Discussion

Jonathan Elmer: So, those are my attempts at summary and a kind of large, open conversation starter, and I'll let Susan respond if she wants to go first.

Susan Staves: OK, thank you very much, helpful comment and nice and loud. I hope that those of you way down there participating in the discussion will imitate this very fine—

Elmer: stentorian…[laughter]

Staves: —example, by projecting so that old professors can hear what you say. One very quick correction—

Elmer: Please.

Staves: I think you got the impression when I was talking about treatise writing as a characteristic Enlightenment activity that puts a lot of pressure on the understanding of precedent in the late eighteenth century, that the treatises I had in mind were about legal reasoning. But they're not. They're generally subject matter treatises, like treatises on bailment, treatises on copyhold, and so on —this is kind of an emerging form in the late eighteenth century. And, one of the things you notice when you study special subjects like that (for some purpose or another) is the pressure under which these treatise writers labor when they collect everything they can on the law of bailments or the law of copyhold [with the intention of showing] a triumphant synthesis where the rationality of the system will be beautifully explored.

Obviously, they find these damn cases that don't fit whatever the, say, bailment rule is that they're about to pontificate about. And then, you see what they do about that. As I said, there are basically three things they can do: they can ignore the precedent that doesn't fit (which causes certain problems when other people do research); or they can distinguish it from the rule they are about to promote; or they can actually attack the decided case as badly recorded or wrongly decided or whatever. This [in fact] becomes a problem for treatise writers in general, and maybe this is a good time for me to remark that another interdisciplinary subject that didn't get tossed in here, besides race and gender and religion (which I agree is absolutely crucial for understanding exemplarity), is music. In my retirement, I've become a harpsichordist and instead of reading novels (which I thought I would do) I've been reading huge amounts of musicology and learning figured bass and so on. And if you think about Rameau's *Treatise of Harmony*, which is an extremely important work for many reasons, it's a very good example of this problem. It's almost an *extreme example* of this problem because Rameau is attracted to the idea—and a fine idea it is—that, as the Greeks already realized, there are ratios in music, mathematical ratios in music. A lot of the *Treatise of Harmony* is about mathematical ratios in music and one of the things that Rameau wishes to do is to show that, although by the second half the eighteenth century, people who were explaining how to realize figured basses in baroque and classical music had come up with… different people had different ideas of how many chords there were. So, somebody in Dresden thinks there's

fifty-six chords, somebody in Munich thinks there are forty-nine, and these chords are not the same. It's not that somebody has three extra ones. I mean, it's just, it's so confusing that it's actually one of the reasons figured bass kind of fell, because the amount of dissonance …it created more chords than somebody could realize in real time at the keyboard.

So, Rameau is trying to fix this, in part, by pointing out that really there are only tonic chords and seventh chords, if you understand that everything else is an inversion, mathematically speaking. And, he does explain this in mathematical terms. The problem—as all the actual, *embodied* musicians pointed out—was that the mathematical ratios required for Rameau's system to work didn't actually fit the chords that people heard in contemporary tuning systems. And, this could not entirely be fixed (although God knows people tried) by arguments over tuning systems, of which there were very many. This is a general point that I think is really interesting about the, sort of, crisis over the relation between examples and theory: people want to have these higher order theories that bring order to a field of chaotic examples that are very difficult to generalize about and hard to use in the real world. Again, Rameau is a good example. So, they do. And sometimes it works better than other times, but it's almost always a problem. Adam Smith, I think, in *The Wealth of Nations* is an example of somebody where it works better than usual, but it's a general problem and you see it in legal treatises as well.

It's not that, it's not—I've said more than I wanted about what I claimed was a tiny correction—but it's important because they're not really writing about… I mean, even something like property is only slowly becoming a general category. It's not really a category in 1700, people don't write big treatises about property law—they're writing about, you know, they've barely written a treatise about copyhold. So, they're trying to get to higher and higher levels of generality through all kinds of theoretical projects, and the higher the level of generality they try and get to the more mess and confusion and problem the numbers of examples create. And, then there's this other problem of more reporting of examples, the more assiduously people come up with more examples for one reason or another. In music, it's baroque composers having more fun dissonances that create more kinds of chords, which cause problems that you never had in Italian music in the seventeenth century because they didn't have that many different kinds of chords. But, you can find examples in any discipline. Music is particularly, I think, a strong example here because of the mathematics of it, and there is a fundamental mathematics underneath, but it doesn't quite work out for practical musicianship.

Elmer: If you're referring to the way in which theory produces conflict by people who resist theory because examples come out of the woodwork when the theory is asserted, this is a dynamic that the group here is extremely familiar with [laughter]. You will find that this happens consistently in the group. So, we're familiar with the dynamic, I think, if I have it right.

Staves: I was interested to hear the large point, though, that you got out of what I was saying, which wasn't illustrative reading, but I would come to a different conclusion about it. I understood you to say that one of the things that struck you was that as precedent in the eighteenth century becomes historicized then [trails off] . . . You said this looks like the story of enlightenment triumph. That you then have in the Renaissance

what you were calling a pre-critical stage that then morphs into something like enlightenment rationality because of *The Critique*, right? So, that was a kind of line.

And, from the perspective of a lot of canonical modern historiography, including some legal historiography, I do tend to want to revise Whig perspectives. I mean, that's actually pretty…it is a kind of leitmotif of the large book I'm working on, so you're right to sort of sniff that out. But, that's not how I see the story going here because, with respect to precedent, it seems to me that a big effect of *eighteenth-century* historiography as it's brought to bear on historical, especially legal materials, is actually to undermine the fundamental notion of precedent, rather than rehabilitate it because the (and I'm going to have to simplify this partly because I don't understand it as deeply as would be desirable, but also for the sake of discussion), …There is this notion, which you see various writers in my paper referring to, that common law is based on custom from time immemorial, custom from "time out mind." That's a much contested phrase, but it does evoke an idea of continuous practice, it's an authority of continuous practice. And, part of the ideology of British common law, why it celebrates itself as the very best kind of law human beings have ever had and could ever have, is this combination of praxis (the trustworthiness of praxis over code law, for example, as a better sort of thing) and, also again, to be brutally short cut about it, there's a kind of genetic wonderfulness about the DNA of English-speaking peoples that makes them particularly liberty loving so whatever they do, as liberty-loving people, is a sort of best practice.

