Except for some members of the clergy and practitioners of a few of the more exotic forms of show business, judges are the only people in America who, irrespective of gender, are expected to carry out their primary duties while wearing a dress.

Yes, I know the garment in question is commonly referred to as a "robe" and may often be worn over a perfectly ordinary business suit. But nomenclature in this field is highly indeterminate. The same item of apparel, which I parade in every year at graduation exercises, is universally known in academia as a "gown" (as in "cap and gown"). English barristers, who don similar garb for court appearances, are said to wear "wig and gown."

While business suits may well be worn beneath the judicial costume, the whole point of the judicial dress (or robe, if you insist) is that it hides whatever the judge is wearing underneath. Because of the robe, a judge wearing a tank top and cutoffs wields just as much authority behind the bench as one dressed by Brooks Brothers (at least as long as that judge stays behind the bench). When it comes to exercising judicial power, in short, the business suit is superfluous. It's the dress that counts.

This is not to imply that the American judiciary is in any way womanly or effeminate, (except, of course, for those judges who happen to be womanly or effeminate). Quite the contrary, one of the salient features of judicial dress is that it confers on its wearers absolutely no sex appeal of any kind. Moreover, to the extent there are any gender

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1. This is obviously a bit of an overstatement. Given the polymorphous perversity of sexual desire, virtually everything is going to be a turn-on to somebody. See Sigmund Freud, Three Essays on Sexuality (1905); see also Ellen Goodman, A Reel of the Real Woody Allen, Boston Globe, Sept. 24, 1992, at 19 ("The heart wants what it wants," says Woody.). There are undoubtedly folks who get a kick out of judicial attire. See Gervase Webb, The Law Wants a Verdict on Wigs in Court, Evening Standard (London), Apr. 28, 1992, at 14 (quoting a male barrister on forensic wigs: "It's about the sexiest thing a woman can wear. There is something about the severity of a wig that makes any woman look attractive.").
bending possibilities to judicial attire, they have already been amply explored, most notably in a series of really funny Monty Python sketches. No, my point is not that judicial dress makes judges look effeminate. My point is that it makes them look like dorks.

The silliness of American judicial garb, however, pales in significance when compared to the truly ridiculous outfits their brethren and sistren2 in England are expected to wear. While judicial robes in America at least have the minor virtues of being cheap and easy to clean, the English judges of the higher ranks are saddled (literally) with enormous horsehair wigs which can cost over £1000 and weigh almost that much. They are also expected to wear garish robes trimmed with the carcasses of small woodland creatures. The English judicial costume is said to be itchy, unhygienic and uncomfortable.3 It also doesn’t always smell terrific.

The absurdity of English judicial attire has been a matter of note for quite some time. That most stylish of Founding Fathers, Thomas Jefferson, said that English judges looked to him “like mice peeping out of oakum.”4 Jefferson was not much of an Anglophile. He was, however, a follower of the latest French fashions, which in his day meant getting rid of powdered wigs and ermine robes, as well as the heads of the people who wore them. A few decades later, another budding

Nonetheless, the weight of scholarly opinion agrees that judicial attire is not the thing to wear on a hot date. For example, Anne Hollander has recently argued that the development of the business suit marked a major advance in sartorial sexiness. She contends that a well-tailored suit, in presenting the human body as an abstract unadorned form, like much modern art, conveys a “positive sexuality.” As she states, “One important thing it [modern abstract art] and they [suits] both continue to have is erotic appeal, in the confidently forceful mode. Suits are still sexy, just like cars and planes.” ANNE HOLLANDER, SEX AND SUITS 5 (1994).

If the well-tailored, form-fitting suit epitomizes sexiness, then the loose fitting, one-size-fits-all judicial robe must embody (or disembodied) its opposite. It is also worth noting that the judicial robe harkens back to a period before the development of gender-based “fashion” in its modern sense. Prior to the mid-seventeenth century, Hollander tells us, “well dressed men and woman had a fairly similar look.” Id. at 64. In short, if there is such a thing as an objectively erotic outfit, the judicial robe is not it.

1. I know there is no such word as “sistren,” but let’s see you come up with a good gender-neutral archaic expression.
revolutionary, Alexander Herzen, described the English judges as “wearing a fur coat and something like a woman’s dressing gown.”

The English judiciary, however, are a proud group—stubborn, traditional, and a little bit strange. They have kept their bizarre accoutrements virtually unchanged from the days Thomas Jefferson first made fun of them. Recently, however, a new Lord Chief Justice of England made the eminently sensible suggestion that maybe it was time for English judges to stop wearing all their ridiculous paraphernalia and slip into something a little more comfortable. The remark set off a firestorm of controversy. Commissions of inquiry were empaneled. Reports were prepared. Charges and countercharges, arguments and counterarguments were exchanged. In the end, it was decided that English judges would continue, at least for the foreseeable future, to wear the same old silly costumes. The difference is that now the English judiciary has a well-defined and clearly articulated set of reasons explaining and justifying why they are wearing those silly costumes. This, as every lawyer knows, is progress.

This essay will examine, in the excruciating detail so beloved of law review editors, the recent controversy surrounding the wearing of judicial wigs and robes by English judges. This debate has received little attention in the United States, for the simple reason that nobody here cares very much about it. Such lack of interest, of course, is one of the hallmarks of a good law review topic. In addition, there is the added advantage that, as an American lawyer, I know relatively little about English judges and their sartorial habits, which enables me, as we say in the law review writing business, to provide a “fresh perspective” on the issue.

Best of all, while this essay may seem to be about the trivial subject of wigs and robes, it is really an opportunity for me to write about Big Important Jurisprudential Issues. This article not only challenges the Prevailing Wisdom, it kicks sand in its face, and dares it to go outside and settle this once and for all. You see, according to Prevailing Wisdom, things happen for reasons. The following analysis shows that, in reality, things just keep happening. The reasons come later.

This article is divided into four parts. The first part discusses the recent English decision to continue wearing wigs and robes. The second part discusses the reasons the English gave for the decision to continue wearing wigs and robes. The third part discusses how I’m a smart law professor and can come up with better reasons than the English did for

the decision to continue wearing wigs and robes. The fourth part was boring and I cut it out.

I. THE POLITICS OF WIGS AND ROBES

A. The Origins of the Judicial Wig

Our story begins in 1660, the date of the Restoration of the English monarchy. Upon the return of Charles II from France, the fashion of the Court of Louis the Fourteenth for powdered wigs became de rigueur for the smart (in every sense of the word) members of English society. Since England had just emerged from a bloody civil war between those who wore their hair short (the “Roundheads”) and those who wore their hair long (the “Beatles”), the pervasive use of wigs was an obvious way to cover over the divisions in society (as well as the occasional bald spot).

