obiter dicta*.[222] This

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215. BOYER, SIR EDWARD COKE, *supra* note 91, at ix (the opening sentence of Coke's biography).

216. *See Countess of Rutland*, 79 Eng. Rep. at 23.

> If there be an indenture for the levying a fine to such persons, before such a time, to such uses, and the fine be levied to the same persons within the same time, it shall be to the same uses; and no averment can be to the contrary, unless it be by other matter in writing.

Id.

217. *See* MACNAIR, *supra* note 47, at 139 (discussing the differences between Coke and Croke's reports and noting that while Coke used the case to establish the parol evidence rule, Croke explained the ruling in terms of estoppel).

218. BOYER, SIR EDWARD COKE, *supra* note 91, at 117.

219. *See* BAKER, INTRODUCTION, *supra* note 133, at 183; *see also* Damian Powell, *Coke in Context: Early Modern Legal Observation and Sir Edward Coke's Reports*, 21 J. LEGAL HIST. 33, 47 (2000) [hereinafter Damian Powell] (commenting that Coke included his opinions to protect his "reputation for posterity").

220. *See* BAKER, INTRODUCTION, *supra* note 133, at 183 (indicating that Coke had no dishonest intent in adding his own commentary to the court's words but, rather, that he viewed his reports as a form of instruction on the law); *see also* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence,* 21 L. & HIST. REV. 439, 455 (2003) (noting that opinions reported by Coke were bound to be influential since most other opinions of that time went unreported); Damian Powell, *supra* note 219, at 41 (chronicling Coke's view of his own authority as a reporter, which led him to include "juridical digressions" in his reports).

221. *See* Hulsebosch, *supra* note 220, at 469 (attributing Coke's influence on the development of the common law to his subtle inclusion of abstract principles, distinct from the facts at hand in a given case, that could be applied to future cases).

222. *See* Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 CORNELL L. Q.

understanding of Coke's general methodology appears to fit our Case nicely, since, as mentioned, the general rule he reported does not lead to the concrete result of the Case.

In light of the four aspects briefly explored above, it is probable that it was Sir Edward Coke who developed the parol evidence rule out of the judicial decision in the *Countess of Rutland* case. Put succinctly, Coke had both the opportunity and the motive to create such a rule at that time. I will start by exploring Coke's possible motivations for using his reporting capacity to elevate the written contractual text. As we shall see, the concept of the parol evidence rule ties in with Coke's more general ideas and ideologies in a way that can shed light on both the rule's nature and the reasons for its formation.

A. Elevating the Common Law

"[T]he common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame and life also."[223]

These famous words written so long ago by Sir Edward Coke capture what appears to have been the prevailing idea that drove his legal work: his boundless belief in the supremacy of the Common Law over any alternative legal system and his ongoing struggle to strengthen this superiority and to reinforce the dominance of the Common Law. Coke's general commitment to the task of elevating the Common Law is much too expansive and profound to be addressed here in detail; however, what appears crucial to the link between Coke's work and the parol evidence rule is the multidimensional way in which his obsession with the Common Law led him to the battle between the oral and the written, a battle of immense importance to our understanding of the creation of the rule.

1. The Common Law vs. the Roman Law

In 1571, when Coke left Cambridge to become a student of the law, Roman civil law had been adopted by Germany, France, Italy, Spain, Portugal, Holland, and—most meaningfully—by Scotland.[224] This development, also known as the "reception," generated considerable legal anxiety in sixteenth century England.[225] England had not been part of the reception process, and the common view, until then, had been that the English law should stay insular and different.[226] Nonetheless, we can imagine that retaining a system so manifestly different from that of the

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190, 212 (1941-42) (positing that "it might be possible to deduce [from this practice] that Coke was thinking (unconsciously perhaps) of the law in terms of substance rather than of procedure . . . .").

223. SIR EDWARD COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND 11 (J. H. Thomas ed., 1818).

224. *See* FORMS OF NATIONHOOD, *supra* note 157, at 67.

225. *Id*.

226. *Id*.

neighboring world might become a tremendously trying experience and the source of a great sense of inferiority. Indeed, for the Continental, the English law was looked on as brutal,"[227] and then a critique from within, made in the 1530s by Thomas Starkey, further condemned the English legal practice as medieval and barbarous.[228]

The attacks were obviously a source of significant apprehension and produced a defensive response accompanied by a desire for assimilation. Calls for legal reform and calls to join Europe by adopting some version of the Roman civil law, were starting to be heard. The idea that England needed a written law was growing out of the combination between two different schools of thought: Renaissance Humanism and English Nationalism.[229] In 1535, Richard Morrison presented a "*discourse touching the Reformations of the Laws of England*" to King Henry III, which suggested actually writing the law.[230] Morrison was paraphrased as saying:

> What the Romans did the English can and should do. They should write the law, produce an English equivalent of the *Corpus Juris Civilis.* Not only would such a book remedy the law's confusion and uncertainty, it would stand as a mark of civility, a mark of England's freedom from barbarism.[231]

This call remained unanswered for several decades.[232] The mission was too challenging and intimidating. If possible at all, it required a rare jurist who is shrewd, learned, ambitious, highly respected, experienced, self-confident and meticulous. It was Coke who had all these qualities (in large quantities) and who took upon himself the lifelong mission of writing down the laws of England.[233] Other than Coke "no one had attempted a picture so comprehensive, [a] legal exposition on so grand a scale."[234] His eleven volumes of the *reports* came first, followed by his four volumes of the *Institutes* and it was said that "together they should . . . represent the whole law of England, spread upon paper for students to learn and see."[235]

For years Coke wrote with "a persistent awareness of a rival system of law against which English law had to defend and define itself."[236] Moreover, by writing laws down he attempted to create a new image for

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227. *See* BOWEN, *supra* note 93, at 64.

228. *See* FORMS OF NATIONHOOD, *supra* note 157, at 65.

229. *Id.* at 101.

230. *See id*. at 70 (proposing to gather the unwritten laws of the land and write them down).

231. *Id.*

232. *See id.* at 70-71 (explaining that although they identified the need for a writing, no one accepted the task until Coke's generation).

233. *See id.* at 80 (noting that many lawyers of the time would have kept their own reports of court proceedings in manuscript form, but that none of these lawyers undertook to create the extensive and illustrative body of work that Coke created).

234. *See* BOWEN, *supra* note 93, at 508.

235. *Id.*

236. *See* FORMS OF NATIONHOOD, *supra* note 157, at 71.

them. No longer would the law be the common memory of small professional community, instead the law would be something else. The law would be more stable, more systematic, more approachable, and, above all, more civilized. In other words, English law would become something that could compete with Roman law.