But, as you know from literary study or historical study or almost any field, once you get, really, the ancients-moderns quarrel, once you get a kind of historicist consciousness brought to bear on the materials whatever [the field] is, you notice discontinuity. The old Humanist notions that the exemplars of Homer and Virgil still have the same relevance start to get corroded by the idea that these are profoundly different cultures, that have profoundly different senses of rationality, so that whatever it was that they did, doesn't work in your world. Once you get to Montesquieu, who is very important in thinking about jurisprudence in the eighteenth century, [then he] has historical consciousness, but he also has a geographical consciousness. So that the kind of law that is satisfactory for a particular people (according to Montesquieu in *The Spirit of the Laws*) has a relation to the geographical environment in which they live. There's one kind of marriage law that has rationality in hot climates where people are lusty and another kind of marriage law that might have rationality in North Germany or Holland where you don't have quite the same problems of uncontrollable lust.

Now, this is a theoretical issue in Montesquieu, but it also becomes an issue of huge political importance in the British Empire because my friend Sir William Jones, about whom I actually know quite a lot, when he gets his start… he has this phase which you're reading about in this paper where he's the Wilkite legal champion, he's Mr. Radical Democrat in Wales. There's been a lot of scholarship on Jones lately from the point of view from Welsh nationalism, so we see a lot about Jones' sympathy with the poor of Wales and this effect. But once he gets into India, then he has to bring to bear all of his linguistic and historical learning on the problem of what law they're going to have in India. And, it is extremely obvious to any intelligent administrator or person who has to think about this in British government that the British after the 1760s cannot possibly administer British law in the subcontinent of India. It is administratively no go, everyone understands this. And anyway, the Mughals already have an empire where they administer both

Islamic law and Hindu law, that system has been working for some time under the Mughal administration. The Mughals didn't try to make the Hindus follow Islamic law, they thought that would be silly. So, they've already done this, and the British just come in on top of it. But, poor Sir Will, Sir William Jones has to bring to bear all of the extreme resources of his mind and scholarship to the question of… okay, common law doesn't like codes, but in Imperial, in Canada and in occupied Canada after the fall of Quebec and in India you really have to have a code because you have to have British administrators equipped relatively quickly with knowledge of a legal system which they have to administer. And it is clear every, every English lawyer who's sent out even to Canada (never mind India) immediately reports back that we can't administer this French law, it's too complicated. So, you have this—

Elmer: Wrap up, because I want to let Simon jump in here.

Staves: Yeah, I'll stop. So, my point is I actually disagree with the conclusion that you drew—

Elmer: OK.

Staves:—here because my conclusion isn't that the historicization of precedent represents a kind of Enlightenment rational progress, but rather that it undermines the fundamental notion, historicism undermines the fundamental idea that supports precedent.

Elmer: I actually think we agree: that Enlightenment triumphs at the cost of precedent. That was basically what I was trying to get to. Simon, please, why don't you go.

Simon Stern: I'm just going to say a few things because I am eager to hear others' thoughts, but I can't resist first commenting further on a point that came up between the two of you. Namely, the way in which this multifarious production of difficult, recalcitrant examples poses problems for the supposedly overarching theory or underlying principles and that is that this is, fascinatingly, a problem, a question that Grant Gilmore in an article he published in 1960 titled "Legal Realism: Its Cause and Cure" in which he tried to explain why it is that realism flourished so energetically in the U.S. in the mid-twentieth century and not in England. And, what he proposed was that the vast quantity of production of reported cases in the U.S. so dwarfed (by several orders of magnitude) the production of reported cases in England or in other common law jurisdictions that it made it impossible to believe there were underlying principles that actually did govern outcomes. And that, he says, is what produced legal realism. In effect, you've got to doubt that the underlying principles have enough force to govern outcomes once they're confirmed with so many conflicting examples. So, this is yet another possible answer, right? To doubt that there really are underlying examples at all or to say at least they may be discernible, but they're not going to get you very far.

Just briefly in response to what you said, I think you're absolutely right about the religious associations of the *Pamela* instance and to that extent, I guess, the mode of exemplarity that I would associate it with is the earlier fictional mode of exemplarity in which you say that it was true, right? So, you're telling a true story, it may seem crazily improb-

able to you, but, you know, believe you me, I'm telling you the truth. And to that extent, fascinatingly, I mean, I think that's an interesting way of thinking about the kind of fictionality that Richardson emphasizes (as against Fielding) because both of them are obviously struggling with this problem of how to allow for it to be made up and allow for readers to understand that it's made up while also trying to figure out some way in which it can be held out as exemplary. So, I'm sort of inclined to think that Richardson, that the religious genealogy, if you want to call it that, of *Pamela* would sort of go with some earlier modes of fictionality in which the pretext is it's a true story no matter how improbable.

As for the impartial spectator, I think this is a great question. I would love to hear others' thoughts about it, it's been something I've been struggling a bit with. What I would say is, first of all, it's convenient for my history that it postdates the rise of the novel of the 1740s because arguably you could say that it's another output of the same modes of fictional imagining. I'd also say that a *way* to think about it is to say that the impartial spectator bridges the question of the normative and the descriptive perhaps in the opposite direction from the one that I described. So, the one that I'm describing is the rise of a legal standard—which I claim begins in a primarily descriptive mode and takes on normative force as time goes by, because it turns out to be not good enough to say that you behaved in a way that should exculpate you from liability so long as everyone else does it that way, right? That it turns out to be not good enough that everyone else does it that way, that an accurate description of what others would do turns out in some instances not to be good enough. And, that's why it's possible, for example, for courts in the twentieth century to say when doctors engage in certain kinds of negligence, which everyone else does as well. So, they don't keep a checklist in advance and they accidentally left a sponge in the patient, well, it's still possible to say, "no, you're liable," because while that's a descriptively accurate account of what others would do it's not good enough, right? So, that the normative comes in as an overlay on the descriptive.

My sense about the impartial spectator is that it begins the other way, right? So, it's force is primarily normative, but it can't be purely normative because, once again, a purely normative instance is too out of whack with what you can reasonably expect of people in everyday operations. And, I guess a question I would raise and, again, I would be eager for people's thoughts about this, I guess there's also the question of to what extent the impartial spectator is a standard (which I think it might be) and to what extent it's meant to provide a psychologically acute explanation for how people might act? If the latter it's not clear to me that it's a standard, and in that way I would differentiate it from the work that the reasonable man standard is doing. But, I really do want to present that as a question, it's not clear to me, you know, which way it's supposed to work.

Elmer: That's a very helpful recasting. The floor is open, just put your hands up and I'll put you down. Okay; go ahead, Fritz.

Fritz Breithaupt: Thank you, thank you and I'll follow the last point made by Simon here. This is a question directed at Simon, thank you. And, I have many questions, but I'll give you the one that you make explicit, the question of narrative. You hint throughout the paper at the narrative implications, of course, and the narrative, the structure of this

reasonable person, and, basically, I want to know how far you are willing to push this. And so, I'll give you two or three things to think about, but that's the basic question.

