BOSWELL'S ENTAIL:
A STUDY IN LEGAL REASONING

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Author's Synopsis: At each nomination of a United States Supreme Court justice, a discussion is renewed about textual interpretation and legal reasoning. This Article will show—by analyzing a classic estate planning problem considered by two eighteenth-century giants, Samuel Johnson and his amanuensis, James Boswell—that the principles giving rise to these questions are mostly unchanged.

The colloquy illustrates the intersection of law, morals, and manners (customs) in the exercise of power. This, of course, is what judges and lawyers do for a living. Judges exercise power in deciding cases using and weighing various principles and reasoning techniques. Lawyers advise clients in a similar way.

The issue of Boswell's entail, as considered by Johnson, is a window into the world of eighteenth-century legal thinking. Johnson provides Boswell great insight and wisdom. At the same time, Johnson provides us, the modern reader, with an appreciation of just how enduring these classic lines of legal thinking are.

I. INTRODUCTION

James Boswell, a Scottish lawyer in the late 1700s, is best known as the author of *The Life of Samuel Johnson*[1]—considered the most famous biography in the English language.[2] Johnson was one of the great public intellectuals of his day—distinguished as a man of letters and the author

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[1] *See generally* JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (R. W. Chapman ed., Oxford Univ. Press 1980) (1791).

[2] *See* W. JACKSON BATE, SAMUEL JOHNSON xix (Harcourt Brace Jovanovich 1979) (1977).

of *A Dictionary of the English Language*, a work of far-reaching scholarship.[3]

The biography consists largely of letters written between the two men.[4] In January 1776, Boswell wrote to Johnson seeking advice concerning a question of "great consequence to [him] and [his] family"—a legal matter concerning the disposition of the family's estate.[5]

Lawyers can learn, and apply to their own professional lives, much from this exchange.

First, this Article will provide an understanding of the principles, and use, of legal reasoning. Borrowing from the scholarship of Judge Richard Posner,[6] I will distill these principles, show their significance to contemporary law, and then illustrate through the Boswell-Johnson colloquy how the model goes back in time.

Second, I will show that Boswell's issue shines light on a fundamental dilemma in estate planning: how much control a testator should exert from the grave. Modern lawyers—whether or not their practice focuses on this area of the law—can draw much wisdom from Johnson's views on the matter.

The set-up: Should a testator's children share and share alike? How does one go about answering this question? This was Boswell's dilemma.[7]

Boswell could trace his family lineage as far back as 1188 during the reign of Scottish King William the Lion.[8] In 1504, James IV, King of Scotland, granted to Thomas Boswell the barony of Auchinleck (pronounced Affléck) in Ayrshire.[9] Thomas Boswell was slain in battle fighting along with the king at Flodden in 1513.[10] The estate passed through a direct series of male heirs to David Boswell, who had no sons, but four daughters, all married.[11]

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[3] *See generally* SAMUEL JOHNSON, L.L.D., A DICTIONARY OF THE ENGLISH LANGUAGE, (1785), https://publicdomainreview.org/collection/samuel-johnson-s-dictionary-of-the-english-language-1785.

[4] *See generally* BOSWELL, *supra* note 1, *passim*.

[5] *Id.* at 665.

[6] *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

[7] *See* BOSWELL, *supra* note 1, at 666–67.

[8] *See* REV. CHARLES ROGERS, BOSWELLANIA: THE COMMONPLACE BOOK OF JAMES BOSWELL 1-2 (1874).

[9] *See* BOSWELL, *supra* note 1, at 665.

[10] *See id.* at 666.

[11] *See id.*

"David Boswell," James Boswell relates, "being resolute in the military feudal principal of continuing the male succession, passed by his daughters and, settled the estate on his nephew by his next brother."[12] The estate was "burthened with large portions to the daughters, and other debts, [and] it was necessary for the nephew to sell a considerable part of it . . . ." [13] His son, James Boswell's grandfather, an eminent lawyer, repurchased a great part of what had been sold and acquired other lands, and Boswell's father, who then was one of the judges of Scotland, added considerably to the estate.[14] Boswell's father decided to exercise his legal right to secure the estate to his family in perpetuity by an entail.[15] However, on account of "marriage articles"[16] this could not be done without James Boswell's—the oldest son's—consent.[17]

Boswell describes the issue, writing:

> In the plan of entailing the estate, I heartily concurred with him, though I was the first to be restrained by it; but we unhappily differed as to the series of heirs which should be established . . . . My father had declared a predilection for heirs general, that is, males and females indiscriminately. He was willing, however, that all males descending from his father should be preferred to females; but would not extend that privilege to males deriving their descent from a higher source. I, on the other hand, had a zealous partiality for heirs males, however remote, which I maintained my