It is worth stressing for our purposes that putting the law in writing was a way of fighting for the Common Law's authority.[237] In contrast to the Roman code, here the written result was not the authentic law, but a strategic *representation* of the law. The law itself remained *oral*, chiefly what the judges had said, for years in courts. Indeed, Coke himself pointed to the risk inherent in English law's oral nature and explained the importance of writing by warning against the phenomenon of "slippery memory."[238] Interestingly, he used this same phrase again and again, whenever he wanted to justify writing, including in the *Countess of Rutland's Case* where he established the parol evidence rule.[239] The danger of "slippery memory" was the danger of the "slippery slope," i.e. the danger of losing authority. Thus, by mimicking the Roman law technique of writing, Coke tied the Common Law to one of the most admired characteristics of its rival, and could thus present the Common Law as the "most equal, most certain, of greatest antiquity and least delay, and most beneficial and easy to be observed."[240]

2. The Common Law vs. the Oaths

The Common Law was threatened by its "barbarous" image not only because of the widespread reception of Roman law, but also because of flaws in its own procedures. Chief among these was wager of law—an archaic procedure, originally used in local courts all over England and a very popular defense method in cases of unpaid debt.[241] When sued for not paying their debt, the defendants could ask to "wage," that is make their law by taking an oath that they do not owe the money or the goods in question.[242] The defendant would then bring eleven neighbors or friends, compurgators, to strengthen the initial oath by taking a secondary oath that the defendant is trustworthy and their oath was good.[243] As time passed, this procedure expanded from the local courts to the central courts in Westminster, where it became increasingly unfeasible to bring close

237. *See id*. at 80 (noting that Coke's reports provided a defense of the English legal system against those threats embodied in Roman law).

238. *See id*. at 81 (suggesting that the reasoning and rules of judges tend to get lost in the transmission of oral accounts). Therefore, his reports provide a remedy to preserve the record of the court. *Id.*

239. *Countess of Rutland's Case*, 7 Eng. Rep. at 90.

240. 2 CO. REP. (opening sentences of the preface).

241. *See* BAKER, INTRODUCTION, *supra* note 13 , at 318 ("Oral agreements were best left to the local courts, where proof by compurgation was used.").

242. *Id*. at 74, 319.

243. *Id.* at 74.

neighbors or friends to support the defendant's claims.[244] A fictional practice of using "professionals," hired oath-helpers, also known as "knights of the post," was developed to cope with this problem.[245]

At the end of the sixteenth century and at the beginning of the seventeenth century, pamphlets mocked the oath-helpers who "will sweare you anything for twelue pence," and the period's literature was full of references to the corruption of the knights of the post.[246] Dependence upon this old procedure entailed such risk to one's reputation that even its classic beneficiaries, the defendants, increasingly were deterred from relying on it.[247] Not surprisingly, the practice of waging law came at the price of increasing disrespect for, and diminishing faith in, the legal system that used it and relied on it to do justice. As Lorna Hutson notes, "In literary texts, the openness of wager of law to abuse became symbolic of wider corruption in judicial and political systems . . . ."[248]

The use of oaths at the turn of the sixteenth century was, therefore, something that needed to be abolished, and it was, like writing the law, a mission for Coke to fulfill.[249] He did this by challenging the system of oaths as part of his argument in the famous *Slade's Case*. The decision in this case practically eradicated the wager of law.[250] A keystone of the modern law of contract, *Slade's Case*, which was litigated during the years of 1597-1602,[251] is known for its legal recognition of "implied promises" arising from a contract.[252] However, as David Sacks pointed out, legal historians tend to agree that the decision in *Slade* was at its time mainly "a vehicle for accomplishing what the lawyers and judges were really after—

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244. *Id.* (reporting that this practical obstacle led the oath-taking procedure to become fictionalized, contributing to its demise).

245. Lorna Hutson, *Not the King's Two Bodies: Reading the "Body Politic" in Shakespeare's Henry IV, Parts 1 and 2*, *in* RHETORIC AND LAW IN EARLY MODERN EUROPE 166, 184-85 (Victoria Kahn & Lorna Hutson eds., 2001)

246. *Id.* (quoting THE WORKS OF THOMAS NASHE vol. 1, 164 (R.M. McKerrow ed. ,1966)).

247. *See* David Ibbetson, *Sixteenth Century Contract Law: Slade's Case in Context,* 4 OXFORD J. OF LEGAL STUD. 295, 313 (1984) (explaining that to wage law would amount to an admission of liability and that even innocent men would rather pay then use this defense).

248. *See* Hutson, *supra* note 245, at 187 (noting that William Shakespeare was among the most influential Elizabethan authors who dealt with the problem of oaths); *see also* BOYER, SIR EDWARD COKE, *supra* note 91, at 133 (observing that Coke viewed written records as more reliable than oaths by self-interested parties).

249. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 113 (observing that, meaningfully, it was Judge Popham—Coke's mentor, the head of the King's Bench and, the same judge who was reported by Coke as forming the parol evidence rule in our Case—who entrusted the Case to Coke's experienced hands).

250. S*ee* BAKER, INTRODUCTION, *supra* note 133, at 345.

251. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 125 (stating the years of the litigation in *Slade's Case*). These dates, as well as the contractual context and the identity of its reporter, make *Slade's case* entirely relevant to the discussion regarding our 1604 Case.

252. *See id.* at 129 (stating that the recognition of implied promises was necessary in order to facilitate the use of the new action of *assumpsit* in a larger variety of contractual situations, including cases in which the plaintiff could have used the old form of action of debt).

namely, *the displacement of the older forms of action in contract* with new capable of *attracting potential plaintiffs to the common law courts*."[253]

We will go back to these marketing efforts later, but for now it is important to see more generally the pains that Coke took to extricate the Common Law from the corrupted and barbarous stigma caused by oaths, and to portray the Common Law as a more rational and better controlled legal system. In this regard, Coke had to address the claim that it was inappropriate to allow plaintiffs to opt for a procedure that would deny the defendants' "right" to wage their law. It was argued that this was especially inequitable in situations where defendants had fulfilled their share in the transaction privately and, hence, could not otherwise prove their innocence.[254]

To this Coke replied that the reliance upon oaths "induces men . . . to perjury."[255] At the practical level, his argument, albeit cynical, was at once rational, practical, and highly educational: the debtor should obtain a receipt.[256] Here, we see Coke dealing pragmatically with the tension between the oral, the private payment, and the written, the receipt, and preferring the tangible record over the elusive oaths. At the policy level, his argument embraced the King's Bench modern view that considered the wager of law an "anachronistic and irrational mode of trial,"[257] and hence, offered a trial by jury.

Whether the trial by jury of the early-modern times was indeed better is highly doubtful,[258] but, nevertheless, what is important to our discussion is that jury trials had *the appearance* of being more rational and, therefore, were considered an improvement. At any rate, the combination of both the practical policy levels of Coke's response led to the conclusion that the best, if not the only, way to refrain from being charged for breaching one's contract is to present tangible proof to the jury.

Focusing on the cancellation of wager of law we can see that *Slade's Case* invol ves a series of dichotomies: oaths/jury, mystical/rational,

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253. *See* David Harris Sacks, *The Promise and the Contract in Early Modern England: Slade's Case in Perspective*, *in* RHETORIC AND LAW IN EARLY MODERN EUROPE 28, 37 (Victoria Kahn & Lorna Hutson eds., 2001) (emphasis added).

254. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 130 (indicating that the defendant could wage his law only in the old-fashioned action upon debt and not in the newer, emerging action of *assumpsit*).

255. Slade's Case, 76 Eng. Rep. 1074, 1078 (K.B. 1602).

256. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 130 n.60 (adding that "Coke's estate records . . . show that this was his own careful practice").

257. *See* Ibbetson, *supra* note 247, at 312.

258. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 139 (1975) [hereinafter SIMPSON, HISTORY] ("A fifteenth-century jury was an oath-taking body which closely resembled a set of eleven compurgators, the main difference being the fact that its composition was not determined by the defendant."); *see also* BOYER, SIR EDWARD COKE, *supra* note 91, at 133 (recording that the dissatisfaction from a trial by jury as a substitute for wager of law was so deep that it finally led to the legislation of the Statue of Frauds in 1677); BAKER, INTRODUCTION, *supra* note 133, at 348-50 (observing that this legislation, which survived as the "Sale of Goods Act" until 1954, insisted on the requirement of writing and made certain classes of oral contract completely unenforceable).

medieval/Common Law, ancient/modern, corrupt/fair and suspect/trustworthy. Parallel to these dichotomies, we can perceive this case as representing a *move*[259] away from the first element, and towards the second element of each dichotomy. Coke's practical suggestion—that the debtor should keep documents that could prove payment—raises another dichotomy, which correlates with the above move, that of the oral versus the written. The "written" symbolizes *tangibly* the superior term in each of the above dichotomies: the rational, modern, fair, and trustworthy Common Law, a law which was wise enough to get rid of the oaths in 1602.[260] One result of the *Slade's Case* move was that many more oral contracts could then be litigated under the Common Law through the action of assumpsit.[261] This probably raised a series of questions about the status of the oral newcomers in relation to the familiar written contracts.

Was Coke, already occupied by the clash between the written and the oral in the greater context of the competition with the written civil law, aware that this complication was to follow from his victory in *Slade's*? It is difficult to know the answer. However, if he did have this potential conflict in mind, this might explain why he made such an effort to establish the parol evidence rule through our Case, even though it was not required given its concrete facts.

3. The Common Law vs. the Common People

To date, what is considered as Coke's leading contribution to the modernization of the medieval version of the Common Law is the concept of "artificial reason."[262] The idea is two-fold: first, that the Common Law is a product of reason and hence reasonable; and, second, that this reason is not natural, but something else, artificial and perfect. In Coke's famous words: "Reason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood as an artificial perfection of reason . . . ."[263]

The first layer of Coke's concept placed "reason" at the core of law. Such a view afforded the Common Law a much needed unifying method, one that could tie together the dispersed precedents that had been building up for so many years.[264] Coke's definition of the law as based upon reason

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259. *See* Sacks, *supra* note 253, at 37 (viewing *Slade's Case* as a "move" as opposed to "mentalité"). As Sacks argues, "[m]oves are highly sensitive to the particularities of the historical setting in which they are made." *Id*.

260. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 132 (reporting that in 1602, "[o]ath-helping passed into desuetude, and lawyers forgot the procedures for waging law").

261. *See* BAKER, INTRODUCTION, *supra* note 133, at 347 (indicating that *Slade's Case* signaled the "formal unification of the law of parol contracts through the action of *assumpsit*").

262. *See* Shaunnagh Dorsett, '*Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry*, 26 MELB. U. L. REV. 32, 37 (2002) (defining "artificial reason" as "the prerogative of the learned judiciary").

263. COKE, *supra* note 223, at 1.

264. *See* John Underwood Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 L. Q. REV. 330, 336

provided the judges with a common tool of assessment: "[w]hat they found agreeable, they approved; whatever failed to meet the test of reason, they struck down."[265] This brilliant idea made the law *appear* fundamentally coherent. Suddenly, the Common Law seemed to have "common sense," and with Coke's brush it was painted as rational, consistent and logical. Simultaneously, this magical concept increased the judges' credibility and reliability, for they were the users of the efficient tool of reason and, as a result, they became the source of reason, its carrier and its reflection. Combined together, these two improvements—of both the image of the law and that of its judges—contributed immensely to the strengthening of the Common Law's authority.

It is important to notice that even Coke's choice of the term "reason" is extremely significant. As indicated earlier, we know he was acutely aware of the increasing appeal of the sophisticated, elegant, and classical Roman law.

We may assume that since Coke was incredibly knowledgeable and well read,[266] he knew the Roman maxim that one should follow reasons rather than precedents.[267] This maxim plainly assumes a contradiction between "reason" and "precedent." Against this background, Coke—in an act of alchemy—turned precedent *into* reason. He took the term "reason" and made it interchangeable with precedent; the judicial point of view *was* reason and following precedents were, therefore, reasonable. Looking closely at the choice of the word "reason," for instance, in the above quote whereby "the common law itself is nothing else but reason,"[268] we can see the labored effort that Coke made in presenting the Common Law *as though* it resembled the respected Roman law *without* changing its true nature. In my view, it was mainly a change of image rather than a substantive transition.

The second layer of Coke's idea, the "artificial" part, served as a way to distinguish *legal* reason, reasoning and reasonableness from the more "natural" traits of reason. To Coke, artificial reason was anything but the ordinary understanding of the human brain. It was artificial in the sense of "man-made," something that emerges from an extremely professional process and, to use Coke's original words, "not of every man's natural reason."[269] Artificial reason was substantially different from the normal way of thinking, involving legalized reasoning and requiring "long study, observation and experience."[270]

(1968) (arguing that Coke's "perfect reason" became the foundation to establish a more coherent common law).

265. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 106.

266. *See* BOWEN, *supra* note 93, at 8 (noting that Coke had a reputation as a scholar and was known to research the law and origins of government).

267. *See* BAKER, INTRODUCTION, *supra* note 133, at 196-97.

268. *See* COKE, *supra* note 223, at 1.

269. *Id.*

270. *Id.*; *see also* Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke, in* CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT

To view law as defined by artificial reason, and artificial reason as reserved for legal specialists, was a powerful move. As Hulsebosch observed, it, Coke "championed the 'artificial reason' of the legal community *above* the natural reason of the individual."[271] No doubt, such a vision powerfully symbolized and, at the same time, reinforced the superiority of the Common Law and its experts. Yet such a vision also evidently distanced and rejected the common people, those who often needed the legal services.[272]

In a way that is meaningful to the connection between the status of the Common Law and that of writing, part of this distancing project was attained by the use of *written* lingual tools. The reasoned law, as written by Coke and others, appeared to be in an especially reserved language, one that no "ordinary" person could fully understand.[273] This strange, if not secret, language even had a symbolic name: "Law-French," a name that captures neatly the condescending character of the exclusive legal club.[274] Other than exposing the true demeaning spirit of "artificial reason," it is worth seeing how such a name also constitutes a nod to Europe. However, just like writing an English version of *Institutions* and just like talking of "reason" instead of using the term "precedents," this, too, was only a cosmetic maneuver: the words were seldom in "real" French and the content was totally English-made.[275]

As we shall now see, the two layers of "reason" and of "artificial" are important to the creation of the parol evidence rule. This is illustrated by a telling example that preceded our Case, the well-known *Shelly's Case*,[276] in which Coke's argument won him enormous admiration.[277] The dispute concerned the interpretation of a contractual formula that was commonly used in family settlements, in which owners of land tried to control the future of their estates.[278] Edward Shelly used the following formula: *to A*

25, 61 (Perez Zagorin ed., 1980) (describing such professionalism as "art").

