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The History of Genres: Reaching for Reality in Law and Literature

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Ben-Yishai, Ayelet. 2013. *Common Precedents: The Presentness of the Past in Victorian Law and Fiction*. New York: Oxford University Press. Pp. xii + 191. $74.00 hardcover.

Genres are historical formations; their ability to generate knowledge depends on their interrelationships within a culture. Since law, too, can be viewed as a genre, studies of specific historical relationalities between law and other genres are necessary for law's own history and theory. This essay discusses differentiations between Victorian law and literature, starting out from the recent publication of Ayelet Ben-Yishai's Common Precedents: The Presentness of the Past in Victorian Law and Fiction *(2013), which reveals some of that history. I examine two points: differentiations in legal and literary approaches to probabilistic knowledge, and differentiations in the author functions in law and literature. These differentiations bear multiple implications. I discuss implications for evidence-law debates about probabilistic evidence, for contract-law debates about the centrality of autonomy and self-authorship, and for understandings of legal reasoning itself—the elusive notion of "thinking like a lawyer."*

DIFFERENTIATIONS BETWEEN GENRES AND LEGAL SCHOLARSHIP

Legal scholars are well aware that their field is, or can be viewed as, a genre;[1] that is, that law—or particular legal texts and practices—though it deals with "society" and human experience, involves distinct forms (procedures, language, categories, etc.) that distinguish its manner of representing and processing that experience. The idea that law, as genre, is somehow distinct yet related to its surroundings has often been channeled through theoretical claims about the relations between "law" and "society." These analyses have preoccupied scholars for a long time now and, when they involve causal claims, they are in fact debates about the level of independence of the genre (see, e.g., Sarat and Kearns 1993; Tomlins 2007). We have at this point a seemingly full array of possible positions—from the social as a determinant of law to law as the social's constitutive force, with every hue in between and

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1. I use "genre" in a broad sense that exceeds the idea of text and material and extends to practice as well. Some readers might prefer "discourse" or "discipline." "Discipline," however, invokes an institutional setting that "genre" does not. Though that setting is often present, the broader notion of genre often captures the stakes of my discussion better. Discourse, meanwhile, does not carry the emphasis on certain stylized elements of law that interest me in this essay.

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with suggestions that the law-and-society relationality has run its course and that new formulations are needed.[2] Can anything more be said about law as genre, about law and its outside?

This essay suggests that better understandings of *specific historical relationalities* between law and other genres—rather than between law and broad, undefined abstractions like "the economy," or "society," or other indeterminate references tied together merely by being in some sense nonlegal—can move beyond existing law-and-society debates about law's relation to the social and are, in fact, necessary for legal scholarship at both general and doctrinal theoretical levels.[3]

Why are relations between law and other genres, such as fictional literature, important? There are many reasons; the one pursued in this essay is that genres constitute knowledge. What we know about our world, and how we know it, depends on the specific genres through which we process experience. Put otherwise, genres shape our common sense of reality—and the ways we can differ about it—hence genres' political significance. This is no news,[4] but worth reiterating.

A core insight of research into the history of genres is that one should pay close attention to the processes of their creation and change. Genres are not essential entities, but historical formations; their modes of generating knowledge, and thus knowledge itself, are matters of historical development—contingent, contested, politically charged. Importantly for this essay, the ability of genres to generate knowledge depends, among other things, on their *interrelationships within a culture*; their authority—their status as truthful, or insightful, or moral, or otherwise worth heeding—is often a question determined relatively, in light of other options offered by other genres at the same historical moment. To understand how knowledge is generated by genres, to see on what terms they appear authoritative and so affect the sense of reality of their subjects, to be able to grasp the relation between the accounts of reality produced by law and those produced by other genres, and to seek the sources of willingness to accept those accounts, what is needed is an interdisciplinary analysis of commonalities and differences between genres as they emerge in particular historical contexts. Although interdisciplinary analysis has become standard in legal scholarship, including legal historical scholarship, the project of historicizing genre differentiations is still just beginning. This perspective requires tracing the emergence and resonance of differentiations between law and other genres dominant at the same time and place—dealing with the same social questions, while facing the contingency of such differentiations.

This essay begins a conversation about genre differentiations between law and literature in the nineteenth century, starting out from the recent publication of Ayelet Ben-Yishai's *Common Precedents*. The law/literature relation of the nineteenth century is a vastly studied relation that has nonetheless been left undertheorized in terms of historical genre differentiations. *Common Precedents*, while not so intended, offers an opportunity to pick up that discussion and show how understanding genre differentiations can contribute to current theoretical debates in various areas of law. Far from

2. Tomlins has been pushing a nonrelational, allegorical formulation (e.g., Tomlins 2012).

3. I use the term "relationalities" to capture the mutual condition in which each genre is constituted relationally vis-à-vis the other.

4. At least since Foucault.

being a matter only for law-and-literature scholarship, or even for cultural legal historians, differentiations between law and literature—because *they are the structures through which law (like literature) stakes claims to authority*—are a matter for legal scholarship interested in the relationship between law and society, between law and "nonlaw" in general, and quite often for scholarship in particular areas of law.

I start out by introducing the broad claims of *Common Precedents*. I then follow through the history of differentiations between law and literature that the book reveals. That history has different manifestations, two of which are examined here: differentiations in legal and literary approaches to probabilistic knowledge and differences in the author functions (in the Foucauldian sense, explained below) in law and literature. In each case, after observing differentiations, I discuss possible implications for current legal debates: implications for evidence-law scholarship, which has been debating the question of probabilistic evidence; implications for contract-law scholarship, which has been debating the centrality of autonomy and self-authorship since the institution of the classical theory of contract; and implications for understandings of legal reasoning itself—the elusive notion of "thinking like a lawyer."

COMMON *PRECEDENTS*: PRECEDENT IN LAW AND LITERATURE

Ayelet Ben-Yishai's *Common Precedents* tackles the problem of knowing in the nineteenth century directly, and examines the social processes of constructing knowledge in a time of change.

The nineteenth century was an era of dramatic social change. Turn where you might in scholarship on the era, the consensus about change is there: industrialization, technology (railways, telegraphs, radios, spinning machines, synthetic dyes, but most of all, as Whitehead has argued, the method of change itself, which relied on professionalism to bridge the gap between scientific ideas and ultimate product [Whitehead 1925, 98–99]), rapid urbanization, expanding democracy, expanding consumption, quickly developing market relations, the stirring of old hierarchies and the rise of new ones, science, secularism, changes in legal ideology, changes in literary practice: much else was going on that makes *Common Precedents*' starting point in the drama of change an obvious one.

