Exemplary Fictions, Legal and Otherwise

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Susan Staves is Professor Emeritus of English at Brandeis University. A recipient of a Mellon Emeritus Fellowship in 2006, and before that of a host of other fellowship awards, including from the Guggenheim Foundation and the American Council of Learned Societies, Professor Staves has produced an impressive body of scholarship focused on intersections between law and property, gender and authority, and the literature of the Restoration and the eighteenth century. In 2006, Cambridge brought out her *A Literary History of Women's Writing in Britain, 1660-1800*, merely the latest of a long list of publications reaching back thirty years.

Simon Stern is Associate Professor of Law at the University of Toronto Law School, where he also directs the Centre for Innovation Law and Policy and the Combined Degree Program in Law and English. In addition to his appointment on the Faculty of Law, he is also an Associate Member of the graduate faculty in the Department of English and the Centre for Comparative Literature. His research focuses on the evolution of legal doctrines and methods in relation to literary and intellectual history. Current research topics include the adoption of the analytical method in the nineteenth century and its effects on modern legal reasoning and writing; the development of the "reasonable man" standard (and its precursors and analogues) since the eighteenth century; the history of the case method and the form of the case; and the history of authorship and copyright law.

It is a great pleasure to welcome two such accomplished and wide-ranging scholars to the Indiana Eighteenth-Century Studies Workshop. We are fortunate to have their contributions orienting our collective work at the start.

Susan's paper immediately present a problem that I suspect will recur over the next two days. Namely, how do we parse and scan and order our terms? Which ones are synonyms for which others? Her own privileged term, obviously, is precedent. As part of a project about the "theory and rhetoric of rights in the British Empire," Susan directs our attention to important transformations in the use of "precedent" in common law. Early court rolls and Year Books of the Renaissance included formal pleadings, occasional debates about substantive law, and (of course) decisions. What they did not do was contain records of explicit reasoning based on precedent. As Susan points out, that precedent instead lived in the collective memory of a small handful of judges meant there was inevitably forgetting—a failure that might also be a boon, inasmuch as "the system thus gained some flexibility." The idea here—the paradoxical, but pleasing idea—is that the imperfectness of precedent actually made it a more successful (because more flexible) system.

Beginning in the seventeenth and eighteenth centuries, however, more written case examples became available. This in turn led to the production of more treatises on legal reasoning: written arguments led to more and more pressure for explicit reasoning, feeding the growing Enlightenment demand for reliable sources, historical questioning, etc., etc. The complex legal battles over impressment that Susan details as her case study show these factors at work. If Blackstone defended common law and its system of obscure precedent, he did so on the basis of a nationalist investment in the hidden rationality of custom and usage. The author of *A Discourse on the Impressing of Mariners* (possibly William Jones, of Orientalist fame), held a different view: the

"lex non scripta" necessarily emerged from a "dark recess" and was merely a "heap of matter which lies in obscure confusion." An important part of Susan's story concerns how rights discourse was able to seize a nationalist "Saxon" imprimatur, while avoiding the "dark recess" of common law precedent, by recourse to the Magna Carta.

This looks to me, despite the twists and turns Susan so ably presents, like a classic story of Enlightenment triumph. I invite Susan to dispute or otherwise modify that simplification. If what we see in the theory and rhetoric of rights discourse is the force of precedent made gradually more explicit—a process of explicitation powered by print—then we might venture that what we see is the force of exemplarity changing from a pre-critical usage ("this is how we have done things in the past") to rationality. If legal precedent is to have exemplary force in this context, it will only be because it has been submitted to rational, historical, analysis. And this analysis can be as corrosive of precedent's claim as it is supportive of it.

Simon's paper brings in another kind of exemplary legal fiction: "the reasonable person." Simon tells us that in the eighteenth and much of the nineteenth century, a precursor set of fictions—a man of ordinary care or prudence, a man of competent skill, the man of common sense—rose initially in tort situations, where they served a largely descriptive function for assessing proportionality. Interestingly, its use in the law of fraud concerned the victim of fraud, not the wrongdoer: the key issue was whether the victim's being such a ninny that he fell below the standard of ordinary competence sufficed to let the wrongdoer essentially go free. If you bought a horse with three legs, and then got the horse home and it has three legs and you say, "I've been ripped off," then the competence standard comes into play and says, "Well, you're just too stupid and we can't charge this guy." [Laughter].

Simon is interested in how the development of the "reasonable person" shares a history with the rise of fiction: "A similar kind of imaginative engagement underwrites both [the] reasonable person and the literary character." In a discussion of Richardson (a *locus classicus* for the force of exemplarity and its relation to fiction), Simon unpacks the assumptions behind some of Richardson's defenses against having unleashed a pernicious example (whether it be Pamela or Lovelace) on the world. "From the outset of the debate over the novel's ability to use made-up people and events to convey the truth about human personality, participants in this discussion were concerned with how generally applicable those representations needed to be, if readers were to rely on them as accurate pictures of behavior likely to be encountered in the real world. In its structure, though not in its application, the dispute resembles the dispute over whether the 'reasonable person' should take an invariable, generic form or whether the standard should vary according to the individual actor's personal background and characteristics." Simon concludes that the rise of fictional persons taken to be exemplary, as in Richardson's novels and elsewhere, served as a "vital background condition for the flourishing of a 'reasonable person' standard in law."

I assume this crowd will have much to say about how literary exemplarity exerted its force on other domains of social life, but let me ask an opening question about discourses that were neither literary nor legal but where some similar dynamics may have been at work. The first would be religious discourses focused less on standard social behaviors than on different kinds of real-world "incarnated" templates. Richardson's defense of Pamela veers in some ways toward setting her up as a paragon of virtue in just such terms. The other domain is moral philosophy, which began in this era to have a quite complex understanding of its filiations to both legal domains and *belles lettres*. Here, a touchstone example would be Adam Smith: is his "man in the

breast," his "impartial spectator" a creature of a fundamentally different kind from the "reasonable person"? And if so, how?