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Legal Fictions

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LEGAL FICTIONS

by

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ABSTRACT

Many judges faced with the task of rendering difficult decisions have a habit of pretending things that they know to be false. In so doing they employ legal fiction. Generally, a legal fiction is a false assumption of fact made by a court as the basis for resolving a legal issue. One of its purposes is to reconcile a specific legal result with an established legal rule. Legal fictions are thought to provide a mechanism for preserving the rule while ensuring a just outcome. By feigning the facts, the rule is said to remain intact. Historically, the fiction has achieved a certain duality. It is thought to be a humiliation to legal reasoning while, at the same time, indispensable to justice.

This study of legal fictions is an attempt to answer plaguing questions in the debate about an old judicial practice. To what extent are legal fictions necessary? What is their proper function? What are the dangers associated with their use? The answer to these questions is gleaned from four separate investigations of the fiction, each taken from a different perspective. The first is an overview of the historical debate that has been generated by the use of legal fictions. It provides an essential distinction between the judicial device known as a legal fiction and other so-called fictions that form the infrastructure of our legal system. The second investigation provides a contemporary account of legal fictions through a critical examination of Fuller's study of them. This investigation reveals certain shortcomings in Fuller's theoretical account. Consequently, in the third investigation, a contemporary case

study is provided. The development of a particular legal fiction is traced from its ancient origins in Roman law to its present use in the Canadian courts in an attempt to understand how the fiction actually operates in practice. In the final investigation, a philosophical examination of the background conditions underlying the use of legal fictions illustrates how reasoning through the device of fiction differs from usual methods of judicial reasoning. This is achieved by contemplating nonfiction in the law on Searle's model of institutional facts.

DEDICATION

With love and utmost admiration, I dedicate the sum total of joy and misery experienced in the practically invisible spaces that exist between these pages, without subtraction, to the living memory of six great men.

To my father's three best friends and to my three best friends' fathers:

Issac Leiser (1926 - 1984) who, in spite of everything of this world, remains a survivor and an icon of sheer strength.

Leon Smehoff (1927 - 1987) whose big hands and heart dispensed so much enchantment. If only I could wave my magic wand ...

Hymie Garshman (1924 - 1989) who taught me through the most delightful prankishness the sense in which life is a carnival.

Ben Kerr (1906 - 1989) *mine zaida*, who bought cattle, loved his family, and loved his God. Never have I seen someone so filled with passion; except perhaps his second son.

David Sair (1924 - 1993) who was my godfather, my fishing partner, my father's dear friend, my dear friend's father and, most of all, kindness and generosity personified.

Peter Renouf (1939 - 1995) one of those rare individuals who commanded immediate intellectual respect. Not even the sound and fury of hellhound on his trail could silence the wisdom he so softly spoke.

ACKNOWLEDGMENTS

I wonder whether I am the first doctoral candidate to think that writing the acknowledgments is by far the most difficult part of a dissertation. Finally having the platform to thank the many people that have touched my life, I am unsure of who I should include. Not because there are too few to thank, rather, too many.

Starting closer to the heart, I thank my parents, Morley and Eta, and my two wonderful sisters, Sheryl and Karen for all of their kindness, their love and support. Likewise, I thank Elizabeth, love of my life, and her amazing mom, Gloria. That all of these people are a part of my life seems to me the best argument in favour of fatalism that I have heard yet.

It would be impossible to write a dissertation without friends nearby. At least, it would have been impossible for me. Bodo Jr. has always been my philosophical soul mate, a second-self. My law school pals also helped in my development. Many thanks to Risa, Howie, Punchy, Cynthia and Scott, Chris, Ivan, Mike and Toni, Jordan, Lissy, Monica, Stephanie and, of course, the ever incredible Terra Strong. My oldest and dearest 'Calgary friends' also need to be mentioned. David, Joey, Bruce, Chris, Pavin (a.k.a. Dav-the-Rav), Sandi and Joel, you have all left a distinct mark on my life. Freddie, I am thinking of you the most during these impossible moments. I wish you peace.

I would also like to acknowledge those who have played a direct role in my intellectual development. I dig into my back pocket and there I find three professors during my undergraduate days who distracted me from my aims in dentistry,

attracting me to philosophy instead. Richard Bosley, Wes Cooper and Roger Shiner, perhaps I owe you the deepest gratitude. More recently, I have been inspired by Robert Butts, Bob Binkley, Kathleen Okruhlik, Gerald Fridman, Bruce Welling, Eileen Gillese, Winnie Holland, Ian Hunter, and Peter Mercer. All of these people are magnificent teachers.

A few lines or even paragraphs could not convey my thankfulness for having had the opportunity to write my dissertation under the supervision of Richard Bronaugh. Besides being a good thinker, writer and editor, he is a good person. He is critical yet encouraging. He is also very thoughtful and deliberate. Thanks as well to the members of my advisory committee, Barry Hoffmaster and David Conter. Their comments shaped a much more interesting version of this dissertation than the one I had started out with. Finally, I wish to thank all of the support group in the Department of Philosophy for all their fine efforts. Julia, Marie, Pauline, Melinda, Andrea and Ella, thank you for everything, most importantly, your friendship.

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Why, would it be ***unthinkable*** that I should stay in the saddle however much the facts bucked?

Ludwig Wittgenstein
On Certainty, § 616

INTRODUCTION

Many jurists have held that there are occasions when the application of an existing common law or statutory rule leads to an unjust result. In such cases it is said that judges are forced to make a difficult choice. Should the court be more concerned with following the established rule or with achieving what is thought to be a just result? One way out of the dilemma, according to some, is accomplished by the legal fiction. Generally, a legal fiction is a false assumption of fact made by a court, as the basis for resolving a legal issue. Its purpose, Fuller astutely pointed out, is to reconcile a specific legal result with an established rule of law.[1] If no such rule precludes the desired result, there is no need for legal fictions; likewise if no particular result is desired. Legal fictions, it is said, provide a mechanism for preserving the established rule while ensuring a just outcome. Instead of ignoring or altering the rule, the judge refurbishes the facts of the case. By fictionalizing the facts, the rule is said to remain intact.

Perhaps the best way to characterize the recent academic interest in legal fictions is to provide an autobiographical anecdote. When I first told my criminal law professor that the topic of my doctoral dissertation was legal fictions, he smiled and replied, "Fuller wrote a little book on that in the forties, didn't he? It's old hat." And right he was. Consider the following apologetic remarks made in the introduction to three of the small handful of recent Anglo-American articles on the subject:

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[1] Lon L. Fuller, Legal Fictions, Stanford University Press, (Stanford: 1967), p.51.

> The legal fiction used to be a hot topic on the jurisprudential agenda. It was written and talked passionately about by those who wrote and talked about such things in the nineteenth and early twentieth centuries. The interest in the subject withered and died, and virtually fell off the vine.[2]
>
> ... commentary on its [the legal fiction's] nature and legitimacy has been infrequent.[3]
>
> Hardly anybody in the United States talks much about legal fictions these days.[4]

While an observer might have considered my professor's comments to be extremely daunting, my own response was to requite him with a smile much bigger than the one that he had just given to me. He was absolutely right. Legal fictions are old hat. They have barely been touched in Anglo-American jurisprudence since Fuller's "little book." How could this news possibly make happy someone who intended to write several chapters on the subject?

The simple answer to this question has much to do with the cleft between the theory and practice of law and the general desire to narrow this gap. In my view the fact that legal fictions no longer happen to be "on the jurisprudential agenda," as Harmon put it, probably makes more of a fashion statement than it does anything else. All that it tells us is what happens to be hot in the law journals. But it says very little about what is actually going on in courtrooms and in other places where law

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[2] L. Harmon, "Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 Yale Law Journal 1 (1990).

[3] Hamilton, "Prolegomenon To Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies," 35 The Wayne Law Review 1449 (1989) at 1452.

[4] Soifer, "Reviewing Legal Fictions, " 20 Georgia Law Review 871 (1986) at 874.

is practiced. Here fictions live on. This point finds support from each of the authors cited above in the continuation of their remarks:

> Words of law matter; they determine how others will lead their lives, and sometimes how they will die.[5]
>
> ... use of this device [the legal fiction] has received widespread acceptance by the judiciary ...[6]
>
> Certainly our scholarly silence is not because reliance on legal fictions has disappeared. To the contrary: in the half of the century since Lon Fuller explored the cave of legal fictions and disclosed that they promoted function, form, and sometimes even fairness, legal fictions no longer merely serve as an "awkward patch" on the fabric of law, as Fuller put it.[7]

Each of the above authors acknowledges that, despite the "scholarly silence," legal fictions still seem to play an integral role in our present system of legal justification. Although legal fictions have been virtually abandoned in the realm of academic investigation, they are quite frequently relied upon by lawyers to win cases and by judges to provide reasons for their decisions. This is true not only in England and America but in Canada as well. In at least 96 Canadian appeals since 1985, the judiciary have considered legal fictions and their role in legal theory.[8] In other

---

[5] Harmon, ***supra***, at note 2 at 71.

[6] Hamilton, ***supra***, at note 3 at 1452.

[7] Soifer, ***supra***, at note 4 at 874-75.

[8] This statistic was generated by a computer search on the ***Quicklaw*** network. Obviously, it does not include decisions in which judgments were not reserved but presented orally. It is also worth noting that one could quite accurately project a number that ***vastly*** exceeds the above statistic if it were possible to determine how frequently fictions are employed in trial courts as well.

words, not only is the "old hat" still being put on, it seems to have become part of the standard apparel of legal reasoning. What needs refurbishing is the analysis of it.

The Call For Revival

The fiction has fashioned a number of chic new looks in the courts of law. In some cases these new looks are quite spectacular, in others, quite stealthy. The look is stealthy when the fiction has been clothed by the courts without the 'legal fiction' label.[9] In spite of all of this, or rather not in spite of it at all, there is clearly a need for a resuscitation of the theory that underlies its use. Here is how the author of the most recently published paper on legal fictions puts it:

> I would like to revive the debate on the legal fiction. It is a subject worthy of enduring concern. I came to this conclusion from my study of the history of the doctrine of substituted judgment, which has its origins in the early nineteenth-century law of lunacy. ... About twenty years ago the legal fiction was borrowed from the law of lunacy into the law of informed consent. There it has been used by courts to remove organs from the body of the incompetent, to sterilize him, to force medication on him, to let him wither and die, and virtually fall off the vine.[10]

Obviously, as author of a dissertation on the subject of legal fictions, I share Harmon's call for a revival. Like Harmon and a few others I too am concerned about the danger of misuses of the legal fiction. In fact sometimes I am sceptical about

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[9] See for example what Stoneking, "Penumbras and Privacy: A Study of the Use of Fictions in Constitutional Decision Making," 87 West Virginia Law Review 859 (1985) has called the Griswald fiction; the doctrine of substituted judgment discussed by Harmon, ***supra***, at note 2; and my own discussion of the unborn plaintiff approach to prenatal and preconception injuries discussed in chapter #3 of this dissertation.

[10] Harmon, ***supra***, at note 2 at 1.

every use of the legal fiction. We shall soon see why. Unlike some of the other writers who share this view, my apprehension is not directed solely at the legitimacy of using legal fictions ***simpliciter***. My scepticism also has to do with my concern about the legitimacy of its operation in conjunction with a careless use of the doctrine of ***stare decisis***. This concern is one that Harmon seems to share in the passage cited above. The worry is about what happens when an established fiction is illicitly co-opted from one area of law to another. Harmon, for example, is concerned with an illegitimate use of the doctrine of substituted judgment which was pilfered from the 19th century law of lunacy for its present use in the law of informed consent.

One way of understanding this worry is found in what Samek has referred to as the ***meta phenomenon***:

> The ***meta phenomenon*** is the human propensity to displace 'primary' with'secondary' concerns, that is, concerns about ends with concerns about means. The latter become perceived as primary, and distort the former in their own image. The new primary concerns are in turn displaced by the new secondary concerns about the means to be adopted to achieve the new ends, leading to another shift in the focus of consciousness. The secondary concerns come to be perceived as primary, and so on.[11]

Part of what Samek has uncovered is reminiscent of Fuller's understanding of the fiction as a ***linguistic phenomenon***, itself inspired by Vaihinger and, ultimately, Schopenhauer. Samek thinks legal fictions – which are secondary concerns

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[11] See Samek, "Legal Fictions and The Law," 31 University of Toronto Law Journal 290 (1981) at 291.

concocted by lawyers and judges as a means of accomplishing the primary concern of achieving just outcomes in hard cases – eventually become valued as real entities that matter in themselves.

In other words, once a legal fiction is employed and accepted it sets a precedent which will be relied upon in future cases. Eventually that precedent will no longer be treated as a fictitious expedient but will become an established legal principle. Instead of being valued as a mere means to a desired outcome in a particular case, the fiction will be valued as an end. Like Fuller, Samek thinks that the fictional aspect eventually dies out. This is a consequence of the ***meta phenomenon***. "The means of overcoming an impeding convention in due course settles down as an end, and the fiction, having lost its dynamism, now becomes a barrier to change."[12] For this reason Samek thinks that unless we recognize the ***meta phenomenon*** and treat each fiction as a means and not as an end, we will perpetuate certain problems in one form or another.[13] In order to avoid these problems we must revive the study of legal fictions. Such a revival is necessary in order to come to a precise understanding of how fictions operate in legal theory and in the practice of law. Only then will we know if they are dangerous or benign.

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[12] Samek, *Ibid.*, at 309.

[13] Although Samek does not give any detailed legal examples of the problems that can arise from the ***meta phenomenon***, I will provide some in chapter #3 of this thesis.

A Comment on the Recent Literature

The recent work on legal fictions can be sorted into two broad categories. The first of these includes what I shall call 'the less ambitious work on legal fictions'.[14] Under this category are two sub-categories. The first consists essentially of recapitulations of what has already been said by others. The second sub-category is not review work. Usually pieces that fall under this second sub-category begin with a rough and ready recap of legal fictions, often incorporating of a few one-liners, typically from Bentham, Vaihinger, or Fuller. The author then discusses some substantive area of law in which a particular fiction has been employed. When I characterize these papers as less ambitious, I do not mean to imply that they are any less insightful instances of legal scholarship than those in the second broad category. They are less ambitious only with respect to the actual operation of legal fictions. The aim in these papers is not to further our understanding of legal fictions *per se*, but rather to increase understanding of the area of substantive law in which a particular fiction is being employed.

The second broad category of recent work on legal fictions, which contains fewer examples, consists of ambitious attempts to further our understanding of the actual operation of the legal fiction.[15] This project is central to my present

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[14] For example: Stoneking, ***supra***, at note 9; Birks, "Fictions Ancient and Modern" in The Legal Mind: Essays For Tony Honoré (ed. N. MacCormick and P. Birks 1986); Simpson, "The Common Law and Legal Theory" in Legal Theory and the Common Law (Ed. W. Twinning 1986); Soifer, ***supra***, at note 4; Hamilton, ***supra***, at note 3.

[15] For example: Olivier, Legal Fictions in Practice and Legal Science, (Rotterdam University Press: 1975); Samek, ***supra***, at note 11; Harmon, ***supra***, at note 2.

endeavour. Authors in this latter category have tended to take one of two approaches. The ambitious first approach is mostly theoretical. Usually the author will rely to some extent on earlier theories and will then come up with some new developments along the way.[16] The ambitious second approach, the one that I think is more useful, relies to an extent on earlier theories but also attempts to ground the investigation in some area of substantive law.[17] Unlike the less ambitious category of substantive work discussed above, authors who take the second ambitious approach examine legal fictions to achieve a reciprocal effect. The author investigates some area of substantive law in order to provide a clearer understanding of the actual operation of the fiction while, at the same time, the examination of the fiction itself is meant to render a finer understanding of that particular area of law. It might be said that Fuller himself used this technique to some extent. My complaint, however, is that Fuller used the substantive law merely to ***illustrate*** the fiction and not to ***examine*** fictions in any thorough way. Although authors in both categories have provided a number of valuable and interesting insights to the contemporary study of legal fictions, I shall not discuss any of them as such in this dissertation. I have cited the papers that I have found most valuable and will consider them where relevant.

It is now time to begin my own investigation of legal fictions. I will start in chapter #1 with an overview of the historical debate that has been generated by their use. This debate raises three central questions which I shall attempt to answer in the

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[16] Samek's article, ***supra***, at note 11, is a good example of this.

[17] Harmon's article, ***supra***, at note 2, is a good example of this.

three chapters that follow. Chapter #2 will provide a contemporary account of legal fictions through a critical examination of Fuller's study of them. Where Fuller falls short, I will pick up in Chapter #3 by examining the development of a particular legal fiction from its ancient origins in Roman law and Early English Property law up to its present use in the Canadian courts. This sustained approach is required to provide a richer account of how the fiction actually operates in the practice of law. In chapter #4, I continue my own inquiry with a philosophical investigation of the background conditions that seem to underlie our use of legal fictions in the common law tradition. Finally, in chapter #5, I sum up by synthesizing the main conclusions from each of the previous chapters. This will be accomplished by addressing the three central questions raised in chapter #1.

CHAPTER #1

THE HISTORICAL DEBATE ABOUT LEGAL FICTIONS

> We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for modern inhabitants. The moated ramparts, the embattled towers and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience are cheerful and commodious, though their approaches are winding and difficult.[1]

Long ago Blackstone painted this picture of the legal fiction, even then, as something that belonged to the past. Blackstone saw the legal fiction as a winding and difficult approach in the reconstruction of an ancient legal edifice. Yet he saw the legal fiction as a route to convenience, cheer and comfort for modern inhabitants of the legal castle. Unlike the magnificent and venerable rules of law, sometimes susceptible to the same fate as the now useless moated ramparts, Blackstone saw the fiction as "highly beneficial and useful".[2]

Blackstone's castle metaphor is powerful. In fact, it has found its way into many contemporary portraits of the legal fiction.[3] Gray, for example, has depicted the legal fiction as a kind of intellectual "scaffolding – useful, almost necessary, in

---

[1] W. Blackstone, 3 Commentaries 268.

[2] Blackstone, *Ibid.*, at 43.

[3] In particular it has found its way into the works of Maine, Ihering, Gray, Vaihinger, and Fuller.

construction, – but, after the building is erected, serving only to obscure it."[4] Gray, like Blackstone, saw the legal fiction as a construction that facilitates a consolidation of the new with the old. But, for Blackstone, the fiction is not a removable scaffold that can be dispensed with as soon as a legal foundation has been built. Rather the fiction is a necessary architectural feature in the castle of the law. It is precisely because we have inherited this old, archaic castle that we need legal fictions. Fictions are required to renovate the castle in a way that will furnish our modern legal needs.

Blackstone's portrait is, as one might well expect, a much more magnificent and artistic depiction than that of Gray. It paints a picture of the legal fiction as a stairway that elevates modern British inhabitants of the legal castle onwards and upwards, beyond the outdated laws of medieval England. As an historical account, however, Blackstone's metaphor, by itself, is rather imprecise. It is not as if Britain simply inherited a body of law that belonged exclusively to medieval England. Along with the old Gothic castle, its inhabitants inherited several other legal traditions. Blackstone recognized this, tracing the ancestry of legal fictions to the juridical techniques of the Roman Empire.[5]

The aim of this chapter is to provide an overview of the historical debate about legal fictions. It will begin with a brief examination of the development of legal fictions in Roman law. Once this has been accomplished, we will be in a better position to return to Blackstone's castle and examine his understanding of legal

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[4] J.C. Gray, The Nature and Sources of the Law. 30-37 (1921).

[5] Blackstone, 3 Commentaries 107.

fictions. Blackstone's position can then be considered against the opposing view of Bentham. The historical debate between Blackstone and Bentham will lead us to consider some of the more recent historical positions that have evolved, including the views of Maine, Gray, Ihering, and Vaihinger. This brief historical overview will not only provide several different perspectives on the role of legal fictions in law but will also help us narrow our current conception of the 'legal fiction,' a term which has in law become so overbroad that it is practically meaningless. With a narrower conception of the fiction, we will be in a much better position to understand some of the present problems that legal fictions pose and we will be better situated for the contemporary discussion of the role of legal fictions in law, which will be examined in chapter #2.

1.1 Origins in Roman Law

Although unknown to the ancient legal systems of the Middle East and Greece, the idea of a legal fiction was well known to Roman lawyers, who employed the word *fictio* and derivatives of *fingere* in the formation of several written laws.[6] Although these lawyers used legal fictions often in practice, it is difficult to know exactly what they thought about the use of legal fictions since they were not inclined towards theorizing, least of all about their own methodology. As one Roman scholar put it:

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[6] Pierre J.J. Olivier, Legal Fictions In Practice and Legal Science, (Rotterdam University Press: 1975), p.5.

> Especially those masters in classical law who were actively involved in law-making practice refrained from theoretical speculations because they did not need them. ... Thus they managed to avoid not only the dangers of false reasoning but specially of reliance on fixed dogma and hence the pitfall of unpractical and lifeless booklearning.[7]

Since Roman lawyers were more concerned with the practice of law than they were with legal theory, the only way to understand the Roman concept of the legal fiction is to examine the way that it was used in the legal texts of Roman Law.[8] For our present purposes, it will suffice to consider a few examples.

1.1.1 *Bonorum Possessio*[9]

In the early period of ancient Rome the *Ius civile* (The Institutes) was characterized by its rigidity. Its excessive formalism was the result of deeply held principles rooted in an agricultural community that was based on family and clan organization. As Rome expanded, and as commercial interaction with foreigners increased, the simplicities and formalities of the *Ius civile* became unsuitable for many of the new conditions of Roman life.[10] Consequently, several legal constructions were developed to circumvent the strict results of the *Ius civile*. These constructions were developed and employed by the praetor in his written edict. A

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[7] M. Kaser, Das romische Privatrecht, 2nd ed. (Munchen: 1971), Vol.1, p.3.

[8] The most notable examples occur in the Institutes of Gaius [Inst. 4.34, 4.35, 4.36 and 4.38] and in the Digest and Institutes of Justinian [Inst. 1.12.5 and 1.12.6].

[9] Cf. G.3.32.

[10] L.B. Curzon, Roman Law, MacDonald and Evans Ltd., (London: 1966), p.17.

praetor was an elected official whose role was to administer the law in the city of Rome and to protect the civil rights of citizens. In the praetor's edict all of the rules of legal procedure were recorded. Such edicts were displayed in the forum and were closely adhered to by succeeding praetors. Although praetors could not, so to speak, "make law" by the provisions of their edicts, they could bring about changes in the legal system which would, as the great legal commentator Papinian put it, "aid, supplement or correct" the civil law. In a sense, it could be said that the praetors introduced a system of equity.[11] One of the techniques by which the praetors were able to do so was with the employment of legal fictions. One such fiction, developed in the praetorian law of succession, was known as ***bonorum possessio***.[12]

The most important function of a Roman will was the nomination of an heir. Where a will failed to nominate an heir it was of no use according to the ***ius civile***. However, cases would arise in which the title granted did not confer on the claimant the status of heir, even though the claimant was a ***bonorum possessor***. Since the ***bonorum possessor*** is not ***heres***, he is barred from instituting an action. Thus the ***bonorum possessor*** has no remedy under the ***ius civile*** by which he could acquire the inheritance.

As a result, the praetor, if he wishes to accommodate the ***bonorum possessor***, must prescribe a formula in which the ***bonorum possessor*** is allowed

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[11] See D.G. Cracknell, Law Students Companion No.4: Roman Law, Butterworths, (London:1964), p.45.

[12] For a thorough discussion of ***bonorum possessio*** see W.W. Buckland's famous discussion in his Elementary Principles of the Roman Law, Cambridge University Press, pp. 198-214.

to represent himself as if he were ***heres*** and to litigate as ***heres***. He would do this by way of action ***ex iure civile***. Conversely, a creditor who has a claim against the inheritance is allowed to treat the ***bonorum possessor*** as if he were ***heres*** in order to instigate a civil lawsuit against him. Thus the praetor would instruct the judge to treat the ***bonorum possessor*** as if he were the heir. If the praetor prescribed such a formula, the judge, as a matter of procedure, had no choice but to pretend that the claimant was in fact an heir. This procedural fiction allowed any claimant that the praetor believed to be entitled to an 'equitable' remedy to bring an action in spite of the strict wording of the ***ius civile***. It also allowed the strict wording of the ***ius civile*** to remain unchanged.

1.1.2 *Actio Publiciana*[13]

According to the ***ius civile***, one could acquire property by use if, among other things, the period of ***usucapio*** had elapsed without an interruption of possession. Certain cases ensued in which the strict rule of the ***ius civile*** resulted in inequitable outcomes. The ***actio Publiciana***, introduced by the Praetor Publicius in 66 B.C., employs a fiction that allows the praetor to protect the possessor of a thing who is on the way to ***usucapio*** but, for some reason, did not possess it for the full period of ***usucapio***. In the formula of the ***actio Publiciana*** the judge was

[13] Cf. G.4.36: "If the slave whom the plaintiff [in good faith] has bought and taken delivery of, had the plaintiff for a full year been in possession of him, would have been in his quiritary ownership ..."

ordered to assume, fictitiously, that the required period of ***usucapio*** has elapsed. The employment of this fiction is illustrated by Shulz in the following case:

> The quiritary owner of a ***res mancipi*** sold it to B and conveyed it to him by ***traditio***. B was now merely a possessor, but he might acquire quiritary ownership by ***usucapio*** if he remained in possession for one or two years. However, before the end of the ***tempus usucapionis***, B lost possession and the thing came into the hands of C. The rei vindicatio was of course not available to B, since he was not quiritary owner; but the ***actio Publiciana*** was open to him. By the ***formula*** the judge was instructed to consider the case under the assumption that B possessed the thing for the full ***tempus usucapionis*** and, if under this assumption B would be quiritary owner on the strength of ***usucapio***, to treat C as if the action were ***rei vindicatio***. Thus the judge had only to decide whether the quiritary owner had in fact conveyed the thing to B by ***traditio***, for the other conditions of ***usucapio*** (... a thing capable of being ***usucapted*** and ***bona fides***) were obviously satisfied in this case.[14]

1.1.3 *Civitas Romana Peregrino Fingitur*[15]

'Ius civile' in its technical sense refers not merely to the law of Rome but, more specifically, to that part of the Roman law available only to Roman citizens.[16] Actions of the ***ius civile*** were originally not available to or against foreigners [***peregrini***]. Again, numerous situations arose in which it was desirable for certain actions to be granted in favour of or against a ***peregrinus***. One such example occurs in the case of the ***actio legis Aquiliae***. This action allowed a plaintiff to recover

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[14] F. Schulz, Classical Roman Law p.376.

[15] Cf. G.4.37.

[16] Curzon, ***supra***, at note 10 at 17.

damages for the killing or wounding of his slave or beast by another. In such a case the praetor would again prescribe a formula by which the judge was ordered to accept as a fact that the *peregrinus* was a Roman citizen for the purpose of obtaining jurisdiction over him. Here, as is the case with all of the fictions discussed so far, there is no direct allegation that *peregrinus* was a citizen. The praetor's instructions would have been put in the form of a counterfactual statement: "if, in the case the foreigner had been a Roman citizen, such and such a judgment ought to be rendered, then render that judgment here."[17] Once this counterfactual was assumed, the action could then proceed according to the *ius civile*.

1.1.4 The *Nasciturus* Fiction[18]

Roman law drew a basic distinction between *persona*, the bearer of rights and duties, and *res*, the object of rights and duties. The concept of *persona* was synonymous with that of a living human being. As a legal state of being it began at birth and ended at death. All other states of being were considered *res*. Thus, in the formalistic early period of ancient Rome, the unborn child [*nasciturus*] was considered *res*.

Later, the Romans recognised that the unborn child was a nascent human being and held that in certain cases the foetus ought to be recognized in law as the

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[17] This formulation of the fiction is suggested by Gray, *supra*, at note 4 at 31.

[18] Cf. D.1.5.7; D.1.5.26; D.50.16.231; D.11.8.2; D.25.4.11; D.37.9.12; D.37.9.7pr.; C.6.29.2; Inst.Just.3.1.8.

bearer of rights. One such example occurred in the law of succession. On some occasions a soon-to-be-father would die while his wife was still pregnant. At the time of the soon-to-be-father's death the child was not yet *persona* and was therefore unable to inherit, despite the fact that the child was due to be born only days later. Since Roman jurists were too conservative to alter the entire system by including the foetus into the category of *persona* they resorted to a legal fiction: "***nascitturus pro iam nato habetur quotiens de commodo eius agitur.***"[19] Again, the praetor would prescribe a fictitious formula, this time ordering the judge to treat the foetus as though it were already born. The application of this fiction was strictly limited to the law of succession.[20] However, it allowed an unborn child, once born, to inherit despite the fact that the child was not *in rerum natura* at the time of the devise. The use of this fiction is described by Olivier:

> [T]he foetus is not recognised as legal *persona;* certain rights are merely kept in abeyance pending the birth of the child. These rights are kept open for the *nascitturus* not because the foetus is a legal *persona,* but because the law takes cognisance of the fact that the foetus is a potential human being and wishes to protect the human being as such. The fiction is merely a brief way of expressing this conditional and anticipatory protection of the child to be born.[21]

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[19] For a discussion of this see Olivier, *supra,* at note 6 at 107.

[20] The scope of application of this fiction has since expanded greatly in our Canadian common law system. For a complete examination of the development of this fiction see Chapter #3 of this dissertation.

[21] Olivier, *supra,* at note 6 at 109.

1.1.5 Elements of the Roman Legal Fiction

Bonorum Possessio, Actio Publiciana, Civitas Romana Peregrino Fingitur, and Nasciturus provide a representative sample of the Roman law fictions. These examples together illustrate four of the main characteristics of the legal fiction as it occurred in Roman law:[22]

1. **A fact or situation was assumed to exist whereas in reality it did not.**

As we have seen, it was accepted that the ***bonorum possessor*** was ***heres;*** that the ***usucapio*** had already taken place; that the ***peregrinus*** was a Roman citizen; that the ***nasciturus*** was already born. This ancient characteristic of the legal fiction helps to distinguish a legal fiction from a modern legal rule.[23] As an assumption of fact, the acceptance of a legal fiction means accepting certain facts that are contrary to reality. Not all legal rules prescribe such an assumption. In fact, most legal rules define the nonfictional elements of law, making such assumptions unnecessary.[24] Still, it is important to note that although legal fictions are not legal rules, they can indeed be prescribed by legal rules. In Roman law this occurred whenever the praetor prescribed a fictitious formula into his edict, thus making it

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[22] These four characteristics of legal fictions were discovered and discussed by Olivier, ***supra,*** at note 6 at 8.

[23] See Olivier, ***supra,*** at note 6 at 61.

