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Wigmore's Shadow

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Part I: The Fictions of Law

The pull of the image, into the past. As you enter the Chicago Homicide Project website, you experience it right away. A lady in a feathered hat, perched on the corner of a desk, waiting, we are told, to testify. What is that look on her face—apprehension? Amusement? Anticipation? And that street in the background, behind the child with the ball—isn't that around the corner from here, where the market stands now? Leigh Bienen's visionary project is a project that celebrates the visual, and the story, and the capacity for the visual to tell stories about the law.

As I click through the pages of the website, those images pull me into several other pasts, all in a sense my own. The site mentions a certain John H. Wigmore, professor and Dean of the Northwestern Law School at the turn of the century. It tells us that Wigmore was one of the founders of *The Journal of Criminal Law and Criminology*, the institutional host of the first academic articles from the Chicago Homicide Project, in 2002. I imagine how much Wigmore would have enjoyed this website, how he would have wanted to contribute objects from his own collection—the personal effects of Al Capone, or materials from his early experiments in new forensic techniques from handwriting analysis to fingerprinting, or his carefully preserved and indexed clippings of newspaper accounts of famous Chicago trials. Most of all, I think how much Wigmore would have approved of this harnessing of the pull of the image.

Wigmore arrived in Chicago in 1894, the year after the World Columbian Exposition. He was an outsider, an import from the East Coast, brought in to preach a newfangled Harvard-style legal education on the intellectual frontier. Truth be told, he probably would have preferred to stay in the East, but he himself was something of an outsider to the Boston Brahmin culture, and so his best hope was to focus his tremendous energies on building something new, elsewhere. From the beginning, he had an outsider's appreciation, a taste and flair for the exotic brand of justice administered on the streets and in the courts of Chicago. He was no missionizing critic; on the contrary, the rough and tumble of it all fascinated and energized him. Taking on the fedora as his own signature piece, he embraced Chicago, enjoyed it, helped build it. In no time he was the darling of the legal establishment and counted several prominent Chicago financiers as his personal patrons. It was a good life, a fun life, I imagine.

The website celebrates Wigmore, then, as a kind of institutional forefather. But that is not how I met John Henry Wigmore. I met him rather, through the pull of his images.

1996. I have just landed in Chicago to take up my first academic post, a post-doctoral fellowship at the American Bar Foundation. The only person I know in town is Leigh Bienen, the woman who years before at Princeton University had dazzled me with her dual life as both a fiction writer and a courtroom lawyer, each identity kept intricately hidden from the other, on two tracks, under the sign of two different names even, each feeding each other silently, secretly, in ways known to her alone, a kind of practical joke on the world that seemed to keep her continually amused. She had held up the only example of a life in the law that I could imagine for myself. For me, that had led to zigzags back and forth between graduate school in anthropology and law school, between periods working on legal reform projects in far flung places and periods of anthropological fieldwork in others. And now, in 1996, here I am. I will be teaching two law courses at the Northwestern Law School to supplement my fellowship stipend. The day before, just before catching the shuttle bus to Heathrow Airport, I turned in my doctoral dissertation at the University of Cambridge, and throughout the flight to Chicago I have been sitting on my hands, trying to resist the urge to open the thing and find all the errors and omissions that surely lie between those covers. When I arrive at Northwestern Law School, I haven't opened a law book in three years.

I drop my things at the rooming house where I will be staying and

walk past the shiny glass buildings, down one of those movie-set-like Magnificent Mile streets with its immaculate gardens and glamorous women pulling along equally glamorous dogs, toward the Northwestern Law School, to pick up my keys. I am anxious. I am a foreigner to Chicago, and I know enough to know that it would take years to understand a city like this one. After three years of graduate school in anthropology, half of which I spent in the Fiji Islands conducting research, the rest spent furiously typing on my own inner world of the keyboard, I also fear I am now a foreigner to the law. I pull open the heavy glass door of the law school, step onto the vast marble floor, and glance at the students chatting, books in hand. I suddenly become aware of myself, my long frizzy anthropologist hair, my billowing skirt. I slowly climb the enormous staircase. At the top, a long glass case, the length of the corridor, displays the publications of members of the faculty—I read off the titles, sinking into my shoes. Technical subjects in securities law, corporate law, the law of evidence, contracts; some I can't even decipher. I grasp back into my law school past, trying to remember what the words in those titles mean. I try to picture the men and women behind those texts, and a wave of panic hit. I wish I could lie down, right now, in front of this enormous glass case and fall into a deep, dark sleep.

A year later, and outwardly, life is transformed. I have joined the Northwestern Law School faculty as an Assistant Professor of Law and traded my boarding house room for a respectable apartment. I wear neat suits and carry a briefcase. In daily life—classroom, committee meetings—I am a well-disciplined subject, dutifully doing what needs to be done, not overreaching.