6. Hollander argues that the Court of Louis XIV was a critical time and place in the development of fashion in that it was there that men’s and women’s clothing styles first began to significantly diverge. One of the major gender-based differences she notes is the development of the wig in the latter half of the seventeenth century as a decidedly male accoutrement. She states: “The virile hair of Samson, stylized in wig form, moreover retained its quality of masculine privilege. . . . Women rarely wore full wigs, but augmented their natural hair with all manner of false pieces, padding, wiring and eventually powder, without usurping the glorious false male crown. HOLLANDER, supra note 1, at 64.

7. The judicial robe and barrister’s gown developed much earlier. By the time of Edward III (1327-77), the fur and silk-lined robes were well established as a mark of high judicial office. Judicial costume changed with the seasons, generally green in the summer and violet in the winter, with red reserved for special occasions. COURT DRESS—A CONSULTATION PAPER ISSUED ON BEHALF OF THE LORD CHANCELLOR AND THE LORD CHIEF JUSTICE (August 1992) [hereinafter COURT DRESS] (Appendix by John H. Baker) App. ¶ 2.3.1.

These days, High Court judges still must choose appropriately from a range of sartorial options that would stagger the average GQ reader. Dressing properly requires a mix of fashion savvy and jurisdictional expertise. Consider the following helpful advice:

When sitting in the Court of Appeal (Criminal Division), High Court judges, like other members of the Court of Appeal, wear a black silk gown and a short wig, as they do in Divisional Court . . . . When dealing with criminal business at first instance in the winter, a High Court judge wears the scarlet robe of the ceremonial dress but without the scarlet cloth and fur mantle . . . . When dealing with criminal business in the summer, the judge wears a similar scarlet robe, but with silk rather than fur facings. A Queen’s Bench judge trying civil cases in winter wears a black robe faced with fur, a black scarf and girdle and a scarlet tippet; in summer, a violet robe faced with silk, with the black scarf and girdle and scarlet tippet . . . . On red letter days (which include the Sovereign’s birthday and certain saint’s days) all judges wear the scarlet robe for the appropriate season.

Id. at 4.
English judges and barristers began wearing wigs and robes because everybody in polite society was wearing wigs and robes in those days. They continue to wear them because nobody has ever told them to stop. It is true that by the end of the eighteenth century (the time of that Thomas Jefferson wisecrack), the powdered look was starting to seem a little dowdy and old-fashioned. The wigmakers, seeing their general wig sales dwindling, appear to have focused on the legal profession as a specialized market for their wares. In 1822, Humphrey Ravenscroft, a third generation wigmaker at Ede & Ravenscroft, a firm founded by his grandfather, developed and patented the "forensic" wig. Made of white rather than black horsehair, it did not uncurl, needed no powder and purportedly maintained a fresh smell indefinitely. It was the permanent press polyester of the wig world.

Most barristers, most of the time, wear a basic black gown to court. Queens' Counsel gowns are made of silk (pearls are not an option). The plain black gown was adopted by most barristers in 1685 when the Bar went into mourning at the death of King Charles II. They have apparently never gotten over it. It is worth noting that until the nineteenth century the wig was not considered a particularly legal headgear. The distinctive medieval legal headdress was the coif, a piece of white linen which seems originally to have been designed to cover the tonsure of monks who were acting in a legal capacity.

By the late sixteenth century, however, all members of the legal profession wore round black skull caps to court, with the white edges of the coif sticking out underneath. When wigs were introduced, judicial wigs had a small version of the black skull cap and coif sewn into them. Law students, not yet entitled to wear wigs, continued to wear the legal skull cap for some time after the introduction of wigs, but by the early eighteenth century it had disappeared completely. Much writing in this area tends to confuse the coif with the legal skull cap. See, e.g., BLACK'S LAW DICTIONARY 260 (6th ed. 1990) (referring to the "black patch at the top of the forensic wig" as a form of coif). This confusion is probably not altogether a bad thing, since otherwise law school honor societies would be inducting their students into the "Order of the Yarmulke."

There are no codified legal rules requiring barristers to wear wigs and robes. In 1974, the General Council of the Bar issued "Notes for Guidance on Dress in Court" which stated, inter alia, that barrister's dress "should be unobtrusive and compatible with the wearing of robes" and that "wigs should, as far as possible, cover the hair, which should be drawn back from the face and forehead, and if long enough should be put up." COURT DRESS, supra note 7, at Appendices 1, 1.1, App. 4, 1.

The Judges' Rules of 1635 attempted to codify the conventions under which various types of robes should be worn. Since then, the judges have received no further formal instruction in the matter. The current judicial attire, anachronistic though it may seem, appears to be in violation of the Rules of 1635. Id. at Appendices 1, 2.1.5. See Gow, supra note 4, at 914 ("by the end of the 18th century [wigs] had been given up by all gentlemen—except bishops, judges and barristers, and even bishops were excused in 1832 by William IV.").

Wigs were still hot and uncomfortable to wear, particularly on sweltering summer days in English courtrooms not known for effective cross-ventilation. The Times
As wigs became the specialized apparel of the legal community, they also became a way of distinguishing the various ranks within the profession. These days, in general, the bigger you are (hierarchically speaking), the bigger the wig you are entitled to wear. On ceremonial occasions, superior judges and Queens Counsel wear full bottomed or “spaniel” wigs (those are the ones that hang down over the ears). For ordinary court work, all judges wear smaller “bench” wigs with frizzed sides and a queue at the back. Barristers wear a different small wig, the “tie-wig,” with a few rows of curls at the sides and the back which usually do not fully cover the hair. Solicitors, lawyers generally not permitted to appear in English courts, do not get to wear any wigs at all.

Wigs are expensive, and English judges get a stipend to cover the cost of their wigs and robes. Barristers, on the other hand, must buy their own, and there is a thriving market in used wigs.

of July 24, 1868, contained the following report:

During the last two days the learned judges and the bar have been sitting without their wigs, and in opening a case Sir Robert Collier called attention to the innovation and apologized for not appearing in full forensic costume. His lordship said he had set the example of leaving off the wig in consequence of the unprecedented heat of the weather as he thought there were limits to human endurance. Sir Robert Collier expressed the wish that his precedent might be generally followed, and hoped that the obsolete institution of the wig was coming to an end—a hope in which many of the profession concur.


13. In this connection, Hollander’s point about the wig as a symbol of male virility, supra note 1, is perhaps relevant; see also Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 244 (1994) (“[W]hy do phallic metaphors haunt property discourse?”).


15. Lesser judges wear this even for ceremonial occasions. *Id.* at 14.

16. *Id.* at 15. The fanciest barristers, the Queen’s Counsel, do get to wear full bottomed wigs on ceremonial occasions.

17. *Id.* at 16-17.

18. Seamark and Connett note:

Senior and circuit judges receive a one-off payment of £5,000 to £7,000 to help dress themselves for work. This payment includes £1,460 for a ‘full-bottomed’ wig for circuit judges, £225 for breeches and £132 for court shoes and buckles. Judges also receive £45 to purchase the black cloth cap traditionally donned before sentencing a prisoner to death—even though the death penalty was abolished in 1964.