[24] For further discussion of this point, see Chapter #4 of this dissertation.

binding upon the next praetor. However, a fiction is not itself a legal rule, it is merely an assumption about a case that is contrary to the facts.[25]

2. This false assumption was deliberate and conscious.

In each of the examples the praetor, the judge, the plaintiff and the defendant were fully aware that the ***bonorum possessor*** was not ***heres***, but consciously accepted that he was. Likewise, they were all aware that the period of ***usucapio*** had not lapsed; that the ***peregrinus*** was not a Roman citizen; that the child was unborn at the time of its would-be father's death. In each case they accepted the contrary deliberately, completely conscious of its falseness. This characteristic of the Roman fiction helps to distinguish a legal fiction from a legal presumption.[26] In the case of the ***nasciturus*** fiction, for example, everyone is aware of what the true facts are and that a false assumption is made deliberately. This is not so in the case of a rebuttable legal presumption, where an inference is made in favour of a particular fact.

With rebuttable presumptions, the finding of some basic fact gives rise to the existence of a presumed fact, unless and until the presumption is rebutted. One example is the presumption of death. In certain jurisdictions, proof of the fact that someone has disappeared and has been continually absent from his or her customary location or home for a period of seven years, without any apparent reason for his or

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[25] This simple point is often confused as soon as the fiction has been used once. This is because it is utilized in later cases via the doctrine of ***stare decisis***. An example of such confusion can be found later in this chapter by authors like Hamilton who argue that fictions, once utilized, simply "drop out in the final reckoning".

[26] At least from certain sorts of legal presumptions. There is some question whether a distinction can be drawn between a legal fiction and an irrebuttable presumption of law.

her absence, gives rise to the inference that the person is dead – unless sufficient evidence to the contrary is proved. Note that with the rebuttable presumption, if it becomes clear that the provisional assumption is false, i.e. if the person is proved to be alive, the assumption is rejected and the truth prevails. This clearly distinguishes legal fictions from rebuttable legal presumptions. As Olivier puts it:

> The presumption is based on doubt and disappears as a presumption as soon as the doubt disappears. In the case of the legal fiction, there is never any doubt as to the incorrectness of the assumption and the assumption is maintained in spite of the certainty of its incorrectness.[27]

As we have seen in the case of the *nasciturus* fiction, there is never any doubt that the child was not yet born at the time of the would-be father's death. Yet the assumption is deliberately and consciously maintained in spite of this fact so that the child is able to inherit, once born.

3. The false assumption may not be disputed or contested.

Prior to the praetor's intervention, the *bonorum possessor* who falsely represented himself as *heres* could be exposed and his claim consequently dismissed.[28] The praetor's intervention enabled the *bonorum possessor* to be falsely represented as *heres*, and although the parties were fully aware of the falseness of this assertion, it was not permissible to adduce evidence in rebuttal. With

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[27] Olivier, *supra*, at note 6 at 70.

[28] Olivier, *Ibid.*, at 9.

the praetors prescribed formula the falseness of the assertion was unassailable.[29] Of course, this characteristic of the Roman fiction also distinguishes the legal fiction from the legal presumption.

4. The function of the legal fiction in each case was to create an action which was not available under the strict *ius civile*.

Persons (and nonpersons) previously excluded from its operation were, by the incontestable and consciously false assumption of certain facts, brought within the ambit of the *ius civile*. In each case a sense of 'equity' gave rise to the creation of a new rule. The *ius civile*, in spite of the narrowness of its outlines and the rigour of its forms, was by aid of the *formulae ficticiae*, able to keep pace with the rapid progress of contemporary life.[30]

1.2 Procedural Fictions in the Early English Common Law

The Roman law fictions examined above were utilized to expand the jurisdiction of the *ius civile*.[31] Similarly, in the 15th and 16th centuries, there are several examples of English courts using legal fictions to enlarge their jurisdiction. This was accomplished mainly by use of the procedural fiction. Two such examples

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[29] As an evidentiary procedure this assumptive formulation of the legal fiction should be contrasted with the assertive fiction of the early English common law. This contrast will be considered below.

[30] Olivier, *supra*, at note 6 at 9.

[31] With the use of legal fictions nonheirs, nonpossessors, noncitizens, and nonpersons became subjects of the Roman Court under the expanded jurisdiction of the *ius civile*.

can be found in the historical resurgence of the King's Bench and the expansion of the Exchequer of Pleas.

1.2.1 The Resurgence of the King's Bench

Clause 17 of Magna Carta established two benches, the Court of King's Bench and the Court of Common Pleas. The Court of King's Bench was in law held "before the lord king wheresoever he should be in England" and was therefore excluded from hearing "common pleas". Common pleas for this purpose were all suits in which the king had no interest. By comparison with the Common Pleas, the jurisdiction of the King's Bench before Tudor times was slight. Its records filled only a few hundred skins of parchment per year whereas those of the Common Pleas filled closer to two thousand.[32]

The jurisdiction of the King's Bench originally included all criminal matters and a very limited number of pleas. The "plea" side was occupied mainly with actions of trespass, appeals of felony and suits to correct errors by courts of record. The King's Bench had no jurisdiction over *praecipe* actions to recover property or debts, which formed the majority of all civil cases. All of these actions were in the exclusive jurisdiction of the Court of Common Pleas.[33]

In the King's Bench bills were often used to petition the court to commence an action. Bills were a more convenient procedure than writs because they did not

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[32] See J. Baker, An Introduction to English Legal History, Butterworths, 3rd ed., (London: 1990), pp.45-46.

[33] Baker, *Ibid*, at 45.

require involving the Chancery, as the writ system did. Bills could also be used in the King's Bench to commence actions that would otherwise fall outside its jurisdiction against its personnel and prisoners. Because personnel and prisoners were deemed to be already present in court, the Magna Carta no longer prevented such actions as debt or covenant. With this, plaintiffs could combine procedures:

> If *A* wished to sue *B* for trespass and debt, he need only sue a writ of trespass, upon which *B* would be arrested and committed to the Marshal; *A* could then start his debt action by bill, avoiding the expense of a writ.[34]

Thus the bill system allowed those already being sued in trespass to have a concurrent action brought against them that would otherwise fall outside the jurisdiction of the King's Bench.

Around the middle of the fifteenth century English barristers discovered that the like advantage could be obtained even if there was no genuine complaint of trespass: the writ secured the arrest, whatever the facts. Consequently, the custody of the defendant was secured by an unsworn *ex parte* complaint in Chancery of a fictitious trespass. Once the defendant was in custody and had been impleaded by the bill, the action of trespass could be discontinued before it ever came to trial. This allowed the defendant to be sued in debt alone, which would otherwise have been impossible in the King's Bench. This was made possible by the plaintiff's false allegation of fact, which was never officially discovered.

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[34] Baker, *Ibid.*, at 49-50.

This procedural dodge began as no more than a clever lawyer's manoeuvre. However, it soon became an accepted legal practice. Fortescue CJ encouraged the use of such a bill and said that the court would not enquire into the reason why the defendant came to be before the Court.[35] Eventually, a special bill was utilized for this procedure, known as the bill of Middlesex. Since the alleged trespass was fictional, it was thought that the plaintiff might just as well fabricate things so that the trespass was said to have occurred in Middlesex, where the court invariably sat. With the fictitious bill of Middlesex alongside the bill indicating the genuine complaint against the defendant, the plaintiff could successfully sue in debt at the King's Bench without a writ from the Chancery. As was the case with the Roman fiction, it did not matter whether the plaintiff or defendant had ever actually been to Middlesex.[36]

1.2.2 The Expansion of the Exchequer of Pleas

The Exchequer of Pleas was inferior in rank to both the King's Bench and the Common Pleas. It was presided over by a chief barron and four puisne barrons. It was originally the king's treasury and was later charged with keeping the king's

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[35] Kempe's Case (1448) Y.B. Mich, 27 Hen. VI, fo. 5, pl.35 (a bill lies against a prisoner unlawfully arrested); *Anon.* (1452) Y.B. Mich. 31 Hen. VI, fo. 10, pl.5 (a bill lies against a prisoner bailed from the Marshalsea, even if there is no record of his first committal).

[36] Actually, this fictitious procedure was slightly more complex. In the case where the defendant was not found in Middlesex, the plaintiff had to inform the court that the defendant "lurks and roams about" (*latitat et disurrit*) in some other County. In such a case the Court then issued a writ called a *latitat* to the sheriff of that county, who was then able to effect the arrest even though the defendant was neither lurking nor roaming there but, in actuality, openly and permanently settled. Together these two procedural fictions, the bill of Middlesex and the *latitat*, worked to expand the jurisdiction of the Court of King's Bench. See Baker, *supra*, at note 32 at 51.

accounts and collecting the royal revenues.[37] Like the King's Bench, the original jurisdiction of the Exchequer of Pleas was quite narrow, limited to revenue cases arising out of the nonpayment or withholding of debts to the crown. But the privilege of suing in this court was later extended to the king's accountants. This expansion of jurisdiction would soon lead to another. The court began to attract other private litigants. As Baker put it:

> The attraction of the court to private litigants needs little explanation: the methods used by the king to collect his own revenue must be best. Plaintiffs therefore sought to harness its procedures for their own purposes ...[38]

By the mid-fourteenth century, actions were allowable by all debtors to the crown. The rationale was that debtors to the crown ought to be allowed to recover their own debts or damages so that they could satisfy their debt to the king. This was achieved by way of a writ known as *quo minus.*[39] With this writ, those who owed a debt to the king could commence personal actions in the Exchequer. Successful plaintiffs could then pay their debt to the king and keep any remaining sums recovered in their lawsuits.

As it was with the bill of Middlesex, there evolved a tendency to make fictitious use of the writ of *quo minus.* In 1665, Sir Matthew Hale, then the chief

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[37] See Blackstone, 3 Commentaries 44-45.

[38] Baker, *supra*, at note 32 at 56-57.

[39] The name of this writ was derived from the phrase "***quo minus nobis satisacere valeat de debitus quae debet ad scaccarium***" ["so much the less able to satisfy [the king] of the debts which he owes at the Exchequer"]. Baker, *supra*, at note 32 at 622.

barron, "scrupulously attacked the fiction and also the assumption that a man could recover the whole of his demand even if it exceeded his liability to the crown."[40] But this attack came much too late. By that time the court had already been thrown open to all suitors in personal actions. All that was required to enter the Exchequer was the false allegation that the plaintiff owed a debt to the king. Blackstone described the fictitious use of *quo minus* as follows:

> the plaintiff ***suggests*** that he is the king's farmer or debtor and that the defendant hath done him the injury or damage complained of ... But now, by the ***suggestion*** of privilege, any person may be admitted to sue in the exchequer as well as the kings's accomptant. The ***surmise*** of being debtor to the king, is therefore become ***matter of form and mere words of course***, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another ***upon the bare suggestion that he is the king's accomptant; but whether he is so or not is never controverted.***[41]

It was not long before the fictitious use of *quo minus* had become commonplace and the Exchequer, a third court of common pleas.

1.2.3 Elements of the Early English Procedural Fiction

These two historical examples help illustrate the difficulty in characterizing the early English legal fiction in comparison with the fiction of Roman law. This difficulty is in part a function of the vastness of the English common law system. By contrast,

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[40] Baker, ***supra***, at note 32 at 58.

[41] Blackstone, 3 Commentaries 45, (emphasis added).

the Roman use of fictions took place in a much smaller, more contained legal system. Consequently, the Roman fiction developed in a linear fashion, as one praetor handed down his procedures to the next in a written edict. In Roman law each legal fiction was a carefully constructed formula with prescribed parameters. This resulted in the uniform use of the procedural fiction. Not so with the procedural fictions of the early English common law. These fictions developed in a piecemeal, evolutionary fashion, over much time and across many jurisdictions. The early English fictions were not well crafted procedural assumptions, consciously employed to make a desired legal result comport with a given rule of law. Originally they were nothing more than the accumulated effect of what crafty lawyers could get away with.

This illustrates an important difference between the early English legal fiction and its Roman ancestor. In Roman law, the fiction was purposely fabricated by the praetor in order to affect the legal procedure of the Roman courts in a particular way. In early English law, it was the other way around. The legal fiction was the effect of a falseness in the proceedings. These proceedings evolved into accepted legal practices such as the bill of Middlesex and the writ of *quo minus*, both of which fictionalized certain facts in a case. Thus the establishment of the early English procedural fiction came about without much foresight, practically, by accident. Originally, these fictions were merely the products of false assertions made during the course of litigation.

It was perhaps this fact that led Gray to say "that the use of fictions in England was bolder and, if one might say so, more brutal in England than it was in Rome."[42] Gray recognized that while the Roman fiction, in its "as-if" formulation, carried a grammatical acknowledgement of its falsity, the English fiction appeared as a bald statement of fact. The English fictions were not assumptions. They were assertions. They were formulated:

> in the shape of allegations which one of the parties made and the other party was not allowed to deny, in order that the wine of new law might be put into the bottles of the old procedure.[43]

Once a number of these procedural fictions came into popular use, it was not long before they, like their Roman ancestors, were purposely employed to extend substantive remedies. Some examples of this include the false allegation of "deceit" in ***assumpsit*** and other actions on the case,[44] the false claim of "loss" and "finding" in trover,[45] the false allegation of "lease" and "ouster" in ejectment,[46] the collusive common recovery,[47] and in the implied promise in ***indebitatus assumpsit*** for quasi-contractual claims.[48] In such cases the pretence was of a fact

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[42] Gray, ***supra***, at note 4 at 31-32.

[43] Gray, ***ibid.*** at 34.

[44] See Baker, ***supra***, at note 32 at 384.

[45] See Baker, ***ibid.***

[46] See Baker, ***ibid.*** at 431-42.

[47] See Baker, ***ibid.***, at 319-20.

[48] See P. Birks, "Fictions Ancient and Modern" in The Legal Mind (P. Birks and N. MacCormick ed., 1986), pp.83-101.

which, if true, would have led to the desired result under the pre-existing forms of action.

Unlike the Roman fictional formulae, each of these early English fictions were cast in an assertive form. As Fuller described the early English fiction, "its fictitious character was apparent only to the initiate."[49] This was so because the litigant would assert a falsehood which the respondent was estopped from denying. Thus if one were to read the reasons for judgment, there would be nothing to indicate the fabrication of the facts. The result of this evidentiary technique was that the litigant's allegation would be accepted as an established fact, even though it could easily be disproved but for the rule of evidence.[50]

1.3 The Return to Blackstone's Castle

One might construe the bill of Middlesex and the writ of ***quo minus*** as examples in which the fiction assumed is not material to the particular cause of action. In those cases the fictional assertion merely satisfied a procedural or

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[49] Lon L. Fuller, Legal Fictions, Stanford University Press, (Stanford: 1967), p.36.

[50] It is not clear whether this difference in the form of the Roman and early English fic has any bearing on their use. Those sympathetic to the civilian school, Olivier, for example, think that the Roman fiction is superior. Since its form has a built in acknowledgment of its falsity, it is thought that the Roman fictional formula is less susceptible to mischief and misuse. Against this claim, common law lawyers, like Fuller, argue that "the distinction is one of form merely." (Fuller, ***supra***, at note 49 at 37.) Fuller goes on to say that both the Roman and the English fiction deal with statements known to be false and that the grammatical construction used to concede the falsehood of the Roman fiction is unnecessary. Since we are no longer as concerned with the appearance of conservatism as the Romans jurists were, Fuller thinks there is no longer a need to clothe the fiction in the as-if form. It is my contention that Fuller might well be mistaken on this point. Given the dangers that come along with the common law doctrine of ***stare decisis***, the form of the fiction can indeed have a profound effect upon its use. For a further discussion of this point see Chapter #3 of this dissertation.

jurisdictional requirement. Similarly, in reference to a fiction that allowed litigants to assert that contracts were made at the Royal Exchange (when in fact the promises had been exchanged upon the "high seas") Blackstone defended the fiction by minimizing its effect:

> But our lawyers justify this fiction, by alleging as before, that the locality of such contracts is not at all essential to the merits of them ...[51]

Since it applied only to the matter of jurisdiction and not to the merits of the contract, the use of the procedural fiction had absoluteiy no bearing on the substantive issue in the case. At least this is what Blackstone thought.[52] For this reason, Blackstone thought that the use of such fictions is neither harmful nor dangerous. In fact, he described the use of such fictions as:

> one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding everything that is dear to us.[53]

With this we return to Blackstone's castle. Blackstone saw the fiction as a necessary constituent in legal reasoning. Blackstone recognized that it is not possible

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[51] Blackstone, 3 Commentaries 107.

[52] As a formalist, Blackstone seemed to think that the contents or "merits" of a contract were completely distinct from the issue of which court ought to resolve the matter. Clearly, this was not always the case. In some cases it must have mattered which court settled the dispute. For example, around Blackstone's time, the only court in which a plaintiff might obtain the remedy of specific performance was the Chancery. In a case where the "merits" of a particular contract were of no value to the plaintiff unless the defendant actually performed his contractual obligations, it mattered very much whether the Chancery had jurisdiction to hear the case. If jurisdictional rules or the use of a legal fiction caused the case to be heard, say, at the Exchequer, the so-called "merits" of the contract quickly faded into insignificance.

[53] Blackstone, 3 Commentaries 267.

to build a procedural system that inevitably leads to the desired result in every case. Just as an old castle requires renovations from time to time, based on the needs of its inhabitants, so too does a legal system. Legal fictions like the bill of Middlesex and the writ of *quo minus* were renovations that were required to meet the growing needs of litigants. Although such fictions were "minute contrivances" that had to become "sufficiently known and understood",[54] they were the glue that helped fasten the new tiles to the older bricks. "Though their approaches are winding and difficult" they were the means of converting the inferior apartments into rooms of convenience in the castle of law.[55]

One of the obvious shortcomings of Blackstone's treatment of legal fictions is the fact that he did not spend much time distinguishing the earlier jurisdictional fictions from some of the more dangerous substantive fictions that evolved from them. These later fictions seemed to go much further in w..king substantive changes by allowing the assertion of facts that, unlike the jurisdictional fictions, were clearly material to the question at issue. Although many such fictions were already being used in Blackstone's time, he rarely discussed them.

One example of this more troublesome sort of fiction can be found in the implied promise in *indebitatus assumpsit*.[56] In 1676 the City of London brought

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[54] Blackstone, *ibid.* at 268.

[55] Blackstone, *ibid.*

[56] See Baker, *supra*, at note 32 at 231, 417.

an ***indebitatus assumpsit*** to recover duty from a silk importer.[57] In that case the jury found that although the money was due by custom, Goray had made no actual promise to pay it. Despite this, the King's Bench held that the city could recover by implying a promise to pay based on Goray's indebtedness. The promise that was implied was, of course, a fiction. Goray had never asserted anything like a promise and, strictly speaking, he owed no 'debt' to the city.

The danger of this sort of fiction, perhaps unlike the earlier jurisdictional fictions, is that the facts implied by the fiction clearly are material to the outcome of the case. In City of London v. Goray it was the use of the fiction itself that decided the issue. It is also extremely important to note that, by 1676, the fiction was no longer merely the result of the procedure or the proceedings. In City of London v. Goray it was the King's Bench that invented and employed the fiction, not the litigants.[58]

While Blackstone thought that the invention and employment of legal fictions can be justified because they are "highly beneficial and useful", in the same breath he reminds us that our use of legal fictions must invariably observe the maxim "***that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.***"[59] This passage is essential for an understanding of the

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[57] City of London v. Goray (1676) B. & M. 476; 2 Lev.174; 1 Vent.298; 1 Freem. 433.

[58] The precedent for this was not created in this case. For some time, years before this case, judges had been inventing and employing their own fictions in order to achieve a particular result.

[59] Blackstone, 3 Commentaries 43.

limitations placed upon the use of legal fictions by the jurisprudence popular to Blackstone's time. It also tells us more about Blackstone's castle. Blackstone thought that we could never extricate fictions from the castle without making its halls utterly inaccessible. But it is crucial to know that he also thought that the courts are not the architects of the law. Thus legal fictions are not to be used as tools to construct the law. They are to be used only as tools for repairing the castle.

Blackstone accepted the use of legal fictions by common law judges because he thought that the function of fictions could be restricted to repair work alone. Blackstone's preoccupation with the distinction between the form of law and its substance did not allow him to see that, especially alongside the doctrine of *stare decisis*, reconstructing legal procedures often leads to substantive changes in the law. Blackstone should have recognized this important point by virtue of his own metaphor. Repairs sometimes change the castle; the useless trophied halls become commodious rooms of convenience. Without the appropriate supervision and the proper safeguards there is always some danger that the castle might not simply be repaired but actually rebuilt. Somehow, Blackstone's trust in natural law prevented him from recognizing this worry. Since he thought that judges and lawyers could recognize what natural justice demands in a particular case and that judges could limit the use of fictions to achieving equitable results, Blackstone thought that legal fictions had a home in law's castle.

1.4 Bentham

Bentham, Blackstone's jurisprudential nemesis, clearly recognized the danger that legal fictions might be used by the judiciary to reconstruct the castle. Bentham disparaged Blackstone for his treatment of legal fictions:

> If there be one purpose for which a book of Institutes is wanted more than another, it is to draw aside the curtain of mystery which fiction and formality have spread so extensively over Law. Our Author thinks he has done his part when he embroiders it with flowers. Law shews itself in a mask. This mask our Author instead of pulling off has varnished.[60]

However, reading Bentham on legal fictions one quickly comes to the realization that Blackstone certainly did not corner the market on flowers. Bentham's remarks on legal fictions were at least as flowery as Blackstone's, though Bentham's blossomed in the form of poisonous shoots:

> It has never been employed but to a bad purpose. It has never been employed to any purpose but the affording justification of something which otherwise would be unjustifiable. No man ever thought of employing false assertions where the purpose might equally have been fulfilled by true ones. By false assertions, a risk at least of disrepute is incurred: by true ones, no such risk.
>
> It is capable of being employed to every bad purpose whatsoever.
>
> It has never been employed but with a bad effect.
>
> It affords presumptive and conclusive evidence of the mischievousness of the act of power in support of which it is employed.
>
> It affords presumptive and conclusive evidence of the inaptitude of the form of government in support of which it is employed, or under which it is suffered to be employed.
>
> It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed.

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[60] J. Bentham, A Comment on the Commentaries, in A Comment On The Commentaries And A Fragment On Government (1977), p.124.

> It affords presumptive and conclusive evidence of moral turpitude on the part of all those functionaries, and their supporters, by whom it continues to be employed.
>
> It affords presumptive and conclusive evidence of intellectual weakness, stupidity, and servility, in every nation by which the use of it is quietly endured.[61]

Elsewhere Bentham compared the hazards of the fiction to the dangers of drug abuse and disease:

> They [lawyers] feed upon untruth as the Turks do opium, at first from choice and with their eyes open, afterwards by habit, till at length they lose all shame, avow it for what it is, and swallow it with greediness, not bearing to be without it.[62]
>
> In English law, fiction is a syphilis, which runs in every vein, and carries with it into every part of the system the principle of rottenness.[63]

With these remarks it is clear that Bentham was worried about the symptoms that might arise with the misuse or abuse of legal fictions.

Bentham's attack on legal fictions was connected to his more general attack upon the judicial element of common law, which he compared to "the fancied ether".[64] The root of Bentham's disdain was that, as a system of general rules, the common law is itself no more than an imaginary thing. Often it amounts to no more than the abstractions of particular judges. As such, the common law is inaccessible to those bound by it. Bentham did not trust judicial abstractions to determine the

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[61] J. Bentham, 9 The Works of Jeremy Bentham (ed. Bowring 1962) 77.

[62] Bentham, *ibid.*, at 59.

[63] J. Bentham, Elements of Packing as Applied to Juries, in 5 The Works of Jeremy Bentham (J. Bowring ed. 1843) 92.

[64] J. Bentham, An Introduction to the Principles of Morals and Legislation, (ed Burns and Hart 1970), p.8.

law. Rather he wanted a legal system which was both concrete and accessible. He thought that the law should be knowable before a dispute arises, not merely after some judge has written the reasons for judgment.

Bentham's remedy for the inaccessibility of the common law was a system of codification.[65] In fact, it was Bentham who introduced the word "codification" into the English language.[66] As one author has recently put it: "By distilling the common law into a comprehensible, internally consistent code, Bentham hoped to shatter the monopoly that lawyers held upon the language of the law."[67] His object was to produce a statutory code that left law purely in the hands of parliament and not the judiciary. For Bentham, the proper role of the judge was simply to apply the code to the facts of a particular case.

Bentham's contempt for legal fictions lay in the fact that he saw them as a tool in the common lawyer's bag for usurping the powers of parliament. Lawyers and judges used legal fictions as a way to get around existing law. Bentham defined the legal fiction as a:

> wilful falsehood, having for its object the stealing of legislative power, by and for hands, which could not, or durst not, openly claim it, – and, but for the delusion thus produced, could not exercise it.[68]

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[65] See Comment, "Jeremy Bentham's Codification Proposals and Some Remarks on Their Place in History", 22 Buffalo Law Review 239 (1972).

[66] See Baker, *supra*, at note 32 at 249 fn. 108.

[67] Harmon, "Falling of the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 Yale Law Journal 1 at 4 (1990).

[68] Bentham, "Preface for the Second Edition" *supra*, at note 61 at 509.

Again, one of Bentham's chief concerns was that legal fictions would be misused:

> What you have done by way of the fiction – could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.
>
> Such is the dilemma. Lawyer! escape it if you can.[69]

Whoever employs the fiction, thought Bentham, is either evil or foolish. Fools, Bentham could do without. When a fiction is employed in a case where the same result could have been achieved without it, the fiction serves only to confuse and annoy. Foolish acts, everyone knows, often cause problems. Maine picked up on this horn of Bentham's dilemma when he later said that "legal fictions are the greatest obstacle to symmetrical classification."[70] The unnecessary use of fictions "makes the law either more difficult to understand or harder to arrange in harmonious order."[71] In a common law system, this will take its toll on a lawyer or judge who is trying to make sense of a particular legal problem. Fictions make legal problems much more difficult to characterize.

But the real abuse, according to Bentham, occurs when a lawyer or judge invents a legal fiction because there is no other way to circumvent an existing law. Bentham, unlike the Romans and Blackstone, was a strict legal positivist. Consequently, Bentham held that there is no such thing as a 'desired legal result' in a particular case. Bentham did not think that 'natural justice' or 'Equity' made any

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[69] J. Bentham, ***supra***, at note 61, 7 Works 283.

[70] H.S. Maine, Ancient Law, 3rd ed. (London:1870), p.27.

[71] Maine, ***Ibid.***

demands in the settlement of a legal dispute.[72] Bentham held that there is no question about what the law *desires*, only about what the law *requires*. Since Bentham held no ties to the natural law tradition, his formalism was of a different sort from that of Blackstone. Bentham denied that considerations about 'natural justice' are a part of the judicial decision making process. Justice, Bentham thought, is in the hands of the law makers in parliament and not the judiciary. Thus any judge who employs a legal fiction in order to achieve justice is evil. In Bentham's words: "Fiction of use to justice? Exactly as swindling is to trade."[73] With this bit of rhetoric Bentham anticipates Mitchell's definition of the fictions as "a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law.[74] This view is in contrast to that of the Roman fiction – which did not conceal; it was a conscious and deliberate mechanism employed purposely to achieve a legal result desired by the praetor.

How, then, does one escape Bentham's dilemma? Having already investigated elements of the Roman system and parts of Blackstone's Commentaries, at least one answer to this question has been foreshadowed to some extent. Bentham's belief that legal fictions are evil is the result of his extreme view of legal positivism. One could deny Bentham's claim by arguing that the employment of legal fictions, even if they

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[72] It must be remembered that around Bentham's time Equity was a system of rules separate and distinct from the common law.

[73] Bentham, *supra*, at note 61, 7 Works 283.

[74] O.R. Mitchell, "The Fictions of Law: Have They Proved Useful or Detrimental to its Growth?" in 7 Harvard Law Review (1893) 249.

do not lead to 'just outcomes', sometimes yield useful and desirable consequences.[75] One recent American commentator on legal fictions argues that:

> [i]f fictions are to justice '[e]xactly as swindling is to trade', as Bentham put it, we Americans tend to exalt trade so much that we tolerate a good deal of swindling. Indeed, we embrace the Yankee trader, the flim-flam man, and the innovative judge.[76]

As a good utilitarian, one would think that Bentham should have been open to this line of justification, at least in theory. Perhaps he was. But he outright denied the possibility that a legal fiction could ever be used to achieve good consequences. To comprehend precisely why Bentham thought so requires a basic understanding of his theory of the logic of fictions.

1.4.1 Bentham on Logical Fictions

As Hart rightly points out, "Bentham's best known contribution to logic and linguistic theory is his doctrine of Logical Fictions which anticipated the early writings of Bertrand Russell on logical constructions and incomplete symbols."[77] Hart goes on to explain that Bentham's theory of logical fictions was an attempt to "dissipate the idea that words like 'duty', 'obligation', and 'right' were names of

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[75] For the Romans and for Blackstone desirable consequences resulted from the use of fictions whenever 'natural justice' or an 'equitable outcome' was achieved. To expect Bentham to accept this sort of justification would beg the question entirely. But it is worthwhile to consider why Bentham would not accept that fictions could be used in a way that maximizes utility.

[76] Aviam Soifer, "Reviewing Legal Fictions," 20 Georgia Law Review 871 at 877 (1986).

[77] H.L.A. Hart, Essays on Bentham, Clarendon Press (Oxford: 1982), p.11.

mysterious entities awaiting men's discovery and incorporation of them in man-made laws and social rules."[78] Bentham was worried that the names used to denote logical fictions would be confused with the names of real entities. He thought that "[t]hese words have been the foundation of reasoning as if they had been external entities which did not derive their birth from law but which on the contrary had given birth to it."[79]

Although Bentham was to some extent able to see through the notion that words must correspond to things,[80] it is clear that he still took very seriously the correspondence theory of truth. Consequently, Bentham thought that fictitious entities, since they correspond to nothing, must be analyzed in a special way. Bentham therefore developed a method to reduce these fictitious propositions to other statements of plain unmysterious fact. Thus, as Hart puts it, "[w]e cannot say what the words 'obligation' or 'right' name or stand for because, says Bentham, they name nothing; but we can say what statements employing these words mean."[81]

It is important to grasp the reason for such an endeavour. As noted above, Bentham was worried about the possible consequences that ensue when fictitious entities are mistaken for things. This worry is indeed legitimate, as we shall see in chapter #4. One manifestation of it recognized by Bentham was the result of the

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[78] H.L.A. Hart, *Ibid.*

[79] Bentham, *supra*, at note 61, 8 Works 322.

[80] In fact, as Hart points out, Bentham's idea that sentences and not words are the unit of meaning anticipates the work of Frege and Wittgenstein.