But as a scholar, I am still the girl in front of the glass case. I am unwilling to give up what I do, I know that, but I am struggling to find a place for myself, for my work in that case, among those articles. "Why should anyone care about Fiji?" I have heard enough times so that I no longer mention it. I cringe at faculty meetings when people call me out, jokingly, for example in response to a problem with the central administration: "maybe Annelise knows some witchcraft we could use," to wide chuckles. I panic when a colleague asks, good-naturedly, what I am working on, and I develop elaborate techniques of deflection, ways of changing the subject. I work furiously, round the clock.

One night, when I am working alone in the law school, I stumble down the hall to the faculty lounge for a cup of coffee and loiter back to my office, procrastinating. I stop in the hall in front of a dark stone object, some eight feet tall, and more than a few feet around, in a glass box,

by the potted plants. I have passed it a thousand times before. "This is a replica of the Code of Hammurabi, brought back from France by John Henry Wigmore," the Chair of the Appointments Committee had said, as he gave me the mandatory tour of the building on the day of my interview for a permanent position. I had been far too preoccupied to allow that to sink in, and we had moved on, chatting about my research agenda, and about plans for expansion of the school.

The Code of Hammurabi? A *replica* of the Code of Hammurabi? What is it doing here? In what is now a dark early morning hour, the presence of this enormous object, by the potted plants, seems like some kind of preposterous joke, both wildly impossible and just right. Almost in the same instant, I catch myself wondering; and also pulling back—no time for dilly-dallying. I have to finish this thing; whatever it is I'm working on, it's late already, et cetera, et cetera.

I walk down the hall, back toward my office. It is a dark, wood paneled hallway, built when Wigmore was dean. It has always felt cold and slightly depressing to me. Boring, old, conservative, alien territory. For the first time, I slow down enough to glance at the lithographs hung at three-foot intervals on the walls. A series of cartoons from English newspapers lampooning the courtroom, barrister and judges. Some are honestly quite funny. I end up spending most of the night wandering the halls, noticing the cartoon-like spoofs of crests of arms, with the names of legal scholars who would have been Wigmore's contemporaries, in the moldings, or the imitation facsimile of the American Declaration of Independence posted in a case. Downstairs, in the original foyer of the building, a sign is posted, so that every student would confront it on his way through the doors: "Lex Delicto, Lex Contracto, THIS—IS—LAW!" On the facing wall, a giant stone is engraved with the following slogan: "If Bologna, that Capitol of Sausage, can become the Seat of Legal Theory, Why not Chicago, the Capitol of Corn?" How could I never have noticed these things before? I wonder at the absurdity of us all, students and faculty, going on our business in the midst of this circus of statements and images. And I wonder what my colleagues would think if they saw me lurking around the building like this in the middle of the night . . .

John H. Wigmore came to Northwestern fresh from three years in Japan. After graduating from the Harvard Law School, he floundered a bit, did some work for Brandeis, and then got sent off to Japan through an arrangement between the President of Harvard University, Charles Elliott, and the venerable Yukichi Fukuzawa, one of Japan's most illustrious Meiji era intellectuals, and the founder of Keio University.

Fukuzawa wanted to import the new Harvard methods of law teaching to Japan, and so in 1889, Wigmore was sent to Japan, much as he later would be sent to Chicago, to do the job. But from the letters and accounts of his wife and lifelong confidante Emma, one gets the sense that something happened to the man almost from the moment of that sail into Yokohama harbor. Wigmore found himself riding in rickshaws, having tea with British consuls, playing shortstop on Japan's first baseball team. He wrote articles on flower arranging and architecture and ethnology, as well as on the new Japanese Civil Code. He discovered abandoned records of the customary law of "Old Japan," as he called it, and initiated a major project to organize, translate, and publish these. He took an interest in Buddhism. He traveled.

How does all this shoehorn itself into a professional life, when a person returns? In inhabiting Wigmore's carnivalesque palace of legal studies, I began to realize that Wigmore and I shared a set of secrets, passions, maybe even anxieties (it was hard to tell on the latter point with Wigmore). Wigmore seemed to deal with it all by collecting things. Every summer Wigmore and his wife Emma traveled and brought back from foreign lands, images and pictures and other representations of law. Wandering through the basement of the library, I encountered his books, probably unopened since his death—the enormous tomes of decisions of the highest appeals of Japan, signed in the emperor's own vermillion brush; even the case law and statutes of Fiji and Tonga, and Trinidad; and many other places he surely had never visited. One day, the librarian, who knows of my developing obsession, brings me two legal seals discovered in a box under the staircase, with a note from Wigmore stating that they are Mesopotamian relics, dug up in the Middle East somewhere. Reading the records of his elaborate instructions to his travel agent, I imagined him plotting his summer escape, through one European, African and Asian city after another, by every possible mode of transport, back into that other world of adventure and no questions asked, all bankrolled, of course, by his devotees among the Chicago elite.