19. It is not clear, however, that used wigs are cheaper than new ones. Tradition being what it is in Great Britain, wigs that have previously been worn by great jurists and
In April 1992, a new law term began in England, and there was much speculation that judicial wigs might finally be going out of fashion. The judges of the Commercial Court were expected to vote positively on a recommendation by the Commercial Bar Association to abolish the wearing of wigs in commercial court proceedings. Commentators pointed out that wigs had already been abandoned in the matrimonial courts, and it was suggested that the trend might well lead to the abandonment of wigs by all High Court judges.

Supporting this view was the fact that the new Lord Chief Justice, Justice Taylor of Gosforth, was on record as being strongly anti-wig. In an interview with the BBC in 1990, he had stated that "I believe that at a stroke we could disarm a good deal of public misunderstanding of the legal profession if we stopped wearing wigs and gowns in court."

It didn't happen. Whether it was an attack of cold feet or the chilling of some other part of the anatomy, the Commercial Court judges voted not to abandon their wigs, but instead to place the whole matter before all fifty-five judges of the Queens Bench Division of the High Court for continued consideration and debate. Why did the Commercial Court judges seek cover on the wig issue? Were they getting dirty looks from the other High Court judges? Interviewed the following day, the clerk to the Chief Judge of the Commercial Court ventured a

20. Commercial Court is the division of the High Court that deals with commercial litigation.


22. Frances Gibb, *Judges Asked About Bare-Headed Justice*, THE TIMES (London), Apr. 27, 1992, Home News Section. A few days before becoming Chief Justice, Baron Taylor repeated his objections, while making it clear that he would take no immediate action on the matter. He stated:

I have made no secret of the fact that I believe we should probably shed wigs and robes. However, I would not fire into doing that without consultation and without seeing what we are going to do, which is not quite as simple as it may seem . . . One could just have ordinary suits or one could have the kind of gown they have in the United States, or various other alternatives which we have to look at closely.


"I think they felt it was too big an issue for them to sit in splendid isolation."24

"Too big an issue?" These are the judges of the highest court of original jurisdiction for commercial matters in England. Sitting in "splendid isolation," each judge frequently decides cases involving the most complex business affairs and the disposition of many millions of Pounds Sterling. Clearly, the judicial wig is directly connected to something deep within the English judge's psyche.

Justice Taylor, sensing that the time was not yet ripe for a major new fashion statement, promised that the Judges' Council would "undoubtedly examine the issue in depth and take many soundings before expressing any view."25 The most cogent rationale for deciding not to decide, however, was provided by one of the most senior judges, the Master of the Rolls, Lord Donaldson. As he put it, there was no urgent need to go "discarding something which has been out of date for at least a century."26

C. The Wig Debate Goes Public

Under the British parliamentary system, the House of Lords has a particular interest and expertise on the subject of anachronism. On June 22, 1992, they debated the issue of judicial dress at some length in the presence of Lord Mackay, who, as Lord Chancellor, was simultaneously the highest judicial officer in England, a member of the Cabinet, and a member of the House of Lords.27 Most of the peers who spoke argued strongly for the retention of wigs and robes. They did so, however, in business suits. Lord Mackay, who took no substantive position on the wig question, appeared before the House in full court dress.

Lord Mackay, however, in masterful lawyerly fashion, shifted the focus of the debate from the arcane but still relatively straightforward question of whether judges should wear wigs and robes to questions of constitutional authority and subject matter jurisdiction. Who, if anyone, had the right to decide whether judges should wear wigs and robes?28

24. Id.
25. Id.
26. Id.
27. From an American perspective, try to imagine William Rehnquist, Janet Reno and Robert Dole all rolled into one. Now try to imagine a better argument for the doctrine of separation of powers.
28. For those who are fans of abstruse issues of English constitutional jurisprudence (and who isn't?) the question is not without interest. Since no authoritative legal rule actually requires the wearing of wigs, see supra note 9, one might think that the judges themselves have the power to simply take them off. Others argued however that
In a democracy that is also a constitutional monarchy, there are two ultimate sources of authority, the people and the Sovereign. Lord Mackay assured the Lords that in a matter as grave as the wearing of wigs and robes, both would be consulted before any final decision was made.

He announced in the House of Lords that the question of judicial dress would be presented to all interested parties, including the public, through a “consultation paper.” Lord Mackay also assured the Lords that “[t]he monarch has an important interest in these matters and in due course account will have to be taken of that.”

Lord Chief Justice Taylor, meanwhile, continued to push his anti-wig campaign. At the end of May he gave a long interview to the Sunday Telegraph, a publication noted for conservative views, in which he argued that the wig “makes us look antique and slightly ridiculous.” (He meant that as a criticism, although the Telegraph readership may not have taken it that way.)

Others, however, were rallying round the ancient horsehair. Counsel Magazine, a practice journal for British barristers, published a totally unscientific survey conducted by two English schoolboys of about 200 people they found hanging out at the courthouse in Oxford in early

the Judges' Rules of 1635, although they said nothing about wigs (and are currently being somewhat ignored), nonetheless established the exclusive right of the monarch to prescribe fashion tips for judges. It was also argued that since the Anglican bishops had sought permission from the King before shedding their wigs in 1835, judges were required to do the same. Anthony Looch, Judges Rely on Queen to Keep Perry Mason Out of Court, THE DAILY TELEGRAPH (London), June 23, 1992, at 14. Of course, once the Chancellor and Chief Justice agreed to consult the Queen before making any changes, this issue became moot.

29. Sian Clare, Queen to Be Consulted on Ending Judge’s Wigs, PRESS ASS’N NEWSFILE, June 22, 1992, Parliamentary News; Arthur Leathley, Courtroom Dress in the Dock, THE TIMES (London), June 23, 1992, at 8. Precisely why the Queen has an “important interest” in wig wearing has never been disclosed. It’s probably better not to ask. The poor woman has enough problems.

30. Brian Masters, In His First Interview Since Being Sworn in as Lord Chief Justice, Lord Taylor of Gosforth Tells Brian Masters of His Aspirations, SUNDAY TELEGRAPH (London), May 31, 1992, at 10. Lord Taylor went on to say,

Shedding the wig would help to improve the image of the judiciary. Damn it all, it would be nice if we could catch up with the 20th century before we enter the 21st . . . Some judges say that the wig gives them anonymity, protects them from being recognised in the supermarket. In which case, it is entirely adventitious. We haven’t preserved the wig in order to provide a disguise. As I said to a judge the other day, if that were the object, we might as well put on a yashmak.

Id.
June. These folks (nineteen of whom were defendants in criminal cases) came out overwhelmingly for retaining traditional wigs and robes both for barristers and judges.

When the Consultation Paper was released on August 19, 1992, it turned out to be a sort of bench memo for the moot court of public opinion. It sought to summarize the strongest arguments both in favor and against the continued wearing of wigs by the English judiciary. These arguments are considered at some length in the following section of this essay.