[81] H.L.A. Hart, *supra*, at note 77 at 11.

pervasive personification of fictions. According to Bentham and his followers, personification was an instrument of delusion cleverly employed to reconcile the population at large to the rule of the few:

> Thus the designation for kings becomes the Crown, for churchmen the Church, for lawyers the Law, for judges the Court, for rich men Property. As a result, any unpleasant ideas associated with the individuals of the class in question are purged, and in their place a fictitious object of respect is created.[82]

One need only reflect briefly upon the political rhetoric of our own time to understand Bentham's concern for the consequences that can result from such terminological inexactitude.[83]

At this point it is worth noting that Bentham distinguished fictitious entities like 'duty' and 'right' from the names of what he called the "*fabulous*, i.e. imaginary *persons*, such as *Heathen Gods*, *Genii*, and *Fairies*."[84] Although Bentham thought that it would be wrong to put *fictitious* entities on par with *real* things by considering them to exist in reality, he supposed of them "a sort of verbal reality, so to speak..."[85] This "verbal reality" distinguishes *fictitious* entities from the

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[82] R. A. Samek, "Fictions and the Law", 31 University of Toronto Law Journal 290 at 297 (1981).

[83] For example, Wayne Sumner, in The Moral Foundation of Rights, Oxford University Press, (New York: 1987), shares Bentham's worry while, at the same time, epitomizes it with his discussion of what he calls "a proliferation" of rights claims.

One can only imagine how loudly Bentham would have screamed "Anarchy!" upon hearing some of the claims that Sumner was also concerned with, for example, the non-smoker's right to a smoke-free environment or the recent talk of the ecosystem's right to exist undisturbed by modern technology, the rights of future generations etc..

[84] Bentham, *supra*, at note 61, 8 Works 262.

[85] Bentham, *Ibid.*

fabulous, which are not real in any sense. Another important difference between ***fictitious*** entities and ***fabulous*** entities is that, while neither correspond to things, Bentham held the former to be necessary for the very possibility of modern discourse. Bentham recognized logical fictions as mere tools but as tools "without which the matter of language could never have be enformed, nor between man and man any converse carried on other than such as hath place between brute and brute."[86] However, Bentham thought that the logical fiction, as a tool, must serve some useful purpose. If it serves only to confuse us in discourse, it is of no use to us at all. Worse still if such confusion is put to pernicious ends. Thus Bentham thought we must ensure that logical fictions are properly analyzed and understood.

Bentham developed a fairly elaborate method for analysing logical fictions. For our present purposes no more than a thumbnail sketch is required.[87] According to Bentham, the only way to properly explain the idea of a fictitious entity is by relating it to something real. To put it in a more modern parlance, the immaterial import of a word must be explained with reference to its material meaning. To achieve this, Bentham developed two operations which he called ***paraphrasis and archetypation***:

> The ***paraphrasis*** consists in taking the word that requires to be expounded - viz. the name of the ***fictitious*** entity - and, after making it into a ***phrase***, applying to it another phrase, which, being of the same import, shall have for its principal and characteristic word the

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[86] Bentham, ***ibid.***

[87] For a full account see H.L.A. Hart's essay "Legal Duty and Obligation" in Essays on Bentham, ***supra***, at note 77 at 127. For a more brief account see R.A. Samek, ***supra***, at note 82 at 294-95.

> name of the corresponding ***real*** entity. In a ***definition***, a phrase is employed for the exposition of a single word: in a ***paraphrasis***, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word.
>
> ***Archetypation*** ... consists in indicating the ***material image*** of which the word, taken in its primeval sense, contains the expression.[88]

Bentham used these operations to understand fictitious entities like 'obligation'. To claim that someone has an 'obligation' to behave in a certain way, Bentham thought, is to say that "in the event of his failing to conduct himself in that manner, pain (or its equivalent, loss of pleasure) is considered as about to be experienced by him, that such pain is probable or likely."[89]

With this, it is clear that Bentham thought fictitious entities are only comprehensible when a natural relationship exists between them and nonfictional entities. If the fiction could not be tied to some concrete experience Bentham thought it was intellectually untenable. Here we have a very traditional empiricist approach to philosophy. The truth of a proposition is grounded in its correspondence to the external world. Following an even older tradition, stemming back to Socrates and Plato, it is clear that Bentham privileges truth and reality over falsehood and error. Fictions, since they are unreal, have instrumental value only.[90] Since a fictitious

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[88] Bentham, ***supra***, at note 61, 8 Works 126-27.

[89] Bentham "Essays on Logic" in 8 Works 247.

[90] For example, Plato's noble lie in Republic. Bentham, as we have seen, has given fictitious statements a more expansive instrumental worth: they allow us to converse in a sophisticated manner.

entity does not exist in reality it has no intrinsic worth. It is for this reason that Bentham thought that fictitious statements which were espoused as true are evil unless they serve some linguistic end. Without the proper methods of analysis, one might come to believe them to be true in fact. This distorts reality and impedes the philosophical search for truth.

While Bentham admitted a legitimate need for *logical* fictions like'rights' and 'duties', he was unwilling to extend a need for *legal* fictions. Bentham did not think that legal fictions are required for legal discourse:

> No man ever thought of employing false assertions where the purpose might equally have been fulfilled by true ones. By false assertions, a risk at least of disrepute is incurred: by true ones, no such risk.[91]

Further, Bentham thought that the fictions of common law adjudication could not possibly be analyzed in the way that logical fictions could. Since the very purpose of a legal fiction is to falsify certain facts, there can be no natural relationship between a legal fiction and reality. Legal fictions negate reality. Bentham would not put up with this.

1.5 Maine

Maine, a near contemporary of Bentham, held a very different view of the place of legal fictions in the history of law. He thought that:

> We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To

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[91] Bentham,*supra*, at note 63.

> revile them as merely fraudulent is to betray ignorance of their particular office in the historical development of law.[92]

In order to understand their particular office Maine, in his Ancient Law, provides a developmental view of legal history. Law and social order progress through several stages, starting with a primitive legal society, moving through a period of customary law until, finally, the law becomes codified. On this evolutionary historical model, law develops as society progresses. Of course, the ever-changing needs of a progressive society always roll ahead of the law, which operates upon the wheels of progress more as a brake than an engine. For this reason, certain instruments are required to achieve harmony between the law and the evanescent attitudes of a progressive society. Maine describes the historical development of three such instruments: legal fictions; equity; and legislation.

Maine held that fictions, in all their forms, are particularly congenial to the infancy of society. Thus they were the first of the three legal instruments to develop because, as Maine put it:

> They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law.[93]

Thus fictions, for Maine, are the most conservative method of achieving changes in the law. Maine employed the expression 'legal fiction' to signify:

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[92] Maine, *supra*, at note 70 at 27.

[93] Maine, *Ibid.*

> any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.... The fact is ... that the law has been wholly changed; the fiction is that it remains what it always was.[94]

This very broad conception of the legal fiction distinguishes it from its Roman predecessor which did not attempt to conceal its falsehood. It was precisely this cloaking effect that worried Bentham and his adherents.

Maine was well aware of the consequences of allowing the use of an instrument that conceals its own falsity. Indeed, he pointed out a certain naivete in Blackstone's nonchalance about the surviving legal fictions. Yet Maine recognized that fictions exert a "powerful influence on English jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language of English practitioners."[95] With this, Maine shows certain affinities to both Blackstone and Bentham. Although he was willing to recognize a place for legal fictions in the past, as Blackstone did, Maine shared Bentham's worry about the possible dangers of keeping fictions alive.[96]

Ultimately Maine sided with Blackstone. Not only did he see fictions as a thing of the past, he did not think, as Bentham did, that the use of legal fictions must stand in opposition to the legislative process. According to Maine's evolutionary

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[94] Maine, *Ibid.*

[95] Maine, *Ibid.*

[96] Though, as we have already seen, Maine's alignment with Bentham extends only as far as the worry that fictions are "rude devices" that present an "obstacle to symmetrical classification." Maine thought that the ultimate danger of fictions was that it would make law inaccessible to legal analysts, unlike Bentham who was more concerned with laymen than lawyers.

development of the law, the instrumental application of fictions precedes a system of legislation in the natural course of things. Therefore, one need not worry that fictions will usurp legislative authority. As legal systems become more progressive, they will naturally move away from the use of fictions, first to a system of equity and then to a comprehensive system of legislation.[97]

This view of the legal fiction as an apparatus that holds steady a shaky legal foundation until an area of law is completely developed has since been embraced by lawyers in both the civilian and common law traditions. The civilian jurist Ihering, for example, said that "It is easy to say,'Fictions are makeshifts, crutches to which science ought not to resort.' So soon as science can get along without them, certainly not! But it is better that science should go on crutches than to slip without them, or not to venture to move at all." Ihering saw legal fictions as a tool useful for mending broken bones in the law. This is not altogether different from the later view of the common law jurist Gray who, in a way similar to Blackstone and Ihering, spoke of fictions as "scaffolding, – useful, almost necessary in construction, – but, after the building is erected, serving only to obscure it.[98] What is common among all of these theorists is the idea that legal fictions are useful and perhaps even necessary at some point in the development of law but ineffectual and superfluous once an

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[97] It will be interesting to see how this hypothesis has stood against the test of time. Although Maine's view of the fiction is still most prevalent, one of the central purposes of this dissertation will be to argue that fictions are not a thing of the past, that they are still frequently in use, and that a deeper understanding of their role in legal theory and practice is required.

[98] Gray, *supra*, at note 4.

area of law has developed. The culmination of this long line of thinking can be found in the writings of Vaihinger who had much to say about fictions in general.

1.6 Vaihinger

Vaihinger, the author of The Philosophy of *As If*, built his entire philosophical point of view around the role that fictions play in human thinking. Vaihinger recognized great utility in the use of consciously false premises to reach valid conclusions. His influences include Plato's myths, Schiller's verse ["In error only is there life, and knowledge must be death"], and Kant's struggle with contradiction in the realm of metaphysics.[99] But it was clearly Schopenhauer's embrace of the irrational element in human thinking that impressed him most:

> This theory of Schopenhauer's seemed to me to be so fruitful that it called for expansion and general application. In my notes of the years from 1872 onwards this universal 'Law of the Preponderance of the Means over the End' is constantly recurring. Everywhere I found evidence that an original means working towards a definite end has the tendency to acquire independence and to become an end in itself. Thought, which originally serves the purposes of the will and only gradually becomes an end in itself was the most obvious special case of a universal law of Nature that manifests itself in new forms always and everywhere, in all organic life, in the processes of the mind, in economic life, and in history.[100]

In describing the project, Vaihinger expressed that "'As-if' (i.e., the consciously-false) plays an enormous part in science, in world philosophies, and in life."[101]

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[99] See Samek, *supra*, at note 82 at 299-300.

[100] Vaihinger, The Philosophy of *As If*, trans. C.K. Ogden, 1924, p.xxx.

[101] Vaihinger, *Ibid.*, at xli.

Vaihinger's goal was to provide a complete enumeration of all of the methods in which we operate intentionally with consciously false ideas.

Vaihinger argued that fictions facilitate almost every kind of human reasoning. Vaihinger maintained that fictions could be employed honestly, so long as they are used in a way that recognizes their falsity and so long as they are employed with a view to achieving 'true' results. Fictions are a false means to a true end. They can be used legitimately to build a theory or explain something but, since they are merely an expedient means to truth and understanding, Vaihinger held that we must disregard them as soon as their utility in an enterprise is exhausted. Vaihinger would have approved of Gray's use of the scaffolding metaphor. The falsehoods may be useful in constructing 'true' theories, but once the theory is firmly in place the fiction, like scaffolding, is torn away from the construct and it is discarded.[102]

Vaihinger distinguished very carefully between scientific fictions and hypotheses. A hypothesis is a proposition that is assumed to be true so that it can be tested and verified. It is, so to speak, up for grabs. A fiction, on the other hand, is known to be false from the outset. It is employed only for its utility.

> Thus the real difference between the two is that the fiction is a merely auxiliary construct, a circuitous approach, a scaffolding afterwards to be demolished, while the hypothesis looks forward to being definitely established. The former is artificial, the latter natural. What is untenable as an hypothesis can often render excellent service as a fiction ... On the other hand, a fiction may become superfluous in the course of time, and we know that thought is always glad to throw away its crutches. But the main types of true fictions are never

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[102] See K. Scott Hamilton, "Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Studies", 35 The Wayne Law Review 1449 at 1460 (1989).

> repudiated by thought, for without them reflection and analysis would be quite impossible.[103]

Vaihinger never applied his theory of As-if to the role of legal fictions in common law adjudication. However, a few American authors have.[104] According to one of them, if 'truth' is viewed as the correct legal result in a given case, once the fiction is employed by a judge to reach a particular result and that decision is rendered, the fiction may then be discarded:

> Under Vaihinger's theory, when a judge reaches a legal conclusion by relying on a fictional assumption, the fiction only 'exists' for the purposes of that result. It will not become enshrined as a substantive component of the common law by virtue of its use by a judge, but would merely be a tool used by a judge on the occasion of the decision. In terms of *stare decisis*, the act of using a particular fiction may have procedural import, but the fiction itself would not enjoy any precedential value in subsequent cases that attempt to hinge rights and liabilities on the fictional concepts developed in an antecedent case. In other words, the court's mode of analysis is woven into the fabric of the common law, but the substance of the fiction is not.[105]

Thus, not unlike mathematical concepts such as $\sqrt{-1}$ a legal fiction has no counterpart in reality and, after serving some useful purpose, it must be removed from the equation or, in Vaihinger's parlance, it must "drop out of the final reckoning."[106]

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[103] Vaihinger, ***supra***, at note 100 at 88.

[104] For example, see Hamilton, ***supra***, at 102; J.B. Stoneking, "Penumbras and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making", 87 West Virginia Law Review 859.(1985)

[105] Hamilton, ***supra***, at note 102 at 1462. Hamilton's account is indeed a plausible application of Vaihinger's theory of fictions to the realm of common law adjudication. Whether Hamilton is correct about the benign effect of using fictions in common law analysis is another matter. This claim will be thoroughly scrutinized in Chapter #3 of this thesis.

[106] Vaihinger, ***supra***, at note 100 at 194-219. Whether and to what extent this is true, I will discuss in chapter #3.

1.7 Legal Scaffolding and the Infrastructure of the Law

In the third and final chapter of his Legal Fictions, Fuller examined Vaihinger's theory of fictions by considering whether and to what extent fictions are an indispensable instrument of human thinking. Although he thought that particular fictions "drop out of the final reckoning", Vaihinger argued that without fictions human thinking would be impossible. For our present purposes, it will be important to distinguish the general question about whether fictions are indispensable to human thinking from the more specific question about whether legal fictions are essential to the practice of law today.[107]

As we have already seen, Bentham held that *logical fictions* are necessary for the very possibility of modern discourse. Bentham thought that without notions such as 'rights' and 'duties' there could be no such thing as legal discourse. He therefore recognized logical fictions as conceptual tools "without which the matter of language could never have be formed, nor between man and man any converse carried on other than such as hath place between brute and brute."[108] Despite their different philosophical outlooks, Bentham, Vaihinger, and Fuller have all affirmed an idea that goes back at least as far as Plato; namely that the existence of certain entities are a necessary precondition for the very possibility of discourse. These so-

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[107] Fuller seemed to think that the second question is bound up in the first: "To understand the legal fiction we must undertake an examination of the processes of human thought generally." [Fuller, ***supra***, at note 49 at 94.]

[108] Bentham, ***supra***, at note 85.

called "fictions" are a necessary instrument of human thinking. We could not do without them.

If we turn our attention more specifically to thinking about the law, we see that there are a number of basic legal concepts that are required for legal discourse. They are not, to use Vaihinger's terminology, hypotheses which are empirically verifiable. Although the need for some of these concepts is challenged from time to time, ***without any*** our common law system could not exist in its present form. For this reason I shall call these concepts the ***infrastructure of the law.*** Without them, there would be nothing to talk about in a legal context; no way to get between point A. and Point B. I have introduced the infrastructure metaphor because I think it will lend clarity to the historical characterization of legal fictions. Notionally separate from legal fictions are Bentham's 'logical fictions', and Fuller's 'legal postulates and premises.'[109] These concepts enform the basic installations and facilities upon which the continuance and growth of the law depend. They are, in a sense, the foundations of the law. As foundations, these legal concepts must be distinguished from Blackstone's 'winding approaches', Gray's 'scaffolding', Ihering's 'crutches' and Vaihinger's 'scientific fictions.' The latter are examples of legal fictions. It is only within this latter category that we feign anything.

Legal fictions, unlike the logical fictions that make up the infrastructure, are not indispensable elements of our common law system. At best, they are sometimes

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[109] Fuller's postulates and premises will be further discussed in chapters #2 and #4. The nonfictional elements of infrastructure, as I call it, will be further discussed in chapter #4.

useful expedients. What can be gleaned from all of this is ***a very clear distinction*** between Fuller's general question about whether fictions are indispensable to human thinking and the more specific question about whether legal fictions are essential to the practice of law today. Since the legal fiction is not at all an instance of the logical fiction, but something else, it is not a part of the infrastructure of the law. Consequently, the question whether fictions are indispensable for human thinking is different from the question of whether legal fictions are necessary for legal theory and the practice of law. Thus it would be wrong to infer that legal fictions are necessary in the law simply because logical fictions are necessary for the possibility of legal discourse. Therefore, the question about the role of legal fictions in law must be pursued in another way. This will form the subject matter of chapter #2 where we will examine Fuller's attempt to justify the employment of legal fictions based on their supposed utility.

1.8 Synopsis

The historical debate considered above reveals a number of important issues that arise with the use of legal fictions. One of the central characteristics attributed to the legal fiction throughout its history was a certain sort of duality. On the one hand, legal fictions seemed to be, in some sense, necessary. On the other hand, the legal fiction was continually recognized as a menace, if not a danger, both to the theory and practice of law. I have attempted to make sense of this duality by distinguishing between legal fictions and other so-called "fictions" that make up what

I have called the infrastructure of the law.[110] This distinction helps restrict the definition of a legal fiction. A legal fiction is an assumption of fact made by a court in order to facilitate a decision in a legal dispute. Thus legal fictions, though they have held an important historical place in the development of the law, are not the conceptual entities that are necessary for the possibility of law. They are auxiliary assumptions made long after a legal system is already operational. Here the historical dialogue raises an important issue. With a narrow conception of the legal fiction, one which distinguishes legal fictions from legal foundations, the question of whether legal fictions are a ***necessary*** architectural feature in our present legal castle remains open and worthy of pursuit.

A second major issue seen in the historical exchange centered around a concern about the ***function*** of legal fictions. Some jurists, Maine for example, have argued that fictions conceal the fact that the law has undergone change at the hands of the judiciary.[111] Others, like Austin, following the Roman tradition, maintained that "[i]t is ridiculous to suppose that such fictions could deceive, or were intended to deceive: or that authors of such innovation had the purpose of introducing them covertly."[112] This unresolved historical issue is also worthy of pursuit.

A third issue, one that is connected with the second, has to do with the ***danger*** inherent in the use of legal fictions. Historically, as we have seen, this issue

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[110] I refer to these as ***so-called "fictions"*** because in chapter #4 of this thesis I will argue that it makes some sense to think of them as the nonfictional elements of our common law system.

[111] Maine, ***supra***, at note 93.

[112] J. Austin, Lecture on Jurisprudence or the Philosophy of Positive Law, p.308.

was addressed to some extent by Bentham and Maine. Unfortunately, neither provided a very substantial analysis of what exactly these dangers are or how they make themselves manifest. Achieving this end requires a more contemporary look at the theory of legal fictions and how they are used in practice today.

All three of these issues will be addressed in chapters #2, #3, and #4 of this dissertation. Chapter #2 will focus on the motives that give rise to legal fictions via Fuller's contemporary theory of legal fictions. Chapter #3 consists of a practical case study of the use of a particular historical fiction in the Canadian courts. Chapter #4 provides a description of the background conditions that underlie our use of legal fictions.

CHAPTER #2

FULLER'S THEORY OF LEGAL FICTIONS

2.1 Fuller's Project

Written originally as a series of three papers when Fuller was twenty-eight years old, the final version of Legal Fictions,[1] published more than thirty-five years later in a form virtually unchanged, is one of the few full texts on the subject. It is also the text most relied on in contemporary discussions about legal fictions. For this reason, it is worth pursuing Fuller's conception of legal fictions in some detail. One of the primary aims of this chapter is to provide an account of some of the more salient aspects of Fuller's theory of legal fictions as well as to show where Fuller's project falls short. This aim is sought not merely to review the profits and pitfalls of Fuller's account but also to provide some of the preliminaries for my own investigation of the legal fiction, which will ensue in the following two chapters.

In his introduction Fuller expresses the nature of his interest in the subject by suggesting that the fiction represents the pathology of law:

> When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions. There is also little occasion for philosophizing, for the law then proceeds with a transparent simplicity suggesting no need for reflective scrutiny. Only in illness, we are told does the body reveal its complexity. Only when legal reasoning falters and reaches out

[1] Lon L. Fuller, Legal Fictions, Stanford University Press, (Stanford: 1967).

> clumsily for help do we realize what a complex undertaking the law is.[2]

Though situated in a legal context, Plato's voice rings clear in this passage. Plato often used the medical model to characterize and discuss philosophical problems. Here Fuller borrows Plato's technique. When legal reasoning falters and reaches out clumsily for help, legal fictions are prescribed by the doctors of the law. Afflictions in the life of the law are thus healed by the gifted hands of philosophical-physicians.[3]

Yet for Fuller, the fiction is less a panacea than it is evidence of a deeper pathology. The fiction is a manifestation of the undertaking that law thrusts upon us. It is, as Fuller says, a symptom of the complex relation between theory and fact, between concept and reality. Because the law claims to be comprehensive, fictions are required when theory does not fit the facts or when established legal concepts are out of step with reality. In law, unlike noncomprehensive disciplines, the threat of mental paralysis which can occur when concept and reality do not meet is particularly distressing. As Fuller rightly points out:

> The judge cannot say, "For the litigation now before me there happen to be no clearly formulated rules, so I shall simply leave it undecided."[4]

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[2] Fuller, ***Ibid.***, at viii.

[3] That is, legal scholars and members of the judiciary. It is interesting to compare Fuller's Platonic tone here to the similar sound in Dworkin's recent treatment of the judiciary in Law's Empire, Harvard University Press, (Cambridge: 1986).

[4] Fuller, ***supra***, at note 1 at x.

In this sense legal fictions are less like a crutch, to use Ihering's phrase, and more like a prosthesis. They bridge the gap when the legs of the law do not quite reach the floor. But, at the same time, the falseness of these plastic limbs of the law also serves as a reminder of our potential for intellectual immobility. This duality of the fiction, that it is both defect and remedy, continually intrigued Fuller.

One of the effects of this intrigue was for Fuller to view the fiction as a skeleton in the jurisprudential closet. Keeping it in the closet, thought Fuller, is both dangerous and unbecoming. Therefore, we must take it out of the closet and subject it to a thorough examination so that we may then decide whether it is worth trying on, hanging up, or throwing out. Thus the aim of Legal Fictions is not only an attempt to characterize the previous use of the fiction but also to defend its current use in common law adjudication. In fact, Fuller's intent goes even further. By characterizing the fiction as a symptom of the pathology of law, Fuller's aim is clearly prescriptive. Part of the project is devoted to showing how, when, and why lawyers and judges should dispense a legal remedy by way of the fiction.

As an attempt to defend the current use of fictions and to provide lawyers and judges with advice about how to use them it is my contention that Fuller's project is incomplete, as I shall indicate at various points in this chapter. Although he says many interesting and insightful things about legal fictions, some of which I shall discuss in detail, Fuller never examines the actual operation of the fiction in the course of legal analysis. Neither does he consider the philosophical background conditions required to understand how the fiction operates in legal analysis. Though

it is clear that he thinks legal fictions are sometimes useful, Fuller leaves lawyers and judges with little guidance about how, when, and why legal fictions are and ought to be employed.

Notwithstanding these defects, Fuller's theory of legal fictions has much to recommend it. I will begin this chapter with an examination of Fuller's definition of the legal fiction. Once this is accomplished, I will consider what I take to be one of the main contributions of Legal Fictions, namely, Fuller's examination of the motives for adopting them. After that I will briefly explore an idea which Fuller rejected: the juristic theory of truth. This will, foreshadow, in part, what is to come in chapter #4 of this dissertation, where I attempt to describe the background conditions that underlie the use of legal fictions.

2.2 Fuller's Alternative Definition of the Legal Fiction

Fuller's attempt to define the fiction in a way that approximates its current usage amounted to the following disjunct:

> A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having some utility.[5]

Fuller explains that there is often underlying the seemingly illogical usages of language a penetrating comprehension which does not find expression in any other way. Consequently, Fuller acknowledged that when a false statement is employed

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[5] Fuller, ***supra***, at note 1 at 9.

knowingly to express something that could not otherwise be said, it has a certain value. It is useful.

Both aspects of Fuller's definition have some rather obvious appeal. Still, it is not clear exactly how the two work together to accurately depict the legal fiction.[6] Fuller recognized that, on the face of things, his definition seemed to embrace two entirely discordant elements. Fuller describes his conception of the legal fiction as an "alternative definition."[7] In the first alternative the criterion is "consciousness of falsity," in the second "utility." Presumably by this he means that the definition of a legal fiction can be met by either criterion. In other words, that each of the two criteria is, on its own, a sufficient condition for a legal fiction though neither criterion is itself necessary.

Whether and to what extent he actually meant this, however, is unclear. If the alternative aspect of Fuller's definition is taken literally, then his definition is far too broad, as we shall see in the examination of each criterion below. Fuller openly acknowledged this possibility. His acknowledgement seems to provide leeway for another interpretation of his definition. After defining the fiction in the form of an alternative, in Fuller's very next breath, he practically conflates the two alternative elements by saying: "In practice, it is precisely those false statements that are realized as being false that have utility."[8] While other jurists have been careful to delineate

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[6] Part of the reason for this is because Fuller's alternative definition is stated as a summary of a long, sketchy discussion.

[7] Fuller, ***supra***, at note 1 at 9.

[8] Fuller, ***Ibid.***

the construction of the fiction from its merits, perhaps it is more charitable to view both elements of Fuller's definition as necessary conditions which, when taken together, are sufficient for the existence of a legal fiction.[9] On this reading the two elements are not alternatives at all. If this is indeed the case, it is certainly an interesting twist on the traditional understanding of the fiction. It is interesting because it builds the justification for using the fiction right into its very definition.[10]

Since it is unclear how one should interpret the logical relationship of the two elements of Fuller's definition it is worthwhile to discuss each of them separately, keeping in mind both of the possible interpretations outlined above.

2.2.1 Statement Propounded with Consciousness of its Falsity

The criterion that a legal fiction is a statement propounded with a consciousness of its falsity dates back to the fiction of Roman law of which Austin maintained "[i]t is ridiculous to suppose that such fictions could deceive, or were intended to deceive: or that authors of such innovation had the purpose of introducing them covertly."[11] By including the consciousness of its falsity as an essential aspect of the definition of the legal fiction, Fuller distinguishes himself from

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[9] This becomes clear with his later discussion of the motives that give rise to the legal fiction, which will be considered below in section 2.3.

[10] It is also interesting because, if this understanding of the legal fiction is correct, Fuller now has a response to the criticisms of Olivier and Honoré discussed below [at notes 24 and 26]: if utility is a necessary condition of the legal fiction, then it makes no sense to say that there are fictions that do more harm than good or that it is arguable that all do so. Whatever those harmful things are, they are not, by definition, legal fictions. On this interpretation, there can never be an instance of a legal fiction that is not useful.

[11] J. Austin, Lecture on Jurisprudence or the Philosophy of Positive Law, p.308.

Bentham, Maine, Mitchell, and others, who thought that fictions are used to conceal the fact that the law has undergone some change at the hands of the judge.[12] Since, by definition, the legal fiction requires an acknowledgement of its falsity, Fuller thought that it could never be used to conceal or to deceive. Consequently, Fuller distinguished legal fictions from lies.

While Fuller, following Austin, is quite correct in his analysis, he is rather imprecise. What makes a false statement a fiction under this criterion is not merely the fact it was propounded with a consciousness of its falsity. What distinguishes the fiction from a lie is the fact that there is a public awareness of its falsity in the case of the fiction.[13] This distinction can be illustrated by examining the elements of deception required in order for a liar to meet his objectives.

To meet his objectives the liar must accomplish three things. First, though the liar might be unaware of the truth of the matter, he must at least know what the truth is not. The liar will then communicate some non-truth to an audience as though he believes it to be true. Finally, if the liar is to meet his objectives, the audience must come to believe what he said to be the truth. Clearly, from the first and second criteria, the liar must be aware of the falsity of the communicated statement. Thus an acknowledgement of the falsity of the statement will not, on its own, distinguish the fiction from the lie. What distinguishes them is the fact that the liar's objectives preclude the possibility of a public awareness of the falsity of his statement. If the

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[12] For a further discussion of this position see chapter #1 of this thesis.

[13] I owe this point to Richard Bronaugh.

audience is aware of the falsity of his statement, the liar's objectives can never be met since his audience will not believe what he said to be true. It is this general awareness or public consciousness of the falsity of the statement that distinguishes the employment of legal fictions from the telling of lies. Since the fiction is employed with a public acknowledgement of its falsity, Fuller thought that it could never be the "white lie"[14] of the law that Ihering thought it was, nor the "wicked lie"[15] that Bentham thought it was.[16]

One interesting revision that Fuller makes in his definition, however, is that he thinks there are different degrees of awareness with respect to the falsity of the fiction. Unlike his Roman predecessors who wore their fictions on their sleeves, always employing them with a complete public awareness of their falsity, Fuller recognized that the modern legal fiction employed by lawyers and judges is sometimes used with only a partial consciousness of its falsity:

> How many of us, in discussing a legal problem, have had the experience of making a statement with a vague feeling in the back of our minds that the expression was in some unexplained way inadequate, inaccurate – even fictitious – without being able at the time to formulate the precise nature of its inadequacy? On such occasions, lacking the time or mental energy for a more complex analysis, we are apt to rush on in the devout hope that a half-consciously-felt defect in our expression could be shown not to affect

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[14] Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (6th ed., 1924), p.305.

[15] J. Bentham, 7 The Works of Jeremy Bentham (ed. Bowring 1962) 283.

[16] The above analysis would suggest that the 'magic' of a stage magician provides a more suitable analogy of the legal fiction than does the liar. During the performance, there is a clear public awareness of the deception. Still, it is accepted because it serves a purpose (namely entertainment). I owe this analogy to Barry Hoffmaster.

> the validity of the statement in its context. We trust that our statement is at least metaphorically true.[17]

In fact, Fuller used the degree of the awareness of its falsity as the benchmark for testing the safety of employing a particular legal fiction. Fuller thought that "the danger of the fiction varies inversely with the acuteness of this awareness. A fiction becomes wholly safe only when it is used with a complete consciousness of its falseness."[18] According to Fuller, "a fiction taken seriously, i.e., 'believed', becomes dangerous and loses its utility. It ceases to be a fiction under either alternative of the definition given above."[19] This is because a false statement that is believed is no longer distinguishable from an erroneous conclusion. Fuller wanted to differentiate between the legal fiction and a particular type of erroneous conclusion in science that he oddly referred to as the 'false hypothesis'. Sometimes an hypothesis that is false is believed to be conclusive. When false hypotheses are believed, they no longer operate as working assumptions. They are erroneously accepted as decisive theoretical explanations. Likewise with the legal fiction that is no longer acknowledged to be false. Once the fiction is believed to be true, it is no longer merely an assumption.