I admired him, for trying to bring the unrestrained, omnivorous passion for the outside world he had discovered, to the profession: his published "list of legal novels," for example, distributed to every Northwestern law student, admonished lawyers to learn something about human nature, and about ordinary people's perception of their profession, through fiction (John H. Wigmore). I smiled at the first line of his book, *A Kaleidoscope of Justice*, itself, a collection of images, stories, songs about the law in different jurisdictions of the world, inter-

spersed with kaleidoscopic images, drawn by Wigmore, that depict differences among legal systems as permutations of one another, like pieces in a kaleidoscope.

> READER! This work is not offered to you as a piece of scientific research, but mainly as a book of informational entertainment (John Henry Wigmore, *A Kaleidoscope of Justice: Containing Authentic Accounts of Trial Scenes from All Times and Climes*)

I made a point of walking through the old foyer of the law school, where Wigmore had installed a chime that played one of his favorite limericks, a song he delighted in playing for the students at the annual talent show, each morning. In the foyer, up high, perched there in the corner where the ceiling meets the wall, a wooden sculpture about three feet tall looked down at us. At the Northwestern archives, I learned that Wigmore, a lifelong skeptic of all organized religion, had discovered to his delight the existence of a Catholic patron saint of lawyers, St. Ives. With characteristic gusto, he had organized a delegation of Chicago lawyers to France to make an offering to the saint, and the group had brought back this shoddy replica as a souvenir.

There were rumors that he and Emma kept a Shinto shrine in their living room in Evanston, among other oddities. More than once, I found myself straying up Lake Shore Drive, to sit in my car, across the street from the house I had seen in the photos in the archives, now probably occupied by a professor who had never heard of Wigmore, imagining him and Emma, sitting on that porch debating one silly question or another, with gusto. Where did the energy, the compassion, the stories, the words, the courage to bring those worlds together come from?

I should add also that there were problems in our relationship from the start. Wigmore refused to be shoehorned into the role I sometimes seemed to concoct for him, as fairy godfather of humanistic legal studies. For one thing, I had to admit that he was basically a despicable character. He came to class each day dressed in his World War I military uniform and insisted that his students call him "The Colonel" (in retrospect, I wish I had summoned the courage to try this). He wrote diatribes against labor unions and lambasted Sacco and Vanzetti in print during their trial—something which cost him the friendship of numerous luminaries of the legal academy. He praised the lack of due process in the Japanese criminal justice system and criticized American justice as excessively soft on crime. I remember confiding to Leigh Bienen about my newfound interest in Wigmore. Amused and perplexed, she

pulled out an article she had written many years earlier critiquing Wigmore's claim that young women could not be trusted to give proper evidence in a court of law on matters of sexual abuse since by definition they were incapable of telling the truth.

Wigmore is known as the father of American comparative law for an article in two parts he published in the *Harvard Law Review*, the first article in comparative law in a major American law journal (John Henry Wigmore, "The Pledge Idea: A Study in Comparative Legal Ideas"; John Henry Wigmore, "The Pledge Idea: A Study in Comparative Legal Ideas. II."). The article traces the evolution of modern markets from "primitive" systems of barter to the evolution of the legal institution of collateral and accompanying creditors' rights. As I only later learned, the article includes, among other things, an extensive discussion of Japanese law. The underlying message concerns the role that law plays in supporting the development of markets, and the role that comparative law plays in understanding the contributions of law. It is a highly technical, torrid piece of work. I read it quickly and paid little attention to the argument, concluding it belonged to that other side of Wigmore that held no particular fascination for me.

But for a while I ignored all this and took the Wigmore of the elaborate performances, the strange objects, the limericks, and the travel as a kind of ready-made justification—not so much to be emulated as invoked, St. Ives-like.

As it turned out, my own life and research took me to Japan, to conduct ethnographic research among regulators of the derivatives market. That was the end of my relationship with Wigmore, I thought—he had served his purpose, we had had some fun. I didn't imagine he would catch up with me.

As it turned out, the topic of the moment, in the regulation of the Japanese derivatives markets, was collateral. With the economic downturn, Japanese banks had to post collateral with their counterparties in New York or London in order to enter into swap transactions. Those counterparties in turn wanted to have rights to sell the collateral, or to use it somehow, before the completion of the swap, when they would then return the collateral to the Japanese bank. This is legal under New York and UK law, but it seemed that it was not legal under Japanese law (which among other things affords higher degrees of protection to creditors). Regulators, academics, and lawyers working for the banks debated how to amend or interpret Japanese law to bring it into line with so-called "global standards."