Careful readers of the Consultation Paper thought they detected a slight anti-wig tilt in its description of the various arguments (the paper was prepared under the auspices of Lords Mackay and Taylor, with an historical appendix by Professor John Baker of Cambridge). Nonetheless, it was the pro-wig forces that gained the most from the Consultation Paper. It provoked a strong wave of sentiment from the English Bar, the judiciary and the public in favor of the retention of wigs. John Mortimer, a barrister better known as the author of the Rumpole series, took no position in the great wig debate. Horace Rumpole, himself, however, came out strongly in favor of wig retention.

31. Christopher Frazer, Wigs and Gowns Must Stay—The People’s View, COUNSEL, June-July 1992, at 6; see also Stuff and Nonsense, 144 MOD. L.J. 967 (1994) (referring to the Counsel survey as “a couple of boys in the school holidays interviewing punters at the local Crown Court”).

32. The results strongly indicate that the British public approves of the current dress code. Eighty-five percent of those surveyed thought robes “lend dignity” to Court proceedings, while only 20% thought they made judges and advocates “look silly.” Far more (71%) felt that they “emphasize the importance for witnesses of telling the truth.” Frazer, supra note 31, at 8. Criminal defendants were a little less certain about the effect of robes on the veracity of witnesses. Only 58% agreed with the statement. Of course, it could be that they were disagreeing with the notion that it is important for witnesses to tell the truth. Overall, 79% of those surveyed favored retention of robes. Of the criminal defendants surveyed, not a single one was willing to go on record as favoring abolition of the robe.

33. Although there had been some question as to how great a change in judicial dress was being contemplated, the Consultation Paper focused on the wig as “the most strongly criticised as being the most outmoded, the most often pictured or cited as a symbol of exclusiveness, detachment from normal life and out-of-date attitudes.” COURT DRESS, supra note 7, at 16.

34. Actually, he said he didn’t “give a hoot.” Webb, supra note 1, at 14.

35. JOHN MORTIMER, RUMPOLE ON TRIAL 171 (1992). In a typically impassioned defense of tradition, Rumpole imagines the consternation that would be caused by “rights of audience in the higher courts being given to lay preachers and disc jockeys, or the abolition of the wig and judges listening to arguments from counsel in T-shirts and jeans.”
By the time the end of the consultation period came around, the result was pretty clear. Wigs were here to stay, at least for the foreseeable future.36

II. THE SEMIOTICS OF WIGS AND ROBES

A. Why English Judges (Supposedly) Kept Their Wigs

The Consultation Paper set forth a number of reasons for retention of the judicial wig. One of the most prominent was the claim that traditional judicial garb imbued in laypersons a sense of the solemnity and dignity of the law. This was seen as a particularly important function in connection with criminal defendants who tend, as a group, to be underappreciative of the law's dignity and solemnity.37 On a more practical note, a second major justification was that the wig and robe served to disguise the appearance of judges to a considerable degree, making it difficult for criminal defendants and other litigants to identify them outside the courtroom context.

Both these arguments struck me as vaguely familiar. I had heard them before in some other, different connection. After careful research, I have determined that these are precisely the same reasons Batman gives for wearing his mask and cape. Batman, like the English judiciary, seeks through his bizarre and slightly anachronistic apparel (after all, who wears a cape these days?) to "strike fear into the hearts of criminals

36. Terence Shaw, Judges and Barristers to Keep Wigs and Gowns, THE DAILY TELEGRAPH (London), Oct. 1, 1993, at 2. In a formal statement announcing the decision, Lords Mackay and Taylor stated that responses from jurors, witnesses and the public, as well as from the legal profession and the judiciary, "revealed strong support for maintaining the status quo." Lord Taylor said that for some time he had "personally been in favour of making some changes in court dress" but he had "accepted the strength of feeling among the public, court users and judges." A spokesperson for Ede and Ravenscroft (the firm that has supplied wigs and gowns since the 1850s) was quoted as being "obviously very pleased." See also Frances Gibb, Lawyers Hold on to Their Wigs, THE TIMES (London), Oct. 1, 1993, at 2 ("Of all the responses, 67 per cent favoured retaining court dress in its present form. Some 15 per cent favoured abolition in all respects and the rest favoured some simplification, including 14 per cent who wanted to banish the wig.").

37. COURT DRESS, supra note 7, at 10. The point was made more forcefully in a letter to the editor in the New Law Journal:

[T]he awe inspired by court dress, particularly that of the judge, impresses on all participants the solemnity of the occasion and the importance attached by society to the judicial process. That is of particular importance in criminal trials for it shows that "Society" does not condone the crime for which the defendant is being tried.

everywhere." Moreover, both the English judges and Batman use their costumes to hide their "secret identity" which is, in fact, their ordinary everyday identity, the one they use when they are not busy fighting crime.

Conscientious students of the law will note, however, that a legal argument is not invalid merely because it has previously been put forward by a cartoon character. The cogency and force of these arguments must be evaluated on their own terms. On their own terms, they are a hoot.

Striking Fear in the Hearts of Criminals. Consider first the claim that the dignity and solemnity of legal proceedings are enhanced by judges and barristers wearing their traditional garb. There is undoubtedly a certain theatrical aspect to judicial proceedings. One wants to impress on observers, particularly lay people, that the application of the law is a serious, impartial and magisterial process. It is hard to see, however, how these goals are enhanced by having the repositories of legal expertise wear dressing gowns and badly fitting hairpieces.

One might reply of course, that English judicial attire appears silly only to ill bred, wisecracking Americans like myself, and that real Brits are awestruck by the sight of a jurist in full peruke. Moreover, preserving "respect for authority" was the reason most respondents to the Consultation Paper gave for retaining the wig. Nevertheless, I have my doubts. After all, dignity, solemnity and respect are not only required for judicial proceedings. If these funny costumes are a British fashion statement meaning dignity and solemnity, how come people don't wear them at other solemn British occasions, like funerals or horse races? No, the dignity and solemnity justification for wig wearing just won't wash.

Disguising One's Secret Identity. Even more flimsy is the "secret identity" justification for keeping wigs and robes. Indeed, the ubiquity of this argument by the advocates of wig retention is an indication of the

38. There is even English case law to this effect. St. Edmundsbury and Ipswich Diocesan Board of Finance v. Clark, 2 W.L.R. 1042 (1973) (judicial costume seen as "an indication of the functions of those engaged in proceedings, and as enhancing the formality and dignity of a grave occasion"). This statement was made, however, in a case where the judge chose not to wear his wig and robe.

39. Gibb, supra note 36, at 2 ("The overwhelming view of more than 500 responses among the legal profession was that formal dress had a 'significant role to play in maintaining respect for the authority and status of the court.'"). Of course, when someone asks me how they look in some new (or old) clothes, I invariably give a similarly flattering response. I usually say "I maintain respect for your authority and status." (or words to that effect).