Here Fuller follows in Vaihinger's footsteps. Vaihinger, who was himself influenced greatly by Schopenhauer's 'Law of the Preponderance of the Means over

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[17] Fuller, ***supra***, at note 1 at 8.

[18] Fuller, ***Ibid.***, at 10.

[19] Fuller, ***Ibid.***

the End', was deeply concerned with the phenomenon that "an original means working towards a definite end has the tendency to acquire independence and to become an end in itself."[20] The result of this phenomenon is that we sometimes tend to confer the very same importance upon what was once a mere means to an end as we grant to the end itself. Applying this phenomenon to the case of legal fictions, the false statement employed to achieve some valuable end itself tends to become valued. Somehow the false statement is believed to be true.

Despite this worry Fuller was prepared to accept a limited awareness of the falsity of the assumption. In fact Fuller thought that "[t]he 'half-conscious' insight into the falsity of the assumption ... will normally be a sufficient safeguard against the harmful application of it."[21] So long as there is some recognition of the falsity of the assumption, the fiction remains an assumption and is not treated as though it were a conclusion held by its author.

2.2.2 False Statement Recognized as Having Utility

The criterion that a fiction must be a false statement recognized as having utility also has strong historical backing. Though they were by no means thinking about utility in any modern sense, even the Romans thought that the fiction must be of use; it must be of use to justice. Blackstone also recognized the fiction as "highly

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[20] Vaihinger, The Philosophy of *'As If'*, trans. C.K. Ogden, 1924, p.xxx.

[21] Fuller, ***supra***, at note 17.

beneficial and useful."[22] Maine went so far as to say that "[a]t a particular stage of social progress they are invaluable expedients for overcoming the rigidity of the law."[23] Historically, one could say, the notion of utility has always been tied to the utilization of legal fictions. After all, few traditions have valued an avowal of false statements for their own sake whether done consciously, half-consciously, or unconsciously.

Though it is true that utility is a serious consideration when deciding whether to employ a fiction, it is unclear precisely how the notion of utility is to fit into the definition of the legal fiction. Nowhere in Legal Fictions does Fuller elucidate what he means by the concept of utility. This is problematic. When does a false statement have utility? When it is used to overcome the rigidity of the law? When it serves justice? Without providing an answer to these sorts of questions, Fuller's second criterion allows for a catalog of fictions that is virtually boundless depending on one's understanding of 'utility'. As one South African commentator put it:

> The second part of [Fuller's] definition is extremely vague and in fact tells us nothing about the construction of the fiction.[24]

This objection is perhaps a bit strong. In addition to the charge of vagueness, part of Olivier's complaint is that the definition of fiction must be distinguished from the justification for its use. For Olivier, utility is not part of the definition of the fiction.

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[22] Blackstone, 3 Commentaries 43.

[23] Maine, Ancient Law, 3rd ed. (London: 1870) 27.

[24] Pierre J. J. Olivier, Legal Fictions in Practice and Legal Science, (Rotterdam University Press: 1975), p.35.

y including utility in the definition Olivier thinks that Fuller avoids the more important elements of the construction, which are essential to understanding its use.[25]

Even if Fuller had been more precise in the second part of his definition he might still be subject to the following reproach:

> This curious bifurcated definition has little to commend it, since there can certainly be fictions which do more harm than good, and it is arguable that all do so.[26]

Here Honoré demonstrates his concerns about the danger of misusing the fiction. This criticism also highlights the difficulty of interpreting the logical relationship of the two elements of Fuller's "curious bifurcated definition." Obviously Honoré's critique is relevant only if utility is a necessary condition of the fiction. Yet even if Honoré's interpretation is correct, his criticism might not be. If a necessary condition of a fiction is that "it is recognized as having some utility" and if "utility" is taken to mean that the fiction is more useful than not (i.e. it has "net utility") then Honoré is wrong to say that "there can certainly be fictions which do more harm than good."[27]

If Honoré's interpretation is wrong and utility is a sufficient condition, not a necessary one, then there are other difficulties with the second part of Fuller's definition. If every "false statement recognized as having utility" were to count as a legal fiction, the inventory of fictions would again be far too expansive. In particular

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[25] See section 2.2.3 below.

[26] A.M. Honoré, 13 Natural Law Forum 170 (1968).

[27] See note 10 above.

it would include all sorts of statements that Fuller did not consider to be legal fictions. For example, it would allow all lies and erroneous conclusions to count as legal fictions, so long as they are useful. Part of the problem here results from the fact that only the utility of the statement and not its falsehood must be recognized according to Fuller's second criterion. This, of course, completely undercuts the first criterion in Fuller's definition discussed above. It also faces the problem of comporting with justice.[28]

2.2.3 Missing Elements in Fuller's Definition

Regardless of how it is construed, it is also worth noting that Fuller's definition neglects a number of elements that have traditionally been considered essential to the concept of a legal fiction.[29] First, Fuller's definition makes no mention of the fact that the fiction must be lawful. Not just any useful but false statement will count as a legal fiction. The fiction must be prescribed or, at least, permitted by law. This element of the legal fiction enables us to distinguish between the fiction that is lawful and an instrument of the law, and fraud and simulation, which are not permitted by law and consist of misrepresentation by one or more of the parties concerned in the

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[28] Anyone who has had even the slightest introduction to the theory of utilitarianism is aware of the criticism that when lies are told for the sake of their useful consequences the outcome is often unjust. Consider the almost worn out example of the sheriff who falsely accuses and hangs an innocent drifter simply because such 'telishment' will appease the vengeful attitudes of the townspeople, who are in a dangerous state of social unrest as a result of a series of brutal anonymous murders. The lesson learned by fledgling philosophers in this example is that while alleviating strife in the town might be a useful social goal, the telling of such a lie (and the actions that ensue) could not be said to be an instrument of justice.

[29] These missing elements were provided by Olivier, ***supra***, at note 24 at 35.

litigation.[30] A second missing element in Fuller's definition is the fact that a legal fiction is irrebuttable. This helps distinguish the fiction from most legal presumptions. Third, it is actually misleading to speak of the legal fiction as a false 'statement.' Though it may be subsequently expressed in the form of statement the legal fiction is not a statement. It is an assumption. In all cases an assumption amounts to a conditional acceptance of certain facts. Not so with all statements. Many statements are not conditional. Some are declarations or assertions.

Despite what has been labelled by more than one commentator an "unhappy" definition,[31] Fuller's understanding of the legal fiction is still considered "one of the classic contributions to Anglo-American jurisprudence."[32] Part of the reason for this has much to do with Fuller's excellent discussion of the motives that give rise to the legal fiction. I shall now turn to that subject.

2.3 The Motives that Give Rise to Legal Fictions

2.3.1 The Intellectual Underpinnings of the Motives

In a review of the three essays that comprise Legal Fictions, Honoré describes the chapter on the motives that give rise to legal fictions as "much the best of these."[33] Honoré quickly enumerates the four main motives with a tidbit of

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[30] See Olivier, ***supra***, at 24 at 74.

[31] See Olivier, ***supra***, at note 24 at 35 and Honoré, ***supra***, at note 26 at 171.

[32] Olivier, ***Ibid.***

[33] Honoré, ***supra***, at note 26.

commentary on each and ends with the compliment that Fuller's account seems both cogent and sensitive. While Honoré's discussion is interesting and perhaps even quite correct, it is somewhat cursory.[34] In a way, this is true of every commentary on Fuller's account of the motives that give rise to legal fictions.[35] Unnoticed in the literature on Fuller's discussion of the motives giving rise to the fiction is his description of the intellectual underpinnings which give rise to those motives. In this description Fuller characterizes the world of law. As a result, he is able to uncover certain crucial, underlying aspects of the fiction that have historically been overlooked.

Fuller begins his second chapter by distinguishing his approach from the traditional one:

> Every attempt to classify fictions on the basis of mere logical or grammatical form is doomed to sterility. A fiction becomes understandable only when we know why it exists, and we can know that only when we know what actuated its author.[36]

This notion is reminiscent of Blackstone, who once said "In simple but loose words, we only know for certain ***what*** is said when we know ***why*** it is said."[37]

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[34] To be fair, one must recognize the fact that Honoré's project here is merely a book review.

[35] See for example, R. A. Samek, "Fictions and the Law," 31 University of Toronto Law Journal 290 (1981); J. Stoneking, "Penumbras and Privacy: A Study of the use of Fictions In Constitutional Decision-Making," 87 West Virginia Law Review 859 (1985); A. Soifer, "Reviewing Legal Fictions" 20 Georgia Law Review 871 (1986); K.S. Hamilton, "Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies," 35 The Wayne Law Review 1449 (1989); Louise Harmon, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 Yale Law Journal 1 (1990).

[36] Fuller, ***supra***, at note 1 at 50.

[37] W. Blackstone, 3 Commentaries 43.

Fuller bluntly states that the general purpose of the fiction is to reconcile a specific legal result with some premise or postulate. Where no intellectual premises are assumed, Fuller argues, the fiction has no place. For example:

> An autocrat, deciding disputes on the basis of instinct or selfish interest and feeling no compulsion to explain his decisions, either to litigants or to himself, would have no occasion to resort to fiction. A premiseless law would be a fictionless law ... And so we might go through the list of all legal fictions ever devised and show how they might be eliminated if we struck down some expressed or assumed premise. We may say in short that the necessity for fictions will vary directly with the number and inflexibility of the postulates assumed.[38]

The picture painted in this passage is quite remarkable, especially when one considers the natural law tendencies usually attributed to Fuller. Here the law is seen as something that we have ourselves constructed from certain chosen intellectual postulates. Sometimes this intellectual world requires judicial repair by way of the fiction. As Fuller states, "***we eliminate the necessity for fiction in direct proportion as we eliminate premises from the law, as we disencumber the law of intellectualism.***"[39]

This is certainly one of the most important passages in Fuller's entire treatment of the motives that give rise to legal fictions. Yet it goes untouched in all of the contemporary literature on legal fictions. Perhaps the reason for this omission is that

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[38] Fuller, ***supra***, at note 1 at 52.

[39] Fuller, ***ibid.*** (emphasis added).

Fuller himself does not develop the view in any detail.[40] Such an inquiry would, after all, have less to do with legal fictions than the legal world that gives rise to them. However, as I shall argue throughout this dissertation, if one really wants to understand legal fictions and the motives that give rise to them, one must also undertake an inquiry into the world that gives rise to those fictions.

Fuller's rather quick characterization depicts law as a world composed of what he calls postulates and premises. Fuller never explicates these concepts. However, calling them 'postulates' and 'premises' was likely a mistake on Fuller's part. In any event, the 'postulates' are what I identified in chapter #1 as the infrastructure of the law. They are the basic installations upon which the continuance and growth of the law depends. In a legal system they are a precondition for the possibility of legal discourse. Fuller never distinguished legal postulates from legal premises in any careful way. Fuller usually associated legal premises with accepted rules of law. Occasionally they are more obscure. Sometimes they are what Fuller described as "unexpressed and rather general and vague principles of jurisprudence."[41]

Law, says Fuller, is encumbered with intellectualism. Though he does not elaborate much on this point, it is not said with any sense of disapproval. Rather, it is an important part of his description of the law. Fuller's aim has nothing to do with

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[40] Not only does Fuller neglect to peruse in any detail the kind of intellectual premises upon which the law is constructed, he also quickly dismisses the juristic theory of truth, as will be discussed below in section 2.4.

[41] Fuller, *Ibid.*, at 53.

disencumbering the law of its intellectualism.[42] This, he thinks, would be impossible. Without such postulates and premises there could be no law. Rather his point is that if we were somehow able to eradicate each and every intellectual premise from the law there would no longer be any motive at all for adopting legal fictions. Remember that, for Fuller, the legal fiction is required to reconcile a legal premise with a desired legal result. If no legal premises existed there would be no need for reconciliation. It is precisely to the extent that we cannot disencumber the law of its intellectualism that Fuller thinks we need legal fictions.

With his recognition of the fact that "we eliminate the necessity for fiction in direct proportion as we eliminate premises from the law, as we disencumber the law of intellectualism",[43] Fuller makes a remarkable discovery. Though he himself never hit upon this point directly, ***our understanding of the legal fiction is enhanced by describing its intellectual underpinnings, i.e., by studying nonfiction in the law.*** This important aspect of Fuller's account of the motives that give rise to the fiction will be further discussed below.[44]

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[42] In fact, one could argue that Fuller's remedy for the pathology of the law is the addition of several new legal premises.

[43] Fuller, ***supra***, at note 39.

[44] In this chapter it will be addressed rather quickly in my account of Fuller's critique of the juristic theory of truth. It will be considered in greater detail again in chapter #4 of this dissertation.

2.3.2 The Expository and Emotive Function of Fictions

Fuller thought that understanding a particular fiction requires the following inquiry: "What premise does it assume? With what proposition is it seeking to reconcile the decision at hand?"[45] Fuller recognized that, in general, a fiction is intended to escape the consequences of an existing, specific rule of law. With this in mind Fuller distinguished between two basic functions of legal fictions, the expository and the emotive.

Sometimes the author of a fiction uses it as a means of conveying what she or he had in mind. In such cases the author's motive "may have been simply to achieve a succinct mode of expression."[46] When a fiction is employed for this purpose, says Fuller, it is an expository fiction. Although they are literally false, expository fictions sometimes serve as a "convenient shorthand" in legal explanation. Here fictions operate in much the same way that metaphors do in folk psychology. Just as one might describe the complicated psychological process of habit formation by saying that the repetition of an action "cuts a groove" in the nervous system, so too one might use a legal fiction as an expository device. Fuller, as a professor, certainly recognized this function of the legal fiction. As an example he cites the notion of "relation back" of title in the law of property. Following this principle, an act done today is considered to have been done at an earlier time. For example, a document held in escrow and finally delivered is deemed to have been delivered at

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[45] Fuller, *Ibid.*, at 53.

[46] Fuller, *Ibid.*

the time at which it was escrowed. Expository fictions such as this, Fuller thought, help bridge the gap between theory and fact.

Fuller recognized that legal fictions can be utilized not only to explain but also to persuade. When a fiction is employed for some rhetorical purpose, says Fuller, it is an emotive fiction. As such, it forms an important link between concept and reality. On the notion of "relation back" of title, for example, Fuller comments that:

> Every teacher of property law knows how difficult it is to convince students that the only proper function of the "relation back" of title is as a device of expression.[47]

According to Fuller, even students are able to recognize that legal fictions are sometimes used as a persuasive device intended "to induce conviction that the result is just and proper."[48] Perhaps even the author of the fiction, thought Fuller, may be as much influenced by its persuasive power as his or her audience. Fuller suggests that some fictions waiver between a purely expository and a persuasive function. It should never be assumed that every fiction is either of one type or the other. Much of this has to do with Fuller's understanding of the fiction as a ***linguistic phenomenon***. "That a statement which is disbelieved by both its author and audience can have any significance at all is evidence enough that we are here in contact with the mysterious influence exercised by names and symbols."[49]

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[47] Fuller, *ibid.* at 55.

[48] Fuller, *ibid.* at 54.

[49] Fuller, *ibid.*, at 11.

When one considers the fiction as a linguistic phenomenon, says Fuller, whether a given statement is a fiction is always a question of the proprieties of language. A statement must be false before it can be a fiction. The falsity of a statement, which distinguishes the fiction from other modes of expression, depends largely upon the inaccuracies of the statement, which must be judged with reference to the standards of language usage:

> In law we speak of the ***merger*** of estates, of the ***breaking*** of contracts, of the ***ripening*** of obligations. Vivid and appropriate are the literal connotations of these expressions – yet they are usually not even felt as metaphors. These words, and many others like them, have become naturalized in the language of the law. They have acquired a special legal significance which comes to the mind of the lawyer when they are used, so instinctively, that he is usually unaware that they have a more vivid sensual connotation.[50]

Here Fuller makes an extremely important point. These modes of expression are not fictitious. In fact, they are not false statements at all. Unlike the fiction which takes place in the action of trover, for example – in which the defendant alleges to have ***found*** a chattel when really he has ***taken*** it by force – expressions like the "merger of estates" or the "breaking of contracts" accurately describe that which actually occurred. Consequently, we must be careful not to confuse legal fictions with metaphors and other modes of expression that have become naturalized in the language of the law. Although both have an expository and an emotive function, metaphors and other figures of speech which accurately portray the reality of a situation, are not legal fictions. Since such figures of speech are used purely to

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[50] Fuller, ***Ibid.*** at 12.

describe reality and are not intended to escape the consequences of an existing specific rule of law, they are not legal fictions.

2.3.3 Conservatism and the Historical Fiction

'Historical fictions', as Maine and Pound used the term, are employed for the purpose of introducing a change in the law. Of course, effecting change is not the sole concern of judges who use fictions. Fuller rightly points out that the reason legal fictions are utilized is because they allow judges to introduce new law in the guise of old law. Fuller describes the impulse that has produced this habit of the mind as one of *conservatism*.

It is usually held that the proper role of the judiciary, as a mechanism in the law, is more like a brake than an engine. This conservative impulse of judges is, as its name suggests, a long standing tradition. Judges are supposed to interpret and apply the law, not make it. Fuller's examination reveals a number of distinct motives that arise from the general tendency towards judicial conservatism.

The first of these is what he called *conservatism of policy*. In mentioning this motive for employing the fiction, Fuller clearly recognized the worries of Bentham and Austin: "a judge, fully conscious that he is changing the law, chooses, for reasons of policy, to deceive others into believing that he is merely applying existing law."[51] Though Fuller recognized that "[i]t cannot be positively affirmed that

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[51] Fuller, *Ibid.*, at 57.

Bentham and Austin were wrong",[52] he viewed their position as a somewhat uncharitable if not completely unrealistic interpretation of what the courts are doing. Since a fiction is either recognized as a false statement or as a statement that is being employed strictly for its useful consequences, it is difficult to imagine anyone actually being deluded by it. Certainly Bentham and Austin themselves were not.

For this reason Fuller thought that the only effect of the fiction motivated by the conservatism of policy is that it is sometimes successful in obscuring the process of legal change:

> Without deceiving anyone into the belief that no change has occurred, it may serve to create the impression that the change is no greater than that involved in the ordinary case where legal principles are extended by analogy. It may temper the boldness of the change.[53]

This observation that legal fictions obscure the reasoning process is interesting, because, if right, it is curious why Fuller was so utterly unalarmed by the danger that would almost certainly result. The way that a judge reasons through a fiction proceeds much differently from, say, reasoning by analogy.[54] When a fiction is employed, a judge treats one thing as though it were something else. Something is not what it is but it is another thing, as Butler and Moore did not say.[55] Unlike an analogy, the fiction need not resemble that to which it is treated alike. A judge

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[52] Fuller, *Ibid.*

[53] Fuller, *Ibid.*, at 58.

[54] A much more detailed discussion of how the fiction actually operates than the one provided here is essential in order to make this point clear. Unfortunately, Fuller attempts no such thing. In chapter #3 of this dissertation I will.

[55] A phrase borrowed from Richard Bronaugh.

simply pretends something. Consequently, if the employment of a fiction blurs the type of change that occurs in the law, or tempers its boldness, there is at least some worry that it does so illegitimately. When one argues by analogy, one must provide reasons in support of it. The analogy is only as strong as the reasons that support its use. This is not always so with legal fictions. Sometimes a fiction is employed even though there is no real analogy between that which is fictionalized and the original facts. When this occurs there is a genuine cause for concern, as will be discussed in chapter #3 of this dissertation.

The second motive that gives rise to the fiction is referred to by Fuller as ***emotional conservatism***. This motive does not result from judicial policy but rather from a particular judge's own longing for continuity and balance. Fuller cites Cardozo on this point, who says: "We may think the law is the same if we refuse to change the formulas."[56] Fuller comments that the feeling that law always remains the same and that the existing law is capable of determining the case at hand is comforting for judges whose job it is to intervene in the affairs of fellow citizens:

> I call this the motive of emotional conservatism because it proceeds, not from some clearly formulated theory of the process of law making, but from an emotional and obscurely felt judgment that stability is so precious a thing that even the *form* of stability, its empty shadow, has a value.[57]

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[56] Cardozo, The Paradoxes of Legal Science, (1928), p.11, cited by Fuller *ibid* at 58.

[57] Fuller, *ibid*.

Fuller differentiates conservatism of policy from emotional conservatism by saying that, while the former is aimed at deceiving others, the latter involves an internal- or self-deception.

Fuller never considers whether the fictions motivated by emotional conservatism will be successful in achieving their objective. However, if one applies Fuller's own reasoning about the conservatism of policy to his discussion of emotional conservatism, it is even less clear that a fiction would ever be capable of deceiving its own author. How could a fiction ever deceive its own author if the author is aware of its falsity?[58]

Perhaps because it is unlikely that fictions result in self-deception, Fuller also cites Austin's understanding of emotional conservatism. Austin thought that fictions are often motivated by "a respect on the part of the innovative judges for the law which they virtually changed." According to Austin, and Fuller would likely concur, it is not so much that judges wish to fool themselves into thinking that they have been able to resolve the dispute at hand on the basis of existing legal principles but, rather, that their respect for continuity and coherence in the law motivates them to dress new legal principles in the guise of old ones. In the end Fuller never does say whether he thinks that merely pretending to one's self that the law is coherent while at the same time laying down an incoherent decision is an acceptable judicial practice.

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[58] One attempt to answer a more general version of this question can be found in Jean Paul Sartre's chapter on "Bad Faith" in Being and Nothingness, Washington Square Press, trans. H. Barnes, (New York: 1966). There Sartre criticizes Freud's attempt to explain the phenomenon of how one lies to one's self. Sartre then goes on to provide his own account.

A third motive for employing legal fictions, according to Fuller, is *convenience*. Fuller examines this motive by quoting Ihering at length, who thought that convenience was the dominant motive for using the fiction. Ihering thought that legal fictions ease the problems involved in the acknowledgment and explanation of new legal rules. The fiction, according to Ihering, allows old laws to be maintained while, at the same time, allowing the application of that law to develop and change. Of this motive Fuller says:

> Change always carries with it troublesome adjustments to the new situation. Let us, therefore, restrict the reform to as narrow limits as possible; let it affect the substance but not the form of the existing law. In this way existing treatises will not have to be rewritten – if one reads judiciously between the lines, everything now stated within them remains true. Lawyers will not have to change their concepts – they need only change the content of these concepts.[59]

Though he acknowledges the convenience of fictions when they are used as a shorthand or an abbreviation, Fuller is careful to confine their use to the narrowest possible limits. In fact, following Bentham's advice, Fuller contends that "it seems exceeding questionable whether it is ever truly convenient to employ a fiction where the judge introducing the reform can state the new rule in nonfictitious terms."[60]

The fourth and final motive spawned by the impulse of conservatism is what Fuller refers to, for want of a better name, as *intellectual conservatism*. Sometimes fictions are devised when a judge simply does not know how to formulate a legal rule in non-fictitious language. Rather than formulating a new rule, which would be

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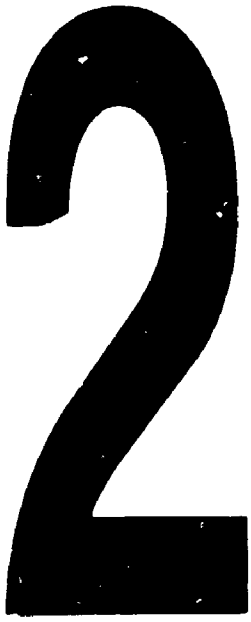
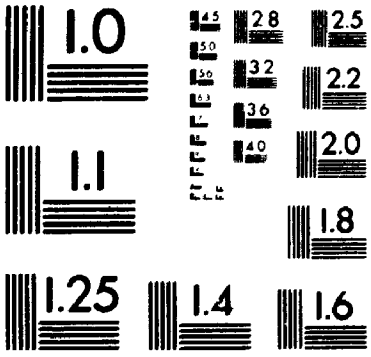
[59] Fuller, *supra*, at note 1 at 62-63.

[60] Fuller, *Ibid.*, at 63.





an extremely onerous responsibility with potentially disastrous consequences, judges are often inclined to fall back upon a well-known, well-established rule of law and fictionalize the facts of the case at hand so as to force it under the category of that rule:

> Legal categories are constantly being remade to fit new conditions. Words like 'possession,' 'estate,'and 'delivery,' have, in the course of legal history, undergone rather obvious expansion. In a less obvious way this is true of all legal categories, and is going on constantly. Generally we do not use the term 'fiction' in describing this process, for the simple reason that we are not aware of the process itself. This adaptation is so inconspicuous and gradual that it does not impress itself on our minds at all. It is only when a particular step in this process of adaptation is unusually bold and cutting that we cry 'Fiction!'.[61]

Fictions of this kind, "constructions 'feeling the way' toward some principle," as Fuller puts it, "may with justice be called *'exploratory fictions.'*"[62]

The notion of an exploratory fiction is amongst the most impressive and original contributions that Fuller makes in his study of the motives that give rise to legal fictions. With this notion Fuller recognizes the extent to which law is not nearly as comprehensive as judges often claim it to be and that judges are all too often limited by their own intellectual capabilities. Sometimes it is almost impossible for a judge to articulate precisely why a novel situation yields a particular result. To this end legal fictions are useful. Although a new principle is not yet developed, it is in the making. By viewing the fiction as a construction that helps judges feel the way

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[61] Fuller, *ibid.*, at 65.

[62] Fuller, *ibid.*, at 69.

toward some new principle, Fuller once again assimilates the fiction with other acceptable judicial techniques like reasoning by analogy.[63]

The example Fuller chooses to illustrate the exploratory fiction is the attractive nuisance doctrine in tort law. Of this fiction he says:

> This case has not been selected as typical of the process now under discussion, but rather because it is *not* typical. It is intended to show merely this: Even in the case of the crudest and most obvious fictions it is possible that the fiction may proceed from purely intellectual considerations. The judge, whose mental operations have been outlined, was not thinking of fooling others nor was he carried away by an emotional desire to preserve the existing doctrine. Neither was he considering the "convenience" of preserving the current notions. Indeed he may have been acutely aware that his own fiction would introduce inconvenience and obscurity into the law. He was simply seeking a solution for the case which was intellectually satisfying to himself. And the solution turned out to involve a forcing of the case into existing categories instead of the creation of a new doctrine.[64]

Before the fiction of attractive nuisance was constructed, the existing rule concerning the liability of those who hold property in land was that a duty of care is owed only toward 'invitees,' toward those whom landowners permit, expressly or impliedly, to enter onto their land. According to this rule, no duty of care is owed to trespassers. One day a case ensued in which a child who lived near an industrial district, attracted by the heavy equipment on the worksite, sneaked onto the land to play without the permission of the landowner. The uninvited child was subsequently injured by playing on the equipment on site. Given the rule laid out above, it is clear that since the child was neither expressly nor impliedly permitted to enter the land,

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[63] As mentioned above in the discussion of conservatism of policy, this comparison is likely problematic. For further discussion, see chapter #3 of this dissertation.

[64] Fuller, *Ibid.*, at 68.

that child is not owed a duty of care. Consequently, under the established rule, the injured child has no cause of action against the landowner in tort, even though the standard of care might have been breached had the case been one in which the child was actually invited onto the land.

When such a case arises for the first time, an intelligent judge will almost instantly recognize that applying the general rule is problematic. Children of a certain age are not always aware that they are trespassing or of what it means to trespass. Even those who are aware seldom understand the possible legal consequences of doing so. All that some children know is how much fun it is to play there. Realizing this, the judge who must decide this issue for the first time, might, depending on the particular facts of the case, perceive that the case is more closely aligned with that of the invitee than with the ordinary trespasser. Unfortunately, there exists no third, middle-category for the judge to consider. What is the judge to do? Fuller rightly points out that establishing a new rule limited to children would be a proposition that is too broad. "And would the landowner be responsible in a case where a child was aware of the danger?"[65] What about the case in which the child knew that no one was permitted onto the land to play?

While avoiding the creation of an entirely new rule and rather than saying, "[f]or reasons that are essentially inarticulate and not wholly understood even by myself, I decide for the plaintiff,"[66] Fuller thinks that in this case the best way to feel

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[65] Fuller, *Ibid.*, at 67.

[66] Fuller, *Ibid.*, at 67-68.

out a new legal principle is to fictionalize the facts so that the plaintiff fits under the category of those invited onto the land. The judge is able to use the facts to construct a situation which makes it look as though the child was actually an invitee. Since the industrial site was enticing to the child, virtually attracting the child there to play, it is almost as though the child ***was*** invited to play there. Consequently, the judge will ***pretend*** that the child was in fact invited.

Although Fuller makes no mention of it, it is obvious that the word 'invite' takes on an entirely new meaning with the employment of the fiction. Prior to the doctrine of attractive nuisance only legal persons could 'invite' (in this case the person who holds property in the land). With the legal fiction, almost as if by magic, ***the land itself*** is somehow able to 'invite'. Now the case can be decided under the existing legal categories. Since it is pretended that the child was 'invited' by the beckoning of the industrial site, it is now possible for that child to bring an action, since, according to the established rule, a duty of care is owed to all who are invited. The legal fiction allows the judge to explore what would be an appropriate principle for some children who trespass without altering, in any way, the form of the established rule. As Fuller describes it at the outset, the legal fiction enables the judge to reconcile a desired legal result with an established legal premise.

Fuller justifies the use of exploratory fictions by likening them to the empirical formulas of practical trades. Here he cites Demogue who says: "it frequently happens that we find the practical instrument for solving difficulties presented, before we discover the theoretic principles for explaining the excellence of these instruments

... The formula may be discovered before its *raison d'etre*, as industrial processes may be known before their scientific explanations."[67] This comparison is an interesting one. It reinvokes, but in a different way, an image depicted by Fuller which I discussed at the beginning of this chapter. Remember, Fuller thought that legal fictions represent the pathology of law. Interestingly enough, in the study of disease, sometimes the most successful treatment results when theory is abandoned in favour of whatever happens to work best. Usually the theoretical pieces fall into place at some later time.

But it is unclear to what extent this model actually applies to a judge who is forced to make a decision in a hard case. To what extent is the judge in this situation like a physician who is trying to solve a medical problem? This question admits of no straightforward answer. Suffice it to say for the purposes of the present discussion that there is an important disanalogy between the two. Consider the case of a physician who prescribes some successful form of treatment, i.e., one which the patient responds to with increasing physiological function and improved general well-being. Even if the physician does not fully understand exactly how or precisely why the treatment is working, the prescribed remedy can be justified so long as it is the only one that seems to be working. No doctor would ever stop a successful treatment simply because there is no known theoretical basis explaining its success. A legal pragmatist might attempt to make a similar claim about a legal remedy. If the result of a legal decision works, there is no need for any further theoretical exegesis.

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[67] Demogue, Les notions fondamentales du droit prive, pp.242, 246, cited in Fuller, *Ibid.*, at 70.