The first thing is, it seems to me, that more and more the standard of the reasonable person is one that is embedded in the narrative, that's basically how you present it. In such a way that one should tell the story of what one is doing that it doesn't matter any longer that it's A or B if this and this happens, there's a three-legged horse (I like that example), and so on, any person, it doesn't matter A or B, should act in a certain way. That seems to be, kind of, the crux of this. Of course, then, this is the side, Richardson in his defense, of course, goes the opposite direction: No, it matters very much to me that Pamela, you know, and—

Stern: If and only if it was a Pamela, if and only if it was a—

Breithaupt: It makes no difference.

Stern: Lovelace would've done it, right.

Breithaupt: In a legal narrative, character is exactly that which shouldn't matter any more, A or B doesn't make a difference. But in the literary sphere, suddenly, character becomes the new standard. I mean, it's Pamela, Pamela, only Pamela, not everyone else. And you use this beautiful phrase "to the letter" which was unique paragon in literary genres and Dutch literary scholars call it the casus, where you're an integral shaping agent. But that's not what I want to ask you about. It is really this question about the narrative standard of the reasonable person: is it that narratives of, the narrative about character, becomes suddenly something that is reasonable? Is the new idea of a reasonable standard here about narrative and character becomes the unreasonable standard or the unique one or so on because it's only, its specific plausibility to such a degree then that you couldn't even think about nineteenth-century attempts to deal with the diversity of people. Psychological diversity is something that they have to retranslate into narratives, trauma. Suddenly it's, their psychological difference is a problem, so you have to find a way to narrate it and make it temporal and so that you can tell it again. *Anyone* would've been traumatized by the situation and would then later kill people, something like that. So, the great accomplishment for Simon is, how far are you willing to push this and what are the implications of this narrative reasonability for character difference?

Stern: I really like that. I guess my take is that in the legal context, of course, there's always two warring narratives, right? And, the work is done by the counsel, assuming that we're talking, actually, about a trial, right? So, the work of the lawyers is to produce narratives each of which, although in contradistinction of each other, makes the behavior of the person reasonable or unreasonable depending on who it is that is they're representing. And, let me just make sure that I'm following what you are saying. So, the thought would be that literary narrative begins with the unreasonable or the premise of the narrative involves the unreasonable character who then is made reasonable through narrative, is that the suggestion?

Breithaupt: Well, I'm only just, these lines are conformed from Britain, basically literature can only function by having characters that escape this generality—

Stern: Right.

Breithaupt:—anyone would behave that way.

Stern: Yes, I see. This is exactly the problem that Cathy Gallagher confronts in "George Eliot, Immanent Victorian," right?[1] So, it turns out, on her account, no matter how exemplary you try to make a character, the character always turns out to take on traits which exceed the exemplary function. In that view, you may very well think that the narrative structure is one which begins with the same premises as the ones that I described, but the difference between law and literature is that the need to particularize in literary narrative is the very thing that produces the unreasonable excess, whereas the very point of the legal narrative is always a persuasive function. And so there's always a lot of incentive on the part of those telling the [legal] story to keep it as generic as possible, as exemplary at a level of generality so that it's not particularized.

In fact, if you think about it… This is a way that I've tried to think about it, and you can tell me if you find this persuasive. So, Gallagher's account sort of has three steps: you start by inducing features out of a bunch of people that you've observed in the real world, you get to a generic version of it, and then you instantiate that through the particular literary character. The legal version, it seems to me, doesn't really make the third move or the third move is an applicative one rather than a creative one. That is, you get to the generic version and then you say, "Guess what, that turns out to be exactly true of my client. And so, without having to worry about the particular features of my client, which I, which yes, happens to have a name, a background, you know, etc. All you really need to know in order to understand that my client isn't liable is that he or she comports precisely with that second bit at the apex of the triangle where you've generalized it up without, you know, moving it back down to a particular instance." So, I'm not sure if that's a good answer? Tell me, say more.

Breithaupt: Well, I don't want to monopolize the discussion here, but a question for me is still then, how does it shape law, then? In the sense that this is always what you want to do; that you want to erase character, you want to exclude the case that the farmer—

Stern: Right.

Breithaupt: I mean, the area of many horses that have three legs, or—

Stern: Right, yeah, yeah, yeah.

Breithaupt: —but yours has a little intervention into, maybe, Jesse has a question to add to this.

Stern: OK, great.

[1] Catherine Gallagher, "George Eliot: Immanent Victorian," *Representations* 90:1 (spring 2005), 61-74.

Jesse Molesworth: Yeah, I think my question is actually a version of Fritz's, and I know that—

Elmer: Is this a little intervention?

Molesworth: Little intervention, yeah. I mean, there is a difference between character and plot, and novels are composed of more things than simply characters.

Stern: Clearly.

Molesworth: You know, I'm all on board in thinking of the exemplary aspect of this character, but you know, plot is different. I mean, it doesn't seem to me that plot can be exemplary of our own experience—

Stern: Yep, very nice.

Molesworth: —precisely because of the teleology that has no continuity with our experience. You know, so in thinking of something like *Robinson Crusoe,* yes, we can think of him as an exemplary character, but… you know, the problem is, that if you read Gildon, you know, he thinks that people are going to be dissuaded by reading *Robinson Crusoe* when surely thousands of people were absolutely inspired by the plot that was offered.[2] So that's mainly a distinction of plot versus character.

Stern: Yeah, I quite like that. I think that's completely right, and I guess my take would be that it's precisely the placement of these fictional characters which is the thing that's productive of law, which is productive of legal thought. And that plot helps because it provides, it also provides, lawyers with ways of thinking about how to tell the story that did happen or on the part of the person, on the part of the lawyer who's saying that the person is behaving unreasonably, then clearly the incentive is to articulate the counterplot to what really happened (the counterplot that would've avoided the accident, that would've avoided the harm that produces the liability). So, without wanting to argue that the plot is exemplary, it's at least another means of equipping lawyers with techniques of persuasion and imagination that provide the context in which to make the character exemplary.

Elmer: Great. Our horse has only three legs, but it's gone out of the gate pretty fast [laughter]. Richard.

Richard Nash:[partly inaudible] … may turn out to be simple minded, with a long windup… But I'm thinking of it as "the Solomon Question" in my own mind and it's born for me of two things (neither of which may be generally applicable). One is my sense that I've inherited generally from culture at large of what law and legal education and legal research consists of—which is endlessly pouring over accumulated precedents that you can array in various fashions—and the other is that I'm looking for one really

[2] Charles Gildon, *Robinson Crusoe examin'd and criticis'd* (1719).

particularly fascinating case that was heard in the Court of King's Bench in 1751 and it's virtually impossible to find any record of it whatsoever. It just doesn't have—

Staves: What kind of case is it?