[12] *Id.*

[13] *Id.*

[14] *See id.*

[15] *See id.* An entail (or fee tail) is a common law sanctioned legal restriction, by deed or settlement, on the inheritance of property so that ownership remains within a particular group, usually one family. The original states, and certainly those added later, disfavored this model. Wisconsin, my home state, is a good example. For although the Northwest Ordinance of 1787 provided that inhabitants "shall always be entitled to . . . judicial proceedings according to the course of the common law," Wisconsin, organized first as a territory in 1836, soon thereafter abolished "estates tail." 1838 Wis. Sess. Laws 178. While many states decided to follow the common law rule against perpetuities (prohibiting the grant of an estate unless the interest vests, if at all, no later than twenty-one years after a life in being when the interest was created), or some variation, Wisconsin instead established a rule that voids a future interest for longer than a life in being plus thirty years. *See* WIS. STAT. § 700.16(1)(c)-(5).

[16] Covenants contained in his parents' marriage settlement (contract). *See* BOSWELL, *supra* note 1, at 666.

[17] *See id.*

> arguments which appeared to me to have considerable weight. And in the particular case of our family, I apprehended that we were under an applied obligation, in honour and good faith, to transmit the estate by the same tenure which we held it, which was as heirs male, excluding nearer females. I therefore, as I thought conscientiously, objected to my father's scheme.[18] My opposition was very displeasing to my father, who was entitled to great respect and deference; and I had reason to apprehend disagreeable consequences from my non-compliance with his wishes. After much perplexity and uneasiness, I wrote to Dr. Johnson . . . .

II. PRINCIPLES OF LEGAL REASONING

Before we get to Johnson's response, let us return to the present day and the world of twenty-first century legal thinking. We can then work back and see how much, or little, has changed. Judge Richard Posner will provide our tools.

Posner is an American jurist, economist, and legal thinker who, between 1981 and 2017, served on the United States Court of Appeals for the Seventh Circuit.[19] By many measures, Posner is the most influential legal scholar in the United States.

In *Problems in Jurisprudence*,[20] Posner identifies the common principles we use in legal reasoning. These include:

- Adherence to precedent and respect for *stare decisis*: in other words, to stand by things decided.[21]
- Originalism and textualism (objective legal construct).[22]

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[18] *Id.* at 666–67 (footnote omitted). Apart from the "implied obligation" arising from Thomas Boswell's decision to pass by his daughters, Boswell grounds his position on (a) natural law as explained in scripture (female's role is that of nurse as "Mother Earth is to plants of every sort") and (b) a settled preference, by reasons of law and custom, for males in matters of legal succession. *See id.* at 667 & fn. 1.

[19] *See* Richard A. Posner *Faculty Biography*, UNIV. OF CHICAGO L. SCH., https://www.law.uchicago.edu/faculty/posner-r.

[20] *See* POSNER, *supra* note 6.

[21] *See id.* at 50 & n.14.

[22] *See generally id.* at 296.

- Appeal to natural law: a body of unchanging moral principles regarded as a basis for all human conduct.[23]
- Exercise or non-exercise of discretion.
- Appeal to morals, custom, or historical practice.
- Application of existing rules, norms, and standards.
- Practical reasoning. "A grab bag"[24] that can include anecdote, introspection, imagination, common sense, empathy, imputation of motives, metaphor, and experience.[25]
- Pragmatism. Weighing and balancing probable practical consequences: "A functional, policy-saturated, nonlegalistic, naturalistic, and skeptical conception of the legal process."[26]
- Reasoning by analogy (inductive reasoning—from the specific to the general).[27]
- Use or non-use of policies, preferences, values, or public opinion.
- Interstitial decision making (filling in the gaps).
- Value of personal detachment in decision making.

Johnson's response: Johnson responded in a series of letters and laid out certain principles that might inform the discussion. Let us see how many of Posner's principles we can spot—I'll use brackets for this purpose.

Johnson begins with the intersection of "natural right" with law.[28] "Land[,]" said Johnson, "is like any other possession, by natural right wholly in the power of its present owner; and may be sold, given, or bequeathed, absolutely or conditionally, as judgement shall direct or passion incite."[29] [Natural law.]

However, Johnson notes that natural right must be accompanied by the protection of law: "the primary notion of law is restraint in the exercise

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[23] *See id.* at 14–15.

[24] *Id.* at 73.

[25] *See id.*

[26] *Id.* at 26.

[27] *See id.* at 86–88.

[28] *See* BOSWELL, *supra* note 1, at 668.

[29] *Id.*

of natural right. A man is therefore, in society, not fully master of what he calls his own, but he still retains all the power which law does not take from him."[30] [Practical reasoning; pragmatism.] "In the exercise of the right which law either leaves or gives, regard is to be paid to moral obligations."[31] [Morals, customs, historical practice.]