In eras of rapid change, the world is new, strange—or *un*precedented—and the future uncertain. Ben-Yishai argues that this was a source of anxiety and that nineteenth-century English subjects needed a sense of knowing their social world—a sense of familiarity and belonging—in order to live through the turbulent changes that were taking place. Law and literature, in turn, were two sites of social thought that responded to that need and sustained a sense of knowing the world. Ben-Yishai relies on the concept of precedent to substantiate her claim; precedent is not merely a doctrine, she argues, but a *cultural process* that forges knowledge by linking the present with the past—making sense of the new in terms of a shared old—hence creating a sense of continuity and stability that can hold a community together through a period of upheaval.

Precedent, as a cultural process, informed both law and literature in the nineteenth century, argues Ben-Yishai. In so arguing, she refers both specifically to the legal and

literary sources she reads—the law reports containing judicial decisions and the particular novels she discusses—and more broadly to the discourses of law and literature, in claims that rely on her broader familiarity with Victorian law-and-literature sources and scholarship. For purposes of this discussion, however, my references to "law" and "literature" in the context of Ben-Yishai's analyses are limited to the primary sources she examines.

The animating anxiety for both law and literature was to stake claims about their contemporary world—to reach for a reality shared by their subjects and make it understood, known. This was an obvious challenge for realist *fiction*, but no less a challenge (if perhaps less obviously) for law. Apparent facts, we shall see, were no more stable for Victorians than for us. Knowing the world involved questions such as whether one could know probabilistically and what authorities supported knowledge. While law and literature both participated in the nineteenth-century project of precedent and attempted to formulate answers to these questions, they did so through radically different forms.

Common Precedents tells us that a common social function of law and literature—that of smoothing and assimilating change by basing the new on the old—emerged in different generic structures. Those structures, in turn, provided different answers to the questions at hand. Law and literature were differentiated in their approaches to the probable and in their treatment of authoritative sources of knowledge. Attending to these differences, I will later argue, can contribute to current understandings not merely of the law/literature relation, but also of core legal questions such as the theory of evidence, the theory of contract, and the way lawyers reason.

What Is Precedent in *Common Precedents*?

Quite familiarly for lawyers, when a legal case is decided in reference to precedent, the process is one of identifying features of the current case that have some significant relationship with a case of the past. The new case is thus made to feel familiar: we have an intelligible way of discussing a new experience by reference to an experience we have had before, even if only to note a difference. In precedential thinking, therefore, change is conceptualized in incremental and cumulative terms, rather than as a radical break with the past, and becomes easier to live through. In Ben-Yishai's terms, what we see here is a process of recognizing the new and assimilating it as part of a continuous past. As a cultural process, this is a form of creating a community by affirming a common and continuous identity.

Common Precedents thus explores a historical answer to the philosophical puzzle of identity through time. The puzzle has usually been framed for an individual looking forward, from present to future: What guarantees that I will be the same person tomorrow that I am today?[5] Ben-Yishai is concerned with the collective anxiety of social members who need to reinstate their sense of communal belonging in the present, but

5. I take the wording from Wahrman (2004, 191), where he discusses Locke's account of identity as identically over time.

their anxiety, of course, is no less forward looking: the difficulty is how to think about the future when social reality is unstable and changing.

As a cultural process, the significance of precedent is hardly limited to law and legal rules; it potentially applies to every site involved in forging community by establishing shared knowledge on the basis of a shared past: shared values, shared history, shared interests. Literature was one such site.

To show the work of precedent, Ben-Yishai examines in law and literature the least familiar elements of each genre: in the first part of the book, which discusses law, she does not focus on the doctrine of stare decisis in the abstract, but on the major textual tool through which it was realized: the law reports. To refer to precedent, judges had to rely on law reports that told them what had been decided in earlier cases. Ben-Yishai explores what kind of narrative the law reports forged of Victorian times. She finds they hardly forged a narrative at all; theirs was an *antinarrative* as she terms it. More on antinarrative soon.

In the second part of the book, which turns to literature, Ben-Yishai spends more effort in establishing the genre's commitment to precedent. The implicit motivation seems to be that the narrativity of novels (unlike the antinarrative in law) is already familiar, while the precedential logic of novels is not (while the precedential logic of law is).

It is perhaps worth clarifying why Ben-Yishai's choice of genre serves her argument. Defining literary realism is a vexed theoretical question; however, for introductory purposes it suffices to note some salient formal features. The realist novel's fictional events and characters are located in a concrete place and time; it contains detailed accounts of the social and physical surroundings typical of that place and time; its plot has chronological order and causal links; its characters are concrete too, bearing first and last names and psychological features; it is written in prose; it deals with the everyday, with the ordinary and common. These features speak to the realist novel's location at the heart of tension between the imaginary and the real. It is fiction, and yet insists on maintaining close explicit relations with the nonfictional world.[6] It is hardly an exaggeration to say that literary realism was one of the most important cultural productions of the Victorian era.[7] These qualities of the genre explain its significance for the claim of precedent as a cultural process. The same process of assimilating the new in terms of the old, argues Ben-Yishai, was in fact the basic form of realist narratives, which repeatedly forged a sense of a common past.

The opening epigraph of George Eliot's 1876 novel, *Daniel Deronda*, nicely illustrates Ben-Yishai's argument:

> Men can do nothing without the make-believe of a beginning. Even science, the strict measurer, is obliged to start with a make-believe unit, and must fix on a point

6. I will later discuss the theory of realism as the genre of the probable in detail. Ben-Yishai, note, insists that precedential thinking is so central that it too should become part of the theory of realism, as I explain below.

7. Swinburne: "To the England of our own time, it has often enough been remarked, the novel is what the drama was to the England of Shakespeare's" (Swinburne [1883] 1970, 94). Present-day critics have much the same to say, for instance, Miller (1988, x): "no openly fictional form has ever sought to 'make a difference' in the world more than the Victorian novel, whose cultural hegemony and diffusion well qualified it to become the primary spiritual exercise of an entire age."

> in the stars' unceasing journey when his sidereal clock shall pretend that time is at Nought. His less accurate grandmother Poetry has always been understood to start in the middle; but on reflection it appears that her proceeding is not very different from his; since Science, too, reckons backward as well as forward, divides his unit into billions, and with his clock-finger at Nought really sets off in medias res. (Eliot 1876, 1)

The discourse about the hopeless search for beginnings invoked by George Eliot in this epigraph fosters in readers a precedential sensibility; it grounds a sense that things are always already in the middle, that radical beginnings are make-believe, while in truth no one is ever breaking new ground. This, according to *Common Precedents*, became a favored cultural form of countering the many new grounds actually broken in the nineteenth century. In Ben-Yishai's words, "precedent constitutes a sophisticated and powerful mechanism for managing social and cultural change" (2013, 3).

With these basic assumptions about precedent and Victorian times, consider some of the details of *Common Precedents*' claims about law and literature.