Nash: It's an assault, a dunking in a horse pond. The horse never gets too far away from my work [laughter]. But, what I'm struck by when I think of what little obscure archival work I've tried to do in the legal archive is how, particularly before Burrow start his run of reports on cases at the King's Bench,[3] is how scattered and haphazard the recording seems to be. And, it raises for me this question of how important precedent could have been in an era when cases weren't being exhaustively reported, and was it then the case that was exemplary or the figure of the judge himself? (Which is why I'm asking this as the Solomon question.) What's important in early eighteenth-century law: is it precedent or the figure of the judge? What's, how do you balance that? And, how can I even imagine precedent having much importance to a period in which the recording itself seems very haphazard? That's my simple question.

Staves: Okay, we can probably both try to give versions of an answer to this. I think you're quite right to be struck from your point of view as a person of the twenty-first-century Information Age with how scattered and haphazard records seem to be. You have all different kinds of legal records in the eighteenth century. The printed law reports make no—even in the time of Mansfield who tries to, who is sometimes in Burrow's law reports credited with having created a modern, a more finally satisfactory modern system of law reporting—these printed law reporters made no pretense of reporting all of the cases that happened. This is a lawyer's literature and the cases that they bothered to report are normally cases that lawyers think involve some interesting novelty of decision, some new set of facts that hasn't really been quite dealt with before that's now being dealt with that could come up in your practice. Or sometimes a judge "refining" (to use a relatively neutral word) an existing precedent because the judge isn't supposed to be making new law, but part of the, you know, paradoxical quality of legal history is the way judges are, in fact, celebrated for having finally established some great new legal rule which the whole precedent system is suggesting they shouldn't be doing in the first place. So, the first thing to say is that the reported cases are, the printed law reports in the eighteenth century are a very particular kind of lawyer's literature which have no investment in reporting all decided cases.

Now, the court roll, whatever… another thing that if you do any research in legal history, one of the things that can drive you particularly crazy in English legal history is that there are very, very many different courts and very, very many of them have overlapping jurisdictions. For example, [the court of] Common Pleas can issue writs of habeas corpus as well as King's Bench and maybe Exchequer can issue writs of habeas corpus to say nothing of other people's little courts that might decide they can issue a writ of habeas corpus. So forum shopping is a very important lawyerly skill in the eighteenth-century as now, and you find a sort of court where your client is more liable to prevail. So, so if you're… the records are very scattered and all these courts have different procedures and

[3] Sir James Burrow, *Reports of Cases Argued and Adjudged in the Court of King's Bench During the Time Lord Mansfield Presided in That Court* (1772).

it's very easy if you do the kind of legal historical research that people used to do (but people try not to do so much anymore), if you're just following one court and one kind of (like the writ of habeas corpus and King's Bench), you can really screw yourself by failing to see that there are all other kinds of overlapping jurisdictions which are shaping, you know, contesting courts are trying to get business from each other, and what are they doing in Ireland, can this be heard in England, and blah, blah, blah. So, that's a problem.

But, there's also… the chances that you'll find in some court somewhere a record of the *names* of the plaintiffs—maybe not spelled in a consistent way—or the defendant or the litigants in the civil case and some kind of entry about how it went in the end are much, much, much, much, you know, infinitely better than you would find a full report of the case. As some of you know that I wrote about, I used to write about criminal conversation suits in the eighteenth century where the husband gets money damages from the man who slept with his wife, and it has been said, and quite rightly said, that criminal conversation cases are the best reported civil cases in the eighteenth century, and why is that? It's not because the legal professionals took any particular effort to report them, it's because the scandalous press had shorthand and sent its reporters into the courts to provide something you never get in the printed law reports: long accounts of the arguments of council on both sides, sometimes almost verbatim.

The political cases, actually, that I'm working with now also, often, will throw out particularly good—not unimpeachable, but particularly good records—of what happened because when… in these big political cases when people, maybe, lose their argument in court they rush to the press and they print their version of every damn thing they said in court because they know perfectly well it's not going to be said anywhere else, it's not going to be in any official report. You even find clergymen, bishops who give pastoral charges to their diocese and clergy (Catholic clergymen in Ireland, Protestant clergymen everywhere), they start publishing dueling pastoral letters because they're motivated to provide a record of their position on tithes or whatever.

Elmer: If I understood the force of, one force of Richard's question—and maybe I'll direct it to you Simon, whether you see the same—part of it was not simply why is it such a spotty and uneven record, which you've just laid out some of the reasons for that, but… if it is that spotty and uneven, is there a deeper lack of belief in or lack of efficacy of precedent, per se. Is precedent ultimately a kind of self-serving fiction that develops in the legal profession that the lack of records sort of undermines the evidence for?

Stern: So, I think that's beautifully put, actually, the way you pose the alternatives. So, one answer is that if you have access to court records in London, you can build up much more of a precedent-oriented argument than if you are relying on the printed reports. Another though, which is quite in sync with your second alternative, which I think is exactly right, is that if you look at how English lawyers talked about what they thought the system was and how they thought precedent worked, they used this phrase like "our law," which might seem to mean nothing at all, but which seems to mean to lawyers "our system of reasoning, our system of precedent-based analysis," such that there are things which are true in law by virtue of being consistent with a large number of precedents without needing to have a particular one cited.

And, one way to see this shift is … there's a legal historian called Jim Evans who's written an article showing that it's in the nineteenth century that our current understanding of precedent really takes off and that, indeed, courts start making rules for themselves about their inability to depart from precedent in the nineteenth century when there was no such formalized account available in the eighteenth century. So, another way to think about it is to look at what people claimed were paradigmatic legal virtues, that is paradigmatic virtues of judges in the eighteenth and early nineteenth centuries. What were these paradigmatic virtues? People who understood the common law so well that they could give you the right answer to a case without looking at any case [laughter].

Mary Favret: It's beautiful, it's beautiful, yeah.

Stern: Exactly. So, they don't seem to have thought that this involved departing from precedent. In fact, you know, what it showed was that the judge understood the laws so well that they didn't need to refer to precedent, but if you could find a precedent that was inconsistent with what the judge said, well that just shows that that precedent was wrong.

Elmer: Rebecca, short one?

Rebecca Spang: Short comment. Is this or is this not exactly the way Burke talks about tradition? That we feel it in our guts and we don't have to look it up?

Elmer: Yeah.

Stern: Very nice, yeah, right.

Elmer: It is, and the geniuses are English people in both cases. A short one?