40. Even some Britishers find them funny. One member of the House of Lords commented that "[o]n a rainy Sunday, my small children would say: ‘Go on dad, put your wig on and give us a laugh.'" Wigs and Gowns in the Lords, 142 NEW L.J. 887, 887 (1992).
fundamental absurdity of their position. It was seriously argued that wigs were useful in making it harder for English criminals to recognize the judges who sentenced them and thus lessened the danger that such defendants would later seek to take revenge.\footnote{\ref{COURT_DRESS,~supra~note~7,~at~16.}}

Such a claim, of course, is a preposterous and totally unsubstantiated slur on the skill and intelligence of the English criminal. Remember, the judicial wig doesn't actually cover up the judge's face, and the participants in the proceeding all know the judge's name. Any self respecting American criminal who wanted to dispose of such a judge would have more than enough information (wig or no wig) to do so. All it takes are the elementary planning, networking and stalking skills that all Americans learn by the time they are in high school.\footnote{\ref{Id.} at 10-11.}

The "disguise" argument assumes that the English criminal will only seek revenge on sudden impulse. For example, while shopping at the local convenience store, a disgruntled recidivist might spot his judicial tormentor across the check out aisle and go into a murderous rage. If the judge has worn a wig in court, the argument goes, the befuddled criminal will simply take his groceries and go home, muttering "I'm sure I know that bloke from somewhere." This scenario, of course, is completely preposterous. It is based on the unlikely premise that English judges shop in convenience stores.

It was also argued that Court dress tended to give the judges and barristers who wore it a useful anonymity and conformity. Wigs and robes supposedly obscured differences of gender, race and age, creating an edifying sameness among all the participants.\footnote{\ref{Id.} at 10-11.} This is where my transatlantic perspective comes in handy, because it is obvious to me that the English have mistakenly confused an effect (Court dress) as the cause of lawyerly conformity. The fact is that English lawyers and judges look, sound and act the same way because \textit{all} lawyers and judges look, sound

\begin{itemize}
\item\footnote{\ref{COURT_DRESS,~supra~note~7,~at~16.}} The Consultation Paper devoted considerable space to this issue, analyzing the disguise potential of various styles of judicial wig. It concluded that the full bottomed or spaniel wig "would probably be very effective for the stated purpose," but unfortunately was "virtually confined to ceremonial use." The more commonly used short bench or bar wig "may conceal the shape of the upper part of the head and conceal the hair line, but it leaves the features completely exposed." The authors of the Paper express uncertainty as to whether such a wig "would be effective for the stated purpose," and note that "[u]pon this point first hand evidence, with examples . . . would be particularly helpful." 
\item\footnote{\ref{Id.} at 10-11.} The Consultation Paper does point out that "[i]n the recent past judges in this jurisdiction have been harassed or attacked (including at least one case of arson and one of murder) and in those cases the wig was clearly no protection." \textit{Id.}
\end{itemize}
Anyone who has ever observed an American law school during interview season, with everyone wearing the same blue pinstripe suit, carrying the same resume, and mouthing the same platitudes ("Yes, I'm sure that working on collateralized receivable financing deals will be very exciting.") knows that it does not take wigs to remove differences of gender, race and age. All it takes is a first rate legal education.

B. Why English Judges (More Likely) Kept Their Wigs

Just because the reasons stated by the English judiciary for retaining wigs and robes are unconvincing, however, does not mean that the English might not have other good reasons for their actions. Much of current academic legal theory is based on the notion that the reasons stated in legal decisions are not the real reasons motivating legal decisions. Rather, the real motivation for such decisions may come from considerations of economic efficiency, or reflect deeply embedded sociocultural norms, or depend on what the judge ate for breakfast. These seemingly disparate approaches to legal theory in fact incorporate a common theme—judges don't know what they are doing, but law professors do.

It might have been possible for me, by constructing an elaborate economic model which weighed the benefits of wig wearing against such variables as wig cost, dressing time, undressing time, scratchiness, and lost hat wearing opportunity costs, to show that the English public must be deriving enormous pleasure from the fact that their judges are walking around in funny wigs and robes. Alternatively, I might have explored the complex socio-psychological phenomena embedded deep within the structure of British legal discourse through close textual analysis and attention to nuance and connotation, applying the insights of semiotics, philosophy and psychology to uncover the hidden traces of deeply suppressed societal influences.

I chose a third approach. I called up a couple of English lawyer friends of mine, got them good and drunk and said, "hey, what is it with all this wigs and robe business? What's really going on?" This is what they said:

*It's a Brit thing, you wouldn't understand.* As every devotee of Masterpiece Theater knows, the British like to dress up. They wear top hats, morning coats, riding habits, bowlers, breeches, kilts, gaiters,

44. Obviously I have to throw in a few exceptions here for people like Gerry Spence, but you would recognize him even if he was wearing a wig and robe (or a yashmak).
garters and knickers in a twist. It would be highly improper to criticize this British devotion to fashionable excess. Every nation has its little penchants and foibles. The French have an inordinate fondness for wine. The Italians show an inexplicable devotion to opera. The Germans have a tendency to invade small neighboring countries. Everybody can be criticized for something. Who are we, the nation that gave the world Ronald MacDonald, to criticize others?

Given this cultural relativism, perhaps the very premise of this paper is flawed. When I say that the English judicial costume looks ridiculous, am I falsely assuming a transnational standard of objective ridiculousness that transcends cultural boundaries? Is it possible that English judges only look ridiculous to me, an outsider, while to the average British citizen, steeped in a culture of sartorial eccentricity, they look just fine? As my English friends would say, "not bloody likely."

Resisting All Temptations to Dress Like Other Nations. A more likely explanation is that English judges and barristers kept their wigs and robes not because they liked the way they looked with them on, but because they really hated the way they looked with them off. An English judge without a wig would look just like a European or American judge. An English barrister without a wig and robe would look just like a solicitor, or even worse, a European or American lawyer.

One can detect bits and pieces of this concern throughout the wig debate, although virtually everyone is too polite to make the point expressly.45 The concern about these sartorial issues can be viewed against a much deeper set of changes and challenges that have been confronting the British judicial system. First and foremost is the British relationship with the European Union. Many fear that as Britain becomes more deeply involved with the European Union, English law and English judges will become subject to the nameless, faceless Bureaucracy of Brussels, which goes around issuing directives limiting the amount of sawdust the English are allowed to put in their sausages and the amount of water they can put in their beer. The English consider this an infringement of their basic rights.

Moreover, European Union directives are written in European, a language nobody understands. This means that the European judges who interpret those directives can drive everybody else crazy by making the

45. Adrian Jack was one of the impolite few to voice his opinion on this issue. He argued that wigs and gowns, by differentiating English judges from those of other countries "are a very strong brand symbol or trade mark for the Bar and for English justice." He thought this product differentiation would come in handy "[I]n the international commercial field, where jurisdictions compete for choice of seat of arbitration and choice of law." Adrian Jack, Marketing Wigs and Gowns, 142 MOD. L.J. 1116, 1116 (1992).
law up as they go along. English judges, who feel that their own right to make up the law as they go along is thereby in jeopardy, tend to hate the guts of the European judges. Most European judges wear black robes, stiff collars and no wigs. The proposal to remove wigs and change to a plain black robe could easily have seemed to the English judges a suggestion that they dress like Europeans, a frightening prospect to the average English person.