Precedent in Law

Until the late eighteenth century, Ben-Yishai reminds us, stare decisis was only a flexible guidance principle premised on judicial declaration of custom or tradition. Precedent as we know it today—a mandatory requirement to adhere to rules created in earlier cases by higher authorities—is a relatively late phenomenon. Its current status as the very basis of the common law—the basic structure of its development—is a similarly new notion in historical terms.

Reviewing historical accounts of precedent, Ben-Yishai suggests that the changing understanding of precedent was intertwined with changes in legal ideology. With the advent of legal positivism, the authority of case law was shaken. The old idea that case law represented declared customs was attacked as fiction; its relation to a "command of the sovereign" central to Victorian legal positivism was unclear, while statutory law gained standing. In response, a new formulation, in which precedential cases were conceptualized as representations of judge-made general rules, served to confer authority on case law. Put otherwise, Ben-Yishai argues that case law was facing a crisis of authority under legal positivist thought, in response to which new theories of precedent evolved. Another theory of precedent, drawing on legal positivist ideas but also paying tribute to traditional ones, was a conventionalist conception that represented precedent as a process of reasoning that creates a general form that can be particularized according to the specifics of every case.[8] The positivist and conventionalist views of stare decisis were inextricably bound with the written form of precedent, found in the law reports. Indeed, one explanation for precedent's late emergence—in the form we know it

8. Ben-Yishai here draws on existing historical research. The discussion of different theories of precedent relies on Postema (1987, 9).

today—is its dependence on a high level of certainty in recording cases. The modern form of case recording reached its maturity in the nineteenth century.[9]

Ben-Yishai brings into focus the function of law reports by comparing them to two other kinds of accounts of legal cases. The court record of the case registered the judgment, but not its reasoning, and was intended for the parties themselves interested in the outcome; the newspaper report supplied the public at large with particulars considered of general interest. A law report, the subject of analysis here, was reported by a third-party observer in the courtroom to the legal profession. A typical Victorian report contained a statement of the facts, the arguments made by the parties' lawyers, and the judgment.

Ben-Yishai's analysis is wonderfully innovative in concentrating on the statement of facts in the reports. This statement would initially seem a good starting point for an examination of the common practices of law and literature in linking past and present because the narratives of realist fiction, like litigation, gave the best of their attention to the details of ordinary life. Ben-Yishai offers a textual analysis of the narrative form of law reports, which, as she notes, has gone largely unnoticed in scholarship.

The exercise, however, reveals a curiosity: the reports were hardly narratives at all. Ben-Yishai observes a number of features contributing to this phenomenon. The statement of the facts in law reports was hardly descriptive; the narrative voice of the reporter was excluded; beyond opening laconic paragraphs, the report was presented in direct speech of the barristers or judge; no attempt was made to explain the substance of arguments or precedents invoked; proper nouns were excluded; and one is struck by a dearth of adjectives, adverbs, or modifiers in general. The story is generic to the point of abstraction. Here is Ben-Yishai's example:

> The bill in this case was filed by plaintiffs (who were also plaintiffs in a suit against the defendants in the mayor's Court in the City of London) to restrain defendants from proceeding in a judgment obtained by them in the Lord Mayor's Court in respect of an attachment issued by them against certain goods belonging to a foreign merchant who had become bankrupt, and whose assignees the plaintiffs were, and that the goods might be declared to belong to plaintiffs as such assignees. Defendants pleaded a verdict and judgment obtained by defendants in a suit between the same parties in respect of the same subject-matter in the Mayor's Court; and the question was, whether the plea was good (Sieveking v. Behrens & Von Melle, 19 The Jurist 329 (1837)).[10] (2013, 50)

Difficult to read and eliding their own stories, law reports' narratives struggle against their own narrativity: antinarratives. These were far removed from the realist novel's reveling in narrativity, a naturalized form which was the default mode of nineteenth-century narration.

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9. Ben-Yishai references Duxbury (2008).

10. This example is extreme. Victorian law reports were often more readable and contained more elaborate references of pretrial events. However, as a comparative matter, Ben-Yishai is correct in her analysis of antinarrativity.

While the form of the reports predates the Victorian era by centuries, its role and significance were a peculiarly nineteenth-century phenomenon, according to Ben-Yishai. At this moment in history, the antinarrative was functional in catering to urgent needs, those internal to legal ideology—the rise of legal positivism, which required a reformulation of the meaning of case law as generalized rules, and those arising more broadly from rapid social change, which demanded an urgent finding of precedents for an unprecedented world. The reports supported the newly conceptualized meaning and significance of precedent.[11]

Precedent in Realist Fiction

Common Precedents offers close readings in three works of realism: George Eliot's *Middlemarch* (1872), Anthony Trollope's *The Eustace Diamonds* (1872), and Wilkie Collins's *The Woman in White* (1859). Realism's empiricism, its communal mode reliant on a shared common sense that it produced and reproduced, and its reliance on continuity through time, all separately familiar to critics, are here linked into an account of precedential reasoning in fiction.

For my purposes, one example of the kind of analyses Ben-Yishai offers should suffice. In discussing *Middlemarch*, Ben-Yishai argues that the sense of the real forged by literary realism depends on precedential thinking, that is, it depends on knowing the past as a way of understanding a new present. Ben-Yishai examines, for instance, the relation between the novel's narrated content dealing with democratic reform in England and its narrative form. *Middlemarch*, written just after the Second Reform Act of 1867, sets its fictional events just before the first reform of 1832.[12] At the level of content, the novel's characters do not yet know what the reform entails and they present different political stances toward it. At the level of form, meanwhile, the novel represents the radical change of the advent of democracy as inevitable. Readers already know what could not have been known to the fictional characters of the novel, and the novel relies on this setting to cast the reform as continuity. The positioning of readers vis-à-vis the plot encourages them to accept this view.

Throughout her analyses of literary texts, Ben-Yishai relies on the theory of literary realism as a genre premised on probabilistic thinking. Fiction's mode of being truthful, Ben-Yishai claims, is the probable: while its stories may never have happened, it implicitly suggests that they *could* have. This theory explains how literary realism gained cultural authority in an age of empiricism while openly acknowledging, unlike earlier literary genres, its own fictionality. The probabilistic mode of realism is important for Ben-Yishai because she argues for a mutually constitutive relationship between realism's

11. The above excerpt, to be sure, tells us little about how this particular example could itself be used as a precedent. The point of quoting it, for Ben-Yishai, is to highlight the antinarrative form. The notion that cases served as precedents is taken for granted; the question Ben-Yishai raises is, on the assumption that they did, what narrative forms sustained their authority?

12. The Reform Acts extended voting rights to larger portions of the male population, gradually eroding the political power of the landed aristocracy.

basis in probability and the logic of precedent: by relying on a precedential logic, which repeatedly recasts the new as familiar and continuous, novels both relied on and expanded what could be viewed as probable.