Unidentified Participant: Oh, sure. I guess I have a question and want a bit of clarification, and perhaps Susan can answer this one because I have a question about how common law is defined. So, it seems to me that there's one sense in which common law is looking back towards a written legal precedent, right? That much I understand. And then on page five, the one that deals with impressing mariners seems to deal with the question of practice that's not addressed by law as a form of common law. So, actually one turns back to writing and it seems there's another form of common law that turns back to practice not addressed by the form of writing, and I just want to make sure I'm understanding that correctly and maybe some details around that.

Stern: Yeah, that's really nice.

Elmer: You want to jump in, Kirsten, because you're next anyway?

Kirsten Sword: I'll wait for it.

Elmer: Okay.

Staves: Yeah, in the Broadfoot case (one of the leading cases about impressing mariners) Michael Foster, for example, produces lots of evidence of impressment writs over many centuries and also some evidence of statutes referring to impressment. And you're quite right that these impressment writs he offers up in part as evidence of the continuing practice. And, part of the idea of common-law precedent is that it is the continuing practice *of the people* and common law, as opposed to local law, is supposed to be the continuing national practice of the people, at least in theory. Sometimes in order to establish a common-law precedent in a locality, oral testimony is to be taken from very old people. They just round up the oldest people they can find [laughter], and say, okay, I've seen a lot of this in the tithe modus cases, you round up a bunch of the oldest people you can find, three are very old people, and you say to them, "well, as far as your memory goes, was the tithe on wheat three pence, as long as you could remember?" For establishing the modus or yes or no, and that's the evidence. Now obviously they didn't live at the time of the Roman conquest. How long is… I mean, this is a fundamental issue in common-law precedent, how long does the continuity have to be and how is the continuity established?

The other thing in Broadfoot, though, that's relevant, I think, to your concern is that some of Foster's argument is based on what I just said (evidence of continuing practice), but some of it he argues, particularly the statutes, for Richard II statute and bunches of other statutes that don't actually say impressment is legal, they just do something that assumes that impressment is happening. And, Foster says, well, surely a parliament would not have passed a statute that just takes for granted that impressment is happening without protesting that they thought it was illegal if they hadn't accepted that it was common-law practice. So, it's the, it's, some of this evidence is evidence from the silence of protest, and those of you who are English historians know that sometimes, especially in political cases, there are parliamentary mechanisms for entering protest into the journals of the House of Lords or the House of Commons. Something's passed and you think it's a fundamental violation of the Magna Carta, you can actually put that in the journal to say you think that and create a record to say well, at least some people didn't let it pass in silence. So, the, and it's, these kinds of legal historical inquiries which are very important in the eighteenth century, naturally are cousin to general historiographical inquiries. They are questions about, you know, questions about the authenticity of documents, the intelligibility of the language in which the documents that are written, I mean, every kind of historiographic question that arises anywhere else arises in legal history.

Daines Barrington who is one of the, sort of most fun legal antiquarians of the eighteenth century, looked briefly into this impressment question and, you know, he really had no political axe to grind and he comes up with, he's pointing out that, yes, Foster's precedents exists. He quibbles about whether he can get quite the right version of them from somebody, from Rhymer or whatever, but at one point he just tosses out in the, kind of, irresponsible historian's way, doesn't care what the political consequence is, I've found requirements for arresting minstrels [laughter]. Well, yay, great, but what does that tell you about the impressment precedents then? If the fact that you could impress sailors in the fifteenth century was accompanied by the fact that you could impress minstrels, do we really want to think that we should still be impressing musicians [laughter]? Probably not.

Elmer: Right. Kirsten?

Sword: Well, I guess I'm going to ask for you to give feedback on my understanding of the larger trajectory I see in common between you is in terms of… we're looking at a story about the emergence of… first of all, for me, I was struck by the common law as "our law" and wondering what's driving that, and I'm really interested in Professor Staves' comments about jurisdiction. And then, also, the conclusion caused by the proliferation of texts. We were trying to come up with some consistency of different things if we have this ironic, sometimes intentional sometimes unintentional, codification of (technically not) statutory codes, but putting down in text what happened in common law in the late seventeenth century. We've got a substantial body of the judiciary and a Restoration Parliament that's saying "Oh my God no, we don't want this written down, we certainly don't want it published because what's that's going to do to our Solomonic authority to say what we've meant if everyone is going to ask a question about it later?" So, you've got this parsing of law as text and then law among these different jurisdictions as common law.

I guess I'm curious one, about this trajectory and two, if you'd weigh in on what's driving it. You've got novels driving normative, you've got novels driving law, you've got imperial jurisdictions and the need to create common texts. I'll invite you to comment, I'm trying to figure out what the overall framework is, but I'm struck by what it means for a central jurisdiction over multiple, multiple legal systems.

And, the last question I have coming in is then what does [this mean], as we go through this elliptical thing of replaying eighteenth-century dilemmas, if you look at precedent trying to say what is law, it is incredibly confusing (and was confusing then). Are we [wrongly] privileging in our own accounts common law *as law* over against competing jurisdictions that were the real politics on the ground?

Stern: So, I think your observation about competing jurisdictions is very helpful. One way to think about it is just to understand that the common law courts since their creation around the twelfth and thirteenth centuries had made business for themselves by seeking to expand their jurisdiction. Judges got paid by having cases argued in their courts and so it was in the interest of these courts to figure out ways to expand their own jurisdictions. And, you're quite right to suggest that the effect of that is a series of conflicting, overlapping, inconsistent debates among lawyers and judges about where a claim is properly brought or whether you can get it out of one court and into another if you're unhappy with what happened there.

The way I would enter the general framework question is to say that, certainly since the Renaissance, the history of English law has been the history of the law trying increasingly to rationalize itself and, so, trying to iron out the inconsistencies. And, this is something that happens very slowly over time and I think this is exactly what drives the adoption of new legal standards, new legal methods as judges and lawyers discover new ways to make the law more transparent, more explicit, more printed, more available, more produced in ways that make it readily available to consumers in digestible chunks so that they can supposedly figure out what applies to them and use it. Now, obviously this is a convenient story for the law to tell about itself. Look, I'm not asserting that the law has become more rational, just that it's the business of judges and lawyers and law professors to make it seem more rational [laughter]. And, I think that this is the single driving force

that explains most legal change, except, obviously, the legal change that's imposed by outside. There are many social and cultural and technological events that also drive legal change as well, but to the extent that you want to tell a story about how the law perceives itself to be changing, it's the story of the law trying to make itself more rational as time goes by and it borrows techniques where it can find them: from scientists, from novelists, you know, what have you. I think it's a quite eclectic set of non-legal materials and this is why I don't think it's at all possible to tell a story about legal change that doesn't involve all of these external forces as well.

Elmer: Great, thank you. Jesse you're next.

Molesworth: I used mine.

Elmer: You used yours. Okay, Julia.