271. *See* Hulsebosch, *supra* note 220, at 460 (emphasis added).

272. *See id.* (observing that because mastery of the law required years of intensive study, it was inaccessible to even the "wisest" of lay people).

273. *See* Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640,* 146 U. PA. L. REV. 323, 373 (1998) [hereinafter Ross, *Commoning*] (describing the philosophical and cultural underpinnings of the debate over whether to print the Common Law and thereby make it more accessible to the lay people). "'Which of us has not heard it objected,' asked Thomas Wentworth in The Office and Duty of Executors (1641), 'that we the professors of the law, seek to hide and secret the knowledge thereof under this dark and distasted' French language?" *Id.* at 371.

274. *See id*. at 374 (reporting that this language was one of the anti-publicists' means of keeping the developing law out of the reaches of laypeople).

275. *See id*. at 436-37 (recounting several criticisms of Coke's Reports).

276. *See* 91 Eng. Rep. 262 (K.B. 1581).

277. *See* BAKER, INTRODUCTION, *supra* note 133, at 286 (indicating that Coke's ability to persuade the King's Bench to adopt his argument in this case led the courts to recognize that legal rules should govern executory interests); *see also* A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 13-44 (1995) [hereinafter SIMPSON, LEADING CASES] (supplying a detailed historical background and legal analysis of the case).

278. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 114-20 (describing the dispute and how it subverted traditional rules of inheritance).

(himself) *for life, then to the heirs of A* in order to pass on his estate (or the part thereof) to his grandson from his deceased first son.[279] The problem, however, was that this grandson was not yet born when Edward used the formula and, therefore, at that specific point in time, Edward's male heir was still Richard Shelly, Edward's brother.[280] Richard claimed that the above formula gave him an immediate interest in Edward's estates, one which later incidents, such as the appearance of a newborn grandson could not rescind.[281] The grandson's counterclaim was that the transfer only happened after Edward's death, a time in which he, and not his uncle Richard, was the closest male heir.[282]

Shelly's Case emphasizes the strong connection between the idea of artificial reason as a locus of legal expertise, on the one hand, and the interpretation of legal, and specifically contractual, language on the other.[283] Richard's elite lawyers creatively emphasized the need to respect Edward's *intention* at the time of writing, which they took as Edward's desire to transfer immediate entitlement to his brother.[284] Opposing them stood Coke, who represented Edward's grandson and argued for a "reasonable" interpretation of the legal formula.[285] To him, "reasonable" meant the way legal experts of the time would write and read the formula that Edward used.[286] Coke based his argument on a literal approach to lawyers' language, a language that became the visible symbol of their expertise.[287] At a very practical level, this kind of "artificial reasoning" ruled out the thesis of immediate inheritance by Richard and brought Coke's client, Edward's grandson, the victory.[288]

However, what is even more important for the current discussion is that the same reasoning rejected the relevance of other understandings of identical language and left out the social, political or personal meaning of

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279. *Id*. at 115.

280. *Id*.

281. *Id*.

282. *See* EILEEN SPRING, LAW, LAND & FAMILY 138 (1993) (examining facts analogous to those in Shelly's Case from a feminist point of view by noting that "[t]o B's son if he should have a son, but to his younger brother if he should not, is a limitation that cuts out in advance B's *female heirs*") (emphasis added).

283. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 119-20 (noting that *Shelly's Case* launched an era, lasting four centuries, which largely ignored parties' intentions and interpreted legal documents in a technical and esoteric fashion).

284. *See* SIMPSON, LEADING CASES, *supra* note 277, at 31 (explaining that Richard's lawyers necessarily distorted the dispute in order to place the focus on Edward Shelley's intentions).

285. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 116-17 (explaining that Coke, in an effort to counter the clever arguments of opposing counsel, used numerous persuasive arguments based on the existing legal rules on remainders).

286. *See* SIMPSON, LEADING CASES, *supra* note 277, at 31-32 (reporting that the language that Edward used in his will, "of the heirs male of the body of Edward Shelley lawfully begotten," were the crux of Coke's arguments in support of Henry Shelley's position).

287. *See id*. (observing that, based on the language in the transaction, "Henry seemed to have a good case").

288. *See id.* at 34 (stating that the court found that "Richard lost his rights the moment [Coke's client] was born").

the legal words. Coke's innovation was at this later level: although his arguments followed the old feudal rules and tried to reaffirm them—his approach carried with it radical change.[289] As Allen Boyer has written:

> This was one of the most significant achievements of Coke's era, and one of its most troubling. For the next four centuries, whenever the terms of a legal document required definition, English courts would apply the private, technical meaning current among the bar. When construing contracts, courts arrogated to themselves the construction of disputed terms, refusing to hear what the parties themselves had meant . . . . Not until the 1950's, prodded by Lord Denning, would the English bench once again begin to read documents in terms of the parties' original intent.[290]

From here, the stretch to the first version of a contractual parol evidence rule seems quite easy: if legal documents speak (reasonably) in a professional language, which is so different from the natural language, then what justification can there be to accept evidence regarding the parties' intentions?

The general idea of artificial reason as well as its lingual derivative fit neatly with Coke's personal nature. Coke described himself as direct in his speech and a strong believer in bright line rules, and scholars attest that Coke preferred the most literal interpretation possible to any legal written material, be it a statute, a will, or a contract.[291] His "plain-meaning" approach to questions of legal interpretation was closely intertwined with his ways of thinking and talking, which in turn did not lack their fair share of arrogance.[292]

In light of our focus on the *Countess of Rutland's Case*, it is startling to see how in his report on *Shelly's Case* Coke seems to have told his readers much more than what he said in court and certainly more than the decision-makers stated in the actual judgment. In fact, Serjeant Anderson, a sub-serjeant court reporter later blamed Coke for reporting things "which had never been uttered in the courtroom."[293] Remarkably, the famous rule that was attributed to *Shelly's Case* and prevailed for centuries, concerning the distinctive legal meaning of the contractual formula, did not appear in any other account of the same case.[294]

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289. *See id.* at 40 (pointing out that Coke's arguments resulted in an inflexible rule of law to guide document interpretation, "however silly the result").

290. BOYER, SIR EDWARD COKE, *supra* note 91, at 120.

291. *See id.* at 120-21 (noting that Coke saw himself as a "bluff, honest speaker" and behaved this way when he made his courtroom remarks).