However, the disanalogy between medicine and law lies in the different criteria for determining whether the remedy prescribed actually works. In medicine the justification is made manifest by the healing process of the patient. At some point in that process both the doctor and the patient can determine with relative certainty that the particular remedy is on the road to success. And if a doctor and patient are lucky enough to reach that point, it is utterly inconsequential to them both, insofar as the continuation of the treatment is concerned, that no theory exists to account for the medical success. Of course there are other considerations where theory is of some consequence. For example: Will the treatment cause any unwanted side effects? Will the treatment be capable of long range success? What effect will this treatment have on other concurrent treatments? etc. Notwithstanding the need for theory with respect to these kinds of concerns, the important point is that theory is not required in the practice of medicine to justify a successful remedy. As Fuller points out, the same holds true of the empirical formulas of other practical trades. In both of these situations it is good enough that the theory comes later.

But in what way does this hold true of judicial formulas and prescriptions? One important difference lies in the fact that the kind of problem a judge is trying to solve is different from a medical or industrial problem. While there may exist a so-called 'social ill' with which the judge is concerned and wishes to remedy, a legal problem is always the result of a dispute between parties who disagree. Our legal system is adversarial. Consequently, when a judge prescribes a solution to some legal malady, it must contain an element of justification. The justification is meant to

explain the loss to the losing party. Because the parties disagree from the outset, it simply will not do to say, "I am deciding in favour of one party because that is what works." Obviously, the other party will deny that it works. The judge must somehow show that other party that it does. The judge must provide a *ratio decidendi*. These reasons for the decision are written for and addressed to the parties of the dispute. They are a direct response to the action that has been brought before the court. To say simply that a result works will not work. One of the parties will always disagree.[68]

2.3.4 A Synopsis of the Motives that Give Rise to the Fiction

To recapitulate what has been said so far in this section, we have seen that Fuller was sympathetic to the use of legal fictions whenever they help reconcile an existing legal premise with the desired legal result. He held that a legitimate motive for employing the fiction exists whenever the fiction tempers the perceived boldness of judicial innovation, when it serves as the most convenient method of law reform,

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[68] It is important to note that this is not to deny the possibility that a legitimate *ratio decidendi* can be justified by an appeal to general utility or on the basis of some other sort of pragmatic considerations. In that sense, it does suffice in some instances to say, "I have decided to prescribe a particular remedy in this case because that outcome works best." But the judge, unlike the physician, cannot stop at that. The judge must explain to the losing party why that outcome is the one that works best. It is precisely because of this that the judge must provide some sort of theoretical account, based on accepted theoretical principles. Unlike the physician and the industrial engineer, the judge is in no position to wait until later to develop a theory that neatly accounts for all of the phenomena. The judge has an attentive audience who might choose to appeal the case to a more attentive court. Unfortunately, a portion of that audience is not going to be convinced that the judge's remedy works, simply by watching the manifestations of it, in the same way that a patient might be convinced after receiving a dose of medicine. The criterion for "what works" is somehow quite different.

or when there is no other way for a judge to express some new legal principle. What we have not seen, on Fuller's part, is any attempt to identify the actual operation of the fiction. Yet without such an attempt one can never be sure that the fiction is properly fulfilling its objective. Does the legal premise which motivated the judge to employ the fiction in the first place really remain intact once the fiction has been employed? Has a proper justification for the desired outcome really been supplied? Fuller never addresses these questions.[69]

Still, Fuller's discussion of the conservative function of the legal fiction is instructive, especially his realization that the motives that give rise to the fiction are an indication of the extent to which law is encumbered with intellectualism. As Fuller says, "a premiseless law would be a fictionless law ... We may say in short that the necessity for fictions will vary directly with the number and inflexibility of the postulates assumed."[70] Unfortunately, this insight is one that Fuller never quite developed. Had he done so he might have seen precisely where his own project falls short.

In order to understand what a legal fiction is and how it operates one must also understand what in law is *nonfictional*. Fuller's account is unfinished because he never discusses the nonfictional elements that make up the law. Without discussing them, Fuller is unable to expose the actual operation of the fiction. Consequently he is unable to put forth any account of where the danger lies in the

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[69] I will address them in chapter #3 of this dissertation.

[70] Fuller, *supra*, at note 1 at 52.

misuse of legal fictions. Because he has not clearly defined how legal fictions operate in our common law system, Fuller leaves lawyers and judges with little guidance about exactly how, when, and why legal fictions ought to be employed.

2.4 Fuller and the Theory of Juristic Truth

The closest Fuller ever comes to providing a theory of the intellectualism that underlies our use of the fiction falls out of his quick description of two distinct methods that eliminate fiction from the law. Fuller explains that fictions can be eradicated by *rejection* and by *redefinition*:

> By rejection is meant simply the discarding of those statements that are felt as fictional ... By redefinition is meant a change in word meaning that eliminates the element of pretense; to preserve the figure used before, redefinition results in the death of the fiction. Through rejection a fiction disappears entirely; through redefinition it becomes part of the technical vocabulary of the law.[71]

Rejection was the method sought by Bentham and others:[72] simply stop using fictional precedents altogether as reasons for judgment and legal fictions will quickly become a thing of the past. Redefinition is the opposite. With continual use, the fiction becomes incorporated into the language of the law. The fiction dies and a new truth is born in its place. The process of redefinition is another fascinating instance of Fuller's understanding of the legal fiction as a ***linguistic phenomenon.*** Somehow, through its continued use, the fiction acquires not only a new meaning

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[71] Fuller, *Ibid.*, at 20.

[72] See especially J. Smith, "Surviving Fictions," 27 Yale Law Journal 147 (1917).

but a different value. Over time, it finds its way into the language of the law. At some point it becomes an acceptable justification for a decision and an appropriate mode of expression in the vocabulary of judges. At that point, it is no longer a fiction.

After describing the processes of rejection and redefinition, Fuller discusses the possibility of using either method in order to eliminate completely all fictions from the law. Of wholesale rejection Fuller thinks that it would be impossible, and inadvisable if it were possible. This is because Fuller thinks that "to reject all of our fictions would be to put legal terminology in a straightjacket – fictions are, to a certain extent, simply the growing pains of the language of the law."[73]

Acknowledging fictions as growing pains in the language of the law, Fuller recognizes that we might eventually eliminate all of the present pretenses from all of our fictions by redefinition. "We might cease to say, 'A is legally treated as if it were B,' and simply say, 'In a technical sense, A is B.' We might erect a legal world in which silence ***is*** consent, taking ***is*** finding, attracting ***is*** inviting, to bring a suit ***is*** to achieve Roman citizenship."[74]

Such a world is what Bernhöft and Bülow have described in their theory of juristic truth. As Bülow put it:

> We see then clearly that, from the moment when one introduces into the sphere of law an element of intellectual conceptualism, a portion of conventionalism, one is tempted to say that there are no fictions at

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[73] Fuller, ***supra***, at note 1 at 22.

[74] Fuller, ***Ibid.***, at 21.

> all, and that, in every legal relation, from the moment it is accepted as such, there is a reality of law.[75]

But Fuller rejects the project that attempts to redefine fictions all at once. He describes it as Pickwickian and likens it to the rants and raves of Humpty Dumpty, who said, "When I use a word, it means just what I choose it to mean, neither more nor less."[76] Fuller thinks that one could never introduce such sweeping changes in linguistic usage by arbitrary fiat and that, in general, new meanings grow only in places where they are needed. Fuller worries that the end result of any such attempt "would only result in encumbering the law with a grotesque assemblage of technical concepts lacking the slightest utility."[77]

Fuller is almost certainly right about this. A project that actually attempts to extricate fictions from the law by arbitrary judicial fiat is bound to fail. Even if it did not, it would surely lead to disastrous consequences. All of this notwithstanding, Fuller has stumbled upon another extremely important point, perhaps without even realizing it. If Fuller is right when he says that fictions are to some extent capable of redefinition and that there is a linguistic phenomenon whereby fictions somehow give rise to legal truths, then there might be more value in their use than we have so far seen. The crucial point behind all of this is that although Fuller rejects the Pickwickian project of redefining fictions all at once, ***there is no need for an***

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[75] Bülow, 62 Archiv f.d. civiistische Praxis (1907), cited by Fuller, ***ibid.***, at 21.

[76] See Carroll, Through The Looking Glass, in Martin Gardiner's The Annotated Alice, Penguin Books, (London: 1970), p.269.

[77] Fuller, ***supra***, at note 1 at 21.

outright rejection of the kernel of the idea that underlies the juristic truth, viz., the idea that the language of the law can be said to engender its own reality. In fact it could be said that Fuller has already embraced this idea to some extent in his account of exploratory fictions. The linguistic phenomenon that underlies the Pickwickian project is, in essence, nothing more than a speedier version of what is said to occur with the exploratory fiction.

Remember that, with the exploratory fiction, "[l]egal categories are constantly being remade to fit new conditions. Words like 'possession,' 'estate,' and 'delivery,' have, in the course of legal history, undergone rather obvious expansion. In a less obvious way this is true of all legal categories, and is going on constantly."[78] Put more simply, fictions eventually achieve reality. What was once a mere judicial construction with time becomes a fixed legal category. That is, the fiction evolves into an established institutional practice that gives rise to accepted legal rules.[79] As Fuller puts it, "[t]his adaptation is so inconspicuous and gradual that it does not impress itself on our minds at all. It is only when a particular step in this process of adaptation is unusually bold and cutting that we cry 'Fiction!'.[80]

The Pickwickian project of redefining every legal fiction is nothing but the attempt to achieve this linguistic phenomenon all at once. According to Fuller, the institution of language just doesn't work that way. Consequently, the Pickwickian

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[78] Fuller, *ibid.*, at 65.

[79] For further elaboration of this see my discussion of institutional facts in chapter #4.

[80] Fuller, *supra*, at note 1 at 65.

project is neither useful nor workable. However, this takes nothing away from the linguistic phenomenon of redefinition. More importantly, the fact that the Pickwickian project is either doomed or undesirable has no repercussion on the underlying notion of the juristic theory of truth. As I argue in chapter #4 of this dissertation, perhaps there is something to the idea that the language of the law can engender its own reality. Of course, if this is correct, it will be of great significance to our understanding of legal fictions. We will not know what a legal fiction is unless or until we know what in law is considered to be nonfictional.

Fuller discounts the idea that underlies the juristic theory of truth. Consequently, he never engages any theory of nonfiction in the law. As a result, all that he is able to provide is a mere description of some of the interesting aspects of legal fictions. It is my contention, however, that without some account of the nonfictional elements that underlie our need for legal fictions, there cannot be a clear account of legal fictions. Fuller's work is deficient. I will now attempt to fill in the some of these gaps with my own investigation of legal fictions in the two chapters that follow.

CHAPTER #3

THE USE OF LEGAL FICTIONS IN CANADIAN COURTS: A CASE STUDY

3.1 Introduction

In this chapter I shall examine the development of a particular legal fiction from its ancient origins in Roman and English property law up to its present use in the Canadian courts. This sustained approach is required in order to provide a richer account of the use of legal fictions than those seen so far in chapters #1 and #2 of this dissertation. My approach will build on Fuller's more piecemeal account. In addition to enriching Fuller's characterization of the fiction, part of the aim of this chapter will be to expose the dangers which arise when fictions are employed uncritically. One of my conclusions in chapter #2 was that Fuller's approach did not allow for a critical analysis of this sort. I will illustrate my point by examining a series of different judgments that employ the same fiction explicitly and consider some more recent judicial attempts to solve the same legal problem without recourse to the fiction. I will argue that these recent cases still employ legal fictions, though their use is often implicit. If I am right, there is even further cause for concern about the misuse of fictions. There is also further reason to examine the intellectual underpinnings that underlie our use of legal fictions, which will be the subject matter of chapter #4 of this dissertation.

I have chosen as my focus a particular legal fiction, that which treats the child ***en ventre sa mere*** as though it were already born. It is an excellent example of a fiction that is required, as Fuller would have put it, to reconcile a desired legal result with an intellectual premise which stands in its way. The first time this fiction was employed in the law of property was to realize a testator's intention to transfer property to a child-not-yet-born despite the existence of a legal rule to the contrary. This same fiction has since been used aggressively in Canadian courts to broaden these so-called "desired results" across several distinct areas of law. Recently, the fiction has been applied in tort law to allow newborn children to recover damages for prenatal injuries caused by the negligent actions of others. More recently still, the fiction has been employed in family law to grant injunctions against parents in order to preempt injuries that have not-yet-occurred to a child-not-yet-born. The use of this fiction gives the unborn child certain legal powers over what a parent can and cannot do, sometimes even before she or he does it. This has the ***potential*** to create an unjustifiable difference in the way that the child ***en ventre sa mere*** is treated in private law compared to its treatment in public law.

A critical examination of the fiction which treats the child ***en ventre sa mere*** as though it were already born will highlight the danger inherent in employing legal fictions in practice. It will reveal how fictions are illicitly smuggled across distinct areas of law. I will show why this use of the fiction appears to be legitimate and why, in fact, it is not. The fiction which treats the child ***en ventre sa mere*** as if it were already born was originally created to allow a grandfather's intentions at the

time of his death to comport with a well-established legal rule. When contained to such particular circumstances, this might well be the result. However, I will show how the effect of fictionalizing the facts in a particular case can work alongside the doctrine of ***stare decisis*** to erode the well-established common law rules that the fiction was used to preserve. Obviously this result is contrary to the very purpose of employing the fiction. I will also demonstrate the fact that an illicit use of some fictions can lead to contradictions in our legal system. If the child ***en ventre sa mere*** is continually treated as if it is a person in private law, it will acquire legal rights and remedies that it does not hold in public law: it will have the right to bring injunctions against a woman to restrict some of her actions while it will not have the right to prevent her from terminating the pregnancy.

3.2 The Child *En Ventre Sa Mere* in the Law of Property

While it might be said in the realms of theology and medicine that life begins at conception, in the common law world, legal personality begins only at birth.[1] This is because there exists a longstanding rule at common law that "[a]n unborn child has no existence as a human being separate from its mother."[2] This rule was epitomized by Coke in his discussion of the law prohibiting murder:

> If a woman be quick with child and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body and she is delivered of a dead child, this is ... no murder, but if the child be born alive and dieth of the potion, battery, or other cause,

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[1] David A. Gordon, "The Unborn Plaintiff" (1965), 63 Michigan Law Review 579 at 581.

[2] see the *dicta* of Holmes J. in Dietrich v. Northampton, 52 Am. R. 242 (1884).

> this is murder; for in law it is accounted as a reasonable creature, ***in rerum natura*** when it is born alive.[3]

Thus only at birth is a child considered a reasonable creature or, in modern parlance, a legal person. Once a person, the child has legal rights and remedies that are unavailable to nonpersons. At any point prior to birth, however, the child is not a person and is not entitled to legal rights or remedies.

3.2.1 Fulfilling the Testator's Intentions

The strictness of this common law rule was first encountered by judges in the law of property. The facts in Thellusson v. Woodford[4] illustrate the hardships suffered under the rule. At the time of the testator's death the wife of his son Peter Thellusson was pregnant with two twin sons, later born William and Frederick Thellusson. According to the common law rule, since the twins were not yet persons at the time of the devise, they were not entitled to inherit. Under the common law rule this was so despite the fact that the devisor bequeathed to his grandchildren "***as shall be living at the time of my decease or born in due time afterwards.***"[5] The court considered a long line of cases to determine whether the testator had

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[3] Sir Edward Coke, The Third Part of the Institute of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes (1669), 4th ed., (London: A. Crooke), p.50.

[4] (1798), 31 E.R. 117; 4 Ves. Jun. 227.

[5] ***Ibid.*** at 159.

transgressed the boundary of executory devises by extending the devise to include nonpersons.

In deciding that William and Frederick could inherit, the court followed a number of older cases including one from the Court of *Common Pleas*[6] which stated as a settled principle that, for purposes of inheriting, "the child *en ventre* is to be considered begotten and born." In Thellusson v. Woodford the court also relied on "the fiction of Roman Law that considered children in the womb as living persons" and held that this fiction has been adopted by the common law "to enable them to take legacies and devises."[7] Thus a fiction was employed so that the court could execute Thellusson's devise in the manner that he had intended it. With the fiction the court was able to honour his request without altering the rule at common law that only those who are born are persons.

The scope of this fiction in the law of property was tested in later cases. Questions ensued when a testator would make specific bequests in his will to "surviving children" or to "all living children" without a clause including those "born in due time afterwards." What would happen if the testator had a posthumous child? In other words, what if the child was *en ventre sa mere* at the time of the father's death? Would that child count as a "surviving" or "living" child that could inherit after its birth? On a strict common law analysis the child *en ventre sa mere* would not have been a "living" child since it had no existence as a human being separate

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[6] Whitelock v. Heddon (1798), 126 E.R. 883; 1 Bos. & Pul. 243.

[7] *supra*, at note 4 at 140.

from that of its mother. Consequently, the child *en ventre sa mere* could not inherit. However, in Trower v. Butts,[8] a strict application of the common law rule was found problematic. The court reasoned that, as long as the donor had not expressed or implied in the document an intention to confine the gift to children born at the date at which the gift takes effect, the posthumous child should inherit. For if the donor had thought about it at all, he would almost certainly have said that he wished to include his posthumous children among the beneficiaries. This reasoning was subsequently adopted in a number of English cases[9] and by the Canadian courts in Re Charlton Estate.[10] There the court held that if the potential existence of such child placed it plainly within "the reason and motive of such gift", the court will resort to a legal fiction and construe the will so as to include the child by finding him alive at the relevant time.

Thus, in the law of property, a legal fiction is invoked to change the facts in particular situations. ***In order to fulfil the intentions of the testator,*** the posthumous child is treated as though it were already ***in rerum natura*** at the time of the will. The end result is that a child-not-yet-born can inherit in spite of the common law rule to the contrary.

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[8] (1823), 57 E.R. 72; 1 Sim. & St. 181.

[9] Blasson v. Blasson, (1864) 2 De G.J.& S. 665, Villar v. Gilbey, [1907] A.C. 139, Elliot v. Joicey, [1935] A.C. 209.

[10] [1919] 1 W.W.R. 134 (Man.) Kings Bench.

3.2.2 Extending the Perpetuities Period

Since the advent of this legal fiction, its subsequent use has engendered a lineage of its own. In the law of property it has had the further effect of extending the lifespan of the common law rule against perpetuities. Originally the rule against perpetuities limited the subject-matter of the devise to a period no longer than a life in being plus 21 years thereafter. However, with the continued use of the fiction which treats the child *en ventre sa mere* as though it were *in rerum natura*, the perpetuity period was eventually extended to include the ordinary period of human gestation. Instead of determining the perpetuity period by considering lives already "in being," as the courts had always done in the past, judges began to consider the child *en ventre sa mere* as though it were a "life in being," not only for the purpose of the acquisition of property by the child itself but also a "life in being" chosen to form part of the perpetuities period.[11]

As we shall soon see, the use of this property law fiction has since been extended to the law of tort and to family law. What began in the law of property as a judicial device to preserve the intentions of a testator has since become an aggressive tool that furnishes the unborn with rights and remedies that are not available at common law. Is it legitimate to extend this fiction to these other areas of the law?

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[11] P.H. Winfield, "The Unborn Child" (1942), 4 University of Toronto Law Journal. 278 at 279; see, also, The Perpetuities Act, R.S.O. 1990, c. P-9, ss. 1, 8(2), 8(3), 8(4).

was able to bring an action to recover damages for injuries brought on by the negligence of Mr. Seguin. This was so notwithstanding the fact that Mr. Seguin's negligent act occurred before there ever existed a legal person named Ann Duval.

In the same year as Duval v. Seguin the Full Court of the Supreme Court of Australia handed down a comparable decision on a case with remarkably similar facts.[23] In Watt v. Rama a pregnant woman driver had been injured by th faulty driving of the defendant. The woman driver had subsequently given birth to the plaintiff who suffered from brain damage, epilepsy and paralysis from the neck downward. Like the majority in Duval v. Seguin, all three members of the court in Watt v. Rama resorted to the basic principles of modern negligence, in particular to the statement of the "neighbour principle" by Lord Atkin in Donoghue v. Stevenson. Winneke C.J. and Pape J. held that it was reasonably foreseeable at the time of the collision that the defendant's conduct might cause injury to a pregnant woman in the car with which it collided. Therefore, the court concluded, the possibility of injury on birth to the child she was carrying must also be reasonably foreseeable.

For Winneke C.J. and Pape J., this foreseeability gave rise to a potential relationship capable of imposing a duty on the defendant to the child if, and when, the child was born alive. On such birth the relationship crystallized, since it was then that the child suffered injuries as a living person. With the crystallization of this relationship a retrospective duty of care arose owed by the defendant to the child.

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[23] Watt v. Rama [1972] V.R. 353.

for its prenatal injuries. Lamont J. justified his rejection of the common law in this case on the basis of the following principle:

> If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy.... If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.[14]

As a result, the Majority of the court took judicial notice of the fact that in the law of property, the child ***en ventre sa mere*** had already been treated as a person and, likewise, applied the fiction to the case at bar.

Unfortunately, Lamont J. did not proceed further with the analysis. Once the child ***en ventre sa mere*** was deemed to be a person, the court held ***without question*** that the child could recover damages for its prenatal injury. No theory was provided to explain exactly how it was that the child could recover. For example, the Majority did not reason, as it had in the past, that the child, by virtue of its position, was deemed to be a party to the contract between its mother and the tramway company. Nor did the Majority contend that the child, once deemed to be a person, became a foreseeable plaintiff who was owed a duty of care by the tramway company.

Lamont J. simply ignored these issues.[15] The decision in this case not only

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[14] ***Ibid.*** at 464.

[15] Considering the implications of employing the fiction, which the majority of the court did not do, would have resulted in a number of theoretical difficulties. This was recognized in the sole dissent of Smith J. who submitted that the civil rule which treats the child ***en ventre sa mere*** as if it were a person refers to its property rights only and therefore the fiction could not be given

required use of the property law fiction but also transcended the issues usually considered in tort law analysis. As Lamont J. put it:

> To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.[16]

Other than this rather esoteric appeal to "natural justice" and an odd use of the notion "its person," no legal theory was put forward to account for the decision. In particular no theory was provided to support the proposition that the child in the womb is ascribed legal personality. There was no discussion of how or why the property law fiction was relevant or material or how the property law fiction could apply as a proper precedent across such diverse areas of law. It is important to remember that the property law fiction was originally employed only so that the court could fulfil the intentions of the testator. It was not invoked to protect foetal rights or interests. Despite all of these theoretical deficiencies, there has been an increasing tendency for courts in a number of common law jurisdictions to allow compensation for prenatal injuries following the decision in Montreal Tramways v. Leveille.

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general application. Smith J. held that when the fiction is applied in tort analysis, problems arise with respect to the issue of causation. Smith J. held that medical science was unable to prove a direct link between the negligent act of the tramway company and the subsequent birth of the child with club feet. While more recent decisions, including that of Fraser J. in Duval v. Seguin, point out the tremendous advances that have been made in medical technology, the causation issue remains a serious theoretical difficulty. This theoretical difficulty will be discussed at length below.

[16] *Ibid.* at 464 (emphasis added).

3.3.2 The Unborn Child As a Foreseeable Plaintiff

The impact of Donoghue v. Stevenson,[17] which was decided one year before Montreal Tramways v. Leveille, extended the reach of negligence actions in this area further still. The decision in Donoghue v. Stevenson and in a number of cases since[18] have made it clear that it is unnecessary for damages to coincide in time or place with the wrongful act or default. Further, in all of these cases the existence of the particular plaintiff was unknown to the defendant.

In the leading Canadian case on prenatal injuries[19] Fraser J. said of these earlier cases that "it would have been immaterial to the causes of action if the plaintiffs had been persons born after the negligent acts."[20] In Duval v. Seguin a women 31 weeks pregnant was involved in a car accident caused by the negligent actions of another. Three weeks later the child, Ann Duval, was prematurely born suffering cerebral defects as a result of the accident. In deciding whether the child had a right to damages for the prenatal injury, Fraser J. developed a test more precise than the appeal to "natural justice" invoked in Montreal Tramways v. Leveille. By extrapolating from the developing law of negligence, Fraser J. determined the scope of recovery for prenatal injuries by citing the famous *dictum* of Lord Atkin in Donoghue v. Stevenson:

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[17] [1932] A.C. 562.

[18] see especially Grant v. Australian Knitting Mills, [1936] A.C. 85, and Dorset Yacht Co. v. Home Office, [1970] A.C. 1004.

[19] Duval v. Seguin, [1972] 2 O.R. 686.

[20] *Ibid.* at 700.

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[21]

Under this doctrine Fraser J. held that an unborn child is within the foreseeable risk incurred by a negligent motorist. He further held that when an unborn child becomes a living person and suffers damages as a result of prenatal injuries caused by the fault of the negligent motorist, the cause of action is completed.

Following the modern developments in the law of negligence, Fraser J. awarded damages for prenatal injuries without *expressly* employing a legal fiction. Because Fraser J. held that a child ***en ventre sa mere*** is a foreseeable plaintiff he thought that:

> ... it is not necessary in the present case to consider whether the unborn child was a person in law or at which stage she became a person. For negligence to be a tort there must be damages. While it was the foetus of child ***en ventre sa mere*** who was injured, the damages sued for are the damages suffered by the plaintiff Ann since birth and which she will continue to suffer as a result of the injury.[22]

According to Fraser J. the common law rule that an unborn child is not a person has no bearing on the ability to recover for prenatal injuries suffered after birth. Because Ann Duval was a foreseeable plaintiff who was owed a duty of care, once born she

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[21] Donoghue v. Stevenson [1932] A.C. 562 at 580; cited *Ibid.* at 699.

[22] ***supra***, at note 19 at 701.

was able to bring an action to recover damages for injuries brought on by the negligence of Mr. Seguin. This was so notwithstanding the fact that Mr. Seguin's negligent act occurred before there ever existed a legal person named Ann Duval.

In the same year as Duval v. Seguin the Full Court of the Supreme Court of Australia handed down a comparable decision on a case with remarkably similar facts.[23] In Watt v. Rama a pregnant woman driver had been injured by th faulty driving of the defendant. The woman driver had subsequently given birth to the plaintiff who suffered from brain damage, epilepsy and paralysis from the neck downward. Like the majority in Duval v. Seguin, all three members of the court in Watt v. Rama resorted to the basic principles of modern negligence, in particular to the statement of the "neighbour principle" by Lord Atkin in Donoghue v. Stevenson. Winneke C.J. and Pape J. held that it was reasonably foreseeable at the time of the collision that the defendant's conduct might cause injury to a pregnant woman in the car with which it collided. Therefore, the court concluded, the possibility of injury on birth to the child she was carrying must also be reasonably foreseeable.

For Winneke C.J. and Pape J., this foreseeability gave rise to a potential relationship capable of imposing a duty on the defendant to the child if, and when, the child was born alive. On such birth the relationship crystallized, since it was then that the child suffered injuries as a living person. With the crystallization of this relationship a retrospective duty of care arose owed by the defendant to the child.

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[23] Watt v. Rama [1972] V.R. 353.

The third member of the court, Gillard J. came to the same conclusion by a different means. By applying the "neighbour principle", Gillard J. found that the plaintiff was a member of a class which might reasonably and probably be affected by the defendant's carelessness:

> The unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness since the regeneration of the human species implies the presence on the highway of many pregnant women.[24]

Together, the decisions in Duval v. Seguin and Watt v. Rama laid a foundation for a theory of recovery for prenatal injuries in spite of the common law rule that legal personality begins only at birth. As a result, the courts in most common law jurisdictions no longer find any difficulty in holding that there is a duty to take reasonable care for the safety of unborn plaintiffs that stand foreseeably within the scope of the defendant's risk.

3.3.3 An Analysis of the "*Unborn Plaintiff*" Approach

With the decisions in Duval v. Seguin and Watt v. Rama most legal analysts have been convinced that the fiction ascribing personality to the unborn used in Montreal Tramways v. Leveille is no longer required to award damages for prenatal injuries. As one English writer put it:

> since the tort of negligence is incomplete unless and until damage is suffered by the plaintiff, that tort is in fact completed on the live birth of the injured infant, at which time the infant has legal personality and

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[24] *Ibid.* at 374.

> is able to sue through his next friend, albeit that injuries were inflicted on the infant while he was ***in utero***. This last approach has the undeniable attraction of rendering unnecessary any decision as to the legal status of the unborn child, ***though it is implicit in it that such child does have a separate identity from that of its mother.***[25]

With the "foreseeable plaintiff" test there is no longer any need to account for legal personality. Thus, as Gordon described it, there is a shift in emphasis from the "unborn child" to the "unborn plaintiff."[26] The result of this shift is a more elegant analysis. The desired legal result is achieved without resort to a legal fiction. Or is it?

The decisions in both Duval v. Seguin and Watt v. Rama rely on Lord Atkin's "neighbour principle." Applying this principle in Duval v. Seguin, Fraser J. held that "[s]uch a child therefore falls within the area of potential danger which the driver is required to foresee and take reasonable care to avoid."[27] Applying the principle in Watt v. Rama, Gillard J. held that "[t]he unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness."[28] Are these correct applications of Lord Atkin's "neighbour principle?"

It is worthwhile to remember that Lord Atkin, in answer to the question "who, then, in law is my neighbour?", responded by saying "The answer seems to be –

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[25] P.J. Pace, "Civil Liability For Prenatal Injuries", (1977) 40 ***The Modern Law Review*** 141 at 142 (emphasis added).

[26] ***supra***, at note 1 at 579.

[27] ***supra***, at note 19 at 701.

[28] ***supra***, at note 23 at 374.

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question."[29] Thus for Lord Atkin a foreseeable plaintiff is a ***person*** who is closely and directly affected by a negligent act.[30] This limits the scope of a negligence action to persons. For example, a dog cannot bring an action nor can the dog's owner bring an action on its behalf since the dog is not a ***person*** who stands within the scope of the risk. Even if it was foreseeable that the dog would be injured as a result of some risk, the risk taker will never be liable since no duty of care is owed to the dog.[31] Thus, according to Lord Atkin, every negligence action has an answer to the question: upon whom was the wrong inflicted? If there is no ***person*** upon whom a wrong was inflicted, there can be no action in tort. This is because there would be no ***person*** to whom a duty of care is owed. If no duty of care has been breached then there is no cause of action.

While it is true that Donoghue v. Stevenson and subsequent cases have made it clear that it is unnecessary that the damage coincide in time or place with the wrongful act, it does not follow that it is "immaterial to causes of action if the plaintiffs had been persons born after the negligent acts."[32] In some cases it may be immaterial. The defendant may owe a duty of care to someone who will exist in the

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[29] ***supra***, at note 21 (emphasis added).

[30] In fact all plaintiffs must be legal persons. This is precisely why Kings, Queens and corporations have been ascribed personality.

[31] At least, not yet.