Julia Douthwaite: Oh, thank you. Okay, well, I'd like to—I can't talk very loud, so sorry, hope you can hear me—I'd like to change the tenor of things a little bit here. I'd like to ask Simon some questions and, obviously, those of us representing France are not very numerous here, but we will speak up to point out many great differences and to ask you perhaps, to undo some of your claims. For example, on page two of your essay, you point out that at the end of the eighteenth century, the term reasonable began to spread. Well, right there I'd like to just say, what about Voltaire in 1734 in the *Lettres philosophiques* and what about *Le Mondain* (*The Worldly One*, I guess, it's translated as) where he says, you know, "touts hommes raisonnables pensent comme moi"? And, he says it in a very ironic, witty way to say that every right-thinking person has to share my views, my views being that of the wit of the eighteenth century European court and of against obscurantism, against the Catholic Church most notably. In a, kind of, contestatory way toward the French crown, but that maybe was a little less obvious than his attitudes toward the Church.

So, and also the claim in the paper—this is just the first part, then I have another part that's longer than this—that the lawyers would be the ones representing reason. Well, in the French Enlightenment, it's not lawyers against philosophers. Les philosophes are the voices of reason and lawyers, you don't even hear much about lawyers. Philosophers are much more important for putting forth great ideas that can be put on the table and be discussed. So that's one issue—

Stern: Well, let me just try and grapple with—

Douthwaite: No, no, no, I want to keep going further.

Stern: OK.

Douthwaite: Because the other issue is actually much bigger and it's about plausibility.

Stern: Great.

Douthwaite: You profess on page ten and again on page twelve that the eighteenth-century novel "marks a new concern with fictional probability or plausibility as opposed to truth or . . . accuracy." And, again, I would say no, actually, not in France. And, if, as many people think, the French novel was the beginning of all novels, and most notably the 1678 novel *La Princesse de Clèves.*

Stern: Sure.

Douthwaite: This novel was considered *the* first novel because unlike many earlier "novels" it was not, it did not take place in some far away land, it was not full of crazy adventures or strange coincidences and surprises, it was set in a more or less contemporary, recognizable place (the Court of Henry II), and its characters could be then considered contemporaries similar to the people who would actually be reading it. And yet, the heroine's final actions—and this unleashed a huge battle about exactly the issue of plausibility, that's why I'm putting it out and letting you know about it, in 1678 in French newspapers (which were then picked up and of interest in England too). The plausibility and *vraisemblance* was the big topic of the day because what she chose to do was not to marry her lover even though she could have (being that she was a widow), but she chose to not marry anybody and simply to retire to the countryside and spend half her time in the convent and half her time in her country home and to just be that way, just to be rather unhappy for the rest of her life. And, which goes to my last point, which is that she, this, and the term inimitable, inimitable example is exactly, that is, those are the last words of *La Princesse de Clèves*: "elle fut un exemple inimitateable de vertu."

So, she was an inimitable example of virtue. And so the big gist of what I'm trying to say here is that realism is not the only genre and trying to exemplify or trying to imitate people that you read about in books is not the only reason that people were reading. What you see in the *Princesse de Clèves* is that it's not a realist—I mean, it's more realistic than most novels, than most seventeenth-century novels—and that's why it's considered the first novel because it's about psychology. But, it's not so much, I mean, it's been read as, and I think wrongly, as, you know, a feminist text where she's complaining about the treatment of women because obviously the Princesse is very unhappy, unhappily married and then unhappily widowed, but she chooses that. And that's just the way it is. And, it's about, I think—and I'd be curious to know what Hall thinks—I rather think that this novel is simply to teach the reader to be able to disengage and to come to a different place; so, that you're not constantly battling with reality, but rather, you are transcending reality and finding what's called *repos* in French, *repos* meaning quietude or resignation. And, it's a spiritual state in which one is, one doesn't care any more about reality and one is simply accepting that things are that way, and finding peace somewhere else.

So my two points then are, number one: the reasonable, the term "reasonable man" could be and was used in France as a shortcut, a witty ironic shortcut toward the elite reader who would share the views of the writer, and this is why Roland Barthes calls Voltaire "the last happy writer" (because he was the last writer who wrote to people like himself). And then, the second point was that realism is not the only way that people were reading or the only way that people were writing and this notion of the inimitable example could be a prompt to disengage from the whole notion of creating and copying exam-

ples in order to find a different kind of peace that is not possible given this kind of state of affairs.

Stern: So, it's not my claim that the word reasonable didn't have a lot of currency in the eighteenth century prior to its uptake by lawyers; rather, what I argue is that reasonable had… the idea of the reasonable had a different function to the extent that it functioned in law at all prior to the eighteenth century. So, when I talk about its spread I'm not claiming that lawyers were the ones that pioneered its spread. In fact, Lorraine Daston in her book on this sort of probability shows that, again, it's French probabilistic thinkers of the eighteenth century who were probably the pioneers of the phrase "reasonable man" itself, and that they, too, are thinking about problems to do with the descriptive and the normative which are encapsulated in this phrase. So, I'm perfectly happy to say that the word "reasonable" takes off and is pioneered by or gains currency from thought by statisticians, philosophers, religious thinkers—think of John Locke's *The Reasonableness of Christianity*, right? All I wish to say about its legal function is that it doesn't do the kind of work that it begins to do as a legal standard until the very late eighteenth century or, more likely, the nineteenth century, and that what it begins to do at that time is to take up the work that was achieved by a number of eighteenth-century English legal standards to do with prudence, caution, ordinariness, typicality, etc. So, I'm quite sympathetic to a story that says that the word "reasonable" or the phrase "reasonable man" or "reasonable person" has other prior functions before lawyers get all enthusiastic about it.

As for the thought that realism isn't the only genre…of course I think that's exactly right as well. What I'm willing to accept is the story that the extent to which fictional realism begins to have meaning for readers as a motive to do with plausibility, imitation, in that sense, is something that takes off in the eighteenth century so that fiction serves other instances. Indeed, that openly made-up stories about people who might be your neighbors have other functions prior to the eighteenth century is also, I think, a quite sensible thought, and one way of trying to tell that story simply within the history of English literature, let alone French literature, would be to look at instances of made-up people who seem like everyday people on the English stage in the seventeenth century. So, I think it's, it's, of course, useful to think about other functions that fiction serves besides that of meaning to inspire imitation or to serve in an exemplary way. I'm simply accepting for the, for it's persuasive value for this account, what Gallagher and others have said about the rise of a certain kind of fictionality in the mid-eighteenth century and the ways in which it was taken up by English readers.

Elmer: Anahid.

Anahid Nersessian: So, I think this is basically just another version of the same two questions, but it's focused around a terminological issue, and the question is about the word "normative."