Also implicated in the wig issue is England's special relationship with the United States. English judges and lawyers are very familiar with the American judicial system. Every year, planeloads of vacationing American lawyers and judges troop through the English courts to observe the birthplace of the common law and to have an excuse to write off their vacation as a business expense. These American lawyers and judges not only assume that their English counterparts will be pleased to meet them, but that they are interested in the insights American lawyers and judges have obtained into the English legal system after watching five minutes of an uncontested probate proceeding. Being American lawyers, once they start talking about any subject it is impossible to get them to stop. Worst of all, the English lawyers they are speaking to can generally understand most of what the Americans are saying.

All of this has created an understandable fear by the English of any reform that would make their judicial system, or their judges and lawyers, more closely resemble those of the United States. Since dropping wigs would have precisely this effect, it was frowned on by the English bar and judiciary.

Lastly, there is a continuing debate in England about whether to maintain the traditional distinction between barristers and solicitors. The distinction used to be fairly clear. British solicitors were forbidden from arguing cases in court. British barristers were forbidden from seeking out clients, forming partnerships, or doing anything else that might increase their income. For some reason, barristers continue to believe they got the better of this deal. Accordingly, they have become very concerned as solicitors have gradually obtained the right to appear and argue in certain of the less important English courts. Solicitors, however, were generally not permitted to wear wigs while they argued. Accordingly, some of the concern by barristers about giving up wigs may have reflected the fear that, if they went wigless, it would be easier for solicitors to sneak into court and fool the judges into letting them argue.

46. Actually, until very recently, the decision to allow solicitors to wear wigs when they argued was within the discretion of the trial judge. In the summer of 1994, however, the Lord Chancellor ruled that solicitors would not be permitted to wear wigs in court. Stuff and Nonsense, supra note 31, at 997.
Is this it then, the secret hidden reason for the English retention of court dress? Does it all come down to an understandable if perhaps overzealous desire to retain the distinctions between English judges and barristers and the various interlopers, foreign and domestic, who were perceived as usurping their ancient prerogatives? It would be nice to conclude so, thus ending this piece on a triumphant note (and even more important, thus ending this piece, which is getting kind of long for a humorous essay.)

Honesty compels me, however, to express certain doubts. After all, do English judges and barristers really need elaborate robes and funny wigs to distinguish themselves from the competition? There is an obvious way to distinguish English judges from the judges of the European Union, even without their wigs and robes—the English language. There is also an easy way to distinguish English judges and lawyers from their American counterparts—once again, the English language. While English barristers and solicitors may sound the same and, if wigs and robes are removed, may even look the same, I have no doubt that in a nation as renowned for class distinctions as Great Britain, the barristers can find some subtle way to keep those solicitors in their place (maybe a secret handshake?).

We may conclude then that neither the reasons put forward by the English judiciary for retaining wigs and robes nor the more controversial arguments we have just considered provide an adequate explanation for the English decision to retain the traditional wigs and robes. Yet that is precisely what they did decide, and, having hooted and made fun of all the possible arguments that could have justified their curious decision, it still behooves me to explain it. After all, explaining the strange behavior of legal decisionmakers is what we law professors do for a living.

III. THE ECONOMICS OF WIGS AND ROBES

A. An Introduction to Wig Retention Theory

I am now going to provide the true and correct explanation for why English judges chose to retain traditional wigs and robes. Ready? Here it comes: No reason. That’s right, I said “no reason,” as in “there is no reason why the English judges chose to retain traditional wigs and robes.”

47. Yes, I stole this joke from Winston Churchill (“two nations divided by a common language”). But he stole it from George Bernard Shaw, who swiped it from Oscar Wilde. By now it’s in the public domain.

48. I know, you thought it was teaching, but that’s just until we get tenure.
After all, do you really need a reason to keep on doing what you're already doing? Think of all the things you keep doing even though other, more beneficial alternatives might be available—like going to work the same way every day, even though other routes might be faster or more scenic; sitting in the same seat in every class, even though other available seats might give you a better view (or be nearer to the door); smoking, even though you know that smoking is bad for you; watching television, even when there is nothing good on; or continuing to read this article, even though it's starting to get boring and theoretical. None of these activities is likely to have been preceded by a rational deliberative process in which you weighed the pros and cons of your prospective action and decided that you had good reasons for doing it. Nonetheless, these are not accidents or random events, but conscious volitional acts taken by you for no good reason whatsoever.

Notice that in each of the preceding cases you are acting like a dork, or at least in a manner that is suboptimal and perhaps downright silly. I mean, you know smoking is bad for you, and the television is a waste of time, and I suspect you haven't even tried out other routes to work or other seats in class to see if you like them better. As to this article, it hasn’t gotten any funnier and you’re still reading it. My point is that the decision of the English judiciary to retain wigs and robes may have been much the same, a decision to keep doing the same old thing for no particularly good reason at all.

"Wait just a minute," I hear you saying (in a rather unfriendly tone). "The things you are talking about are habits, not real, voluntary, volitional decisions. We all know that habits involve suboptimal actions that are hard to change because they have, through repetition, become practically automatic and are no longer preceded by a rational decisionmaking process." When the English judges decided to continue wearing wigs and robes, however, they were not mindlessly continuing old habits, as I do when I light up a cigarette or watch reruns on TV. They were consciously deliberating between stated alternatives in a nationwide debate and choosing the one they thought best. It’s ridiculous to think they didn’t have a reason for acting as they did."

"What your bad habits and the English decision to retain wigs have in common," I reply (in a more reasonable but somewhat condescending tone), "is that both are the result of contingent historical events." If

49. It may be that some habits can be explained by optimizing behavior. See Gary Becker & Kevin M. Murphy, A Theory of Rational Addiction, 96 J. POL. ECON. 675 (1988).

50. For purposes of the following discussion, I did not have to rely on habits. I could have relied on conventional acts you do every day like driving on the right, speaking English or measuring length in feet rather than meters. Your only reason for
I ask you to explain why you are acting in a suboptimal manner by smoking, taking the same seat, etc., you will not be able to demonstrate that it is good for you to smoke or that your seat is the best one you could possibly have chosen. Rather, your explanation will simply describe historical events. "I sit here because this was my seat on the first day of class." "I started smoking when I was a teenager." "Because of that history" you might well reply, "I find it hard to stop smoking," or "I've gotten used to sitting in this seat" or "Why should I look for another way to go to work, the one I've always taken gets me there on time." These are not "reasons" in that they demonstrate your actions are optimal or even beneficial. They are merely causal explanations which make reference to your particular personal history. They show that your choice was not necessarily the best alternative you could have chosen, but that it was, to use a fancy term that will justify a long footnote, "path dependent." 51

51. In its broadest and most general sense, "path dependent" is the term economists use because they can't bring themselves to say the word "history." "A path dependent sequence of economic changes is one of which important influences upon the eventual outcome can be exerted by temporally remote events, including happenings dominated by chance elements rather than systematic forces." Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. ASS'N PAPERS & PROCEEDINGS 332 (1985).