Some time into my fieldwork, one of my research subjects, a lawyer in private practice, brought up the name of John Henry Wigmore. I expected to discuss Wigmore's time in Japan, or his research in Japanese law, but my interlocutor instead asked what I thought about the details of Wigmore's argument about the evolution of the institutions of collateral. In particular, he noted, Wigmore had analyzed two technical schemes—a collateral security scheme and a so-called "sale with option to repurchase scheme"—as legally distinct but functionally equivalent from the market-participants' point of view. What did I think—was Wigmore right about this? It mattered because one of the options on the table to resolve Japan's collateral problem might be the adoption of a version of a sale with option to repurchase.

Stunned and embarrassed—I had never paid attention to those details—I realized that for all my cheerleading, I had not taken Wigmore seriously as an interlocutor. I listened quietly as my friend evoked Wigmore to me in a new way, as a contemporary of a kind, not an image from the past.

The past in the present: methodologically and theoretically, the article itself is a fairly straightforward application of the evolutionary theories of law prevalent in the nineteenth century (for example, in the work of Henry Maine and Lewis Henry Morgan) but already falling into disrepute by the time of Wigmore's publications in the *Harvard Law Review*. The point of this breezy romp through Scandinavian and German law, followed by Jewish, Japanese, and Hindu law (the latter in one paragraph) is precisely the past in the present. Each of these legal systems followed the same trajectory of development, Wigmore argues, toward the modern system of collateral. It is the sort of argument I would date as belonging in the past—mid-nineteenth century. And yet what is most confusing about my Japanese interlocutor's invocation was precisely his pulling of that article into the present, his enrollment of it in a very prescient, modern-day dispute. Thinking back to that glass case in the corridor of the Northwestern Law School, I remembered that several respected colleagues had, to my confusion, tried to engage me seriously about the details of Wigmore's research in this way—"he had some interesting things to say about the Commons in Scandinavia . . ." Like my Japanese friend, my colleagues had treated Wigmore as a kind of contemporary, a scholar in the next lane, so to speak. Moreover, for these colleagues, it was the other side of Wigmore's work that mattered. The underlying political premise of that work—law in the service of markets—conformed with their own views. The underlying

method—evolutionary theory—was also now back in vogue in the legal academy.

My talisman, it turned out, had been on the other side all along. Or more to the point, my colleagues' pulling of Wigmore into their own present—as a kind of contemporary and co-conspirator in the cause of the technocratic rationalization of the law in light of the needs of the market, seemed somehow much more efficacious than my invocation of Wigmore as an image, through his images, as a kind of excuse for explorations of fiction, performance, parody, meanings, stories, in short a set of law and humanities moves and interests defined parasitically but ultimately weakly by the sheer fact that they seemed to be what technocratic legal instrumentalism was not. I couldn't really blame Wigmore. That article had been there all along, but I had been, ironically, too flat-footed in my sophisticated high-heeled performances, to take it seriously.

So here is a question for my fellow travelers in the humanistic studies of law. Might there be anything of interest to us in this other Wigmore—the Wigmore of technical legal doctrines, of law in the service of the market? To culturalists such as ourselves, the technical details of law are mundane, almost inherently uninteresting. The obsessive focus on law as a technical tool is precisely the problem; it obscures all else, makes it difficult to talk about other important and interesting questions. As James Boyd White put it long ago,

> Law then becomes reducible to two features: policy choices and techniques of their implementation. Our questions are 'What do we want?' and 'How do we get it?' In this way the conception of law as a set of rules merges with the conception of law as a set of institutions and processes. The overriding metaphor is that of the machine; the overriding value is that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs. (White 686)

One way of putting this point is that as experts in meaning, we find nothing particularly meaningful about these technicalities. They are mere tools. There is nothing much to capture our fantasies here; no wonder I skipped over *The Pledge Idea* on my way to the *Panorama* and the *Kaleidoscope*. Engaging the question of what to make of the technicalities requires a different modality, precisely *not* storytelling and images. And so, like the Colonel, I slip into a different costume now.

The Pledge Idea is a dense, highly technical article. Although the evidence on each point is scanty, the legal questions are baroque, and the argumentation intricately woven. But if we take it as a work of legal theory, the article concerns one principal kind of legal technicality, one device, the legal fiction. As the mid-twentieth-century legal theorist Lon Fuller put it, a legal fiction is "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility" (Fuller "Legal Fictions" 369). A fiction differs from a hypothesis, for example, because there is no question of proving its truth—it is known to be false. But a legal fiction differs also from a lie because "it is not intended to deceive" (Fuller "Legal Fictions" 367). Fuller's many examples include the notion that a corporation is a person, or the doctrine of coverture, which held that at marriage husband and wife merged into one person, the person of the husband.