292. *See id*. at 201-02 (remarking that Coke thought so highly of his opinions that he would use the sheer weight of his rhetoric in court to defeat his opponents).

293. *Id.* at 117.

294. *See id.* (noting that the Rule— "that a grant *to A for life, then to the heirs of A,* gives A an immediate freehold"—does not appear in other reports of the courts holding).

1. Coke's Efforts

As we have just seen, at the same period in which the Countess of Rutland was fighting for her land and Coke was writing his "take" on the judicial decision on the matter, the Common Law was also waging its own battle. In this multi-frontier battle,[295] Coke acted as if he was the "Secretary of Defense" for the Common Law, planning and executing the strategies.[296]

This lifelong role that Coke took upon himself involved dealing continuously with the status of written words and their relationship to the authority of the Common Law. As demonstrated, defending the status of the Common Law against the Roman law, the oaths or the ordinary people, involved considerable debate regarding the oral/written dichotomy.[297] It appears that no easy solution was available to Coke, just as there might not be one for legal scholars today. The Common Law was by its nature oral, but it needed to be in written form in order to preserve and promote its authority. The following paragraph captures this dilemma well:

> The need of common lawyers to justify not only the content but the dignity of their law against the slurs of royalists, civilians, university scholars, country gentry, merchants, and divines, meant that lex scripta and lex non scripta, writing and oral/memorial tradition, opposed each other as ideal-typical constructs in debate as they worked together in practice. Unorganized, unfindable, uncertain, unsteady, primitive: These charges battered the unwritten common law.[298]

It is also possible to analyze what was taking place at the turn of the seventeenth century, including in our case, with postmodern tools. Instead of a pure dichotomy between the oral and the written, one which entails hierarchy and superiority of the oral, the two terms related to each other more interactively. The written was becoming more of a "dangerous supplement," the "thing" that the oral was so dependent upon for the sake of preserving its own existence.[299] So, to continue with the postmodern mind-set, around 1604 the hierarchy could be seen in a reverse way: if the

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295. Other than the three battles discussed above (against the Roman law, the oaths and the ordinary people) there were two serious additional battles taking place: the struggle against the King and his absolutism and the competition with Equity (and with Sir Francis Bacon). These two reached their peak slightly after the Case of the Countess of Rutland was decided and hence are not discussed here. However, these last two conflicts seem to fit in well with the general argument made here that the birth of the parol evidence rule should be seen as part of the larger struggle for the Common Law's status and authority.

296. *See* Bowen, *supra* note 93, at 71-72 (remarking that Coke's writings discussed nearly six hundred cases and served as the foundations of legal reasoning for three hundred years).

297. *See* Ross, *Commoning*, *supra* note 273, at 352 (explaining that, by the end of the sixteenth century, skepticism about law printing sparked a fierce debate in legal circles over its benefits and drawbacks).

298. Ross, *Memorial*, *supra* note 157, 319.

299. *See* Ross, *Commoning*, *supra* note 273, at 366 (observing that "printed critiques survive where most manuscripts, sermons, and tavern cursing do not").

oral needed the written so badly then was it not in fact the written which set the tone?[300] At any rate, the very activity of writing, what originally was an oral nature had an *artificial* quality, the exact effort with which Coke seemed to be occupied when he was writing the law as well as when he was creating rules of law that dictated the supremacy of writing.[301]

Scholars describe Coke as having engaged in "creating the secular myth of the common law . . . ."[302] In addition, one can see his tactic as a campaign for improvement of image, one that aimed to create a better appearance for an aging product, an act of marketing. In this respect, at least one authority has already argued that *Slade's Case*—which brought litigation to the King's Bench—was part of a market-driven process.[303] This process, the argument goes, came out of a growing concern on the part of Common Lawyers and judges, who felt that they were being pushed away in the competition between the available courts of the period.[304] My argument is broader and slightly more abstract. First, I believe the struggle for the elevation of the Common Law involved more than purely the narrow worries about personal profits, even though such concerns—especially in an era of rapid inflation—would certainly create a strong incentive. And second, by "marketing campaign" I mean something more expansive than simply offering "attractive deals," as *Slade's Case* with its new option of assumpsit might be seen.[305] I suggest a multifaceted change of image that had the potential for long-term results, far beyond relieving the immediate economic anxieties of the lawyers and judges involved.[306]

What the Common Law needed under the marketing model, where the product was a legal system and services, was more credibility, trustworthiness, firmness, certainty, self-control, and steadiness. What the Common Law required was to get rid of heavy loads of capriciousness, haziness, instability, irrationality, unpredictability, impulsiveness, and the

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300. *But see* Balkin, *supra* note 185, at 755 (noting that deconstructionist philosopher Jacques Derrida has observed a "consistent valuing of speech over writing" as a way to communicate in the western world).

301. *See* SIMPSON, LEADING CASES, *supra* note 277, at 35 (noting that written judicial decisions can reveal "pseudo-logical" arguments and can demonstrate the "fragile foundations of legal reasoning").

302. Peter Goodrich and Yifat Hachamovitch, *Time Out of Mind: An Introduction to the Semiotics of Common Law*, *in* DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 159, 171 (Peter Fitzpatrick ed., 1991).

303. *See* Sacks, *supra* note 253, at 37 (pointing out that King's Bench judges and lawyers worried about their "loss of business" to courts of equity and prerogative courts).

304. *See* FORMS OF NATIONHOOD, *supra* note 157, at 66 (offering the statement of an observer that "the principal courts of the Common Law, had so little business that the lawyers just stood and 'looked about them'").

305. *See* Sacks, *supra* note 253, at 37 (noting that the emergence of the legal action in assumpsit was a desire created to attract plaintiffs in contract disputes).

306. *See id.* (explaining that judges, as well as lawyers, feared the Common Law courts' shrinking jurisdiction over transactional issues). Note that not only the lawyers but also the judges were paid a fee for each case brought to them and hence had a very direct interest in the popularity of their courts.

like. Skimming the above discussions again, we can see that Coke did [307] only that.

In this light, the formation of a rule like the parol evidence rule is a miniature of the larger story of building a new image for the Common Law. Even though a contract is philosophically, an unwritten creature, an abstract meeting point of minds, wills or intentions, rather than a tangible document, the parol evidence rule still reflects the fact that something is missing.[308] By insisting on writing, the rule seeks authority, which in turn derives from the solid image of the written word.[309]

The Countess of Rutland's Case should be read, therefore, as part of a larger written cloak that covers the rules of interpretation of contracts. As such, the Case should be read together with its better known allies: *Slade's Case* and *Shelly's Case*. Jointly, they were part of one big campaign, aimed at building a newer and better image of the "rule of law" for the Common Law.[310] The fact that all these cases belong to Coke's legacy and are all "contractual" should not be seen as mere coincidence. In a period repeatedly characterized as based on a "culture of credit" the demand for contracts and, as a result, for contractual litigation and practical contract rules, was on the rise, and contract law served as a "testing ground" for the law in general.[311] In other words, if contracts could be dealt with in a satisfactory manner under the Common Law, in such a period of need, then the achievement would be much greater and eventually exceed the contractual arena.[312] The achievement would bring more business to the Common Lawyers and judges and it would reflect and signify the law's majestic power of being systematic, rational, organized, predictable, and useful.[313] The success of this marketing campaign would represent Coke's victory, on behalf of his biggest client ever: the Common Law.[314]

Surely the idea of gender stereotypes did not even cross Coke's mind at the time, but from a twenty-first century perspective, his defense strategy

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307. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 121 (describing Coke's desire to avoid "obscurity, ambiguity, jeopardy, novelty, and prolixity" in favor of "bright-line rules" and rigid interpretation of those rules).