In summary, both law and literature, according to *Common Precedents*, deployed rhetorical forms that, though almost diametrically opposed (antinarrative vs. narrative being only the most salient formal opposition), in fact served conjointly to smooth multiple transitions: the transition to legal positivism in law, the transition to realist fiction in literature, and, most importantly, the many transitions that made up the Victorian era, look where you will.

HISTORICIZING DIFFERENTIATIONS BETWEEN GENRES

The History of Genres

Ben-Yishai's discussion of law and literature relies implicitly on the two classical strands of genre analysis. On the one hand, she is concerned with the formalities of rhetoric and pays much attention to the formal characteristics of both law reports and realist texts. On the other hand, in claiming that the forms of law and literature served to foster a common precedential sensibility, and thus provided a framework accommodating social change, she invokes genre as social action, in Carolyn Miller's terms (Miller 1984). Miller reminds us that genre studies are important not as a way of creating taxonomies for their own sake, but because they emphasize social and historical aspects of rhetoric.

Bringing the two approaches together, Ben-Yishai insists on a gap; while a formal analysis highlights difference—most forcefully pursued in her exploration of the antinarrative in law reports versus the narrative of realism—a sociocultural analysis highlights similarity. It is precisely in the gap that one sees the history of these genres, law and literature. It is by regarding the gap that we can begin to develop an understanding of formal differences between genres as a historical process in which broad social anxieties, like the Victorian search for a sense of communal continuity, interact with generic conventions and genre-specific anxieties to form divergent ways of authorizing a sense of reality—of forming knowledge of the social world.

Before I expand on differentiations, it is perhaps worth noting that scholars of literature seem particularly preoccupied with these questions, certainly as compared to legal scholars. The reason seems to lie in the positioning of literature in late modernity. Late modernity has been largely responsible for the emergence of literature as a locus of aesthetic fiction, a realm of doubtful social significance. This position of literature, at once elevated and marginalized, has prompted two almost opposite responses. One response has been a treatment of literature, or the aesthetic more broadly, as a repository of values and possibilities threatened by the advent of modernity, particularly its instrumentalism and materialism, a reaction effectively reifying literature vis-à-vis other genres. Another reaction has been to question the generic distinctions underlying marginalization; here, efforts have turned to reestablish literature's important yet overlooked relations with genres like economics, the cultural centrality of which in late modernity is almost beyond dispute. Historicizing generic distinctions, thus insisting on

their contingent and relational character vis-à-vis other genres, has been an elementary part of these latter efforts.[13]

In contrast to work in literature, legal scholarship seems less concerned with genre differentiations as historical processes. Whatever the reasons, the consequence is a naturalization of law's centrality as a form of cultural authority and social power in late modernity. Both the terms of that centrality and their contingency are worth recovering.

Differentiations Between Law and Literature

In what follows, I rely on *Common Precedents* to open up a conversation about two layers of differentiation between law and literature. With so much sociocultural commonality and so much formal inverse mirror imaging between law and literature, an account of their *mutually constitutive* processes of differentiation seems pertinent. That account captures processes that form perceptions of the distinctness and authoritativeness of law.

In each instance I start out from Ben-Yishai's observations regarding the law reports and expand to broader legal questions. First, I observe that the tension between literary narrative and legal antinarrative reveals differentiated approaches to factuality and, more specifically, to probabilistic knowledge. Realist literature's reliance on probability, I argue, accentuated the legal fear of probability and sheds light on both historical and theoretical discussions of the role of probability in evidence-law scholarship.

Second, I observe that Ben-Yishai's analysis exposes differentiated author functions in law and literature. The role of the author in law, in its difference from literature, is important in making sense of conceptions of autonomy and self-authorship in contract, which have been debated in historical and theoretical scholarship of contract law since the rise of the classical theory of contract in the nineteenth century.

The role of the author is also informative in another sense. It illuminates the differentiated referencing practices used in law and literature to create precedent. Observing that there was more than one way to go about sustaining a precedential logic tells us much about the realities of "thinking like a lawyer." In fact, discussing legal thought as a distinct form of reasoning *without* comparing it to other genres seems futile.

The following discussion thus shows how legal authority's dependence on its relation to other genres is overlooked, even denied, precisely when that dependence is historically significant.

The Probable in Law and Literature, and Evidence Law

It is a commonplace of nineteenth-century law-and-literature scholarship to argue that both genres exhibited similar empiricist sensibilities and were particularly adamant

13. Mary Poovey's work is important here (e.g., Poovey 2008). I discuss Foucault soon. For a review of the split in positions in historical accounts of law and literature, see Rosenberg (2012). As I argue there, some analyses insist on radical divides between law and literature in which literature often serves as a critique of law, while others proceed on the ultimate meaningfulness of commonalities. Ben-Yishai, as noted, invokes both sides of this split.

on sticking to "the facts" in their attempts to account for the social realities of their era. While law's empiricism is possibly obvious to lawyers familiar with modern evidentiary procedures and the fact/law distinction, fiction's empiricism has been identified by literary scholars through the theory, already mentioned, of realism as a genre reliant on probability. In this section, however, I wish to cast doubt on this common wisdom that situates law and literature as similarly empiricist, or at least qualify it. A good starting point is Ben-Yishai's analysis of antinarrativity in law reports, contrasted with the narrativity of realist novels.

The contrast Ben-Yishai describes emerges from the formal treatment of facts in law and literature. While novels reveled in minute factual accounts filling their pages, law reports elided the concrete facts of the case. The reports seemed to resist narrativity precisely because they were reluctant to engage in rich accounts of events preceding litigation and, in consequence, they were almost unreadable to laypersons.

What should one make of the legal elision of facts—and hence narrativity? One suggestion is that it was part of law's empiricism. Empiricism was never a simple endeavor; the fear that facts were—in fact—open to controversy was present to Victorians. As Mary Poovey has argued, the peculiarity of the modern fact, still with us today, is the anxiety around it: Do facts just exist, or are they manufactured? Are facts description or interpretation? (Poovey 1998). Ben-Yishai's analysis of the *absence* of facts underlying the antinarrative suggests that law reports elided these hard questions; they treated facts outside the courtroom as preinterpretive entities, things that existed outside legal proceedings, which operated on them, but did not make them up; this approach enacted law's particular commitment to reality—its ideology of empiricist objectivity. The antinarrative form represents an evasion of accusations that law made up reality as a basis for its precedents, accusations that literature could not even begin to elide given its narrativity.

This suggestion, however, is perhaps too easy; it is not clear that it remains valid beyond the law reports, at least not through the simple practice of eliding facts altogether. Law, after all, deals with facts all the time and foremost in courtroom evidentiary procedures. The more complex point about law's commitment to reality is the challenge it faced with the rise of realism as a major cultural form. The legal elision of facts in the law reports, I would like to suggest, should be read as part of a broader legal anxiety with factuality and, more specifically, with probabilistic knowledge, which realism accentuated.