Wigmore's account of the evolution of collateral is an account of the evolution of one such legal fiction. To simplify dramatically, Wigmore aims to show that in more primitive times, if one person loaned something to another, he or she would keep something of value belonging to the debtor until the debt was repaid. In such a scenario, the object, the *res*, was the creditor's only recourse—if the debtor failed to repay, the creditor could do as he pleased with the *res*—and this was all the creditor could do. Over time, however, both sides learned to act as if the lender kept the asset, and to treat the *res* as more and more collateral to the underlying transaction between the parties. In a modern mortgage, for example, the parties act as if the bank has possession of the property until the mortgage is paid, although the debtor actually remains in possession. This legal fiction—the fiction that the lender, the bank, actually possessed the *res*—allowed modern commercial relations to flourish, Wigmore argues. Wigmore provides dozens of examples of such legal fictions bundled together in the singular, and seemingly straightforward technical device of modern collateral. Although he does not explicitly say as much, concentrated as he is on the details, one could read his larger account as a story about the emergence and growth of an intricate relation of fictions in an emerging body of commercial doctrine.

As a subject, legal fictions ignite lawyers' passions. Some ardently defend the legal fiction as the very engine of progress in the law. Sir Henry Maine, for example, celebrated the contributions of legal fictions to the

evolution of law from Roman times to the present. For him, legal fictions were one of three key political institutions, alongside courts of equity and legislatures, by which the law changed itself in order to keep up with changes in society. For example, the legal fiction of adoption allowed Roman citizens to incorporate foreigners into their communities while preserving the premise that kinship defined political allegiances. Fictions "satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change that is always present," he argued (Maine 31). Without legal fictions, in other words, the law would stagnate—and hence would hold society back by refusing to recognize in law changes long since recognized in society.

But the legal fiction has equally powerful adversaries. Jeremy Bentham, for example, considered it the height of lawyerly obfuscation, the very opposite of ethical, transparent government:

> It has never been employed to any purpose but the affording a justification for something which otherwise would be unjustifiable. . . . It affords presumptive and conclusive evidence of the mischievousness of the act of power in support of which it is employed. . . . In every case, and throughout the whole field of government, these instruments of mis-rule have had, as they could not but have had, for their fabricators, the fraternity of lawyers." (Bentham and Bowring: v. IX, pp. 77-8)

The legal fiction is a device used by lawyers to pull the wool over everyone else's eyes, on the way to furthering their own class interests, in other words. If lawyers wish to change the law, they should do so through their legislature, where the public has at least some degree of access, instead of with a lawyerly wink and a nod. Bentham's position has powerful contemporary advocates. The constitutional theorist Cass Sunstein, for example, has plainly argued that we need "principles, not fictions"—that legal fictions are "unhelpful and in fact harmful to legal reasoning and results. Fictions are not indispensable. The law would be better off without any of them." (Sunstein 1256)

This brings us back to the symposium's theme, violence. The very choice of the word violence—violence, in contrast to crime, in the context of the Chicago Homicide Project—seems to gesture toward an analogy between the literal forms of violence documented in the Chicago Homicide Project database, and more figurative forms of violence—forms of violence that do not, at first glance, seem like violence at all. The law and the humanities movement—and law and literature

in particular—has long sought to draw out the mundane violence of the law in this way. The great dean of humanistic studies of law Robert Cover, for example, famously claimed that "the subject matter of constitutional interpretation is violence" (Cover 818)—incarceration, the death penalty, the coercive authority of the State—and hence "constitutional law is . . . more fundamentally connected to the war than it is to the poetry" (Cover 817).[1] Here, ironically, although Bentham himself drew a sharp distinction between "poetry and truth," and condemned "the mischiefs which have resulted from this magic art" that serve only "to gratify those individuals who are most difficult to be pleased" (Bentham and Bowring v. II, p. 258), when it comes to legal fictions, humanists seem squarely on Bentham's side.

But there is no doubt that we can think of many terrifying examples of the violence perpetrated with the help of this device. Take for example the fiction of *terra nullius*, of empty land, by which colonial authorities gained legal recognition for their dispossession of indigenous peoples of their lands and hence legal title over those lands. Or the fiction under English Law of coverture, of a wife's "covering" (the word also means disguise, deceit, pretense) during marriage, whereby on the day of their marriage, women lost the capacities to contract and own property that they enjoyed as single women.

Here, in fact, Wigmore himself sides with Robert Cover. He emphasizes the foundation of the legal fiction of collateral on the availability of state-sanctioned violence. In "primitive" situations, in which citizens rely only on self-help to enforce their will upon one another, he argues, the creditor in effect holds the *res* hostage for the period of the debt. Only once the creditor believes she can harness the capacities of the state to commit violence, in the service of her dispute with the debtor, will she feel confident releasing the *res*, and allowing the debtor to remain in possession of it for the time being. So here Wigmore seems to suggest a point of humanistic engagement with the technicalities of law—a kind of extension of already familiar themes of legal violence to a new set of subjects, legal technicalities. Along with Wigmore, and Bentham, we might unmask the hidden violence of the law.