Stern: Yes.

Nersessian: So, in philosophy and law we use normative to mean, you know, a standard to which everyone adheres, right?

Stern: Yes.

Nersessian: But in say, English or gender or cultural studies we use normative to mean a standard to which everyone should adhere because there are all sorts of social and cultural and political forces telling you that you should adhere to it.

Stern: Right.

Nersessian: So, the use of normative in my discipline and other people's disciplines is ideological, right? In yours it's not, it's moral minus the ideology. So, I took the story that you were telling to be one in which certain kinds of cultural forms, like the novel, bring those two meanings of the word normative together, right? So, moral claim also becomes an ideological claim. And, I think it's exactly right that we can look, you know, further back to Montaigne or Cervantes or whoever that people have always aspired to be normal, right, so that the normative has always had an aspirational purchase and ordinariness has always had a kind of aspirational dimension to it. So, I say it's a terminological question, but I also think it's a question about the historicity of the idea of the normative, right? So, I just wonder, this is just to sort of put a fine point on it, is it your notion that the eighteenth century is exemplary or important in this regard because the two concepts come together in a certain way or is there something else going on?

Stern: So, I've not thought about whether this is a new fusion of those two forces. I'm inclined to think that you can't have the normative in the first sense without at least some substrate of its ideological force as well, and I would go back to the example of Lorraine Daston's "man of good sense" in eighteenth-century French statistical thought. So, according to Daston if you're trying to make predictive claims about the future on the basis, on an objective basis, right, you're actually trying to give—you're not talking about how you think things should be, but how things will play out—and you look to the man of good sense, and you've already weeded out, you know, the lower classes, you've weeded out women, right? You've already fixed your attention on an elite group of highly educated men and, guess what, they turn out to form the predictive basis for what's statistically likely, right? How you can expect that people will behave—not, according to the proponents of that view, how people should behave, but how people *will* behave. And, it seems to me that what that suggests is that if there's a point at which the two of them aren't already fused, it's obviously got to be before then. And, I guess, I haven't really inquired as to whether there is some point at which the two become fused together. It seems to me, it has seemed to me—and tell me if you disagree—it's sufficient for what I'm trying to do here to accept that they're already intertwined by the time the word "reasonable" or the phrase "reasonable men" is taken up by lawyers in the early nineteenth century.

Nersessian: I don't know if this is in disagreement or an agreement, but I take it that there's a certain critical story about the realist novel in which the realist novel or realism as an aesthetic really creates that fusion in a new way whether, you know, it's the genre of the literary that creates it in a certain cultural sphere… but I, that was just it.

Elmer: Okay. A short one from Rebecca and also from Susan—both *short*, right?

Spang: To connect this to our theme, I'm wondering if these two senses of the normative are the difference between an example (how people behave) and the example (the exemplar of how you should behave).

Stern: Yeah, very nice.

Elmer: Do you have a short intervention, Susan?

Staves: Yes, on this general question of normative. In the civil actions like the negligence actions that Simon's paper refers to where you invoke the reasonable man standard and certainly in the criminal actions there is an important ideological component in British law to the assumption that all subjects are equal under the law, all subjects are the same under the law. And yet, of course, in a class system not all subjects are equal under the law and I would be interested to hear Simon talk a little bit on how he imagines the class issues play out here. I mean all of us now as master Senator Elizabeth Warren has made clear that the normative rationality of Americans in relation to financial instruments is a lot less than what lawyer-drafted instruments and contracts have suggested.

I actually wrote a paper once on the reasonable dog [laughter], about tort law and dogs in the late eighteenth century where the question arises of, you know, this dog bites, spring gun court cases where dogs have been shot because they didn't read the no trespassing sign. Is leaving poison bait on your property an attractive nuisance? So, where's the liability when the dog is poisoned, etc., etc. And, the courts do come to terms with the fact that dogs are not normative subjects, but the class issue is the important one here and the normative question, I think.

Elmer: Hall also has a short one, and then we are going to move on.

Hall Bjørnstad: I wanted to continue Rebecca's development of the normative.

Stern: Yeah, great.

Bjørnstad: So, normal used to be normative, and then it became descriptive in the nineteenth century. So, for example École normale supérieure in France sounds strange to our modern ears because it seems to be about being average, but it's about being superior. Everything's normal.

Stern: Yeah.

Bjørnstad: *The* example, not an example. And, I wondered how that could square with your commonsense man, it maybe goes against, so are there . . . ?

Stern: I think that's wonderful. You know, I mean, I'd never thought of that before, but that seems exactly right, that the availability of this more charged term has allowed the

word "normal" to drift into a more emphatically descriptive sense instead. Yeah, I don't think I have a good answer to that. The answer that I would try to give would depend a lot on Ted Porter's work on the rise of statistical thinking in the nineteenth century, in which, I think, is given just sort of wonderful account of the ways in which the average as such actually became something people aspired to be, right? Such that, you know, there's some peculiar sense in which, in the course of the nineteenth century, it becomes possible to think that, you know, having 2.4 children would actually be the ideal thing to have if you only could, which is obviously a crazy thought. And yet he shows that bell curves and other ways of representing the standard, the representative, the whole spate, the whole range of experiences or scores or whatever urges people in the direction of wishing to embody that position right in the middle.

Elmer: Okay, very short—

Douthwaite: Little tiny. Well, it just reminds me of the Renaissance motif of, you know, the *juste un peu*, not trying to go too far, just accept it.

Stern: Right.

Favret: Golden mean.

Douthwaite: Yeah, accept it, and be happy or not happy, just be.

Elmer: Can I put you at the end of the queue, Robbie? Or is this, or is this? OK, yeah, go ahead.

Robert Schneider: In terms of, you know, the normal and good sense and the reasonable man… at least, looking back to the seventeenth century often, when people talked about good sense or the juste milieu or the *honnête homme* or a reasonable man, it was distinguished by being not pedantic or not professional. So it wasn't necessarily a universal reason as an example or an essence, but in the sense of being outside of the corporate or professional or jargon-laden or pedantic or discursive world, so the world which is that of the gentleman, so it's class based, in that sense, but it departs from certain, you know, the traditional structures that cultivated knowledge.

Elmer: Tracey, you've got a short little intervention, and then we've got two more on the queue and we're going to end it at 4:00, so.

Tracey Hutchings-Goetz: Do you have a response, Simon?

Stern: I think that's wonderful and a really provocative point and, I mean, really my only response would be that that seems like a really helpful way of thinking about how this changes because it then turns out that, at least within legal thought, the precise way to understand typicality, etc. is through a professional lens, so that it completely changes. But, I think that's a wonderful observation.