308. *See* MCLAUCHLAN, *supra* note 47, at 33 (noting that, in the context of the parol evidence rule, some scholars believe that a written contract is not the contract itself—only evidence of the contract).

309. *See id.* at 32 (cautioning that the parol evidence rule only applies where the contract is in writing).

310. *See* Sacks, *supra* note 253, at 37-38 (suggesting that the "winning argument" in *Slade's Case*, for example, was an attempt to serve the client while creating authoritative precedents for future contracts cases).

311. *See id.* at 36 (observing that during Henry VIII's reign, debt litigation and small business transactions were rapidly increasing in urban and rural areas).

312. *See id.* at 37-38 (noting that common law contract lawyers during this period wished not only to create precedents, but also to "extend them as far as they could").

313. *See id.* at 38 (suggesting that Coke's report of these contract decisions "filled the space left by the absence of a definitive statement of the court's reasoning and thereby fixed all future discussions of contracts").

314. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 123-24 (explaining that Coke constantly "asserted the superiority of the common law" and made numerous categorical claims in support of his position).

might be seen as attributing a more masculine-like image to the Common Law while concealing feminine features. Again, bearing in mind, it may be viewed as accrediting stereotypically-masculine qualities of credibility, trustworthiness, firmness, certainty, self-control, steadiness, and so on, while hiding stereotypically feminine traits of capriciousness, haziness, instability, irrationality, unpredictability, impulsiveness, and the like. Such an observation raises two major questions with respect to the move from the "feminine" to the "masculine" as described above: first, about the hegemonic rejection of the womanly qualities of the law and second, about the artificiality of the whole transformation.

The first point is quite straightforward. I explored it earlier when I offered a close reading of Coke's heavily quoted text. Being detached, patronizing, authoritative, rational, commercial, and full of certainty, the parol evidence rule may serve as a silencing mechanism of more womanly voices.

Pertaining to the point of artificiality, to ascribe a more masculine-like image to the Common Law was an artificial move rather than a deep conversion. To write the precedents, to switch from oaths to juries and to use artificial reason was to put on a manly mask and clothes that would hide the more stereotypically feminine sides of the law. When Coke wrote the report of our Case and formed the contractual rule that gave priority to writings he did just that: he wrote a play in which the Common Law had the leading role and he dressed the Common Law as a man.

2. Portia's Efforts

Even though he probably did not meet William Shakespeare in person, Coke was certainly familiar with his play *The Merchant of Venice*, so popular in the years preceding the Case.[315] Generally, as Luke Wilson said, it "seems beyond dispute that the meaning of contractual relations was a matter of particular concern at least roughly at the same time as the drama flourished in the late sixteenth and early seventeenth centuries."[316] More specifically, at least one early study of the legal scene in the fourth act of this famous play claimed that, "If I were asked to name the three men in all England who were most profoundly affected by Shakespeare's *The*

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315. *See* MARK EDWIN ANDREWS, LAW VERSUS EQUITY IN THE MERCHANT OF VENICE 21 (1965).

> The Merchant of Venice was written before 1598, for it is one of the six comedies specifically mentioned by Meres in his Palladis Tamia in 1598. It was very probably written after 1596 for in that year Sylvain's Orator, a book which contained part of the argument of the bond plot, was published in English translation; Thus, the conclusion that the play was presented for the first time late in the year 1596 or in 1597.

Id. Andrews's fascinating work was completed in 1935 but was published only years later in 1965. According to him, the play was first printed in 1600 and his book contains a beautiful reproduction of the title page of this first quarto edition.

316. WILSON, *supra* note 195, at 70–71.

Merchant of Venice, I should unhesitatingly name the following: **Sir Edward Coke, Sir Thomas Egerton, and Sir Francis Bacon**."[317]

Whether inspired by Shakespeare's Portia or on his own initiative, Coke can be perceived as using the parol evidence rule in a manner parallel to Shakespeare's use of Portia's gender-bending.

In *The Merchant of Venice*, Portia disguises herself as a male lawyer in order to give a cunning speech, a feat of rationalism, in favor of Antonio, "the merchant," against Shylock, "the Jew."[318] This disguise—and it alone—invests her with the elevated status of a lawyer, the respect of others, and eventually grants her the power of persuasion, admiration, and prestige.[319] Only in the disguise of the "articulated lawyer," that is to say, of a brilliant doctor of law, can she determine things with decisiveness.[320] Only as a man, and through "male" intellectual slyness, can she appear as one who knows and defeat Shylock.[321] If she had presented herself in her femininity and spoken through her true, emotional, and romantic motives (to save Antonio in order to recapture her love and new husband, Bassanio) —would she have succeeded? Not likely. Support for this estimation may be found in Portia's memorable speech in which she praises the quality of mercy, a stereotypically female quality.[322] Her failure to alter the interpretation of the draconic loan contract by using a feminine voice, albeit wrapped in a masculine costume, suggests a view of what the appropriate gender performance is under law.

The loan bond stated that if Antonio did not redeem his debt, Shylock could claim a fine consisting of a pound of flesh, "fair" flesh to be cut and taken from Antonio.[323] The "lesson" to be learned from the rejection of Portia's attempt to call for compassion and benevolence is that in the interpretation of this commercial contract there is no room for such "soft"

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317. *See* ANDREWS, *supra* note 315, at 21 (emphasis in bold letters added); *see also id.* at 23 (referring to the rivalry between the common law and equity, and suggesting that "Act IV, Scene i, of the play does not depict a legal quibble, as is often said, but is a profound study of the greatest judicial problem of English jurisprudence which was at its controversial height when *The Merchant of Venice* was written").

318. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE 126 (Randall Martin ed., Applause Theatre Books 2001) (1598).

319. *See id*. at 140 (revealing the Duke's admiration for the disguised Portia when the farmer says to Antonio: "[g]ratify this gentleman, [f]or in my mind you are much bound to him").

320. *See id.* at 136-38 (focusing on Portia's use of legalisms and logic as she explains Venetian criminal law to Shylock).

321. *See id.* at 138 (demonstrating Portia's decisive victory over Shylock by ordering him to kneel and beg the Duke for mercy).

322. *See id.* at 126-28 (Act Four, Scene One) (presenting Portia's discussion of mercy, which she likens to "gentle rain from heaven" and that is "twice blest").