On the face of it, this seems like a plausible project. But at least for myself, I have a problem with it as an intellectual vocation. First, one hardly needs humanists to make the point. Bentham himself said it all, one hundred and fifty years ago, and in language far more scathing than most of us would probably dare muster today. Even Wigmore, the champion of law in the service of the evolution of markets, could see the

point, although true to form, he remained tantalizingly ambiguous about what conclusions the reader should draw from his observations. Mainstream doctrinalists like Cass Sunstein have roundly taken up the cause of exposing the political injustices of legal fictions. Do we need further critique and unmasking?

I have to admit that I feel increasingly dissatisfied with the pull of images and the parallel humanistic critiques of technocratic legal knowledge. The unmasking of the violence of legal fictions and other technicalities certainly have their place, and still can be fun to do. But what I like about Wigmore's gluttonous immersion in the intricacies of one set of legal fictions is that it owns up to Wigmore's own insider status, his participation in the technocracy as a lawyer, a teacher of law, a law school dean. There is nothing wrong with denouncing the violence of law, of course, as long as one acknowledges that it is not some other, "The Law," that is violent, as long as one is willing to say, "I am also violent, I am the Law" (Kennedy).

That is, the search for alternative stories to tell about the law, from the outrageous to the ludicrous, appeals to humanists partly because they are not outrageous and transgressive *for us*. On the contrary, they reconfirm our deepest faiths, that law is a set of performances, that its categories are arbitrary and yet constitutive, that hidden beneath the smooth surfaces of technicalities is a ferment of violence and politics. As I think about my relationship to Wigmore, and through him to both objects in the Northwestern Law School foyer—the Code of Hammurabi and the glass case with the technical legal articles on display, I wonder if it might be possible to engage the legal fiction in a way in which the destabilization begins here, with me.

I will come back to this question at the close of this essay. For the moment, instead, I want to consider what makes a legal fiction distinctively legal. What exactly is the difference between a legal fiction and a literary fiction, for example? Most commentators from Henry Maine on simply assume an obvious difference and concentrate instead on highlighting some surprising similarities—on drawing analogies between the disparate realms of fiction and law. Some commentators suggest that the difference lies in the audience's reception of the fiction: the reader of literature knows that he encounters something false in fact, and knows that the falsehood, the telling of a story that never happened, serves to reveal a higher order of truth, the essence of the story. In contrast, in this view, only some parts of the audience of a legal fiction—the expertly trained lawyers—understand that the fiction is not true in this way.

Personally, I think this distinction, and its underlying critique of legal fictions, protests too much. First, reader response theory (Iser) and ethnographies of fiction readers (Reed) conclusively demonstrate that readers have a far more subtle and engaged relationship to fiction than a simple understanding of a story as an untruth at one level in the service of demonstrating truth at another level. Reed, for example, speaks of readers' experience of being captured, possessed by the author of the novel in a way that obviates the very question of truth or falsity. Conversely, the suggestion that lay persons are incapable of understanding, for example, that the law's treatment of mortgaged property as in possession of the bank for the period the mortgagee pays off the mortgage is a fiction seems quite implausible. Moreover, with Nomi Stolzenberg, and, as she shows, with Bentham also, one would want to appreciate how the legal fiction is itself performative and legislative—how the legal treatment of women "as if" they were subsumed in the personality of their husbands for legal purposes alters the husband and wife's conception of themselves and the marriage, even if they understand that this is only an "as if" (Stolzenberg). But nevertheless, even this simple distinction between literary and legal fictions seems inadequate.

So then what distinguishes literary and legal fictions? I want to suggest now that it is the particular character of the legal fiction as an *explicit instrument*, a device with a clearly defined purpose, a means to an end. A legal fiction is a fiction with a purpose explicitly attached, whereas a literary fiction, like all art, has no other purpose but its own existence. It is supremely purposeless without utility. For Maine, for example, legal fictions serve the venerable purpose of legal reform. For Bentham, in a parallel way, the problem with legal fictions is that they serve no rational purpose: "[The fiction] has never been employed but to a bad purpose. It has never been employed to any purpose but the affording a justification for something which otherwise would be unjustifiable" (Bentham and Bowring: v. IX p.77). The two agree in other words on the purposeful quality of the fiction and even on the nature of the purpose; they disagree only on whether the ends justify the means. Lon Fuller, likewise, focuses on the legal fiction's tool-like quality when he argues that at least one purpose of the legal fiction is as technical abbreviation, a "convenient shorthand" (Fuller, "Legal Fictions Part II" 537), a marker or place-holder for the points at which legal theory reaches the limits of its own capacities. To treat human embryos as "quasi-property," for example, is not so much to imagine them as actually part human and part property as to create a placeholder for the fact

that we do not yet know how to imagine embryos, in relationship to existing legal categories of person and property. The legal fiction is an instrument for getting over these kinds of humps—a tool for leap-frogging over our own conceptual limitations. Although other kinds of fictions (most notably, fictions in the sciences) can be tools, they need not be always and explicitly imagined by their users in this way.