Johnson points out that Boswell's father, as things stand, can sell the estate and do with the money what he will, without legal impediment.[32] He offers the example that Boswell's father "sells the land to risk the money in some specious adventure, and in that adventure loses the whole[.]"[33] As a result, "his posterity would be disappointed, but they could not think themselves injured or robbed. If he spent it upon vice or pleasure, his successors could only call him vicious or voluptuous; they cannot say he was injurious or unjust."[34]

"He that may do more, may do less. He that, by selling or squandering, may disinherit a whole family, may certainly disinherit part . . . ." [35] [Reasoning by analogy.] "Laws are formed by the manners and exigencies of particular times [custom and historical practice], and it is but accidental that they last longer than their causes [pragmatism]: the limitation of feudal succession to the male arose from the obligation of tenant to attend his chief in war."[36]

"I know not whether I fully approve either your design or your father's, to limit that succession which descended to you unlimited."[37] [Practical reasoning.] Johnson suggests that because the father received estate without restriction, "should not choice and free-will be kept unviolated? Is land to be treated with more reverence and liberty? [Natural law.]—If this consideration should restrain your father from disinheriting

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[30] *Id.*

[31] *Id.* at 669.

[32] *See id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* The implication, of course, is that a female tenant could not fulfil this duty. At common law, this failure could cause the "tenant" (the property owner) to lose the property through reversion, forfeiture, or escheat. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK II: OF THE RIGHTS OF THINGS, *55 (Simon Stan ed., Oxford Univ. Press 2016).

[37] *See* BOSWELL, *supra* note 1, at 669.

some of the males, does it leave you the power of disinheriting all the females?"[38] [Practical reasoning; pragmatism.]

Johnson points out that Boswell's father can make a will which appoints portions to his daughters.[39] This being the case, "[t]here seems to be a very shadowy difference between the power of leaving land, and of leaving money to be raised from [the] land; between leaving an estate to females, and leaving the male heir, in effect, only their steward."[40] [Reasoning by analogy; practical reasoning; pragmatism.]

"Suppose at one time a law that allowed only males to inherit . . . [that] law [was] repealed [by virtue of societal] change of manners, and women made capable of inheritance . . . ."[41] [Custom, historical practice; existing rules, norms, and standards.] "Could [not,]" asked Johnson, "the women have no benefit from a law made in their favour? Must they be passed by upon moral principles for ever, because they were once excluded by a legal prohibition? Or may that which passed only to males by one law, pass likewise to females by another."[42] [Law can be informed by morals but the two are not the same. Moreover, morals, like law, can change.]

Johnson then turns to Boswell's concern that he is obligated to respect his ancestor's decision, generations before, to pass over his daughters.[43] Johnson noted that because Boswell's difficulties arose from his ancestor's decision to divert succession from his daughters, Boswell properly enquired "what were his motives, and what was his intention; for you certainly are not bound by his act more than he intended to bind you, nor hold your land on harder or stricter terms than those on which it was granted."[44] [Practical reasoning.]

Johnson observed that "[i]ntentions must be gathered from acts."[45] Thus, Johnson asked, "When he left the estate to his nephew, by excluding his daughters, was it, or was it not, in his power to have perpetuated the succession to the males? If he could have done it, he seems to have shewn, by omitting it, that he did not desire it to be done . . . ."[46] [Pragmatism.]

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[38] *Id.*
[39] *See id.*
[40] *Id.* at 669–70.
[41] *Id.* at 670.
[42] *Id.*
[43] *See id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

Boswell's ancestor "set no example of rigorous adherence to the line of succession . . . . [He], for some reason, disinherited his daughters; but it no more follows that he intended his act as a rule for posterity, than the disinheriting of his brother."[47] [Reasoning by analogy.]

"If, therefore, you ask by what right your father admits daughters to inheritance, ask yourself, first, by what right you require them to be excluded? It appears, upon reflection, that your father excludes nobody; he only admits near females to inherit before males more remote[.]" Therefore, Johnson concluded that "the exclusion is [merely] consequential."[48] [Reasoning by analogy.]

Lord Hailes weighs in: Johnson urged Boswell to consult an eminent third party, the jurist and historian David Dalrymple, Lord Hailes.[49] Hailes agreed with Johnson.[50] Hailes pointed out that historically, by the law of Scotland, the "default" provision was the succession of heirs general.[51] [Precedent; originalism and textualism.]