A system or model or game is said to be path dependent if the responses or outcomes generated by it will vary depending on prior events, particularly random or probabilistic events. In this way, a path dependent outcome or decision may be the result of an "historical accident," yet still give rise to a convention to which all or most societal actors find it in their interest to conform, simply because they rationally expect everyone else to do so. *See* DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969); Robert Sugden, *Spontaneous Order*, 3 J. ECON. PERSP., Fall 1989, at 85.

The form of path dependency most frequently mentioned in law review articles is that based on Arrow's Impossibility Theorem, in which it is shown that the order in which various choices are presented to a group of decisionmakers may determine the final outcome of the decisionmaking process. Since the order of presentation is a contingent historical event, the decisionmakers' choice under such circumstances is said to be path dependent. *See*, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 136, 170-182 (1982); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. REV. 533, 547-48 (1983); Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 571-81 (1977); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 950; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory*,
Consider the fact that the United States is the only country in the world which still measures its temperature in Fahrenheit. The only conceivable justification for this archaic practice (and a dispositive one) is that we’re used to it. I am suggesting that the English decision to retain wigs and robes was similarly path dependent. The concept of path dependency helps explain why persuading rational benefit-maximizing individuals to keep wearing a silly costume is so much easier than getting them to put one on in the first place. Once you’ve started wearing wigs and robes, there are identifiable costs in giving them up. The market for used wigs and robes would likely take a dive. Judges and barristers might also have to buy some new clothes and perhaps get more frequent haircuts. Ede and Ravenscroft, the wigmakers, would certainly be looking at some corporate downsizing. It is likely that the more substantial barrier to change, however, is that the costs and benefits of the status quo are known and certain, while the impact of any new sartorial regime is indeterminate and uncertain.

Imagine yourself as an English judge. You know the costume looks silly, but you’ve been wearing wigs in court for your entire professional life. Nobody laughs, at least not to your face. Quite the contrary, people call you “Milord” and treat you like someone special. Then a new Chief Justice comes along and tells you that doffing your wig will make your courtroom more affable and accessible to the public at large. You feel pretty affable and accessible already, and certainly don’t want to do anything that would jeopardize the respect and esteem with which you are


Agenda setting, however, is just one of many ways in which historical events can determine decisionmakers’ choices. An historical event can give rise to a convention, as previously mentioned, or in a game with multiple Nash Equilibria, a random event may determine at which Nash equilibrium the players will arrive. See ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 36 (1989). Historical events may generate dynamically increasing returns for those who are lucky enough (and luck may be all that is required) to have the winning design among competing technologies. These dynamically increasing returns for the winning design may in turn increase costs and discourage investment and investigation of alternative choices.

52. If the English had not already been in the habit of wearing wigs and robes at judicial proceedings, the argument that one could instill respect for the dignity of the law, prevent violence against judges, remove distinctions of age and sex and create a sense of the law’s impartiality by wearing costumes based on the dress of the Court of Louis XIV would have been consigned to the same trash bin as arguments for reinstating trial by battle. (Incidentally, the English took a long time to get rid of that one too. See McKendrick v. Sinclair, 1972 Sess. Cas. 25 (trial by battle abolished in 1819 by 59 Geo III, c. 46). But see Paul R. Sheridan, Trial by Battle, LAW SOC’Y GAZETTE, May 1990, at 12 (arguing that trial by battle still exists in the High Court of Chivalry)). Yet we have seen that the questionable benefits of wig wearing were treated as dispositive arguments for retaining wigs and robes by people who were already wearing them.
currently held. You recognize, as a rational matter, that judges in other places get plenty of respect even without wearing wigs. By the same token, however, you think that presiding without a wig is unlikely to provide much benefit, either to you or the other courtroom participants. Like the student who sits in the same seat in each class, you’re used to it and you don’t feel like giving up the known benefits of your current seat without substantial assurance that the change will bring significantly greater benefits.

“Okay,” you say (with a note of triumph in your voice), “your hypothetical English judge makes a lot of sense, and that shows what’s wrong with your thesis. Your judge is engaged in a rational decisionmaking process, weighing potential costs and benefits just the way we always assume folks do out in law professor-land. All you have shown is that the cost-benefit analysis is affected by historical context and everybody (by which I mean me, at least now) knows that. Now get back to writing jokes.”

“Ahah,” I exclaim triumphantly (it’s my article, so I win the argument), “you perceive the point but fail to understand its significance (you poor, misguided twerp). We have shown that a rational benefit-maximizing English judge is likely to choose to maintain the current rules whether or not that is, in fact, the optimal benefit-maximizing decision.” Fans of path dependent analysis can provide numerous examples of historical events which have led seemingly rational actors to adopt arguably suboptimal behaviors which they continue to follow because moving to a better system would involve unacceptable expense in terms of transition costs, information costs, and/or risk.53

Granted, one can argue that such suboptimal behavior is still the rational benefit-maximizing decision given a particular historical context.54 But the point of this exercise is not to show that people


54. Although in economic models it is easy to distinguish the “context” (what can’t be changed) from the “actions” (what can be chosen) in the real world such distinctions are far less clear. See Charles F. Sabel & Jonathan Zeitlin, Stories, Strategies, Structures: Rethinking Historical Alternatives to Mass Production, in WORLDS OF POSSIBILITY: FLEXIBILITY AND MASS PRODUCTION IN WESTERN INDUSTRIALIZATION 13 (Charles F. Sabel & Jonathan Zeitlin eds., forthcoming 1996) (rejection of the standard distinction between actors and context). Are the English correctly choosing to retain wigs and robes because the costs of getting rid of them actually exceeds the benefits of their removal, or are the English in an historical context which leads them systematically to undervalue the benefits and overestimate the costs of wig removal? The question would
sometimes act irrationally (which they obviously do). The point is to show that even when they are trying to act rationally, people in a given historical context (that is, everybody) may rationally choose to follow a practice or rule which may not be optimal for them. This conclusion may seem rather obvious given our prior discussion, but in fact it is a Big Deal.

Much legal scholarship, starting from the mistaken assumption that things happen for reasons, makes the further erroneous assumption that the reasons justifying any particular legal rule or action can be identified, analyzed and evaluated. Rules can be celebrated by showing how they confer societal goodies, like economic efficiency, or excoriated for benefitting the obnoxious few at the expense of the rest. In all these cases, however, it is assumed that any legal rule or institution that has persisted over time must have some reason for persisting, and that the reason involves conferring substantial benefits on an identifiable societal group, probably one with an expense account. If the rule wasn’t providing optimal benefits to some such group, the argument goes, it would be in everybody’s interest to replace it with a better rule or institution. Some of the most creative (in both a positive and negative

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55. The arguments for this proposition are: a) World War I; b) World War II; c) the baseball strike; and d) Howard Stern.