Hutchings-Goetz: So, in this discussion, sort of, about typicality, I feel like counterfactual examples and counterfactual thought has come up over and over again, and I wondered the extent to which it might be useful to start thinking about the reasonable man or the reasonable dog in legal examples as, sort of, the hero of counterfactual narrative? That, sort of, counterfactual narrative as used in these legal contexts are always, sort of, counterfactually what would have happened had a reasonable dog or a reasonable man been the person acting in this example. So, I guess I was sort of wondering if either of you could speak to this or if that makes any sense.

Stern: So, again I think there's really a lot there, I think that's a terrific observation. So, the burden on the counsel for the plaintiff alleging that the harm wouldn't have occurred but for the negligence of the defendant is precisely the narrative in which you invent what the reasonable person would've done such that this harm wouldn't have arisen. And, I think this suggestion about counterfactuality is actually really crucial, right, so what you have to do is not only make what didn't happen seem not only narratable, but plausible, typical, likely. In fact, what did happen has to be made, you know, at a minimum, a departure from the standard of reasonable care and, desirably, not merely flunking the normative demand but, ideally, flunking the behavior of what someone typically would've done as well. Because even if, as I've been saying, it welds these two things together what you would really like to persuade the trier of fact is most people would've had more sense than this, most people would've been more careful than this.

Elmer: Sarah, you've been waiting patiently for this.

Sarah Knott: Oh. Hunh. I was going to ask a naïve question, actually, because I was really struck until ten minutes ago that we weren't using the vocabulary of the example or exemplarity. So, I'm going to ask a twofold naïve question. One is, and maybe I'll ask specifically about the field of law, is the concept of the example really doing any work in the eighteenth century? Because the more I listen to discussion of precedent, for example, the less… the more I listen to the discussion of precedent, the less it sounds as if it's actually about examples, and it sounds more that it has to do with the accumulation of the past. And the other is, what kind of work is it doing for us? Because the terms we've been groping for have been to do with the normative and the typical. Perhaps the example has something to do with moving from the singular to something else, but even that seems like a generalization that's hard to make. So, I'm just curious. It is an opportunity to add your reflections to those issues, the past and present value [of "example"].

Elmer: I may just executively throw Johannes in, he wants to answer you and he was next in the queue anyway.

Johannes Türk: Because it, in a way, fits well, although my question is the opposite of Sarah's. [laughter]

Elmer: And thus it fits.

Türk: From the other side, so to speak. So, I mean, I asked myself the same question, actually. We open the reader with an article from the *Encyclopédie* about the example, not exemplarity, right, which has different meanings? So, I was going to ask about the role that both play in your presentations for the simple reason that it seems to me that what both are talking about is actually the conflict about how to understand, judge, evaluate, and use the example, and that's exactly what exemplarity is about (and not what the example is). In other words, I can write a history of the examples; you know, I can write a history of the common law as an attempt to establish examples as precedent to invest in a certain authority, but what remains unclear in it is actually *how* the example is to be used and *why* and *how* it is to be recognized as an example and applied as an example.

And, this is a question that actually is difficult not just for precedent based law, but for all law because I think of it as a rule and I still don't know how to apply it to the specific case, even if I have a legal system like the French and German that's actually rule based. Now, on that account it seems to me that both the papers are talking about an extreme insecurity and conflicts about how to apply a law. Now, you can have formal solutions for this scenario. You can say, look Judge A and Defendant B argue and the Judge at the end decides who is right in his judgment of the case, for example, and in which rule to apply or in which precedent to apply and how. But, you can also say, look, the judge's word is final only because it's a pragmatic solution to an irresolvable conflict, a conflict that is irresolvable by its nature. It seems to me that both of your papers were talking about a political, historical situation in which this question emerges. I think Simon's paper [does this] in a particularly interesting way because there's the attempt, with this normative fictional person, to smuggle someone into the scenario of the case itself who actually judges the situation according to a norm or a topology that we consider a standard. So, in other words, this is a problem of second nature observation: how should we apply, judge, and use an example and how does it relate to a case? What is the rule that can guide our judgment on this and smuggle onto the level of the content, right? So here we no longer talk about the judge having to find a rule about the primary example which would apply, but rather we have someone in the situation who is to be judge, on whom judgment depends but who is actually a second order observer.

So, I find that an interesting thing, and, in a way, both the papers talk about exemplarity as a question of the binding force and possibility of something like the authority of an example. And, Richardson speaks exactly to that in his defense, right? He says, "Look if I really go into the details of these characters, no one is going to be by any means similar to them, so how can anyone imitate them?" So, on the other hand, you can see there's a certain oblivion to difference that's always necessary in order to apply, produce, accept any example as exemplary, right? Because, actually, similarity is never identity. So, actually no example can be applied at any moment with sufficient reasonable force not to be refuted.

Elmer: Simon, last word.

Stern: So, let me just say something very briefly about that. First of all, I think everything that you say is wonderful and I would, first of all, try to respond by appealing again to that story I told before about the way in which the history of Anglo-American legal thought is a history of the rationalization of its own premises. On that view, although I

actually hadn't thought about it this way, you might think of the positing of a reasonable man standard as a chapter in the history of the rationalization of the law, precisely as you suggest, by introducing into legal analysis, into legal evaluation itself the figure of the observer. I've not thought about it that way, but I think that's a quite fascinating and provocative way to think about the work that that figure is doing: to make present in the analysis the rational inquirer, evaluator, observer.

There's one other thing I did just want to say about your more basic question about how to get from the example to its application, so this is a problem which, of course, is endemic, as you say, to all legal systems. It's exactly what Tennyson was worrying about, complaining about, when he wrote that English law was a wilderness of single precedents, a "wilderness of single examples" is actually, I think, the phrase he uses; so, he's dubious about the precedent precisely because all you've got, you know, is tons of examples without any guide for figuring how to apply them.[4] So, the guide would be the increasing promulgation of rules making judges more self-conscious about the mode in which they get to apply them. And, I just want to make a plug here for a great article which is coming out in about a year by a legal theorist who teaches at Queen Mary called Maksymilian Del Mar on legal fictions where he talks about this problem of the exemplum and the exemplary in precisely the way that you've just been describing. So, he's editing a special issue of the journal *Law and Literature*, actually, which is coming out at the end of this year which will have that article in it.[5]

Elmer: Very good, thank you so much. Let's thank our two initial paper givers. [Applause].

[4] In his "Aylmer's Field" (1863), Alfred Lord Tennyson wrote of "… the lawless science of our law/ That codeless myriad of precedent/ That wilderness of single instances."

[5] Maksymilian Del Mar and Randy Gordon, eds., "Special Issue on Exemplary Narratives in Law and Legal Reasoning," *Law and Literature* 331 (Fall 2013).