323. *See id.* at 28 (Act One, Scene Three).

> **Shylock**: . . . Go with me to a Notary, seal me there/ Your single bond, and, in a merry sport,/ If you repay me not on such a day. . . let the forfeit/ Be nominated for an equal pound/ Of your fair flesh, to be cut off and taken/ In what part of your body pleaseth me. **Antonio**: . . . I'll seal to such a bond,/ And say there is much kindness in the Jew.

Id.

emotions, but rather, only for that which is termed law.[324] Portia uses, then, the only recourse left to her—she sorts out the written words of the bond and reads them in the most literal way while employing the shrewdness of linguistic rationale.[325] She holds fast to the language of the contract and to the principle that all that is not explicitly permitted is, therefore, forbidden. As the contract manifestly determines that the fine is a pound of flesh, but *does not say* that the fine includes blood, Shylock is allowed to collect his debt, but Portia warns him that he must not shed even a drop of Antonio's blood, or he will endanger his property as well as his life.[326] This sophisticated logical analysis is what finally brings her the cries of admiration, "upright judge . . . learned judge."[327]

Indeed, Portia's "intellectual" acrobatics are presented to the viewer as the height of legal-contractual ability and as ensuring her professional reverence. Holding to the written words and speaking about their meaning in a rational manner is offered by Shakespeare as a way of gaining both authority and success.[328] Is this not the same thing that Coke was trying to achieve for the Common Law? Is it not what he was seeking while reporting the *Countess of Rutland's Case*? And, finally, does not Portia as well as the parol evidence rule present an artificial image of rationalism, which conceals something far less rational?

Having suggested this similarity, it is worth pointing to one major difference between the writings of Shakespeare and Coke. While the play's audience recognizes Portia's real identity and motives, this is not true of the readers of the legal report. In contrast to theater-goers, these readers might not suspect, perhaps even today, that the hierarchical and rigid parol evidence rule entails a disguise that hides the real nature of contractual interpretation or that of the law at large.

This disparity may offer a better appreciation of the legal rule. The theater-goers not only *know* that Portia is not a man, that she is bending her gender performance—they are also fully aware of the *active effort* she is making to hide her true identity and to pretend to be something that she is not.[329] This act of imitating men, their voice, their rough steps, their brags and lies, and their clothes,[330] by one who is originally "a woman fair, and

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324. *See id.* at 128 (Act Four, Scene One) (showing Shylock's rejection of Portia's argument: "My deeds upon my head! I crave the law,/ The penalty and forfeit of my bond").

325. *See id.* (Act Four, Scene One) (containing Portia's request: "I pray you, let me look upon the bond").

326. *See id.* at 134 (Act Four, Scene One) (discussing the terms of the bond, which as Portia notes, allow the extraction of a pound of flesh but "no jot of blood").

327. *Id.* (Act Four, Scene One).

328. *See id.* at 135 (noting that Portia succeeds only by "insist[ing] on the literal tenor of the bond") (editor's commentary).

329. *See* SHAKESPEARE, *supra* note 318, at 127 (observing that the disguise is obvious to the audience, but adding that the audience has little time to examine it because she begins acting soon after taking the stage) (editor's commentary).

330. *See id.* at 108 (Act Three, Scene Four) (containing Portia's characterization of men's physical traits and behavior).

fairer than that word,”[331] is significant. It exposes the *artificial* nature of her “masculine” speech regarding the word of flesh. This imitation is completely at odds with the declared gender conception of the play, which reflects traditional gender stereotypes, according to which “a maiden hath no tongue, but thought.”[332] The effect of the plain act of imitation hence becomes dramatic: it is converted into an act of mockery and it gains a subversive meaning. The loud and open simulation turns the rational-logical-linguistic process of interpretation, as performed by Portia, into a freak-show and it exposes its artificial nature.[333]

This imitation, the disguise, purporting to be something she is not, undermines the unity of the masculine image of the law. It is true that everyone admires Portia because she saved Antonio from Shylock’s clutches, but does the deceit not leave us with an unsavory taste? Is there anyone who senses that the loan contract was indeed properly interpreted?[334] The fact that Portia is not a “real” legal expert also reduces our belief in the legal outcome. Had Shakespeare written about a real doctor of law who interpreted the contract, we would perhaps have been more trustful. The disguise creates a significant fracture in the rational legal façade and brings its limitations to the front of the stage, in both senses of the phrase.[335] And this, in my eyes, is the most important feminist contribution to the matter at hand: when a woman imitates a man and acquires a male image, she nevertheless remains a woman. As a consequence, the image—which is originally an entirely masculine one—is imbued with a new meaning, one which suggests a critical look at the origin.[336] In other words, there is a challenging and thought provoking dimension to the activity of the copycat in a field, namely the legal one, which was originally designed by actual men.[337] The “pretend man,” by

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331. *Id.* at 10 (Act One, Scene One).

332. *Id.* at 34. (Act Three, Scene Two).

333. *See* Thomas Moisan, *“Which Is the Merchant Here? And Which Is the Jew?”: Subversion and Recuperation in the Merchant of Venice*, *in* SHAKESPEARE REPRODUCED: THE TEXT IN HISTORY & IDEOLOGY 188, 188 (Jean E. Howard & Marion F. O’Connor eds., 1987) (observing that the imitations and ambiguities in the play “blur the distinctions on which the polarities . . . depend”).

334. *See* STEWART MACAULY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, CONTRACTS: LAW IN ACTION, VOL. 1, 696-97 (1995) (describing *The Merchant of Venice* as the “classic illustration of creative interpretation” and as a way “to avoid an undesired result” and than arguing that Portia’s reading of the bond is a misinterpretation).

335. *See* GREENBLATT, s*upra* note 27, at 192 (indicating this indeterminacy of Shakespearean representation, which is always shifting).

336. *See* JUDITH BUTLER, GENDER TROUBLE 136 (1990) (suggesting that “one gender” may only be “a fantasy instituted and inscribed on the surface of bodies,” requiring a more nuanced inquiry into gender identity).

337. *See, e.g.*, BUTLER, *supra* note 336, at 137 ("In imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency."); *see also* Zachary Potter & C.J. Summers, *People and Antidiscrimination Law: Reconsidering, Epistemology and Ontology in Status Identity Discourse: Make-Believe and Reality in Race, Sex, and Sexual Orientation,* 17 HARV. BLACKLETTER L.J. 113, 115 (2001) (suggesting a theoretical framework that the authors name as “fictionalism” in order to clarify and expand “upon the arguments in post-structural projects, such as Judith Butler's deconstruction of the sex/gender binary”). In this context it is important to recall that at the times of *The Merchant*

her very appearance in the men's arena, exposes the artificial nature inherent in the binary division into male and female professions, male and female literature, male and female justice.[338] Crossing the gender lines, even if in disguise, casts a doubting light on the lines' existence and threatens to erase them. If all a woman needs to do in order to be a man is to dress up like one, then all of the many filaments built upon the gender images are likely to collapse.[339]

Returning from Venice to the interpretation of contracts in the real courts of England, we may now see more clearly the motivations for covering this process with the distinguished costume of the parol evidence rule. Through these theater binoculars, we can see the disguise as another act of marketing on the part of contract law in order to sell itself and the ideological method within which it operates. In order to be heard, contract law and Common Law at large, like Portia, needed to assume the costume of a rational expert.[340] It seems that Shakespeare and Coke would have both agreed that adhering to the written words of the contract would serve as the best signifier of such rationality.[341] The fact that Shakespeare told his audience about the costuming, while Coke hid it from his readers, further supports the argument that Coke was engaged in a marketing campaign.