Concerning Boswell's uneasiness based on matters of "conscience," Hailes wrote this: "The plea of conscience . . . is a most respectable one, especially when *conscience* and *self* are on different sides. But I think that conscience is not well informed, and that *self* and *she* [i.e. conscience] ought on this occasion to be of a side."[52] [Value of personal detachment in decision making.] "[Hailes'] letter," stated Boswell, "had considerable influence upon my mind."[53]

Johnson's final thoughts: Johnson, however, was not done and offered some final thoughts on the matter. "He who receives a fief unlimited by his ancestors," said Johnson, "gives his heirs some reason to complain, if he does not transmit it unlimited to posterity. For why should he make the state of others worse than his own, without reason?"[54] Johnson then reasons: "If this be true, though neither you nor your father are about to do what is quite right, but as your father violates (I think) the legal succession

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[47] *Id.* at 670–71.
[48] *Id.* at 671.
[49] *See id.*
[50] *See id.*
[51] *See id.*
[52] *Id.* at 671–72.
[53] *Id.* at 672.
[54] *Id.*

least, he seems to be nearer the right than yourself.[55] [Practical reasoning; pragmatism.]

Johnson further provides that "[w]omen have natural and equitable claims as well as men [natural law], and these claims are not to be capriciously or lightly superseded or infringed."[56] For example, "When fiefs implied military service, it is easily discerned why females could not inherit them; but that reason is now at an end. As manners make laws, manners likewise repeal them."[57] [Law can be informed by morals but the two are not the same. Moreover, morals, like law, can change.]

Johnson concedes Boswell's father is legally entitled to exercise the power to entail the estate.[58] "He who gives or leaves unlimited an estate legally limitable, must be presumed to give that power of limitation which he omitted to take away, and to commit future contingencies to future prudence."[59]

But, the reservation of "future prudence" in the service of fixedness comes with risk.[60] "Lord Hailes's suspicion that entails are encroachments on the dominion of Providence," Johnson explains, "may be extended to all hereditary privileges and all permanent institutions . . . care about futurity proceeds upon a supposition, that we know at least in some degree what will be future."[61] Johnson further provides, "Of the future we certainly know nothing; but we may form conjectures from the past; and the power of forming conjectures, includes, in my opinion, the duty of acting in conformity to that probability which we discover. Providence gives the power, of which reason teaches the use.[62] [Practical reasoning; pragmatism; exercise of discretion.]

Boswell reaches a decision: Freed from "scruples of conscientious obligation,"[63] Boswell ended up executing the entail but not changing his mind on the merits.[64] "[M]y opinion and partiality for male succession, in

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See id.*
[59] *Id.* at 673.
[60] *See id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 674 n.1.
[64] *See id.* at 674.

its full extent, remained unshaken."[65] Johnson did not change Boswell's views on women either.[66] "Yet let me not[,]" stated Boswell, "be thought harsh or unkind to daughters: for my notion is, that they should be treated with great affection and tenderness, and always participate of the prosperity of the family."[67]

III. LEGAL REASONING: THEN AND NOW

In the context of legal reasoning, the colloquy encompasses the intersection of law, morals, and manners (customs) in the exercise of power. We may not think about it in these terms, but it is what judges and lawyers do for a living. Judges exercise power in deciding cases using and weighing various principles and reasoning techniques. Lawyers advise clients in the same way.

As far as legal reasoning goes, the Boswell-Johnson exchange feels familiar. As Boswell's sounding boards, Johnson and Hailes use the principles Posner identifies as effortlessly as Posner might himself.

IV. ESTATE PLANNING: THEN AND NOW

The question of favoring or outright disinheriting children in a will or trust was Boswell's dilemma.[68] It is our—and our clients'—dilemma too. The first issue, Johnson teaches us, is whether we can think about it dispassionately.[69] Boswell had his opinions and prejudices, but he had the good sense to question whether those opinions and prejudices would hold up to scrutiny. Thus, he sought third party advice.

The second issue involves control from the grave. This is a delicate matter: children, and their situations, can be very different. Johnson's admonition to balance and weigh the concerns of the present with the uncertainty of the future was good advice then, and it is good advice now. Our "conjectures from the past"[70] may be reasonable—but conjectures by definition are uncertain.

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[65] *Id.*
[66] *See id.*
[67] *Id.*
[68] *See id.* at 666–67.
[69] *See id.* at 668.
[70] *Id.* at 673.

V. CONCLUSION

How much control by a decedent's "dead hand" is prudent? This question persists. Does Johnson's legal reasoning help us with this question, and others? I think yes. Can we draw from our consideration of Boswell's entail a unified and comprehensive theory of legal reasoning? I think not. Such a theory, in fact, may be neither desirable nor attainable. The law has placed certain power in our hands. Perhaps all we can expect of ourselves is, paraphrasing Johnson, to use reason to inform the use of that power.