Here we can see a kind of divide between the humanistic and technocratic studies of law—between the Wigmore of the Code of Hammurabi and the Wigmore of the law in the glass case. The humanistic studies of law have to a large extent defined their project as an attempt to broaden the range of stories one could tell about law, precisely to overcome this hegemony of purposes and instruments, of technical reckonings of relations of means to ends. The legal fiction, from this perspective, is just another technical device.

But is it? Having considered what distinguishes legal fictions from literary fictions, that is, its status as instrument, let's turn to what differentiates this particular instrument in the lawyer's toolkit from others, that is, its fictional status. A legal fiction is a particular kind of tool, after all: it is a statement, a story a judge or a lawyer tells, while simultaneously understanding full well—and also understanding that the audience understands—that the statement is *not fact*. It is a legal conclusion, in other words, that takes the form of a factual statement: At law, a wife's property and personhood merge into those of her husband at marriage; at law, an embryo "is" quasi-property.

In *The Philosophy of "As If,"* Hans Vaihinger describes fictions, or "as ifs," as the fountain of all knowledge (Vaihinger and Ogden). An "as if" is knowledge that is consciously false, and as such irrefutable. It differs from a hypothesis because the point is not to check the claim against some wider and more authoritative reality but rather to turn inward, away from such reality. It differs also from a lie, since the author of the As If makes no attempt to hide its falsity. Vaihinger draws attention to the delicate epistemological stance of the As If—to its subtle, ambivalent, "tension." The As If is *neither* true nor not true, but rather is itself the tension between true and not true. Vaihinger's insights have had some currency in debates about legal fictions. Lon Fuller ignored Vaihinger's own insistence that his theory was "diametrically opposed in principle" to American pragmatism and enthusiastically embraced Vaihinger as the greatest of all pragmatist thinkers about the law: "I am firmly convinced that a study of Vaihinger will make one a *better* legal thinker" (Fuller "Legal Fictions Part III" 880 n. 177).

One of Vaihinger's principal insights is that the fiction is, on the surface, a means to an end. But he emphasizes what he terms "the law of the preponderance of the means over the end":

> It is a universal phenomenon of nature that means which serve a purpose undergo a more complete development than is necessary for the attainment of their purpose. In this case, the means, according to the completeness of its self-development, can emancipate itself partly or wholly and become established as an end in itself (Vaihinger and Ogden xlvi).

The "tension" of the legal fiction, then, is as much a tension of the means and the ends as a tension between truth and fiction. From this point of view we can understand Vaihinger's insistence that, despite all this talk of means and ends, his "fictionalism" is definitely not American pragmatism.[2]

I raise all of this in order to suggest that Vaihinger proposes to us a different avenue for humanistic engagement with the technicalities of law such as legal fictions, those aspects we have either critiqued from the outside as "violence," or have ignored altogether. Vaihinger shows how, at the heart of the instrument, the relation of means to ends, the binds of the tool progressively loosen over time as lawyers begin to appreciate the means as means, for its own sake (Riles "Property as Legal Knowledge: Means and Ends"). Indeed, one could say that such an appreciation of the means, of the qualities of a good legal fiction, of its clever and yet appropriate deployment, is the craft of legal knowledge. It is a special kind of craft, performed and appreciated *as if* it were simply a device for balancing opposing political interests, or rendering the market more efficient, or improving human rights standards, or conditions for scientific research. Heidegger called such things—the art at the heart of technical instrumentalism—*techne* (Heidegger). More recently, Giorgio Agamben has compared the punctuation of the means to the place of gesture in dance—something that happens in the course of moving across the stage, of getting from here to there, but that cannot be reduced to that purpose. Agamben sees in these "means without end" emancipatory possibilities (Agamben). And indeed, perhaps Wigmore found some of the same emancipatory delight in puzzling through the technicalities of legal fictions as a young man as he found in collecting outrageous and ironic images and stories of law as an older man. Perhaps we could think of the pull of techne, of the *means*, as something on par with the more readily ap-

prehensible pull of images exemplified so beautifully by the Chicago Homicide Project website.

From this point of view, the legal fiction, with its delicate preponderance of the means over the ends, begins to look like a challenge worth taking. What would it take for me, as a humanist, to abandon my search for *alternatives* to that glass case in the Northwestern Law School foyer, or again to give up the somewhat sanctimonious performances of transgression and critique, and instead to find some other register—a register of response, in kind, appropriate to, even empathetic of the delicate As If?