To see the anxiety with probabilistic knowledge we should first recall the basic structure of realism that Ben-Yishai explains. In realist novels, developed narrativity went hand in hand with explicit fictionality. Novels reveled in the narration of minute facts, yet the facts of their narratives were *not* real and novels—and this is the crucial observation of Ben-Yishai's (and others') theory of realism—were just fine with that. As *Common Precedents* and other histories of realism show, novels came to stake their authority in the probable, while acknowledging quite openly, unlike earlier literary genres, that their concrete facts were made up. Gallagher describes the realist novel as the genre that both discovered and obscured fictionality: On the one hand, the novel accepted the imaginative status of its stories—which earlier genres had denied by insisting on referential truth—representing themselves either as factual accounts or as allegorical reflections on contemporary events; on the other hand, the novel locked its

imaginative status within the confines of the credible. Fiction became a term distinct from both fact and deception (Davis 1983; Armstrong 1987; Gallagher 2006b, 336). As Robert Newsom remarked some twenty-five years ago, probabilistic judgments lend respectability to literature in the face of an ancient and persistent embarrassment: that it deals in things manifestly untrue (Newsom 1988, 9). Put simply, realist novels established a cultural standing and claimed to be realistic by describing factual events that did not happen, but could have. This form of the realist narrative, which depends on probability, created, I suggest, *a rift—a cultural one—between the real and the probable*. The rift was historically significant: if law reports sought to stake their authority in the real, their elision of narrativity—which could be probable but unreal—was useful in their search for authority.[14]

Though a common empiricist consciousness lay beneath the concerns of Victorian law and realist novels, and though "knowing probabilistically," as Tucker has called it (Tucker 1998, 342), became an inescapable cultural form of thought by the nineteenth century for both genres, the rift between the real and the probable emerged in distinctions that merit attention: as realism successfully linked probability and fiction, it accentuated a fear of probability in law; the level of comfort these genres exhibited toward probabilistic knowledge thus differed. The law reports' antinarrative cues us toward those processes, but it is helpful to look beyond law reports to see what was at stake.

The rift between the real and the probable seems most clear in discussions of evidence. Facts established through courtroom evidentiary procedures, to our own days, depend on a cultural ability to claim that something *probably did happen*, rather than just that something *probably could have happened*. This is a matter of reaching for the real, not just the probable. Analytically, however, in both cases the statement is probabilistic and the probabilities could be equal. If so, what marks the difference between *probably did* and *probably could happen*?[15]

This question—of how to tell apart the real from the merely probable and quite possibly fictitious—was, and remains, salient for modern thinkers. Jurists, like other thinkers, have had a long historical tradition appreciative of the probabilistic nature of retrospective fact finding and have long struggled with the implications of establishing facts in a state of uncertainty (Shapiro 2007). The point I wish to highlight here, however, is that the probable, long acknowledged as inescapable, is a source of concern when it appears *too nakedly*—and that the concern has been most dramatic in late modernity, when we might have expected the exact opposite given the so-called probabilistic revolution (Hacking 1987).

We can briefly observe central sites in which the problematization of the probable in evidence law has played out. First is the historical debate about the role of

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14. One could immediately object that law always acknowledges the epistemological gap between legal truth and factual truth, a staple of evidence discourse, and does not seek to stake its authority in the real. To put this objection to rest for a moment, suffice it to observe that evidence discourse can broadly be described as a relentless effort either to close or to justify and hence rationalize, as best it can, the epistemological gap; this effort preserves an idea of a referential truth—a set of facts vis-à-vis which law's own position is defined—and veers away from any suggestion that facts determined in law are fictionalized. I return to evidence discourse below.

15. My choice of terms here, which may seem somewhat ungainly to readers, is intended to bring out the embarrassment involved in the rift between the real and the probable.

circumstantial evidence—evidence that requires inference—or—in other words—probabilistic reasoning. Alexander Welsh has observed the curious process over the eighteenth century of distinguishing presumptions of law—which denoted inference or probability—from presumptions of fact, now newly couched as circumstantial evidence. Both categories represent—analytically—much the same thing in many cases, but circumstantial evidence culturally denoted in this period a preference for facts over logic. Circumstantial evidence, with its now-celebrated anchor in facts, was for a while viewed as better than direct testimony. Commentators were claiming that the accumulation of circumstances was beyond anyone's ability to make up: "*circumstances cannot lie*," the maxim went. At this point, however, literary realism created a disturbance. As Welsh says, the thesis that circumstantial evidence could not readily be falsified was, paradoxically, "of most lasting use to the inveterate falsifiers known as literary realists" (Welsh 1990, 623). Novelists demonstrated that a narrative so connected that it "could not be invented" in fact could be.[16] If the "unexpected" eighteenth-century embrace of circumstantial evidence, as Shapiro has described it (Shapiro 2007, 60), was predicated on attempts to replace probabilities with actualities, realism soon exposed their hopelessness. No surprise, then, that this unexpected turn was questioned in law by mid-nineteenth century; circumstantial evidence became suspect almost as soon as it was accepted in a world supposedly embracing probabilistic thinking, a curious process revealing a deep anxiety.[17]

The cultural need to tell apart the real from the merely probable remains cogent to our own days and pervades Anglo-American evidence scholarship. To get a sense of it, note this recent statement by two leading evidence law scholars, in the context of discussing alternative approaches to legal fact finding—mathematical probability and relative plausibility—one of the preoccupations of current evidence scholarship. The latter is embraced because, they reason, "relative plausibility is the best available tool to get factfinders to the actual facts of the case. . . . Mathematical probability . . . abstracts away from those facts . . . it prods factfinders to derive their decisions from the general frequencies of events" (Allen and Stein 2013, 560).

Drawing the lines between the probable and the real is, of course, anything but obvious, as these and other writers' efforts make clear. Allen and Stein make careful distinctions between forms of mathematical probability (frequentist or other) and inferential processes. The validity of the distinctions is of less interest for my discussion than the consciousness their maneuvers betray: the *need* to draw the lines between the probable and the real continues to inform debates about evidence and serves to tell apart legitimate from illegitimate evidentiary procedures. It is perhaps worth noting that inferential processes undergirding relative plausibility decisions involve probabilistic assumptions about the world, but those remain undertheorized because it is urgent to insist on these processes' closer relation to reality as compared with mathematical probability. As another recent contributor to the debate has put it, critics of probabilistic proof seem to miss the important point that all evidence is ultimately probabilistic

16. Welsh is concerned with a commonality, namely, the indebtedness of the realist narrative to circumstantial evidence; my point here is the disturbances involved in this process because of realism's unashamed fictionality.

17. Shapiro makes the point of their being questioned (Shapiro 2007, 48).

(Guerra-Pujol 2013). While "missing the point" is too simple an account, the urge to make fine distinctions between the nakedly probable and some other forms of proof that at least appear to exceed it is certainly evident in evidence.