Nicolette

She lost her home.

The parol evidence rule ruled out her situation, her hardship, her need to provide for the future of her only child, her dependence on the man who loved her, her incapacity to affect the written contractual words. Sure, nothing was personal. It is, after all, so she was surely told, an established rule, four hundred years old, and back then, in the old days, they did not know a thing about her, about Hollywood, or about gender bias.[342]

And what if Isabel, the Countess of Rutland, could have heard Nicolette's story? Coming from a different age she probably could not really understand what the term "gender bias" means or even what gender is, but she surely could tell Nicolette much about her experience: *her* hardship, *her* need to provide for the future of *her* only child, *her*

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of Venice no real female lawyer had ever been seen. The cultural effect, perhaps even the shock, of seeing and listening to a woman who acts like a lawyer, might be compared to the modern-day effect of seeing Matthew Bourne's ground-breaking all-male "Swan Lake."

338. *See id.* at 140 (cautioning against interpreting gender as a "subtle identity" or "locus of agency from which various acts [predictably] follow").

339. *See id.* at 137-38 (observing that cross-dressing and drag are popular ways to parody society's traditional beliefs that gender is rigid and permanent).

340. *See* SIMPSON, LEADING CASES, *supra* note 277, at 35 (noting that judges may respond forcibly to rational-sounding arguments while secretly basing their opinions on political considerations).

341. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 121 (explaining that Coke preferred the simplest, most literal reading of statutes and other written legal languages).

342. *See* MCLAUCHLAN, *supra* note 47, at 10-11 (tracing the origins of the rule to the late fifteenth century Norman England).

dependence on the man who loved her, and, lastly, *her* incapacity to affect written contractual words.[343]

CONCLUSION

Four hundred years have passed. And yet, it seems to me that so little has changed. Indeed, one can doubt the practical significance of the Rule, both then and now,[344] or, the other way around, one can admire the Rule's contribution to the functionality of contract law within the commercial sphere.[345] However, when looking through these women's eyes—as this research and analysis have sought to do—it becomes clear that the rule's very presence, with all that it represents, has inherently biased and injurious outcomes.

One may well admire Coke's efforts to structure a rule of law in times of trouble as well as his contribution to the stabilization of a society in a time of change.[346] But even so, through exposing the roots of the Rule, I have argued that centuries later we should reconsider the need for the tree that has sprouted.[347] To my mind, Nicolette, both as an individual and as a representative of our times, should not have to suffer the misery of Isabel and her era.

Piecing together disparate historical and cultural materials, I have attempted to portray the particular contexts of the birth of the very rule that strives to avoid context. I have tried not to take the rule for granted, not to accept its existence as natural or neutral. I have treated Coke's words in the *Countess of Rutland's Case* along the lines of New Historicism, as a textual unit about texts and their importance and, more implicitly, about contexts and their exclusion.

The fact that after four centuries, this textual unit, which once formed the parol evidence rule, has survived the changing times and has played a continuous role in a shifting contractual doctrine is extremely meaningful: it bridges Nicolette and Isabel's stories and transforms the journey taken

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343. *See id.* at 30 (arguing that courts all too often apply the parol evidence rule with very little regard to the real issues in the case or the rule's effect on the parties).

344. *See* Zamir, *supra* note 208, at 1730-31 (analyzing a cluster of cases and concluding that the rule has been reduced to a rhetorical device, "aimed at disguising the active role courts play in contract interpretation"); *see also* Melvin A. Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1769 (2000) (stating that "[t]he parol evidence rule**,** although not abandoned, has been significantly loosened in two relevant respects under modern contract law"). Indeed, commenting on an earlier draft of this article Prof. Gerald Frug noted that those who in modern days follow Corbin ("soft parol evidence rule" in Posner's terms) might have allowed in the kind of evidence discussed here, both in Isabel and Nicolette's stories. *See* Letter from Gerald Frug, to author (Jul. 29, 2004) (on file with the author).

345. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 590-92 (2003) (praising the Uniform Commercial Code's version of the parol evidence rule).

346. *See* BOYER, SIR EDWARD COKE, *supra* note 91, at 119-20 (providing a mixed and ultimately lukewarm assessment of Coke's role in crystallizing legal terminology and establishing the privileged status of lawyers within the changing society).

347. *See id.* (arguing that "[i]f the law remained artificial reason, reason had petrified within the artifice").

here from a mere search for the past to an exposure of a new understanding of the present.[348] This journey has, in a nutshell, the flavor of Foucault's *Genealogy:* nothing that we know today is simply here, and therefore, in order to better understand the meaning and necessity of the twenty-first century's parol evidence rule, we had better search from where it originated.[349]

My reading of the Case's textual unit in and against its context suggests that it played a double role: concurrently reflective and productive, simultaneously passive and active, both a mirror and a torch.[350] On the one hand, through close reading of the text, I have offered to view the text as inertly representing the values that were highly admired within the legal culture of Coke's days. On the other hand, by exploring Coke's motives, I have suggested observing this text as an active player within the same legal culture, as one that was intentionally designed to shape that legal culture.

I hope that a deeper acquaintance with the circumstances of the birth of the parol evidence rule, as offered here, makes it possible to better appreciate the motives that led to its formation. It is, after all, a crucial advantage of the New Historicist practice: knowing the particulars has the effect of de-mystifying the myth.[351] My desire is that from this same well informed standpoint, it will now be easier to feel confident enough to admit the rule's artificiality and biased nature, and to reappraise its necessity. I also hope that this analysis has produced a further argument, original and useful, against excessive formalist textualism in present-day contract law.

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348. *See* MCLAUCHLAN, *supra* note 47, at 2 (acknowledging the long and stoned history of the parol evidence rule, and arguing that analyzing its historical development allows for a better assessment of its relevance today).

349. Michel Foucault, *Genealogy and Social Criticism, in* THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY 39-45 (Steven Seidman ed., 1994).

350. *See* Moisan, *supra* note 333, at 188 (identifying similar dichotomies in the theatrical works of Coke's era, particularly *The Merchant of Venice* where one sees "[o]ld law versus [n]ew law, [j]ustice versus [m]ercy, and [v]engence versus [l]ove").

351. *See* GALLAGHER & GREENBLATT, *supra* note 28, at 5-6 (rejecting the notion that a "supreme model of human perfection" can exist, because even the most elaborate and developed of cultures has inherent limitations on what it can accomplish).