[32] Fraser J. in Duval v. Seguin, ***supra***, at note 19 at 700.

future. This is so in a hypothetical case of a manufacturer of baby toys. Assume that in 1990 the manufacturer negligently produced a defective baby toy that sat unsold on a store shelf until 1992. Along comes an expecting father who purchases the defective toy for his soon-to-be-born child. The child is born and on his first birthday the father gives him the defective toy. Shortly after receiving the defective toy, the child is injured while playing with it. In such a case, it is clear that the child has a cause of action notwithstanding the fact that the child was not yet born at the time the manufacturer produced the defective toy. What makes the manufacturer liable in a negligence action is not the mere fact that he produced a defective toy but the fact that ***some person who falls under the class of consumers to whom the manufacturer owed a duty of care was injured by it.***

However, it does not follow from this example that it is ***always*** immaterial whether the plaintiff was born before or after the occurrence of the careless act. For example, the actual time of birth may be more important in cases that do not involve manufacturers' liability. This is because the foreseeable scope of a manufacturer's risk is far greater than the scope of risk incurred by other risk-takers, such as careless drivers. The reason that there is a cause of action in the baby toy case cited above is precisely because ***an existing person, who stood within the foreseeable scope of the manufacturer's risk, suffered an injury as a result.*** Although the careless act that ultimately made the manufacturer liable occurred before the child was born, an injury resulted to a child who already existed and was, therefore, already a member of the class of persons owed a duty of care by the manufacturer.

But this is because a manufacturer is required to reasonably foresee that the ultimate consumer may not use the product immediately. For instance, had the child never been born or had the father forgotten to give the child his birthday present there would be no cause of action in this case despite the fact that the manufacturer produced a defective product. There is no cause of action in these two situations because there wasn't anyone who stood within the foreseeable scope of the risk created by the manufacturer who was injured as a result.

Like these two latter situations, the facts in Duval v. Seguin and in Watt v. Rama must be distinguished from the case of the negligent toy manufacturer. This is because, in those two cases, the child was claiming for a careless act that occurred before it was a person. In Duval v. Seguin and Watt v. Rama, on a strict temporal analysis of the facts, there can be no cause of action because the ***child en utre sa mere was not an injured person who stood within the foreseeable scope of the driver's risk***. In both cases, the child was not yet born at the time of the collision. Thus the pregnant woman was the only ***person*** who stood within the foreseeable scope of the driver's risk and was injured in the collision.[33] Although the negligent driver owed a duty of care to the class of persons who use the highway, to use the language of the court cited above in Watt v. Rama, the unborn child was not a person and therefore not a member of the class of persons who use the highway. In both of these cases the mother was the only person using the

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[33] For the sake of clarity I have disregard the fact that other adults were also in the car in both Duval v. Seguin and Watt v. Rama.

highway to whom a duty of care was owed and breached. Therefore the mother is the only person who had a cause of action in tort.

It is incorrect to say that although the unborn child was not a person at the time of the accident, she was a foreseeable plaintiff.[34] A plaintiff is a person who brings an action. One cannot be a plaintiff unless one is already a person. Although this legal truism was clearly enunciated by Lord Atkin, who defined his "neighbour principle" in terms of "persons closely and directly affected" by the negligent act, the truism was completely overlooked by the courts in both Duval v. Seguin and Watt v. Rama. Since the unborn child was neither a person nor an entity capable of bringing an action, the unborn child could not possibly have fit into the subcategory of plaintiffs known as "foreseeable plaintiffs" at the time of the accident.

A foreseeable plaintiff is a person to whom a duty of care is owed and who could foreseeably bring an action if that duty is breached. In deciding whether there exists a foreseeable plaintiff one must ask: does there exist some person who might reasonably be anticipated to suffer an injury as a result of my risk? Without the existence of some person who is closely and directly affected by the negligent act at the time of the accident, there is no cause of action. On a strict temporal analysis of the facts in Duval v. Seguin and in Watt v. Rama, the trier of fact is logically compelled to conclude that the plaintiff-child who has brought the action to court once born with injuries was not at the accident scene. The issue then becomes whether there is some way in which the newborn plaintiff-child can now sue for

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[34] Although she is *foreseeably a plaintiff*. See the discussion of potential plaintiffs below.

something that happened, though not to her. The error in the analysis in Duval v. Seguin and in Watt v. Rama is that both courts mistook the notion of a "foreseeable plaintiff" with that of a "potentially foreseeable plaintiff". Consequently, the status of person was attributed in both cases to an entity that was not a person, though it had the potential to become one. Both courts were certainly correct in stating that it is reasonably foreseeable that pregnant women will give birth.[35] But the foreseeability of the event of birth no more makes the child *en ventre sa mere* a foreseeable plaintiff than it makes it a newborn infant. A potentially newborn infant is not newly born. Likewise, a potentially foreseeable plaintiff is not a foreseeable plaintiff. Thus although it is foreseeable that an unborn child might become a foreseeable plaintiff, it does not follow that it is one. This makes the analysis in Duval v. Seguin and in Watt v. Rama problematic.

The difficulty is illustrated in Watt v. Rama when Winneke C.J. said that the events:

> ... constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child.[36]

Winneke C.J. held that the potential relationship crystallized upon the birth of the child, since it was then that the child suffered injuries as a living person. With the crystallization of this relationship a retrospective duty of care arose owed by the

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[35] And that pregnant women drive on highways, and that injured pregnant women will sometimes give birth to injured children etc.

[36] ***supra***, at note 23 at 360.

defendant to the child. Since it was held that this duty was breached, the defendant was liable for damages to the newborn.

These reasons for judgment are extremely difficult to grasp. How is a "potential relationship" capable of imposing a past duty? The concept of potentiality lends nothing to the analysis. To say that there existed only a potential relationship at the time of the accident is precisely to mean that there was no actual relationship at the time of the accident. If it were alleged that Rama was in a "potential relationship" at the time of the accident, he clearly has available to him a perfect line of defence. Since the relationship was only a "potential relationship" there was no actual relationship at the time of the accident. "Therefore," Rama will submit, "I owed no duty of care at the time of the accident."

Alternatively, if it were alleged that Rama was in an actual relationship that crystallized with the birth of a child who is now suffering an injury from some previous event, Rama would still have had a perfect defence. Rama would agree that he now has a relationship with the newborn infant and that he owes a duty to take reasonable care not to injure this infant who is now born. But since he has done nothing to the infant since its birth, he has not breached his duty of care.

Winneke C.J. was correct in stating that a relationship crystallized at birth. But what he was unsuccessful in doing was to explain how it is that this newly-formed relationship can legitimately be applied *ex post facto* to prior events where it is admitted that no duty was owed. Winneke C.J. is horned up in the following dilemma. If Winneke C.J. refuses to employ the fiction used in Montreal Tramways

v. Leveille, pretending that the unborn child was a person at the time of the accident, his decision forces him to utilize a different fiction. He must pretend that there was a breach of duty at the time of the accident when really there was none. Thus, either way, Winneke C.J. is forced to employ an implicit retrospective fiction in order to find for the injured child.

If this assessment of the reasons for judgment in Duval v. Seguin and in Watt v. Rama is correct, it would seem that commentators like Pace are incorrect in thinking that the "unborn plaintiff" analysis "has the undeniable attraction of rendering unnecessary any decision as to the legal status of the unborn child ...."[37] Without conferring legal status upon the unborn child in one way or another, there is no plaintiff with standing to bring an action.

Thus the only way the "unborn plaintiff" analysis really works is to presume, as Gillard J. did in Watt v. Rama, that "[t]he unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness."[38] At its best, this too is an implied use of the legal fiction ascribing personality to the unborn child. Although there is no mention that a fiction is being utilized, the analysis cannot proceed without it. Without implicitly treating the child *en ventre sa mere* as though it were a person, it will not fit into the class of persons protected by the "neighbour principle."

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[37] ***supra***, at note 25.

[38] ***Ibid.*** at 374.

A tacit use of the fiction is also evident in the rhetorical words of Fraser J. in Duval v. Seguin: "Ann's mother was plainly one of a class within the area of foreseeable risk and one to whom the defendants therefore owed a duty. Was Ann any less so? I think not."[39] Upon reading those words one is tempted to ask: "one of a class ***of what? Persons?***" Thus in both Duval v. Seguin and Watt v. Rama the "unborn plaintiff" analysis only works alongside an unwritten treatment of the child ***en ventre sa mere*** as though it were a child ***in rerum natura***. Though its use is unspoken, a legal fiction is still required to award damages for prenatal injuries.

3.4 A Model for Understanding the Use of the Fiction

3.4.1 The Deductive Argument

One way to understand how the legal fiction has been utilized in these cases is to compare the traditional model of legal reasoning to the deductive argument in logic. An argument consists of a set of premises that are put forth in support of a further proposition, called the conclusion. In one type of argument, known as a syllogism, the argument is composed of three propositions: a major premise, a minor premise and a conclusion. For example:

Major Premise:	Only persons alive at the time of the devise are entitled to inherit.
Minor Premise:	Frederick Thellusson was not a person alive at the time of the devise.
Conclusion:	Frederick Thellusson is not entitled to inherit.

[39] ***supra***, at note 19 at 701.

With this example one can think of the legal rule as the major premise, the fact situation in a particular case as the minor premise, and the judicial decision as the conclusion. The traditional model of legal reasoning involves applying the facts of a particular dispute to the relevant legal rule in order to reach a decision. In syllogistic terms this means applying the minor premise to the major premise in order to come to some conclusion.

3.4.2 Applying the Model to the Property Fiction

Using this model of reasoning. one can isolate the stage of the analysis at which the fiction comes into play. The explicit use of the fiction in the early property law cases applied the fiction directly to the ***minor premise.*** The strategy in Thellusson v. Woodford, for example, was to treat Frederick Thellusson as though he was a person alive at the time of the devise despite the established fact that he was not yet born. If it could be pretended that he was, the minor premise would transpose the conclusion to its logical opposite in the following way:

Major Premise:	1)	Only persons alive at the time of the devise are able to inherit.
Minor Premise:	**2)**	**Frederick Thellusson "*was*" a person alive at the time of the devise.**
Conclusion:	3)	Frederick Thellusson is able to inherit.

This model would allow Frederick Thellusson to inherit just as his grandfather had wished it. The reason for transposing the facts in the minor premise is to allow for this wish while at the same time keeping the major premise intact. The court

accepted the common law rule that only persons alive at the time of the devise could inherit and did not implement any rule to the contrary. Instead the court pretended that Frederick Thellusson was a person at that time for the purposes of the analysis.

3.4.3 Applying the Model to the Tort Fiction

The same model of reasoning can also be used to examine more recent tort decisions such as Duval v. Seguin. But here one begins to see that the fiction is applied somewhat differently. As we have seen, the fiction is ultimately applied to the ***major premise*** of the syllogism. Before applying the fiction, the original syllogism would have been as follows:

Major Premise:	1)	Only persons are owed a duty of care.
Minor Premise:	2)	Ann Duval was not a person (but was a potential person).
Conclusion:	3)	Ann Duval was not owed a duty of care.

Rather than applying a fiction to the minor premise and pretending that Ann Duval was a person, thus transposing the conclusion to its logical opposite, Fraser J. ***fictitiously*** broadened the scope of the rule so as to include unborn children. Thus the major premise was amended and the reasoning was as follows:

Major Premise:	1)	**Persons and "potential persons" are owed a duty of care.**
Minor Premise:	2)	Ann Duval was a potential person.
Conclusion:	3)	Ann Duval was owed a duty of care.

This model allows Ann Duval, once born, to recover damages. But notice that it does so at the expense of altering the major premise. It is no longer necessary to be a person in order to be owed a duty of care. With this application of the fiction, the common law rule is substantially altered.

3.5 Some Effects of These Two Uses of the Fiction

3.5.1 An Explicit Use of the Fiction

Having seen both explicit and implicit uses of legal fictions in property law and in the law of tort, a picture of the role of legal fictions in legal practice begins to develop. Used explicitly in Thelluson v. Woodford and Trower v. Butts, a legal fiction was employed to alter the facts so that a testator's intentions could be met without destroying a common law rule. This approach was borrowed in the law of tort in Montreal Tramways v. Leveille where the fiction was once again used explicitly to alter the facts, this time to achieve what the court conceived of as "natural justice". The fiction ascribing personality to the unborn child was used in each of these cases to achieve some desired legal result without changing the rule that personhood begins at birth.

To the deductivist, at least, the explicit use of a fiction to change the facts of a case seems rather strange. By what authority can a judge manipulate the facts in order to achieve what she considers to be a just result? Is not the just result simply the outcome of adhering to the legal rule? As a trier of fact, says the deductivist, the role of a judge is supposed to be that of a neutral and passive observer. This sort of

complaint illustrates Fuller's thesis that fictions are required only to reconcile assumed postulates of law with specific legal results. Since the deductivist has no interest in any particular legal result, he finds it odd that a fiction would be used. Thus, if there was no particular desire to accommodate the testator's intentions or to compensate the child born suffering from prenatal injuries, the fiction would be unnecessary. Likewise, if there were no assumed postulates, i.e., if there was no common law rule that personality begins at birth, there would be no need in these cases to employ the fiction.

Contrary to the deductivist point of view, many judges believe that they have a duty in some cases to consider specific legal results.[40] Judges face theoretical difficulties in such cases when existing legal postulates stand in the way. The only choice available to a judge who feels obliged to come out with a specific legal result is either to ignore the common law rule or to employ a fiction. When a judge explicitly employs a fiction, the facts are fictionalized in order to save the rule. Although the facts of the case have been manipulated, it is done candidly, with a view to preserving the common law. As such, following Fuller's line of reasoning discussed in chapter #2, the explicit employment of a fiction, in a particular case, is neither wicked nor foolish, as Bentham thought it was. It achieves the desired result while at the same time preserving the general integrity of the common law rule.

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[40] All of the cases that have been discussed in this chapter are examples where judges thought that they had a duty to consider specific legal results; i.e., they thought that their decision must square with the testator's intention or that a remedy should exist for the wrong inflicted upon an unborn child who continues to suffer once born etc.

3.5.2 *Stare Decisis*, Rule Erosion and an Implicit Use of the Fiction

However, the above analysis also reveals a serious danger when one considers the effect of the continued use of a fiction. This is a danger that Fuller paid little attention to. When the facts are repeatedly changed by a particular fiction in a growing number of cases it soon begins to look as though the fiction acquires a more general application. Increasingly, judges will find it permissible to change the facts. Ironically, as the fiction acquires a more general application by way of the doctrine of *stare decisis*, it has the ultimate effect of eroding the original postulate that the judge who first employed the fiction meant to preserve. As the common law postulate deteriorates, the traditional method of legal reasoning becomes inverted. While the correct method of legal reasoning involves the application of a particular set of facts to the relevant legal rule, ***it is now the fiction and not the facts that is applied to the rule.*** The result is that the fiction is no longer applied overtly to the facts of the case but, instead, the fiction becomes tacitly built into the legal rule. Once this occurs the common law rule has become substantially altered.

The erosion of a rule in this way is illustrated by the fiction that treats the child *en ventre sa mere* as if it were *in rerum natura*. While the application of the fiction was developed in the law of property to preserve the intentions of testators, it was later misappropriated in the law of tort. The fiction was simply borrowed by the Court without any attempt to justify its use. For example, how is the property law fiction relevant to the tort analysis? Having been used in so many property cases, the Supreme Court of Canada simply stated that the fiction of the civil

law "must be held to be of general application."[41] Further, Lamont J. found support for the use of the fiction in the fact that "none of the judges below cast any doubt upon the right of the respondent to sue."[42]

This is not the least bit surprising. Because the fiction had been successfully employed in so many previous cases, the legal determination that an unborn child is not a person in law becomes blurred. This misuse of this fiction was recognized in sole dissent of Smith J. in Montreal Tramways v. Leveille who submitted that the fiction is applicable only to a very limited aspect in the law of property.[43] For this reason Smith J. held, contrary to the majority, that the fiction could not be given general application.

Perhaps even more dangerous than an explicit application of the fiction is its implicit use. In tort law an implicit use of the fiction ascribing personality to the child *en ventre sa mere* likely originated in one of two ways. The courts might have abandoned the explicit use of the fiction after having heard the dissent in Montreal Tramways v. Leveille. In the alternative, the implicit use of the fiction might simply be the result of the erosion of the common law rule by explicit use of the fiction. Either way, the courts soon began to favour the "unborn plaintiff" approach. As we have seen, this approach does not merely erode the common law rule. It actually rewrites the rule. By calling the child *en ventre sa mere* an "unborn plaintiff", the

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[41] ***supra***, at note 12 at 465.

[42] ***Ibid.*** at 465-66.

[43] ***Ibid.*** at 481.

common law rule has been completely recast. With the "unborn plaintiff" approach, the courts are not simply saying that in particular cases we treat the unborn child as if it were born, but rather, that personality no longer begins at birth. Such orchestrations fly in the face of the rule of law and are contrary to the proper scope of the original fiction in the law of property, which was used to achieve a particular result without altering the common law rule.

3.6 Some Implications

As we have seen, some judges think that a legal fiction is required to reconcile the desired legal result in a particular fact situation with a certain legal rule. There is, however, a cost in employing the fiction. This is because the judge, by pretending to change the facts, does not truly reconcile the desired legal result with the rule. In practice there is no such reconciliation. Rather, with the continued use of a legal fiction, the common law rule is either amended or abandoned. Thus a judge considering whether to use a legal fiction faces an inevitable dilemma. If the judge chooses to employ the fiction, its use is likely to set a precedent that could ultimately have the effect of rewriting established legal rules. The problem is that the judge in the instant case simply cannot know precisely how the fiction will be applied in future cases.[44] On the other hand, if the judge chooses to cease with fictions altogether, certain desired legal results cannot be obtained. There are broad implications for jurisprudence in both of these alternatives.

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[44] Although the judge who has decided to use a legal fiction could always place express restrictions on its future use, as I shall prescribe in chapter #5.

3.6.1 Preconception Torts

As judges continue to use the legal fiction ascribing personality to the unborn child, they continually widen the scope of legal personality. This is already happening in the law of tort. The implicit use of the fiction in Duval v. Seguin widened the class of entities that can recover in tort. And it is not just foetuses that are protected by the "unborn plaintiff" analysis. Because the fiction expands the category of foreseeable plaintiffs to include nonpersons, a number of common law jurisdictions have accepted an emerging tort known as "preconception negligence." In a preconception tort a child born with injuries will bring an action in negligence for some event that took place before the child was conceived.[45] This increases the scope of civil liability immensely. The potential for mischief was recently visited in the Supreme Court of New York in Entright v. Eli Lilly Co.[46] Extending the unborn plaintiff approach to preconception injuries, the court allowed an action by a plaintiff who was the granddaughter of a person who suffered a genetic impairment as a result of ingesting a defective pharmaceutical product. According to the decision in Entright, the category of plaintiffs can now be said to include not only foreseeable plaintiffs and potentially foreseeable plaintiffs but also potential potentially foreseeable plaintiffs. One must now foresee not only the unborn but also the

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[45] See Jane E.S. Fortin, "Legal Protection for the Unborn Child," 51 The Modern Law Review 54 (1987); Peter B. Babin, "Preconception Negligence: Reconciling an Emerging Tort" 67 Georgetown Law Journal 1239 (1979); Joel L. Ross, "Preconception Torts: A Look at our Newest Class of Litigants", 10 Texas Tech Law Review 97 (1978); David S Steefel, "Preconception Torts: Foreseeing the Unconceived" 48 University of Colorado Law Review 621 (1977).

[46] 155 A.D.2d 64, 553 N.Y.S.2d 49 (1990).

unconceived. In Entright, one must even foresee those to be conceived by the not yet conceived. Although no such action has commenced in Canada as of yet, it inevitably will. Whether and to what extent it will succeed, we shall have to wait and see.

3.6.2 Family Law and the "Child in Need of Protection"

The general application of the fiction has also been ascribed to the child *en ventre sa mere* in the area of family law. In 1981 the Ontario Family Court in Kenora held that The Ontario Child Welfare Act did not preclude a finding that a child *en ventre sa mere* was "a child in need of protection" within the meaning of the statute.[47] Bradley J. recognized a child *en ventre sa mere* as "a child in need of protection" because of the physical abuse she suffered through her mother's excessive consumption of alcohol and the mother's failure to obtain proper treatment. The implication was clear that the child *en ventre sa mere* is protected against abuse from its mother from the moment of conception through the full nine months of pregnancy. This decision was affirmed in Re Children's Aid Society of City of Belleville and T.[48]

These cases demonstrate that the fiction can be applied even more aggressively than in the tort cases. In tort the fiction was employed so that a child born with injuries could recover. In family law the fiction is now being used to

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[47] Re Children's Aid Society for the District of Kenora and L.(L.) (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct. Fam. Div.).

[48] (1987), 50 O.R. (2d) 204 (Ont. Prov. Ct. Fam. Div.).

preempt injuries that have not yet occurred to a child that is not yet born. This gives the unborn child certain powers over what a parent can and cannot do – sometimes even before she or he does it. Although these cases do not have binding authority on all Canadian courts, both cases have been cited (neither with clear approval nor contempt) in a discussion of 'foetal rights' in Anglo-Canadian law in a recent Supreme Court of Canada decision.[49]

With all of these examples it is apparent that the judicial response to the strict common law rule conferring personality only to those who are born has been a so-called "progressive movement" towards treating the child *en ventre sa mere* as if it were a person. Yet it is interesting to note the manner in which this "progressive movement" came about. It is not based on anything like the general sentiment of people. Neither is it based on statutory reform or any other act of the legislature. Nor is it the result of any clearly established judicial precedent. Rather, it is an accident that has resulted from the application of a legal fiction by a random group of judges who were each trying to solve different legal problems. Unfortunately, the result of this accident is that there no longer exist any clearly established boundaries delineating the onset of legal privileges and protections. In some areas of law the unborn child appears to have certain privileges and protections, in other areas it does not. This causes serious confusion. As one Canadian writer put it:

> There exists today a grotesque contradiction at the heart of our legal system as it touches the unborn child. On the one hand, the unborn child enjoys the right to inherit property; she can sue for injuries

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[49] Tremblay v. Daigle, [1989] 2 S.C.R. 530.

> inflicted while in the womb; and she has the right to be protected from abuse or neglect by her mother. On the other hand, she no longer enjoys that right which is the indispensable precondition of the exercise of all her other rights – the right not to be killed. How has this contradiction come about?[50]

My answer to this question is that the contradiction[51] has come about as a result of the haphazard employment of legal fictions. Perhaps the legal repercussions arising from this will result in statutory reform. This was the case in England where a report by the Law Commission[52] led to the Congenital Disabilities (Civil Liability) Act 1976. By this statute a child born alive and disabled may be able to sue someone, other than the child's mother, responsible for an occurrence which was the cause of the disablement.[53] The advantage of the statute is that there are clear confinements on the breadth of treating the child ***en ventre sa mere*** as if it were

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[50] Ian Gentles, "The Unborn Child in Civil and Criminal Law", ***Contemporary Moral Issues***, ed. Wesley Cragg, McGraw-Hill Ryerson Ltd., [Toronto: 1987], p.18.

[51] If there is a contradiction, that is. Another response to Gentles' claim is to argue that there is no contradiction here at all. People on death row (or lawmakers concerned about their plight) cannot successfully argue that capital punishment is wrong simply because of the fact that life is always a precondition to exercising the rights that the living have. Being alive, though a necessary condition for exercising certain other rights (such as the right to sue or the right to inherit), is not what ***entitles one*** to exercise those other rights. Being alive only ***allows*** one to excerise the rights he or she is otherwise entitled to. There is no inconsistency between having the right to sue for injuries or inherit but having no right not to be killed, even though you need to be alive in order to sue someone or receive. [I owe this point to Richard Bronaugh.]

Whether there is an actual contradiction here or not, it is my contention that the use of the fiction that treats the child ***en ventre sa mere*** as though it were born has certainly caused difficulty in determining how the law should treat the unborn.[See Trembley cited, ***supra***, at 49.]

[52] "Injuries to Unborn Children", 1974 Law Comm. No.60.

[53] For a thorough discussion of the Congenital Disabilities (Civil Liability) Act see G.H.L. Fridman, Fridman On Torts, 1st ed., Waterlow Publishers, (London: 1990), p.32.

a person.[54] There is no longer any need to resort to fictions and therefore no need to worry about the implications of incorrect applications of the fiction.[55]

The possibility of statutory reform as a response to the employment of the fiction raises a number of interesting questions in jurisprudence. Is the fiction to be thought of as a legitimate vehicle for changes in the law that reflect the needs of society? Should this judicial creativity lead to legislation or is the proper order of events the other way round? Is it not usually thought that the role of the judiciary is more like a brake than an engine? The answer to these questions will not be attempted here. The point of raising them is to show that the choice to implement a legal fiction speaks volumes about a judge's jurisprudential bent. As we shall see in chapter #4, judges who employ legal fictions must view the nonfictional elements of the law in such a way that a judicial device is required in order to achieve the desired result. That is, some judges who use legal fictions must believe that legal rules exist and sometimes require circumvention. Without legal fictions, those judges would be forced to follow the rules at the expense of certain legal results. They would become legal logicians, who merely apply the appropriate rule to the facts and derive a conclusion.[56] However, fictions might also be employed not as a

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[54] For example, the English statute recognizes a duty to the unborn only to the extent that there was a duty to the child's parent. See *Ibid.* at 34.

[55] This may sound confusing to Olivier [cited, *supra*, in chapters #1 and #2] and others who think that there are statutory fictions. It is my contention that there are no statutory fictions. Statutes give rise to legal rules. In law, legal rules are nonfictional. This will be further clarified in the synopsis in chapter #4.

[56] There are implications on statutory reform for this choice as well. Without judicial fictions, our legal system would lose one of the tools that helps lead the law in new directions. Consequently, legislators would be forced to pass untold amounts of legislation, each considered

method of circumventing existing rules but as a device that hides the very fact that the existing rules are not decisive of the issue in dispute. As we shall see in chapter #4, fictions used in this way are little more than an attempt to make it look as though the court is not exercising discretion when in fact it is.

3.7 Synopsis

I shall conclude this chapter with a reconsideration of Ihering's famous remark about legal fictions which was cited above in chapter #1:

> It is easy to say "Fictions are makeshifts, crutches to which science ought not to resort." So soon as science can get along without them certainly not! But it is better that science should go on crutches than slip without them, or not venture to move at all.[57]

Ihering was quick to point out that the judge who refuses to employ fictions does not venture to move at all. Such a judge is content to leave justice to the slow hand of parliament. Yet one of the reasons for having a judiciary is because legislation cannot account for every novel legal situation.

When parliament falls short in this respect one might argue that there exists a legitimate though limited role for legal fictions in legal theory. However, this is not

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in minute legal detail. On a practical level, this would be extremely difficult to achieve. Yet a failure to do so would lead to injustice since, without the fiction, there would be many more occasions where judges would be forced to adhere strictly to the rules set by parliament and previous common law decisions despite the potential for absurd results. Here judges would have to rely on the unlikely possibility that statutory rules and the common law will always lead to just outcomes.

[57] See section 1.5. Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, (6 ed. 1924) III, 297 cited in Fuller, *supra*, 1 at 2.

to say that a fiction may be employed at any time and that, once employed, it is thereby available for general application. If legal fictions are to do less harm than good, judges must learn to think carefully about how to use them. This includes cultivating an ability to recognize *that* they are being used. Further, judges must justify the use of a fiction in the instant case and, wherever possible, they must do so in a way that will restrict its application in future cases. The above examination of the fiction that ascribes personality to the child *en ventre sa mere* illustrates the fact that judges have been uncritical, unclear and unconvincing when employing the property law fiction to the law of tort. Early decisions such as Montreal Tramways v. Leveille lack clear reasons in favour of making a general application of the property law fiction. More recent decisions such as Duval v. Seguin lack any recognition whatsoever of the operation of the fiction. Because the judges in these decisions have not relied upon or developed for themselves any theory about how and when fictions can and should be used, they have left open the possibility of more aggressive and less consistent uses of the fiction. This possibility undermines the coherence of law. Of course, as a system of rules, law requires coherence. When the uncritical employment of a legal fiction results in the establishment of rules that are contradictory, it threatens the legitimacy of our system of legal justification. For this reason, judges need to be more careful when employing legal fictions.

With an exposé of the current use of legal fictions in Canadian courts and of the dangers inherent in their use, the stage is now set for a more rigorous philosophical account of the background conditions that underlie our use of legal

fictions. One cannot thoroughly understand what ***legal fictions*** are and how to use them until one understands what in law is ***nonfictional***. This, in turn, requires a description of what Fuller has called the 'intellectualism' that underlies our common law system, which is the subject matter of chapter #4.

CHAPTER #4

NONFICTION IN THE LAW

4.1 Introduction

The legal fiction is a judicial device. It is perhaps best understood as a phenomenon that occurs when legal rules run out. As Fuller described it, "the fiction represents the pathology of law ... When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions."[1] It therefore seems both interesting and appropriate to consider legal fictions as the result of a positivistic attitude towards law.

In chapter #2, I credited Fuller with an important innovation in the study of legal fictions. During his discussion of the motives that give rise to legal fictions, Fuller pointed out that "the general purpose of the fiction is to reconcile a specific legal result with some *premise* or *postulate*. Where no intellectual premises are assumed, the fiction has no place."[2] With this, Fuller provides a quick description of the background conditions that seem to underlie the use of legal fictions as a judicial device. He depicts the law as a human construction that is built from certain chosen intellectual postulates and premises. Unfortunately, the two intellectual

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[1] Lon L. Fuller, Legal Fictions, Stanford University Press, (Stanford: 1967), p.viii.

[2] *Ibid.* at 51 (emphasis added).

building blocks that Fuller left us with are not especially constructive. The first is what Fuller called an intellectual ***postulate***. Other than mentioning them, Fuller did not discuss legal postulates in any detail, nor did he provide any examples.[3] The second type of building block is the ***premise***. Again, Fuller never discussed these satisfactorily. Besides describing them as "unexpressed and rather vague principles of jurisprudence,"[4] all we are told is that they are usually associated with existing, specific rules of law. Fuller supplements this description by saying that "***we eliminate the necessity for fiction in direct proportion as we eliminate premises from the law, as we disencumber the law of intellectualism.***"[5] What exactly is this "intellectualism" that is said to be an encumbrance to our law? Fuller never tells us. Could it be the said existence of ***deeply entrenched*** legal rules (and other nonfictional elements of the law)? Is some form of legal positivism indicative of a pathology of law? As a result of his having viewed the law as encumbered with intellectual ***postulates*** and ***premises***, Fuller may have paved the way for an important breakthrough in our understanding of the background conditions that underlie the fiction as a judicial device.

My own response to this is an attempt to understand how reasoning through the device of the fiction differs from usual methods of judicial reasoning. This is achieved by contemplating the elements of the law that judges employ when they

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[3] In chapter #1, I described them as the infrastructure (or foundations) of the law. See section 1.7.3.

[4] Fuller, ***supra***, at note 1 at 53.

[5] ***Ibid.*** at 52 (emphasis added). For further elaboration see chapter #2 section 2.3.1.

are not using legal fictions. In other words, what does it mean to employ nonfiction in the law? This chapter is an attempt to provide a philosophical description of certain nonfictional elements in the common law system.[6] My aim, while broadly jurisprudential, is still quite specific; it is simply to provide a clearer picture of the background conditions that underlie the use of legal fictions by judges.