56. The benefit may be one to society generally, such as an increase in fairness or efficiency. See George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, Why is the Common Law Efficient?, 6 J. LEGAL STUD. 51 (1977). On the other hand, it may be a benefit to a particular societal group as a result of capture, monopolization or other disruption of the process of legal rulemaking. See Gary Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q. J. ECON. 371 (1983); Richard Posner, Economics, Politics and the Reading of Statutes and the Constitution, 49 U. CHI. L. REV 263 (1982); George J. Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Both stories, however, share the assumption of evolutionary adaptationism, under which it is presumed, but rarely demonstrated, that a rule which persists must be conferring greater benefits (to somebody) than possible alternative rules. See E. Donald Elliot, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38, 93 (1987); Robert Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 59-65 (1984).

57. The problem with this argument, as much recent work in economics and decision theory has shown, is that sometimes it is irrational to be too rational. If there is a potential change available to me which might increase my welfare by $50 (or might
sense) legal scholarship has been devoted to showing how seemingly arcane legal rules may provide outcomes that are "efficient" or otherwise beneficial to society or at least to some part of society that presumably has the clout to keep them in place. Path dependency, on the contrary, suggests that the persistence of a rule mostly shows that rules tend to persist. Suboptimal, perhaps even rather silly rules can exist for quite a long time so long as they do not strongly disadvantage any powerful and identifiable social group, and so long as the advantages of moving to a different rule are relatively unclear and uncertain.

But aren't competition and innovation supposed to disrupt the status quo and promote new, more beneficial outcomes? If the wearing of wigs and robes was indeed suboptimal for English judges, then shouldn't some—at least the younger, less tradition-bound ones—experiment with new styles, take their wigs off on occasion and thereby discover the true efficiency gains of going wigless? Doesn't much of economic and evolutionary theory assume that just such a process is constantly going on?

Sometimes, perhaps, but such competition among potential actions or potential legal rules may be disrupted by positive network effects (a fancy way to describe the safety and benefits of conformity).  Remember when the commercial judges of the High Court considered dropping wigs on their own, and then backed off, because it was "too big an issue," one that should be decided by the High Court as a whole? This was a recognition that the benefits of wig wearing, whatever they might be, were conferred by the fact that all High Court judges wore

\[\text{\text{58. See Michael L. Katz & Karl Shapiro, Technology Adoption in the Presence of Network Externalities, 94 J. Pol. Econ. 822 (1986); S.J. Liebowitz & Stephen E. Margolis, Network Externality: An Uncommon Tragedy, 8 J. Econ. Persp. 133 (1994).}]}\]
If all judges wear wigs, it is a mark of the dignity and solemnity of their office. If only some of the judges wear wigs, it is a mark that they are conservative fuddy duddies. If one or two judges go on wearing wigs after everyone else has given them up, it is a mark that they are ready for retirement. Conversely, the first High Court judge to give up wearing a wig is not going to obtain most of the benefits that could accrue if all High Court judges gave up the practice, but will suffer lots of dirty looks and cutting remarks in the judge’s lunchroom. Because of these network effects, changes in judicial costume (and perhaps in other legal rules as well) tend to be all or nothing affairs, again making innovation and change more difficult.

So what have we learned from the complexities of wig retention theory? We have learned that reasons, particularly reasons for complex path dependent decisions, aren’t all they’re cracked up to be. Although lawyers and other folks who argue for a living can always come up with reasons to justify and explain the decisions that get made and the rules that exist, the concepts of path dependency, information costs, rational apathy and network effects should remind us that the reasons given to justify a rule or decision may have little to do with why a rule persists or why a decision gets made. Similarly, the fact that a rule persists does not demonstrate that the reasons justifying the rule are stronger than those for changing it, or that the rule is providing optimal benefits. The persistence of a rule may show nothing more than that rules tend to persist.

As lawyers, we often run across the doctrinal equivalents of wigs and robes. There are pieces of legal arcana whose origins are lost in the mists of time (i.e., not available in Lexis), but which lawyers and judges continue to take seriously for no apparent reason. Such doctrines, like the Rule Against Perpetuities, or the Supreme Court’s personal jurisdiction jurisprudence, are often used to torture first-year law students. Those who have made it to the end of this essay may pause to consider whether any reasons can be given, other than historical ones, why interests must

59. When it became clear that the tide of public opinion was running in favor of wig retention, there was once again speculation that judges of the Commercial Court and the Court of Appeal would shed their wigs for an “experimental” period. Frances Gibb, Senior Judges Given Ruling to Take Off ’Ridiculous’ Wigs, THE TIMES (London), July 12, 1993, Home News; Keith Manning, Decision on Judges’ Wigs Likely Soon, PRESS ASS’N NEWSFILE, July 12, 1993, Home News. Once again, however, these judges proved unwilling to be the first to go without.

60. I use the term “network effect” rather than the more common “network externality” in recognition of the continuing dispute about whether such effects constitute market failures in most cases or are internalized through market pricing mechanisms. See Liebowitz & Margolis, supra note 58, at 133-36.
vest not later than twenty-one years after some life in being,\(^\text{61}\) or why state courts may not adjudicate claims against out-of-state defendants unless those defendants have purposefully availed themselves of the privilege of doing business in the forum state.\(^\text{62}\) It may well be that there is no reason for these rules to exist except for the fact that they have existed for a rather long time, which may also be why they make so little sense to first-year law students.\(^\text{63}\) By the same token, however, your own determination that the rule is silly and suboptimal is itself a path dependent one, strongly influenced by your own historical context, and must also be taken with a grain or two of salt.

Meanwhile, things do keep changing, even among the judiciary. It appears that some American judges are dispensing with the use of their gavels and are thinking about stepping down from the bench (literally, not figuratively), in order to adjudicate cases around a conference table.\(^\text{64}\) Some say it might make the proceedings more affable and accessible. Personally, I think it's a terrible idea.

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63. In order to avoid a flood of correspondence from irate Property and Civil Procedure professors, let me concede at once that it can probably be shown, on the basis of sound policy considerations, that it is beneficial to society to have some limitation as to the time contingent future interests in property must vest, and some limitations on the power of state courts to adjudicate claims against out-of-state defendants. For that matter, it is probably beneficial for judges to wear something in court that makes them recognizable as judges. But when asked for reasons why that something should be a wig and robe rather than a nametag, why the limitations should take the form of these arcane and complex rules, the most cogent and plausible answer is: no reason, just history.

Civil Procedure experts may want to remind me that the "purposeful availment" rule is of fairly recent vintage. *Hanson v. Denckla*, 357 U.S. 235 (1958) (I have been known to commit Civil Procedure myself on occasion). They may ask whether this refutes my claim that it cannot be justified on any basis other than history. The answer, of course, is that path dependant institutions change, but they do so in complex and unpredictable ways related as much to their own history as to the needs or benefits of society. The change in constitutional standards from *International Shoe* to *World-Wide Volkswagen* may be highly significant when viewed in light of the historical trends of Supreme Court decisions in this area, but will it make any difference to the conduct of litigation in most courts? Not bloody likely.