The fear of the probable is manifest most clearly today in a related discussion: the heated debate about why law resists naked statistical evidence. Present-day evidence theorists are at pains to find an explanation; this is one of the liveliest fields of debate in evidence theory these days.[18] Ben-Yishai's analysis, by pointing out to us the differential treatment of facts and narrativity in law and literature, should prompt a new discussion. The explanation for past and present anxieties of evidence law is conceivably *historical*—rather than purely analytic, behavioral, or moral. The legal resistance to naked statistics, like the legal fear of circumstantial evidence after a quick flirt with that evidence's hope, marks the generic distance between law and literature, or *fact* and *fiction*. If realist fiction grounded its authority in the probable, law treats the unashamedly probable as dangerous.

Literary realism has taught us that the probable can coexist with fictionalized facts. And so law set out on an impossible search for something beyond the probable, a search that has become increasingly peculiar for observers more and more accustomed to probabilistic thinking. In an environment of theorized uncertainty and observed probabilities, the search for that which exceeds the probable has paradoxically become more urgent. What we see here is a process in which, as soon as probability rose as a form of truth, it was also aligned with the possibility of fiction. When the alignment between probability and fiction became culturally salient through the historical rise of literary realism, sites seeking to mark their nonfictionality, like law, needed to be careful not to rely on naked probability; or, at least, sites committed to the real needed to deny rhetorically and leave theoretically underexplored their reliance on "mere" probabilities.

The difference between antinarrativity and narrativity, law and literature, suggests a cultural fear of probability that realism's probable fictions accentuated. Understanding the literature/law relationality is thus essential to current understandings of how factuality is conceived in law. This history should prompt more nuanced and genre-sensitive assessments of empiricism in law and literature and should inform debates about probability in evidence law history and theory.

Author Functions in Law and Literature

The individual reporter gradually lost importance in law reports. Ben-Yishai describes a process in which the publication of cases, traditionally dependent on individual reporters and their access to particular courts, became independent of relational contexts, especially the judge-reporter relationship, and anonymous—they no longer hinged on any single reporter, but on institutionalized practices. The result I want to highlight here is a disappearance: we see a vanishing author of law reports. This was manifest and amplified in title and citation practices, which shifted from series titles

18. For a recent suggestion and review of the field and its defining paradoxes, see, for example, Enoch, Spectre, and Fisher (2013).

referencing the reporter's name, like "Skinner's Reports," to citations based on court names and depersonalized series titles, finally eclipsed by the familiar "English Reports."

At the same time, the author was and remains an important presence in literary discourse. This is most obvious in the form of Ben-Yishai's own analyses, which, of course, resonate with a great deal of work in law and literature: not only does Ben-Yishai often refer to the well-known personas who wrote the novels she discusses, the argument is also based on a discussion of three canonic works, those of Eliot, Trollope, and Collins, which are closely read for content and form, against an anonymous set of very many law reports by unnamed authors exhibiting broad generic structures.[19] This form replicates the historical role of the author in each genre. Compared to novels, law emerges as almost authorless.

The implications come from Foucault's *What Is an Author?* (1984). In this work Foucault offered a way to differentiate between varied ways in which meaning is made and understood. The author, on his theory, is a characteristic of discourse. It is a social phenomenon; a projection of readerly expectations. Foucault argued for the author's classificatory function, one defining the mode of existence of a discourse in a society or, more simply, making for historical differentiations between genres.

To borrow Foucault's terms, Ben-Yishai's analysis tells us that the author in law, and more particularly the author's name, *functioned* by disappearing. In contrast, in novels texts and themes were closely related to authorial names. The difference in author functions substantiated the cultural authority of law and literature on different grounds. Somewhat like the sciences in Foucault's analysis, the authority of law as precedent emerged by the nineteenth century as something that no longer depended on the talent, inspiration, or cultural capital of specific, name-bearing authors. The author of the report was absent (or rather, absented)—despite his crucial role, which Ben-Yishai recounts, in making precedent what it is; indeed, her analysis hinges on the significance of the law reports' written form for the role of precedent in the nineteenth century. The second crucial author—the judge—likewise lost centrality in law reporting. The presence of literary authors, in the meantime, confirms Foucault's claims about literature: in an inverse process to the sciences, Foucault argued, from the seventeenth or eighteenth century, literature came to be accepted and ascribed value only when endowed with the author function.

Foucault's interest in the author function was not merely classificatory. Beyond a "typology of discourse" (Foucault 1984, 117), he ventured claims about the historical analysis of discourse. In particular, Foucault was interested in the processes through which the sciences assumed a cultural authority on new grounds in modernity, one disconnected from author names, while literature's authority came gradually to depend on the author. Viewed historically, the celebrated presence of authors paradoxically rendered *less* influential a discourse's claim to authority. Foucault here sought to present the author as an ideological construct in the Marxist sense: we are accustomed to presenting the author as a genius, a source of rich meaning, because in reality he functions in just the opposite fashion. In Foucault's terms, the author is "the principle

19. Catherine Gallagher observes a similar tendency in readings of political economy and novels (Gallagher 2006a, 5). For a critique of the continued reproduction of the author in literary studies, see Steinlight (2006, 152–57).

of thrift in the proliferation of meaning"; the author's name reduces the "great peril, the great danger with which fiction threatens our world" in its riches of signification (Foucault 1984, 118). The author function is from this perspective a weakness. This is not to say that the author function is a weakness in every context; it is only to say that within this historical context it was; novels, from this perspective, faced a problem of authority.

Author Functions and Contract Law

Attention to the author function seems to carry potential value for ongoing discussions in contract theory and history. Most modern contract theories, Melvin Eisenberg has rightly argued, "can only be understood against the backdrop of the school of classical contract law, to which [they] stand in opposition" (Eisenberg 2000, 805). The school of classical contract has its roots in the Victorian era. One of the core conceptualizations it brought to life in legal thought is the view known as the abstract, or presocial, contracting person—or, for our purposes, the autonomous author of contract. It is instructive to observe the relation between this construct—which claims to describe the contracting person as a sociological being—and the author function of its genre,[20] that is, between the legal conceptualization of the author of contract and the function of the author(s) of contract legal doctrines—those doctrines through which the conceptualization emerged.

Let us begin with the author of contract. The following points are likely familiar, yet worth recounting for purposes of my argument. Classical contract thought established a view of an abstract, self-sufficient person who, when contracting, is rationally self-interested. This view, associated with atomistic individualism, has been repeatedly identified by historians of the classical legacy in contract and studied as one of the core conceptual commitments of this body of law (Rosenberg 2013). Lukes (1973) explains: the abstract individual is a person pictured abstractly as given, with given interests, wants, purposes, needs, and so forth. The crucial point is that the relevant features of individuals, which determine the ends that social arrangements are held to fulfill (whether these features are called instincts, faculties, needs, desires, or rights), are assumed as given, independent of social context (Lukes 1973, 73–78).[21]

The centrality of the abstract individual in classical contract law made individual will the basis for contract law's entire analytic structure, to the exclusion of other sources of obligations. The idea of individual willing as a necessary and sufficient principle assumed a promisor who did not require society in order to become a

20. My discussion here relies on a distinction between the colloquial use of "author" as a sociological description referring to the person who creates a text, and "author" in the Foucauldian sense of a discursive classificatory function. In the latter sense, Foucault argued that a contract does not have an author.