In my own analysis of nonfiction in the law, I shall adopt a particular theoretical model, namely, Searle's theory of institutional facts. The reason that I have chosen this model is because the notion of a 'fact' provides the most accurate conceptual opposition to 'fiction' as that term is used in the context of legal fictions. As we have seen in all three of the previous chapters, when judges employ legal fictions they simply feign the facts; they pretend that the world is different than it is. Therefore, in comparing legal fictions to nonfiction, I will characterize the notion of nonfiction as a matter of fact. Since law is a social institution, the notion of institutional facts is fitting. Additionally, the theory of institutional facts comports well with the theory of legal positivism. Since I see the legal fiction as a judicial device that results from a positivistic attitude towards law, the theory of institutional facts seems most appropriate.

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[6] By 'common law' I do not simply mean judge made law. I mean the common law tradition as compared to, say, the civil law tradition.

4.2 Searle's Theory of Institutional Facts

Searle's work on institutional facts has attracted jurisprudential interest and has occasioned what has been labelled "an institutional theory of law."[7] As I have already indicated, my present aim is modest. I am not using institutional facts as the basis for a general theory of law. Nor am I at all engaged in the development of institutional facts as part of a general theory of metaphysics or ontology. Rather, I am adopting Searle's terminology as a model for investigating what Fuller so opaquely described as the "intellectualism" that motivates the supposed need for legal fictions.

Searle has been writing about institutional facts for a number of years.[8] Very recently, however, he has paid special attention to them in a legal context.[9] Here is how institutional facts are characterized in his most current work:

> This book is about a problem that has puzzled me for a long time: there are portions of the real world, objective facts in the world, that are facts only by human agreement. In a sense there are things that exist only because we believe them to exist. I am thinking of money, property, governments, and marriages. Yet many facts regarding these things are "objective" facts in the sense that they are not a matter of your or my preferences, evaluations or moral attitudes. I am thinking of such facts as that I am a citizen of the United States, that the piece of paper in my pocket is a five dollar bill, that my younger sister got married on December 14, that I own a piece of property in Berkeley ...[10]

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[7] See Neil MacCormick and Ota Weinberger, An Institutional Theory of Law: New Approaches to Legal Positivism, D. Reidel Publishing Co., (Dordrecht: 1986).

[8] See, for example, Searle, Speech Acts: An Essay in the Philosophy of Language, (Cambridge: 1969).

[9] Searle, The Construction of Social Reality, The Free Press, (New York: 1995).

[10] *Ibid.* at 1.

It is important to note that The Social Construction of Reality is not a theory of law but a theory of ontology. Much of Searle's work is an elaborate account of what he calls "the building blocks of social reality."[11] These building blocks entrench the ontological foundation of his general theory of institutional facts. Not surprisingly, they include many aspects of his earlier work, such as a theory of speech acts, the notion of collective intentionality, the distinction between intrinsic and observer relative features of the world, the nature of functional assignments, etc. It could therefore be said that Searle is using certain nonfictional aspects of the law to make clear his general ontology. I am working in the opposite direction. I am using certain aspects of Searle's general theory to make clear my own account of nonfiction in the law. Consequently, much of the ontological meat of Searle's general theory is beyond the scope of my present investigation. I simply leave those issues to Searle, his colleagues, and his critics. For the time being, I am more interested in his conceptual framework than anything else.

4.2.1 The Distinction Between Brute and Institutional Facts

Central to my present investigation is Searle's most recent description of institutional facts. To take one of the examples cited above, the fact that Searle's younger sister got married on December 14 is only a fact because there is general agreement in society that such an institution exists that makes it so. Institutional facts require some form of human agreement for their very existence. If nobody in a social

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[11] *Ibid.*

order intended that people be married, it would not have made one iota of difference if Searle's sister had marched down an aisle, uttered the words "I do", etc. On their own, these kind of facts do not a marriage make.

Thus we can distinguish 'institutional facts' such as the fact that Searle's sister was married, from 'brute facts' such as the fact that she marched down the aisle, etc. The difference is that brute facts do not require human institutions for their existence. To use two of Searle's examples, the fact that Mount Everest has snow and ice near its summit is totally independent of any human agreement. So is the fact that the sun is ninety-three million miles from the earth. Of course Searle readily admits that in order to ***state*** a brute fact we require the use of institutions, such as the use of language or the measurement of distances in miles. Still, the ***fact stated*** can be distinguished from the ***statement*** of it.

Once the distinction between brute and institutional facts is in place, we can begin to understand the relationship between them. Searle describes this as "the logical priority of brute facts over institutional facts."[12] According to Searle, there are no institutional facts without brute facts. Searle describes institutional facts as existing in a hierarchical structure, built from the ground up. In Searle's words, "institutional facts exist, so to speak, on top of brute physical facts. Often, the brute facts will not be manifested as physical objects but as sounds coming out of peoples' mouths or as marks on paper – or even thoughts in their head."[13] It is the logical

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[12] ***Ibid.*** at 35.

[13] ***Ibid.***

relationship between brute and institutional facts that brings Searle's theory, so to speak, down to earth. In order to understand the sense in which institutional facts are "objective," one need not transcend the world of brute facts. Rather one builds upon it. As Searle puts it:

> Here, then, are the bare bones of our ontology: We live in a world made up entirely of physical particles in fields of force. Some of these are organized into systems. Some of these systems are living systems and some of these living systems have evolved consciousness. With consciousness comes intentionality, the capacity of the organism to represent objects and states of affairs in the world itself. Now the question is how can we account for the existence of social facts within that ontology?[14]

4.2.2 Creating Institutional Facts

Institutional facts are a special subclass of social facts. By stipulation, Searle uses the expression 'social fact' to refer to any fact that involves what he calls 'collective intentionality.' Collective intentionality is, therefore, an essential element in the creation of institutional facts. As we shall soon see, it is collective intentionality that allows us to impose functions on entities that do not have that function prior to its imposition. Collective intentionality occurs when an individual shares with another or with others what Searle calls 'intentional states' such as beliefs, desires and intentions. Collective intentionality is thought to be something different from the sum total of two or more individual intentionalities. It therefore goes beyond mere social cooperation. That is, it is more than "*I* do this, *you* do that." As Searle puts it, it occurs "in cases where *I* am doing something only as a part

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[14] *Ibid.* at 7.

of *our* doing something.[15] Or, as they say, it takes two to tango. When I trot up and down in my skin-tight-jet-black pants, I do it with my partner. The tiny individual steps that I take and all of my other intentions with respect to the tango are ultimately derived from our collective intention to engage in the dance.

Once there is collective intentionality, it can be used in a special way. It can be used to impose upon some brute object what Searle calls an 'agentive function.' The result of this is that the brute object "now has a function that is not performed in virtue of sheer physics but in virtue of collective intentionality."[16] Adopting one of Searle's examples, what was once a magnificent brick wall, after years of erosion, might become a mere pile of stones. Still, by collective intentionality, the societies that continue to live on both sides might agree to impose upon the rubble the function of a physical boundary. Of course, the disintegration of the wall prevents the rubble from being a physical barrier as a matter of brute fact. Yet the two societies might share an intention to respect the boundary line, in spite of the brute fact that it is no longer a physical barrier.

To improvise slightly, we might well imagine two brothers who are forced to share a room because their parents' house has only two bedrooms. Of course, each of the boys would prefer to have a bedroom of his own. Since they cannot, they agree to divide the room into two by laying a strip of masking tape across the centre of the floor. Soon after, and much to his chagrin, the younger boy comes to realize

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[15] *Ibid.* at 23.

[16] *Ibid.* at 39.

that the marking on the floor prevents him from exiting the room into the hallway because the door is on the other side of the line. Because of the boundary line, he must now enter and exit the room via the window. Luckily, however, the closet happens to be on his side of the line. Consequently his older brother has no choice but to ask politely for his clothes. This gives the younger brother certain leverage. Now it may sound odd to say that the younger boy "must" exit via the window or that the older boy has "no choice" but to ask politely. An outside observer might find the whole situation to be rather amusing if not absurd.[17] To understand their behaviour, in terms of Searle's theory, one must recognize that the two brothers have agreed to take very seriously the agentive function of an institutional boundary – notwithstanding the flimsy brute fact upon which that function is imposed.

According to Searle, where the function imposed on an entity can be performed only by way of collective agreement or acceptance, we are en route to the creation of an institutional fact. To continue my example from above, the masking tape could never have operated as a physical barrier without the two boys having agreed to treat is as such. If either of them had decided that he no longer shared the intention of not sharing a bedroom, he could have easily stepped over the tape. Thus, as Searle puts it, "[t]he key element in the move from the collective imposition of function to the creation of institutional facts is the imposition of a collectively recognized *status* to which a function is attached."[18] Once the two boys agreed

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[17] In fact, I have borrowed this example from an old episode of The Brady Bunch.

[18] Searle, *supra*, at note 9 at 41.

to divide the bedroom into two, the masking tape was no longer *merely* tape. In other words, the tape achieved an entirely new status. It became a territorial boundary. Sure enough, the result of this is that the two brothers each had their own bedroom. And, within the context of their arrangement, there is no reason to doubt the institutional fact that they each had their own bedroom any more than there is to doubt the brute fact that the boys laid a piece of tape across the floor.

4.2.3 The Locution of Constitutive Rules

Without existing institutions such as marriage and territorial boundaries, neither of the above examples would be institutional facts. We might therefore wish to consider, what makes something an institution?

Searle's own answer to this question relies on the distinction between what he calls 'regulative' and 'constitutive' rules:

> Some rules regulate antecedently existing activities. For example, the rule "drive on the right-hand side of the road" regulates driving; but driving can exist prior to the existence of that rule. However, some rules do not merely regulate, they also create the very possibility of certain activities. Thus the rules of chess do not regulate an antecedently existing activity. It is not as though there were a lot of people pushing bits of wood around on boards, and in order to prevent them from bumping into each other all the time and creating traffic jams, we had to regulate the activity. Rather, the rules of chess create the very possibility of playing chess. The rules are *constitutive* of chess in the sense that playing chess is constituted in part by acting in accord with the rules. If you do not follow at least a large subset of the rules, you are not playing chess. The rules come in systems, and the rules individually, or sometimes the system collectively, characteristically has the form:
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> **"X counts as Y in the context C"**[19]

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[19] *Ibid.* at 28-29.

With this formula the Y term is said to name something more than the sheer physical features of the object named by the X term. Furthermore, says Searle, "the 'counts as' locution names a feature of the imposition of a status to which a function is attached by way of collective intentionality, where the status and its accompanying function go beyond the sheer brute physical functions that can be assigned to physical objects."[20]

According to Searle, the locution of constitutive rules will sometimes allow us to discover the general social conditions that comprise social institutions like 'territorial boundaries' or 'marriage.' They also allow us to pinpoint the specific conditions that will constitute an instance of an institution. For example, applying the locution to the scenario I described above, the brute fact that ***a strip of adhesive paper was laid on the floor(X)*** **counts as** ***a territorial boundary(Y)*** **in the context of** ***the living arrangement of the two brothers(C)***. The other example is slightly more complicated. This is because there are a number of different sets of brute facts that would have been sufficient to count as a valid marriage ceremony in California. Roughly speaking, the set of brute facts that actually occurred during the ceremony of Searle's sister on December 14, e.g. ***marching down the aisle; saying "I do"; scratching her name down on paper; etc.(X)*** **count as** ***a marriage on December 14(Y)*** **in the context of** ***the California legal system(C)*** (or the Nevada legal system, the Catholic church, or whatever ...).

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[20] ***Ibid.*** **at 44.**

Although the institution of marriage can be viewed in other contexts as well in our society, it is certainly a legal institution. In a legal context, marriage is a particular type of contract. Therefore, as it is with many other contracts, the brute fact that Searle's sister scratched her name down on that paper will *count as* an important part of the ceremony from the legal point of view. In law, that brute fact (in conjunction with a few others) will achieve a brand new status. Within the legal institution of marriage, a document is not the only thing that has been produced. A host of legal rights and duties were also created. The fact that Searle's sister is now the holder and bearer of a number of matrimonial rights and duties is an institutional fact. And the existence of such institutional facts are no minor matter. At some point, as they say in California, they could determine who gets the house.

4.3 Collective Intentionality in the Context of the Judiciary

Before applying Searle's model to nonfiction in the law, I should attempt to clarify the contextual aspect of Searle's locution. What are we talking about when we say that X counts as Y ***in the context of law***? As it is in the context of other social institutions, in law we often impose a new status upon the occurrence of certain brute events. Remember that, for Searle, this is achieved through a phenomenon called collective intentionality. We might ask, how is collective intentionality manifest in a legal context?

We have already seen that collective intentionality exists "where *I* am doing something only as a part of *our* doing something."[21] In the context of our legal system, given its complexity, there is a whole lot of doing. Lawyers perform their function as part of an adversarial system, as do the plaintiffs and defendants they represent. Judges, masters, justices of the peace and other officials do what they do as part of the judiciary. Sergeants, detectives, traffic cops, and meter maids all play a role in law enforcement. So do the politicians who make the laws that are to be enforced. Even citizens play a part, not only by obeying the laws but in other ways as well. For example, they provide information to the police and to the courts. They serve on juries. Sometimes they even prevent others from breaking the law. All of the intentional activities required to carry out these multifarious roles and many others that I have failed to mention are part of an enormously complex system that we call the law. Therefore, in the context of law, collective intentionality will be extremely difficult to pinpoint.

Since legal fictions are only employed by judges (and perhaps the lawyers who make submissions for or against their use in particular cases), I will attempt to locate collective intentionality only in so far as judging is concerned. Most judges think that the roles they perform in our legal system are collectively defined – like the tango, only much more complicated. That is, for the vast majority of judges, the collective intentionality that underlies the judiciary is manifested by their acceptance of legal rules. Those who go through three years of law school, as all judges do, will

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[21] *Ibid.* at 23.

normally adopt what Hart has called an 'internal point of view' to the law. They accept that legal rules exist and that they play an important role in how cases are decided. The rules inform the reasons for their decisions. This is perhaps the most important theoretical bias that I will import into the third aspect, viz. C, of Searle's formula. In this sense it must be said that my description of nonfiction in the law (and so the fictional) is positivistic.[22] For our purpose of understanding the device known as fictions, we must regard the existence of legal rules as one of the central features of a legal system. And it is the *attitude* that judges adopt towards these rules that denotes their collective intentionality in the context of law.

Is there a collective intention to decide cases according to rules? As I have already indicated, I think that there is. In The Concept of Law[23] Hart examined the role that rules play in the lives of those touched by the law. Hart drew a distinction between what he called the *internal* and *external* aspect of a rule. Briefly put, Hart showed that it is possible to be concerned with rules either as a mere observer who

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[22] It is admitted that adopting the internal point of view is far less fashionable for legal philosophers today than it was in Hart's day. Many legal philosophers since have attempted to deconstruct the idea that law can govern activity through rules. See for example Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," 96 Harvard Law Review 781 (1983); Roberto Managabeira Unger, "The Critical Legal Studies Movement," 96 Harvard Law Review 561 (1983); Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 Harvard Law Review 1685 (1976).

Notwithstanding the profound impact that this recent work has had upon certain members of the philosophical subcommunity, almost every practicing lawyer, judge and citizen continues to live and act in a legal world where the role of rules is indispensable to legal analysis. Since it is lawyers and judges who use legal fictions, any successful account of legal fictions must be connected to the practice of law and to the legal profession's ideas about itself. Practically speaking, this presupposes embracing the existence of legal rules.

[23] Hart, H.L.A. The Concept of Law, Clarendon Press, (Oxford: 1961).

does not himself accept them, or as one who uses them as reasons for his conduct as a member of a group that does accept them. The former he called the "external" point of view and the latter the "internal" viewpoint. Hart's distinction shows that the external observer, who lives a detached, scientific existence, is unable to reproduce the way in which the rules function in the lives of most lawyers and judges who do adopt the internal point of view. In particular, judges:

> use [rules], in one situation or another, as guides to the conduct of social life, as a basis for claims, demands, admissions, criticism, or punishment, viz. in all the familiar transactions of life according to rules. For them it is not merely a basis for prediction that a hostile reaction will follow but a *reason* for hostility.[24]

Hart is not the only legal positivist who thinks that judges adopt the internal point of view. Raz, for example, believes that:

> Hart is right in saying that judges and all other officials regularly involved in applying and enforcing the law do accept and follow it. They may have reservations concerning the moral justifiability of the law but nevertheless they accept and employ it for their own reasons (salary, social involvement, etc.) or for no reason at all. Their legal statements normally reflect this attitude. They are internal, fully committed normative statements. When they state the legal validity of a rule they do mean to assert its binding force, though not necessarily its moral force.[25]

Certainly, this is true of the judges who have used legal fictions as a judicial device. After all, the compulsion that judges feel to use legal fictions consciously reveals that they do take an internal viewpoint. If judges did not accept that legal rules inform

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[24] *Ibid.* at 88.

[25] Joseph Raz, The Authority of Law, Clarendon Press, (Oxford: 1979), p.155.

the reasons for their decisions, they would have no need to use legal fictions.[26] As we shall see below, legal fictions are a device used to make it appear as though judges have remained within the rules when in fact they have not. This would seem to reveal their commitment to legal rules. If this is correct, then there seems to be decent evidence of a collective intentionality in the context of law, at least in so far as judging is concerned. The collective intentionality of judges is manifested by their view that law is a rule-governed social institution.

4.4 Applying Searle's Model to Legal Subjects and Legal Objects

By applying Searle's model to nonfiction in the law, I will argue that lawyers and judges often end up treating legal rules and other institutional facts (i.e. the nonfictions described below) like brute facts. As Hart might have said, "[o]ne way of doing this is to *freeze* the meaning of the rule so that its general terms must have the same meaning in every case where it application is in question."[27] As we shall see, this can result in the perception that a fiction is required to solve particular legal problems. If I am right to say that this mistake is sometimes made, then the perceived need to adopt a device thought of as the employment of a fiction might be alleviated to some extent with a proper understanding of nonfiction in the law. Instead of

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[26] Fuller has said that, "[a]n autocrat, deciding disputes upon the basis of self instinct or selfish interest and feeling no compulsion to explain his decisions, either to litigants or to himself, would have no occasion to resort to a fiction." [Fuller, ***supra***, at note 2 at 51]. The reason the autocrat would have no occasion to resort to the fiction is precisely because the autocrat is not deciding on the basis of instituted rules and can therefore do as he pleases.

[27] Hart, ***supra***, at note 23 at 126 (emphasis added).

feigning the existence of certain facts, the judge could simply admit to operating in the realm of discretion. Instead of pretending, the judge might decide to develop a new precedent on the basis of sound (though not legal) reasoning.

However, even if judges are made to understand the distinction between institutional and brute facts it is not clear that they would then cease to use legal fictions altogether. Here, the reason a judge may have for maintaining the device is motivated not only by the desire to achieve a just outcome but also by a desire to avoid appearing to have given up on the law as governance by rules. There is the difficult question, how does a judge decide once a rule has run out? The legal fiction, as I shall argue, can be viewed as one way for the judiciary to conceal what must seem to be an embarrassment for positivism. Instead of admitting to the discretionary nature of their decision in the 'open-texture', judges simply pretend that the rule has not run out.

The order of my approach will be as follows. In the next subsection I will describe certain nonfictions in law on the institutional model. In section 4.5, I will illustrate the way in which institutional facts are sometimes treated like brute facts. Finally, in section 4.6., I will consider the implications of this for the use of legal fictions in a positivist theory of law.

4.4.1 Legal Persons

Law, as a system of rules, gives rise to a number of legal institutions.[28] Logically prior to (or at least contemporaneous with) the existence of rights and duties is the existence of legal subjects. This is the most basic of the law's nonfictions.[29] By 'legal subjects' I mean those entities that have the capacity to be the "holders" of rights or the "bearers" of duties. Therefore, without legal subjects, it would be pointless to talk about rights and duties. As we saw in a different context in chapter #3, the only entities that are capable of holding rights in the common law system are 'legal persons.' Who exactly are legal persons and how do they come into being? In order to answer these questions it is critical to understand the legal person as a ***legal institution.***

I begin with a point that must by now be obvious. Only within the realm of legal practices are there legal persons. If one could imagine a world lacking legal institutions (viz. the state of nature), in it one could not find legal persons. Solitary and poor people maybe; nasty, brutish and short lives being lived, more likely still; but no legal persons. The creation of a legal person is not a brute fact. It exists "only within the legal universe of discourse, and it matters only for legal purposes. It

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[28] Here I am supplementing Searle's terminology. Law itself is an institution. But since our legal system is so complex, it can be said to create a number of sub-institutions such as property, tort, contract, etc. For the sake of simplicity I will refer to them as legal institutions. Likewise, I will sometimes refer to institutional facts in the legal context as 'legal facts' (so that they remain notionally separate from other institutional facts).

[29] See my discussion of Bentham on logical fictions in chapter #1 section 1.4.1.

matters in that legal claims and duties are founded upon [its] existence."[30] How, then, do legal persons come into being?

As we saw in chapter #3, the brute fact that a human being is born counts as the creation of a legal person in our present common law system. This has not always been the case. Although it may be incomprehensible to those who are not thinking of the legal person as a legal institution, it was not so long ago when the birth of human females did not, in all legal contexts, count as the creation of legal persons in Canada. As a matter of legal fact, women were not persons for certain legal purposes.[31] Outside of the context of law, this is hard to fathom conceptually. This oddity tells us that there is something unique about the existence of legal persons. The notion of a 'legal person' is somehow quite different from our notion of 'persons' outside of the legal context. Corporations count as legal persons (though, of course, corporations could not be senators either). Though their birth process is quite a different one, once born, corporations enjoy all sorts of rights including freedom of religion[32] and freedom of expression.[33]

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[30] MacCormick, ***supra***, at note 7 at 52.

[31] See, for example, In The Matter Of A Reference As To The Meaning Of The Word 'Persons' In Section 24 Of The British North America Act, 1867, [1928] C.L.R 276. In that case the Supreme Court of Canada held that women are not "qualified persons" within the meaning of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Canadian Senate. The decision was later reversed by the Judicial Committee of the Privy Council, [1930] A.C. 124.

[32] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (S.C.C.)

[33] Irwin Toy v. Quebec (A.G.), [1989] 1 S.C.R. 927 (S.C.C.)

The important point to be gleaned from all of this is that the occurrence of certain brute facts (such as the fact that a human being was born or that a piece of paper was logged into a binder called a 'corporate registry') will sometimes have important legal consequences – but not simply on their own. In the context of law, these brute facts will create legal subjects (just as others will create legal objects - see below). To put it in the form of Searle's locution, the birth of a human baby will count as the creation of a legal person in the common law system. As we saw in chapter #3, this is so because there exists a common law rule which declares that personhood begins at birth. This rule is an example of what MacCormick has called an ***institutive rule.***[34] An institutive rule is any legal rule that creates an instance of some legal institution.

Of course, the fact that a legal subject is brought into being upon the occurrence of some brute event such as a human birth does not mean that the newly created legal subject is identical to the flesh, bones and drool of the new born baby. The existence of a legal person is a legal fact, not a brute fact. It is not as if 'legal personhood' could be observed either directly or indirectly with the help of observational equipment. Rather it would have to be seen through institutional eyes, so to speak. In other words, the existence of a legal person simply cannot be expressed in the classical terms of primary and secondary qualities.

This is not the end of the story. The whole point of creating legal subjects (and legal objects) is that their existence, as a matter of legal fact, will result in other

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[34] MacCormick, ***supra***, at note 7 at 52.

legal consequences. For example, there are definite consequences that flow from the creation of a new legal person. As we just saw, once a corporation comes into being, born with it are certain rights such as its constitutional right to freedom of expression. Or to continue the example from chapter #3, in tort law the existence a legal person creates in others who are close in proximity a legal duty of care. MacCormick refers to rules that determine the legal consequences of an existing legal subject (or legal object) as "***consequential rules.***"[35]

The existence of legal persons is typically finite.[36] Death can be met in one of two ways. The usual end is the result of what MacCormick has called a "***terminative rule.***"[37] A terminative rule brings a particular instance of a legal institution to an end. As with institutive rules, terminative rules become operative upon the occurrence of certain brute facts. For example, a first-time executor of an estate quickly comes to realize that the demise of a human being also precipitates an institutional death. "Dead men don't wear plaid," as one comedian once put it. On a similar note, certain brute facts will result in the unincorporation of what was once a company. The second, more rare, type of death occurs when the whole or part of an institution (and not merely an instance of it) dies or is killed. For example, it is conceivable that legislators could in the future repeal the laws that had created the institution of the limited corporation. Or, as a different example, there have been

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[35] MacCormick, ***supra***, at note 7 at 53.

[36] An exception might be Her Majesty The Queen. This, of course does not refer to E.R.II the aging woman but, rather, the office.

[37] MacCormick, ***supra***, at note 7 at 53.

times in many legal systems when politically undesirable human beings were legally stripped of their status as persons.[38]

Finally, one can contrast the existence of a legal person with an equally indispensable doctrine in law often referred to as the 'reasonable person' standard. In law, the standard by which a trier of fact determines whether a legal person is guilty of certain criminal offences or liable in negligence is that of the 'reasonable person' put in the position of the defendant. Without this doctrine certain aspects of criminal and tort law could not exist in their present form. What kind of person is the 'reasonable person'? The 'reasonable person' is not a legal subject. It is not a legal entity that comes into being as a result of an institutive rule in conjunction with the occurrence of some brute fact such as a human birth. Since the 'reasonable person' is not a legal subject, it is incapable of bearing rights or duties. Hence, the 'reasonable person' is not a legal person at all. In other words, the 'reasonable person' exists neither as a matter of brute nor institutional fact. What exists, as a matter of institutional fact, is a legal standard which employs the concept of reasonableness in order to determine whether the acts of an existing legal subject were negligent. Understanding this distinction is a key step in comprehending the existence of legal subjects and legal objects. As it must be clear by now, neither is the reasonable person a legal fiction, though innumerable jurists continue to make the mistake of calling it one.

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[38] The legal consequence of this would be that those individuals could then be killed with impunity, unless they happened to be the property of some person.

4.4.2 Legal Objects

The same framework can be applied to the creation, the consequences of their creation, and the termination of legal objects as well. By 'legal objects' I mean those 'nonfictional' entities that, once proved to exist, are utilized to determine how rights and duties are to be distributed amongst the existing legal subjects. Typical examples (in no particular order) include: contracts; corporate shares; implied terms; ***mens rea***; foreseeable plaintiffs; debts; bonds; charitable trusts; choses in action; jurisdiction; intentional torts; estates; licenses; ***rationes decidendi***; mortgages; real estate; secured interests; ***locus standi***, etc. Proving the existence of any one of these legal objects will ultimately affect the relationships between legal subjects by creating certain rights or duties, etc. Notice, that this makes the existence of specific legal rights and duties a matter of institutional fact. For example, the existence of a contract will create certain rights and duties for the parties to the contract. Those rights and duties, like the contract itself, do not exist independent of our attitudes toward them. They do not exist as brute facts in the way that there is snow at the peak of Mount Everest. Rather we collectively intend that the brute facts giving rise to the contract count as the creation of certain rights and duties in the context of law. Let us consider the contract in greater detail.

The contract is a familiar legal object. It is used by lawyers and lay persons alike. The common law system is inconceivable without the institution of contracts. Without it we would not be able to marry, get insurance, sell the farm, ride the bus, or even buy a malt at a hockey game. Canadians make many contracts each day. Yet

despite their abundance, most people who make them have little or no idea of what they are. As a legal institution, not only are the consequences of the contract misconceived, often in fact, the parties do not even realize they have made one. What kind of an object is a contract if the fact of its existence is unknown to its makers? As is the case with legal persons and with other legal objects, contracts do not have a mere physical existence. Contrary to the beliefs of many lay persons, contracts are not blobs of ink on long pieces of paper. It is not as though one of the parties to the agreement could simply tear up a piece of paper and thereby end the contract. That piece of paper is nothing more than a type of evidence used to prove the existence of the contract. To terminate the contract would require an operation of law. One must invoke a terminative rule that would bring the contract to an end. In the common law tradition, this does not include tearing up the paper.

From all of this one sees that the existence of a contract is a legal fact. As such it is by and large a conceptual matter. Still, its existence is not purely conceptual. It requires the occurrence of some brute facts, such as an exchange of words on paper by fax or an oral conversation over the telephone. If those mundane exchanges are consistent with the institutional practices required to enter into a contract (i.e. the institutive rules), then the brute fact of their occurrence will count as a contract. Thus, as we saw with the creation of legal persons, the existence of a contract (or any other legal object) is the result of an institutive rule that becomes operative upon the occurrence of certain noninstitutional events. Still, although the existence of the

contract requires the occurrence of certain brute facts, this does not make the contract a physical object.

To most lay persons, assuming they are even aware of it to begin with, this type of analysis will seem to be unimportant mumbo jumbo. But, interestingly enough, it suddenly becomes crucial to them once a dispute arises. To illustrate this basic point let us use MacCormick's example of a passenger on a bus who doesn't realize that he has entered into a contract of carriage:

> But if there should be a crash and a passenger injured or his property damaged, and if he should take it into his head to seek some recompense at law, then it will be all-important for his success or failure whether there was a contract. ... Whatever he or anyone else actually thought or intended as he entered the bus, it now becomes essential, for the legal purpose of deciding what if any right to compensation he might have, to ascertain whether he then so acted as to make a contract with the operator. The legally banal and ordinarily unimportant and unconsidered truth that getting on and paying the fare concludes a contract becomes a centrally significant fact.[39]

Thus, usually, it is only once a situation has entered the legal forum that the institutional existence of legal objects comes to the forefront of one's attention. Any lawyer who has worked with clients will tell you how quickly those clients come to recognize the existence of legal objects once a lawsuit is pending. This is because legal objects are part of the toolbox of legal argumentation. And the consequences of that argumentation are very real indeed.

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[39] MacCormick, *supra*, at note 7 at 50.

4.4.3 Legal Rules

Having so far described the subjects and objects of the law as constituted by institutive rules, my portrayal of the nonfictional requires a few words about the character of legal rules. As with my brief discussion of legal persons and contracts, the account will be a simple sketch. This is of course because the ultimate aim is not to argue in favour of a particular conception of any of these legal concepts but rather to provide a general picture of those elements we can safely call 'nonfictional' in our common law system.

The first point about legal rules is that they too have only an institutional existence. It is no more possible to hold a rule in one's hand than it is a contract. As Hobbes once described them they are "pronouncements of the mind."[40] Still, as an institutional fact, the existence of a legal rule logically presupposes the existence of certain brute facts. As such, legal rules can be said to have a pedigree that can be traced to certain noninstitutional acts or events. The usual events that create legal rules are the pronouncements of parliament and the practice of judicial precedent, at least for the pure of Hart.