One final thought: I have circled back, as it were, followed Wigmore's trajectory in reverse, beginning where he left off and ending up where he began. This begs a question: why did Wigmore abandon the legal fiction in the second part of his career for the fictions of law? I wonder if it has something to do with the turn legal theory took at the midpoint of his career, that is, the advent of modernism. I have described elsewhere how Wigmore's career began at the twilight of the era of classical legal formalism, and how he himself played a crucial role in ushering in a new style of legal thought by discovering and enthusiastically promoting young modernists (later known as Legal Realists) such as Roscoe Pound (Riles "Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism"). One of the wedges between classical formalism and legal realism, in the realist imagination, was a new scientific, or rather engineering-like quality of modernist theories of law, as opposed to what the realists painted as the amateur character of classical legal formalism. As I describe elsewhere, the realists embraced the banner of law as a "means to an end" and promoted themselves as expert technicians in the construction and deployment of legal instruments.

From this point of view, Wigmore's panoramic evolutionary account of the rise of a "legal idea" like collateral—with its weak sourcing, its broad brush strokes, and, equally importantly, its emphasis on the semi-autonomy of legal ideas rather than its explanation of law as the effect of social and material forces seemed quite outdated, and judging from Wigmore's own embrace of the principles of realism, one must assume that he agreed.

But what is interesting in this context is that although Wigmore abandoned the collateral project, this did not mean that he turned to producing scholarship in the traditional modernist mold. On the contrary, he goes even further in the other direction, pushes the envelope, produces a book that actually announces that it is a "Panorama" and that

it is not serious scholarship but entertainment. It is a bold, and quite clever act of resistance to a new orthodoxy, a refusal of both dominant positions—classicism and realism—that seems to show up their similarities, their intimate relation, the symbiotic nature of their dispute.

This leads me to ask, what would count as the analog to Wigmore's bold move, his careful and calculated, yet celebratory, omnivorous act, that refuses both sides of the dominant opposition? Today, the crucial opposition is not between classicism and realism—in retrospect historians agree that the hard edged difference between those two positions is best appreciated as a kind of legal fiction of its own. Today, the dominant opposition, the key debate, is between "cultural approaches" to law—law and literature, law and the humanities, legal history, legal anthropology, approaches working under the sign of Wigmore's faux Hammurabi Code—and self-consciously instrumentalist, technocratic approaches—law and economics, law and psychology, doctrinal scholarship, work that submits to the constraints and also enjoys the privileges of that glass case. From this point of view, Wigmore's performances are no longer transgressive as they once were; rather, they are just one side, one position, in a well-buttressed debate. In order to recapture the sprit of Wigmore's intervention we will have to do something other than just extend it, or notice it—we will have to replicate it onto our *own* terrain (Miyazaki).

And so what I ultimately take from my friend Wigmore is that to choose either of these positions, humanistic or technocratic, cannot possibly be the answer. Wigmore seems to stand rather for the need to find a third place that is not yet so easily contextualized in existing discourse, that makes visible the commonalities and that obviates the now-naturalized fault lines, that must work to create its own context. And I also take from Wigmore the law of the preponderance of the means over the end in our own work as much as in the law. That is, the project for the sheer passion of it, its own reward, not simply a means to some other professional end.

Notes

1. Here, ironically, although Bentham himself drew a sharp distinction between "poetry and truth," and condemned "the mischiefs which have resulted from this magic art" that serve only "to gratify those individuals who are most difficult to be pleased" (Bentham and Bowring: v. II, p. 258), when it comes to legal fictions, humanists seem squarely on

Bentham's side. With the exception of the subtle work of Nomi Stolzenberg, who rescues Bentham from caricature. Nomi M. Stolzenberg, "Bentham's Theory of Fictions—a 'Curious Double Language,'" *Cardozo Studies in Law and Literature* 11 (1999).

2. Vaihinger's own phrasing of the distinction is telling:

> Fictionalism does not admit the principle of Pragmatism which runs: "An idea which is found to be useful in practice proves thereby that it is also true in theory, and the fruitful is always true." The principle of Fictionalism, is as follows: "An idea whose theoretical untruth or incorrectness, and therewith its falsity, is admitted, is not for that reason practically valueless and useless; for such an idea, in spite of its theoretical nullity may have great importance. But though Fictionalism and Pragmatism are diametrically opposed in principle, in practice they find much in common. Thus both acknowledge the value of metaphysical ideas, though for very different reasons and with different consequences." Hans Vaihinger and C. K. Ogden, *The Philosophy of as If, a System of the Theoretical, Practical and Religious Fictions of Mankind*, International Library of Psychology, Philosophy, and Scientific Method (London, New York: K. Paul, Trench, Trubner & Co. Harcourt, Brace & Company, inc., 1924) viii.

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