21. The abstract individual has, of course, been the target of critics of classical liberalism, who decry its conceptual and normative obliviousness to the role of social relations in the emergence of individual abilities, identities, and goals. Charles Taylor, for instance, critiques the givenness of individual features in liberal thought as a false idea of self-sufficiency. In this vision, he argues, individuals can develop their human capacities independently of society; the development of rationality, or becoming a fully responsible and autonomous being, can somehow be achieved outside society (Taylor 1985, 189–90).

meaningfully choosing person. Being self-sufficient, the promisor knew her own interest best. Being self-sufficient, she did not, at least not by definition, owe any duties except those she first chose to owe to her promisee. She preceded society in terms of significance and conceptual structure.[22] The primacy of the individual will emerged in the nineteenth-century rearrangement of areas of law. Law that represented the involvement of communal will, like tort, status, and quasicontract, was banished from the contractual zone; contract rules were rationalized through the notion of individual will, and remaining rules incommensurate with the vision of contract were conceptualized as exceptions, counterprinciples detached from the operative sources of contract.[23] The centralization of the abstract author of contract exercising his autonomous will thus gave the classical legacy its bite: contract law, under that legacy, became the *law that individuals author for themselves*, rather than law imposed by society on them, hence the celebration of contract law as the very heart of private law: *the* locus of freedom in a liberal social order.

This view is still familiar today. The classical model remains a dominant principle, a starting point for any liberal framing of contract law. Over a century later, it is still the case that "[t]he challenge facing contract lawyers . . . is . . . to identify which features of the classical law should be discarded and which retained" (Nolan 1996, 603). Claims relying on the classicist system of meaning, which distinguished between self-authored and socially authored law, continue to make perfect sense.

Now, the classical view of the contracting individual was never exclusive. It was challenged from various directions, including status-oriented accounts of individuality that were hardly eradicated.[24] Importantly, it also was challenged from *within* Victorian liberalism by a *relational* view of individuals, which was dominant in realist fiction, as I have shown elsewhere (Rosenberg 2013).[25] That view, despite its dominance in novels, has attracted surprisingly little attention from contract scholars interested in liberal formulations of contract. The relational theory of contract of the late twentieth century was disconnected from this history; Ian Macneil developed it from other premises almost a century later.

What explains the marginalization of the relational view of contracting individuals found in novels and the success of the more radically individualized one found in classical contract law? The dominant explanation is ideological: the classical legacy enabled a shift toward a market-based social order. As the central tool of market

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22. For one historicization of the epistemological shifts enabling this outlook, see Muldrew (1998, 328–32).

23. The process is discussed in Kennedy (2006) and Kreitner (2007). The broad history of the will theory of contract, albeit one that does not distinguish it from the classical school as CLS historians have, is found in Atiyah (1979). A full review of the literature is available in Rosenberg (2013).

24. For a discussion, see Rosenberg (2013).

25. Realist novels, no less than classical contract law, have been recognized and assessed by historians as part of Victorian liberalism. The best-known reference is probably Ian Watt (1957), who explained the rise of the realist novel against the economic, political, and ideological rise of individualism in which, Watt noted, the idea of contract was central. Analyses have confirmed and reconfirmed the relation from various directions in a series of claims about the Victorian novel as supporter of bourgeois ideology, as the middle-class art par excellence, or, beyond class relations, generally as naturalizer of a capitalistic social order and promoter of individualistic values, at times lumping novels and law together in the discussion.

exchange, contract's basis in individual self-authorship bolstered the vision of the self-regulating market: that market began with the premise of a sphere in which the state was somehow uninvolved (Polanyi 1957, 71; Olsen 1983; Singer 1988, 477–82; Searle 1998, ch. 11). While I do not dispute this explanation, it is worth noting how differentiations between law and literature at the level of author functions bolstered the classical view.

Attaining the celebrated status of the classical view required naturalization and here the author function was, indeed, functional. Contract legal doctrine was construed as an authorless discourse, consequently bringing to light the legal contracting individual. Put otherwise, the invocation of biographical, name-bearing authors as a constitutive element of legal doctrines could localize classical contract law and underline its quality as a contingent historical construct. This historical contingency was left unprovoked through the *relative* absence of author function[26] and thus made the willing, autonomous person authoring his own law through contract appear real, rather than a construct of discourse. The relative insignificance of authoritative names in law bolstered the dramatic presence of the legal contracting person, making him appear as a natural, extralegal being.

Observe the mutually constitutive role between the author as a particular conceptualization of the sociological being who makes a contract, and the author as a function within a discourse: the contracting person of classical contract law, the core of will untouched by social forces, made the author function appear redundant for legal precedent and so reinforced its relative absence in discussions of legal doctrine. Contract law seemed to merely let real, natural people do as they pleased; the view of individuals as exclusive authors of contract in practice made contract law appear as a genre that does not construct a reality, but finds it, lets it be; its power thus does not depend on the cultural dominance of named talents (be they the names of judges, reporters, or treatise writers), but on its quality as a reflection of an already existing reality of persons who author their daily lives.

The socialized version of the individual in novels, by contrast, is possibly too readily associated with the individual talents who authored novels and so does not enjoy a similar naturalization. The name of George Eliot looms too large, if you will, to allow a naturalization of her novel's representations of contracting persons. As soon as we pay the first admiring compliment to Eliot's brilliant rendering of contracting persons such as Tertius Lydgate—whose contractual adventures in *Middlemarch* support a relational view of promissory agency—we have taken half the bite of that view; it becomes localized, contingent, and idiosyncratic, the product of an individualized historical name. Put simply, the presence of author names at the level of the novel's genre threatened the genre's conceptualization of the author of contract as a sociological being—the relational contracting individual; it undercut, or at least did not encourage, the cultural embrace of this conceptualization.

26. Potential figures who could assume author functions could be not only judges, but also reporters and treatise writers, who were in fact crucial to legal developments in this era. I do not argue that they are unknown; historians of the nineteenth century have certainly recovered their role in making the classical legacy. Neither do I argue that they had no presence at all within legal discourse. I argue, rather, that *compared to author names in novels*, the role of these potential author names for law was much less centrally constitutive.

As theorists of contract continue to debate the classical legacy and its sources of appeal and legitimacy, attention to the generic qualities of law, and, in particular, its author function, in their difference from the author functions of genres that offered, or that now offer, competing ideas, presents valuable insights. Although law and literature were both wound up in the cultural negotiation of the meanings of an emergent market society and were used to debate the characteristics of contracting individuals, their differentiated author functions had a role to play in the more successful naturalization of the atomistic ideas developed by classical legal thinkers.

Author Functions and Legal Reasoning

The differentiated claims to authority of law and novels, predicated on differentiated author functions, had implications for the making of precedent as well. This can be glimpsed in *Common Precedents* when Ben-Yishai explores the referencing practices of law and literature, those that grounded their respective precedential powers. Novels grounded precedent in precisely the *inverse* form of legal precedent. The comparison I am suggesting is not explicitly made by Ben-Yishai and requires clarification.

In law, precedent operates through explicit references to other legal texts—texts that appeared to exist independently of their authors. Ben-Yishai notes what is almost too obvious to lawyers: that law reports, which sustained precedents, contained standard references to other precedents, invoked through case names unintelligible to nonprofessionals; these case names invoked principles abstracted from reporter or judge, within a contained universe of legal discourse.

In novels, by contrast, other texts were assumed rather than explicitly referenced as a source of authority. Novels relied on narrational conventions that *taught readers to trust the text*—argues Ben-Yishai. These conventions both functioned as precedent and allowed novels to sustain a precedential logic as a trusted cultural discourse. In her analysis of *Middlemarch*, for example, Ben-Yishai carefully shows how the narrator aligns her prose with truth, in contrast to her characters, who are never sufficiently knowledgeable. Recall, for instance, the story of Lydgate, a young physician who becomes entangled in a murder in *Middlemarch*'s plot. Although the narrator represents Lydgate as innocent of murderous intentions, the fictional Middlemarch community suspects him. The narrator, however, is the one we should trust with the truth here—because she has on her side *literary convention* as well as the *precedent of novels that came before* this one. Ben-Yishai thus shows that novels depended no less than law on the existence of a genre to sustain their truth claims and foster precedential reasoning. But the important point to see is that novels *did not* explicitly refer to the genre's narrational universe as legal texts did.[27] Thus, while both law and literature depended on forms of reasoning developed within their genre to sustain the logic of precedent, that is, of grounding the present in the past—in law this dependence was openly declared and practiced, while in novels it was underplayed.

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27. This is not to deny intertextuality, of course. Intertextual practices, however, ought to be distinguished from an implicit and possibly more significant reliance on the formal practices of the realist genre.

It seems at least possible that the presence of author names made explicit referencing practices problematic for novels: the genre contained a "principle of thrift" in Foucault's terms, which limited its cultural reach and was thus better left unprovoked. Disciplinary closure was not the way to go about claiming a cultural standing for novels because of their too-close association with historical authors. For the same reason, in a diametrically opposed manner law could easily indulge in its generic closure and use explicit referencing practices. This can explain the opposed forms of creating precedent in law and literature. Observe, again, the inverse effect: referencing practices developed in law reports and novels served to reinforce their differentiated author functions. Law reports' explicit referencing of other texts repeatedly re-created their authorlessness—their existence as abstract principles—while fiction's nonreferencing repeatedly intimated that novels could not be easily invoked as self-standing truths.

Even if one is reluctant to tie referencing practices to author functions, historically differentiated practices supporting similar social tendencies, such as precedential thinking, deserve attention. The referencing practice that sustains precedent in law is integral to legal thinking. Appreciating it as a *nonobvious* formality opens up a venue of contribution to the ongoing debate about the pedagogy of "thinking like a lawyer." The literature on the subject has been expanding and spans both method and substantive goals of legal reasoning in efforts to pin down this often-used but elusive idea that lawyers somehow differ from others in their reasoning processes. Pinning down the idea of thinking like a lawyer is important if law schools are thought to teach anything beyond knowledge of rules, all the less practical skills of the kind better acquired in, well, practice. This preoccupation is, of course, closely tied to the idea of law as genre. It deals, almost by definition, with law's relations to, and level of autonomy from, forms of reasoning considered nonlegal. It is almost odd, therefore, that discussions here often proceed through exclusive reference to law and the history of jurisprudence, with little comparative discussion of structures of reasoning in other genres except as context—sources of inspiration for, or influence on, legal thinking, or as an undifferentiated mass of nonlegal reasoning. Comparative discussion of genres is helpful both as a guard against an implicit naturalization of the uniqueness of legal meaning making and as a support for claims that acknowledge its dynamic realities.

Insights about referencing practices across genres in particular historical times, like other comparative insights about genres, are a form of empirical observation of potential contribution to the insistent question: *Is there such a thing as legal reasoning?* As Frederick Schauer has argued, the answer is in the final account an empirical claim (Schauer 2009, 11).[28] The more we know about forms of reasoning that are nonlegal and exist alongside law, the more we can say about the realities of thinking like a lawyer.

In tracing the differences between law and literature as producers of precedential logic, one is made aware that precedential sensibilities are not a matter for lawyers alone. Against Schauer's suggestion that "[f]requently in law, *but less so elsewhere* . . . the decision must follow from . . . previous decisions" (Schauer 2009, 36), *Common Precedents* tells us that, at least in Victorian times, other genres too had to look over their shoulders to the past in order to gain cultural standing and talk about the present. At

28. Schauer is concerned with the frequency of forms of legal reasoning in the world, but his core intuition can be expanded, I suggest, to other aspects of empirical observation.

the same time, the lawyerly practice and form of reasoning used to sustain precedent—that of abstracting a general rule from a reported case and then using the formal case name as shorthand to reference the rule and reuse it elsewhere—was not a universal way of sustaining precedential sensibilities; it was a genre-specific referencing practice marking a contingent form of reasoning that was specifically *legal*. This practice became, and remains, fundamental to understandings of what "legal" means.

The roles of authors, and the self-referencing practices of law and literature, which Ben-Yishai recounts separately as descriptive elements in her history of precedent seem to tie together into a broader history of genre differentiations through which particular forms of cultural authority were negotiated. To understand what "thinking like a lawyer" means and how it self-enforces a sense of law, a history of differentiations between law and genres like literature is in order. As lawyers come to know their details, they come to know themselves.

CONVERSATIONS

Processes of the kind captured by *Common Precedents*, and by other work in Victorian law and literature, established the late modern sense of these genres and the particular ways we approach them in order to understand the world and know it. The late modern sense of law and literature infiltrates treatments of epistemological questions like the role of probability in Anglo-American evidence law, distributive questions like the role of the individual will and self-authorship in Anglo-American contract law, and, no less crucially, the self-awareness of legal practitioners as they represent human experience.

The vitality of work in Victorian law and literature offers opportunities to study systematically the points of formal differences and functional similarities between genres in particular historical contexts and to develop understandings of the different conversations available about the social world and about ourselves in it, locating beginnings in medias res in order to know.

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