Much ink has already been spilled over the idea of a rule as a social practice.[41] Leaving aside what are known as power-conferring rules, in the legal context a rule is often thought of as a standard of action. What happens when we think of legal rules as standards? Consider the following description:

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[40] Thomas Hobbes, Elements of Law, Oxford University Press, (New York: 1994).

[41] See generally Ludwig Wittgenstein, Philosophical Investigations, 2nd ed., trans. G.E.M. Anscombe, Basil Blackwell, (London: 1958); Hart, *supra*, at note 23.

> the very etymology of the words ***norm*** and ***rule***, which originally denoted concrete tools: the Latin ***norma*** derived from the ancient Greek ***gnomon***, originally meant 'a square'; ***regula*** - which, moreover, still keeps this meaning in French - meant a stick or little board which was used to draw straight lines ... rules of conduct are, more precisely, tools which give to those for whom they are designed and who make use of them, the 'measure' of the possibilities open to them in their actions and behaviour.[42]

According to Amselek, lawyers and judges treat legal rules in the way tailors use patterns to guide their hands in the cutting out of the garments they produce. Through the use of these patterns they can determine ***by how much*** they need to adjust their material. From this point of view, legal rules "serve as the standards which make it possible to judge actions which have already been performed, or lines of conduct followed after the event."[43] This highlights what is often called the instrumental aspect of legal rules. Legal rules are said to be 'measuring-sticks' for the purposes of resolving disputes. How helpful are these physicalistic metaphors?

As Fuller has remarked, these metaphors become naturalized in the language of the law.[44] Consider, for example, the sense of objectivity that is often attributed to legal rules as they are discussed at every Canadian law school in first year constitutional law. I am referring to the rules that define the newly famous 'Oakes

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[42] Paul Amselek, "Law in the Mind," Controversies About Law's Ontology, Edinburgh University Press, (Edinburgh: 1991), p.14.

[43] ***Ibid.***

[44] See chapter #2 section 2.3.2.

test'[45] which is taught almost as though the subject matter is first year physics. Here is how the Supreme Court of Canada has told us to think about constitutional rights. In order to determine the limitations on rights otherwise guaranteed under section 1 of the Charter, we must "***balance***" the interests of society against those of the individual. This can be achieved by "***measuring***" various aspects of the "***proportionality***" between the "***pressing and substantial***" objective of the legislation and the "***gravity***" of the intrusive means by which that legislation is carried out. This rhetoric makes rights analysis sound practically scientific. Of course, the existence of a constitutional right, arguably the most abstract of all our legal institutions, is not a matter of brute fact.

4.5 'Brutalizing' the Facts

The tendency for lawyers and judges to treat institutional facts such as the existence of constitutional rights or marriage contracts like brute facts is not an uncommon occurrence in the law. This proclivity is even recognized by nonlawyers such as Searle who says that:

> It is tempting to think of *social objects* as independently existing entities on analogy with objects studied by the natural sciences. It is tempting to think that a ... contract is an object or entity in the sense that a DNA molecule, a techtonic plate, or a planet is an object or entity.[46]

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[45] This so-called 'test' refers to the methodology for an analysis of section 1 of The Canadian Charter of Rights and Freedoms [hereinafter the Charter] as set out in R. v. Oakes, [1986] 1 S.C.R. 103 (S.C.C.).

[46] Searle, ***supra***, at note 9 at 36.

At least DNA molecules are said to mutate, while techtonic plates shift and planets drift in orbit. Often judges do not afford institutional facts such agility. Sometimes they treat them as though they are as fixed as Archimedes' fulcrum. Or, in Hart's terms, judges "freeze" the meaning of the rule. For some judges rules become as rigid as water when frigid. As an example, I shall consider the rigidity attached to the categorization of property as either movable or immoveable and its effects on the rules in private international law. This will provide a typical sample of the problems that are generated by neglecting the institutional and instrumental character of legal objects.

In the area of private international law, the common law recognizes a number of 'choice of law rules' used to determine which country's laws are to apply in an international dispute. One such rule is that "***succession to property in immoveable is governed by the situs of the immoveable.***"[47] According to this rule, a common law judge who is adjudicating a dispute about succession to property in immoveable (e.g., real estate, corporate shares, debts) will apply the law of the country in which the immoveable is situated. In most of the cases where a choice of law rule is governed by the law of the ***situs***, it is fairly simple to determine which law applies. To use a different example, the 'formal validity' of a marriage contract is governed by the law of the ***situs*** of the ceremony.[48] Since the ceremony usually takes piace at a particular locale, the ***situs*** is relatively easy to

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[47] Al et al., The Book, University of Western Ontario Faculty of Law, (London: 1993), p.29-30.

[48] ***Ibid.*** at 130.

determine. To prove that the applicable marriage law is that of Ontario, as opposed to, say, Florida, one simply hires a cartographer or a land surveyor to testify that the precise location of the ceremony was somewhere north of the 49th parallel.[49] But, to bring us back to the succession to property rule, how does one determine the *situs* of an immoveable when that immoveable is a corporate share, or a debt?

Before answering this question it is crucial to know how it came about. Originally, the classification of 'immovable property' was employed to distinguish land from chattels and other forms of property that could be moved or removed, viz., 'moveable property.' This distinction was at one time quite useful. Consequently, in the area of private international law, the category of 'immoveable' was employed in the "succession to property" rule. At that time, proving the *situs* of an immoveable was dead simple. Since land was the only immoveable, a cartographer would be hired. As new forms of property such as debts and corporate shares were created, it was not clear how to categorize them under the old classification scheme. Were they movables or immoveable? Since, unlike chattels, they could neither be moved or removed, they were defined as immoveables. Unfortunately, it was not realized until some time later that debts and corporate shares do not stay put either. They have no *situs*, that is. Because the rule that categorized property as either movable or immoveable was, practically, *frozen solid*, the possibility of new categories was not

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[49] Problems might arise in cases where the ceremony is at sea (or jumping out of a plane over Las Vegas). It is interesting to note how other contractual problems of precisely the same nature were historically solved in the law of Admiralty. As Blackstone has revealed [3 Commentaries 107], the courts employed a legal fiction, simply pretending that the contracts were made at the Royal Exchange. Consider this an express foreshadow of what is to come.

immediately considered. Consequently, debts and later corporate shares were ***shovelled*** into that category. As a result, the entire concept of locating a debt or corporate share is now problematic. This is because, as we are well aware by now, debts and corporate shares do not themselves have a brute existence.

Now someone might wish to argue that although these institutional objects have no locale, one might trace their existence to some brute event that did occur in a particular place. This is absolutely correct. In some areas of law this is exactly how the location of institutional objects is stipulated. However, in other areas of law, such as private international law, it is much more difficult to determine ***which brute facts*** are most relevant to the question of locale. For example, given the complexity of the different brute events that occur with interjurisdictional commercial transactions, a great deal of confusion surrounds the choice of law rules governing succession to property.[50] There is a similar problem with the choice of law rule governing torts.[51] What we see in these private international law cases is that judges are continually confronted with new difficulties because of the ***brutal*** and uncompromising classification of legal objects into categories such as moveable or immoveable. Because the newer, often more abstract, legal objects where ***fixed*** in

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[50] An appreciation of these difficulties is recognized in The King v. Toronto General Trusts Corp., [1919] A.C. 679 (Alta., JCPC); Brassard v. Smith, [1925] A.C. 371 (Que., JCPC).

[51] i.e. "The law of the place where the alleged tort occurred." In negligence cases the difficulty arises when the standard of care is breached in one jurisdiction while the resultant injury is suffered much later in another jurisdiction. See especially the conflicting results in Moran et al. v. Pyle National (Canada) Ltd. (1973), 43 D.L.R. (3d) 239 (S.C.C.) and Interprovincial Co-operatives v. The Queen (1975), 53 D.L.R. (3d) 321 (S.C.C.) The confusion continues to mount in Tolufson v. Jensen (1995), 1 W.W.R. 609 (S.C.C.).

the same category as other institutional objects whose existence is more closely connected to brute objects (e.g., land), it is not clear how to treat some of the newer entities. Debts cannot be treated in the same way that land is. At least not when it comes to determining ***situs***. How, then, is this problem to be resolved?

According to one author, "both judges and academics have attempted to get around this problem by ***imputing*** a situs."[52] Interestingly, what is being ***imputed*** is precisely a ***legal fiction***. Notice how this comes about. At some time prior to imputing the fiction, an institutional fact was created to serve some purpose. For example, in the context of private international law, a choice of law rule is created to determine which countries laws are to apply. As it is with other legal rules, sometimes those choice of law rules are stretched beyond their limits. For instance, because a judge does not know how else to deal with it, a debt is treated like land. To take another example, in the law of tort negligence is treated like, not as, a battery. As a result of treating negligence as though it can be traced to brute events in the same way that a battery can, the judge is faced with the problem of having to use a rule that was not originally meant for the facts at bar. Therefore, a judge who applies the old rule to the new institutional object is forced to fabricate brute facts. In other words, the judge must pretend that the debt occupies space in the same way that land does, or that the completion of an act of negligence occurs in one spot in the same way that punching someone in the nose does.

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[52] Al et al., ***supra*** at note 47 at 329 (emphasis added).

Now, admittedly, this looks very similar to the creation of institutional facts discussed above. In other words, it looks like the judge who employs a legal fiction is simply allowing certain brute facts to "count as" the institutional location of the debt or tort. There is an important difference. Remember that institutional facts, in the context of common law rules, require a collective intentionality on the part of judges to assign the new status to the brute fact. Now there may well have been a collective intention to assign the status of a negligence action to certain brute facts. But, on the first occasion that the institutional existence of a negligence action was applied to the choice of law rule for torts, there did not exist an institutional practice in which the existence of ***an established set of brute facts*** **count as** ***the location of a tort.*** In the cases cited at note 51 precisely what is lacking is a collective intention. Here is how Dickson J. (as he then was) described the confusion in tort law:

> One theory which has been advanced as a means of ascertaining the ***situs*** or ***locus*** of a tort is sometimes referred to as the "place of acting" theory ... The theory has the effect of dividing the tort into its constituent elements, the tort of negligence being divided into (1) a duty of care; (2) breach of that duty, and (3) damage, and each of these metaphysical fragments is given a geographic ascription. The jurisdiction in which the careless act is alleged to have occurred is, however, held to be determinative, to the exclusion of the jurisdiction in which the hurt was suffered. Logically, it would seem that if a tort is divided and one part occurs in State A and another in State B, the tort could reasonably for jurisdictional purposes be said to have occurred in both States or, on a more restrictive approach, in neither State. It is difficult to understand how it can properly be said to have occurred only in State A.[53]

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[53] See Moran et al. v. Pyle National (Canada) Ltd., ***supra***, at note 51 at 231.

To summarize, private international law provides an example of the manner in which some institutional facts get brutalized. Because judges treat certain legal categories with such brute rigidity, they are often forced to squeeze new institutional objects into old categories. As a consequence, certain institutional facts are often treated as though they have a more brutal existence than they do in fact. This can result in the application of unsuitable rules for the sake of seeming to save the rules themselves. Confusion then ensues. Sometimes a judge will attempt to eliminate this confusion by employing a legal fiction. Though he or she will pretend that the site of certain brute events count as the location of an institutional object, the judge is perfectly well aware that there is no institutional fact to support that pretense. ***Thus the judge feigns the existence of certain institutional facts.*** Therefore, one of the consequences of brutalizing the facts is that judges are drawn into the use of legal fictions. As I have indicated many times throughout this dissertation, these fictions will either generate confusion or else, eventually, become new institutional facts once accepted by the judiciary.

4.6 The Embarrassment of Positivism[54]

We have observed two different ways in which legal nonfiction effects the perceived need for legal fictions. First, if the brute facts in a case do not count as the institutional fact required to achieve a just outcome, the judge might choose to ***feign the existence of brute facts*** that will count. We might call these ***brute fictions.***

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[54] I owe much of the precision and many of the ideas in this section to Richard Bronaugh.

The brute fiction has been employed in this manner in the cases considered in chapter #3, e.g., where the judge pretended an unborn child was born. Second, if a particular institutional fact does not fit within the scope of other institutional facts required to resolve a dispute, the judge might choose to ***feign the existence of institutional facts*** so that the existing rules can then be applied. We might call these ***institutional fictions.*** The institutional fiction has been employed in private international law as described in the previous section. ***In either case, we see that legal fictions are sometimes used by judges when they perceive that the existing rules have run out.*** As Summers has described it, "[l]egal fiction is itself a formal device, one that often involves extending an existing rule or concept well beyond its scope, but with the pretense that the case at hand really falls within existing precedent."[55]

Interestingly, we now have one observation relevant to what has perhaps become the thorniest of questions in contemporary jurisprudence. ***What are judges***

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[55] Robert Samuel Summers, Instrumentalism and American Legal Theory, Cornell University Press, (Ithaca: 1982), p.149. It is not clear whether Summers is referring to brute or institutional fictions although what he says seems to hold true of both. On that note, it is important to recognize the potential difficulties in determining whether a judge is using a brute fiction or an institutional fiction. Take, for example, the property law fiction examined in chapter #3. Is the judge who borrows the fiction for the first time in a prenatal tort case pretending that the unborn child was born or that the unborn child was a legal person? As I argued extensively in chapter #3, the danger in reasoning through the brute fiction begins precisely when it is first used ***unknowingly*** as an institutional fiction.

It is also important to note that reasoning through what I have called an institutional fiction implies that there is some institutional fact that the fiction is meant to get around. In cases where it is unclear whether an institutional fact exists, it will be extremely difficult to determine whether an institutional fiction is being employed. In such cases we will be tempted to say, isn't this just an institutional fact in the making?

doing when they decide hard cases? My study of legal fictions seems to reveal one reply that has been offered by some of the judges in our common law system: "***Pretending!***" As every Anglo-American jurist is well aware, Dworkin is rather unhappy with 'discretion'. Now notice the language in which he characterizes his reproach:

> Legal positivism provides a theory of hard cases. When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a 'discretion' to decide the case either way. His opinion is written in language that seems to assume that one or other party had a preexisting right to win the lawsuit, **but that idea is only a fiction.** In reality he has legislated new legal rights, and then applied them retrospectively to the case at hand.[56]

Notice that Dworkin is describing the judicial device that I have called the institutional fiction. He is saying that all judges write as if they enforce preexisting rights, yet, when a case is hard, judges on a positivistic theory cannot be doing what they say they do. In hard cases, according to the positivist, they exercise discretion, i e., decide by standards from outside the law and do not enforce preexisting rights. Dworkin, of course, thinks that they do well in a hard case to write exactly as they do, for he thinks they do decide according to preexisting rights. In this and all (civil) cases, they do not decide from without the law but from within. Still, what Dworkin seems to be saying is that the overall approach of the legal positivist requires a retrospective fiction. ***In hard cases, positivist judges feign an institutional***

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[56] Ronald Dworkin, Taking Rights Seriously, Harvard University Press, (Cambridge: 1978), p.

fact. They pretend that the answer existed all along when, in fact, the judge (according to positivistic theory) simply invented it in her discretionary mode. What the positivist must say about the practice of judges who write as if they enforce preexisting rights in hard cases is that they are making it up.

In a sense, my investigation of legal fictions could be said to support Dworkin's rather contentious description of legal positivism. One of the most interesting aspects of the fiction as a judicial device is that a judge will pretend something in order to make a rule look as if it has not run out. As we saw with the property law fiction examined in chapter #3, by feigning the existence of brute facts (that the child was born though it was not), the succession rule is made to look as if it is directly on point. The judge who employed the original fiction was in essence pretending that the brute facts were within the core of the rule. As a matter of both brute and institutional fact, however, the case was really in the furthest reach of its penumbra. As it was also the case in the later prenatal decisions, the judge thought himself to be in a predicament because the rule (that personhood begins at birth) could be stretched no further. To get out of the predicament, the judge simply pretended.

The difference between Dworkin's view and my own is that he seems to be implying that fiction is necessary in order for the positivist to save face. Dworkin is saying that on a positivistic theory the practice of judges who say that all their decisions follow from already preexisting rights states a falsehood, a fiction, since sometimes rules run out – on their theory. Legal fictions must be thought by the

positivist to conceal the exercise of discretion. However, if Dworkin is right about this we would need to know why. Why must the positivist pretend that the rule has not run out? Are there no other options? So far as I know, Dworkin does not address the issue any further. In "Hard Cases" and in almost everything that he has written since, he is more interested in finding an alternative theory. Of course, Dworkin is of the view that judges are not forced to pretend because he thinks law is something more than just a system of rules. There is no reason to worry about rules running out, he thinks, because judges can always appeal to underlying principles. With this in mind we might now canvass the positivist judges' options. As I see it there are three.

Positivist judges might decide to go on pretending in hard cases. This would allow them in moments of self-deception to continue thinking of law as a system of rules and to apply those rules with relative ease in the vast majority of cases. It would also allow them to continue the process of deductive legal reasoning in hard cases although some of that reasoning would be based on false assumptions (i.e., legal fictions). The advantage is that they would not be forced to see themselves as reasoning outside of the rules validated by the rule of recognition; of course, their actual conclusions would only be as sound as their assumptions. As we saw in chapter #1 and will see again in chapter #5, relevant practical considerations in deciding whether to do so would include: i) whether a fiction is necessary; ii) whether fictions can perform a proper function; iii) whether fictions are dangerous.

Secondly, judges might drop all pretense and at the same time broaden their collective intention to count as law something in addition to the system of rules

validated by a rule of recognition. Of course, these judges would not just be dropping legal fictions. They would be dropping legal positivism. Relevant practical considerations in deciding whether to do so would include: i) whether the embarrassment caused by hard cases is sufficient to require adopting a different model; ii) whether there is sufficient institutional support in the context of the judiciary to adopt such a model; iii) whether the new model really makes hard cases any easier; iv) whether the new model is prone to fictions of its own.

Finally, positivist judges might drop all pretense and do as Hart suggested, namely, admit that they are exercising discretion. Recogni g this as an option tells us that legal fictions are not necessary in the sense that positivist judges are forced by their theory to use them when rules run out. Rather they are led to use them only by their failure to recognize the conditions under which they do in fact exercise discretion. Of course, most judges (other than those on the highest court of appeal) may not like to admit that they are exercising discretion. In fact, this is precisely the reason why they adopted legal fictions in the first place. Once the pretense is gone, so too are the standards derived from rules pedigreed by the rule of recognition. Once in the penumbral realm, judges are no longer judging according to law, at least not in the traditional positivistic sense. Faced with this prospect, perhaps there is an odd satisfaction in pretending to remain within the law while one knows that one does not. Fuller described something similar with what he called 'emotional conservativism.'[57] "[I]t proceeds ... from some emotional and obscurely felt

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[57] See chapter #2 section 2.3.3.

judgment that stability is so precious a thing that even the form of stability, its empty shadow, has value."[58] On the other hand, it is not difficult to imagine a number of contemporary jurists (under various labels) who believe that it is high time we face the fact that rules do run out and stop pretending otherwise. Hart insisted that the death of formalism does not leave us with rule scepticism. In a certain sense, he was not only a visionary but a radical. As I mentioned earlier, this might allow for the development new rules on the basis of sound (though not legal) reasoning, rather than judicial pretending.

Having laid out these three options, I respectfully leave the difficult task of choosing between them to those judges, much wiser than myself, who have employed the device of legal fictions. My aim in this chapter was to provide a description of the background conditions that seem to underlie the use of legal fictions. It is now time to state conclusions.

4.7 Legal Facts and Legal Fictions: A Synopsis

In an attempt to elaborate what Fuller described as the "intellectualism" that underlies the use of legal fictions, I have tried to present a plausible philosophical account of what I call 'nonfiction in the law.' By applying Searle's theory of institutional facts, I have attempted to describe the sense in which rights and duties, persons, contracts, rules, etc. can all be said to exist in the common law system.

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[58] Fuller, *supra*, at note 1 at 47.

Having done so, I am now in a position to make a number of observations that will further the point of the exercise.

First, we now have a theoretical structure to make sense of what Bentham once called *logical fictions*. In chapter #1 section 1.4.1 we saw that Bentham distinguished between legal and logical fictions. Bentham wanted to eliminate legal fictions from the law. Not so with logical fictions. Bentham thought that logical fictions are a necessary precondition of legal discourse. Still, as we saw in chapter #1, Bentham was trying to dissipate the idea that words like 'duty', 'obligation', and 'right' were the names of mysterious entities awaiting our discovery. Bentham was willing to attribute to these terms a verbal reality but nothing more. We can now understand Bentham's notion of a "verbal reality."[59] By thinking of the existence of 'rights' and 'duties' ('legal persons,' 'contracts,' etc.) as the result of language and constitutive rules, we demystify these concepts by understanding the relationship between their said existence and the existence of particular brute facts. As Searle put it, these concepts "are in fact just placeholders for patterns of activities."[60] Bentham would have been happy with this. However, by attributing to rights and duties, etc., no more than a verbal reality, Bentham misunderstood the structure of institutional reality as it actually works in real human societies. As Searle would likely respond, Bentham was unable to see "the invisible structure of social reality."[61] Despite these

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[59] See chapter #1 section 1.4.1.

[60] Searle, *supra*, at note 8 at 57.

[61] Searle, *supra*, at note 8 at 4.

differences between Bentham and Searle both institutional facts and logical fictions can be contrasted to legal fictions; legal fictions are neither factual nor logical, as we have used those terms.

Second, we now have the theoretical structure to reconsider Bülow's juristic theory of truth mentioned in chapter #2 section 2.4. Bülow thought the language of the law can be said to engender a reality of its own. Given my description above, perhaps this is so. However, Bülow clearly had something much more esoteric in mind. To him, engendering a reality of its own meant that the law could somehow be whatever it wants to be. Consequently, Bülow concluded that there is no need for legal fictions. According to my own description of nonfiction in the law, I agree that there is a sense in which the language of the law engenders its own reality. But not in the way that Humpty Dumpty might have done it.[62] The effect can only be achieved in so far as human beings, through the existence of language and other social institutions, have collectively intended the creation of institutional facts in a legal context. This is, I think, what Fuller had in mind when he talked about the linguistic phenomenon of redefinition. However, what Fuller did not say is that, logically speaking, the existence of legal facts "has to bottom out in phenomena whose existence is not a matter of human agreement."[63] With Searle's model we

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[62] "When I use a word, it means just what I choose it to mean, neither more nor less." See Carroll, Through the Looking Glass, in Martin Gardiner's The Annotated Alice, Penguin Books, (London: 1970), p.269.

[63] Searle, *supra*, at note 8 at 55.

can now see more clearly why Fuller was right to think that the whole of law cannot be redefined by fiat, in one fell swoop, as Bülow seemed to think it could.

Third, we can now describe the actual operation of legal fictions discussed in chapter #3 in more precise terms. When a judge employs a legal fiction for the first time, he or she feigns the existence of certain brute facts (e g., that a child was born at a particular point in time). The motive for doing so is particularly well understood in terms of Searle's formula: ***X(brute fact) counts as Y(institutional fact) in the context C(law)***. If the brute facts in a case do not count as the institutional fact required to achieve a just outcome, the judge might choose to feign the existence of brute facts that do count. However, when that fiction is cited as a precedent in future cases, what often happens is that the new judge no longer feigns the existence of brute facts. Instead, what is feigned is described by different locution; the judge simply pretends that the original brute facts ***count as*** the existence of the institutional facts required for what the judge thinks is a just outcome (e.g., that a potential person counts as one who is owed a duty of care in the context of tort law). By feigning the existence of a different institutive rule, the judge ends up feigning the existence of new institutional facts (e.g., that Ann Duval was a legal person at the time of the accident; that persons and potential persons are both owed a duty of care in tort). Whether the judge does so knowingly or unknowingly, there is potential for confusion and inconsistency in the law. This potential arises when other judges begin to treat those feigned institutional facts as though they are actual institutional facts. In other words, they begin to treat legal fictions in a nonfictional manner. As I argued

in chapter #3, this can have a damaging effect on the institutional facts that the original brute-fact-feigning judge had meant to preserve. One such effect is that those institutional facts are eroded despite the fact that neither judges, parliament, nor the members of society meant to erode them.

Fourth, we can now see why Olivier and others are wrong to say that there are ***legislative fictions.***[64] Fictions are only used by judges. Often, statutory enactments contain what are known as deeming provisions. A striking example can be found in the Abattoir Commission Act[65] of South Africa, which provides that a karakul lamb shall be deemed not to be an animal. Though the language of the provision appears fictitious to the uninitiated, the requirements of the provision are institutional facts. Nobody is feigning anything. It is accepted that there are karakul lambs. This brute fact is not pretended away. Notwithstanding, the karakul lamb is not an animal in the law of South Africa and no amount of zoological evidence could prove otherwise. Why? Because the statute decrees that the karakul lamb shall not count as an animal in the context the rules pertaining to the slaughter of animals in South Africa. Since that statutory decree counts as a law in the context of the South African judiciary, the karakul lamb does not counts as an animal. Thus the brute fact that the being is alive, has four legs, is woolly, has a respiratory system, and bears it own young will not be sufficient to impose the status of animal upon it when it comes to the slaughtering laws in South Africa.

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[64] Pierre J.J. Olivier, Legal Fictions in Practice and in Legal Science, Rotterdam University Press, (Rotterdam: 1975), p.95.

[65] Sec. I (iii) of the South African Act 86, 1967.

Fifth, although legal nonfictions such as the legal rules that give rise to rights and duties, legal persons, contracts, etc. can all be said to exist, one must avoid the temptation to treat them as brute facts. Though they are indeed the tools of legal argumentation, they have a very different character from tools that exist as a matter of brute fact. The function of a brute tool is at least in part derived from, and certainly limited by, its sheer physical nature. Institutional tools, we must be careful to remember, have only the ***functional status*** which we ascribe to them. Consequently, they are much less rigid instruments. This is something that lawyers and judges can forget from time to time. The private international law cases that I discussed were meant to illustrate Hart's warning that, "the rigidity of our classifications will thus war with our aims in having or maintaining the rule."[66] At times, the aftermath of such wars has been the fabrication of legal fictions. The brutality that judges often attribute to legal rules and classification schemes is sometimes seen as a barrier that stands between the facts of a case and a just outcome. Many judges seem to think that the only way out is to feign other brute or institutional facts.

Finally, with all of this I hope to have demonstrated an important connection between the way that judges think about nonfiction in the law and their perceived need for legal fictions. One of the things that has surprised me most throughout my investigation of legal fictions is that no one else had thought to consider the philosophical background conditions that underlie their use. I have argued that the

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[66] Hart, ***supra,*** at note 22 at 127.

best way to make sense of the fiction is to see it as a consequence of the fact that judges have embraced a positivistic attitude toward law. Adopting Searle's formula: a system of rules count as law in the context of the judiciary. The existence of the particular rules are also a matter of institutional fact. Borrowing now from Hart, these institutional facts, since they are formulated in general terms, are open textured. In some situations the institutional facts will not be decisive of a particular dispute. This creates an embarrassment that induces some judges to pretend that the institutional facts are decisive. They therefore treat those institutional facts as though they are as determinate as brute facts. This is done because many of the judges who have adopted a positivistic attitude towards law prefer legal fictions to judi ial discretion. If this is correct, legal fictions are best understood as the positivist's rationalization in a hard case. Fictions are meant to put the facts of the case back within the scope of the rule orutally and institutionally. To conclude in simpler terms, sometimes judges would rather pretend to be indoors than be embarrassed by the thought they really have gone out.

CHAPTER #5

THE ROLE OF LEGAL FICTIONS IN LAW

The aim of this short chapter is to synthesize the main conclusions drawn in the previous four chapters. This will be accomplished by attempting to answer the three central questions raised in the historical debate about legal fictions set out in chapter #1: 1) Are legal fictions necessary? 2) What is the proper function of legal fictions? 3) Is there danger in the use of legal fictions?

5.1 Are Legal Fictions Necessary?

A number of jurists from Blackstone to Fuller have thought that the legal fiction is a necessary architectural feature in the legal castle. Blackstone thought that the fiction was necessary to remedy the harsh, outdated laws of medieval England. Similarly, Fuller thought that the fiction is necessary to disencumber the law of its intellectualism – which we have seen to be a kind of formalism or rigidification. Throughout this dissertation, we have witnessed at least three different situations in which judges ***think*** that the use of a legal fiction is necessary. However, in all three instances it is by no means clear that a legal fiction is necessary, at least not in the sense that it is indispensable to legal reasoning.

The first situation was examined in chapter #3. Legal fictions ***appear*** to be necessary when a rule of law ***clearly*** stands in the way of a desired result. In such

a case the only way to get around the rule while (supposedly) leaving it intact is to feign the facts. For example, the Supreme Court of Canada held that a legal fiction was necessary to get around the rule that personhood begins at birth.[1] This is not an example of a hard case since the rule itself is perfectly clear. It is just that the court did not like the result that would follow from a straightforward application of the rule. Consequently, the court cannot claim to be exercising 'discretion' as we have been using that term. Here, what makes the fiction 'necessary' is the so-called demand for justice. One might well ask, what conception of justice? How does it operate as a justification for breaching clearly established legal rules? As I will mention below, I have not addressed this aspect of the fiction in any detail nor will I in this dissertation. However, to the extent that there might be other ways of achieving justice or that the type of 'justice' sought may not be within the realm of accepted judicial practice, it is unclear why this use of legal fictions is necessary or, as we shall see below, whether it can actually achieve its purpose.

The second situation in which a judge *might perceive* the need for a legal fiction was observed in chapter #4. Because judges sometimes have a tendency to treat certain institutional facts like brute facts, they create problems that they think can only be solved by legal fictions. That is, the apparent need to employ legal fictions will arise when judges 'brutalize' legal nonfiction in such a way that it requires circumventing. Of course, to the extent that they are wrong about this perception, the 'stretching' or 'unfreezing' by means of legal fictions is unnecessary.

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[1] Montreal Tramways v. Leveille, [1933] S.C.R. 456. (S.C.C.)

The third situation in which legal fictions *seem* necessary is the result of an unwillingness on the part of some judges to admit to themselves that legal rules can run out. Those judges prefer the use of legal fictions to the open exercise of judicial discretion. Were they willing to admit that in such cases they are exercising discretion, there would be no need to pretend that they are not. Notice that, in these situations, the judge *is* exercising discretion since the rule has run out. It is just that the judge would rather render the decision in language that ***appears as though*** the decision is within the rules, even though it is not. The judge who decides hard cases in this manner is a kind of closet Hartian.[2] I say this because the judge is unwilling to come out – outside of the rules, that is. Notice that, since it is a hard case, the judge is outside of the rules regardless of the how he or she dresses it. Therefore this use of the fiction is unnecessary on a positivist theory of law.

Together, these three different situations allow us to draw an important distinction. We can distinguish between i) the ***general question*** whether ***fiction*** is an indispensable instrument of human thinking and ii) the more ***specific question*** whether the ***legal fiction*** is an indispensable instrument of legal thinking. Fuller seemed to think that these two questions are inextricably bound together. He thought that since fiction is indispensable to human thinking, it must therefore follow that the legal fiction is indispensable to the law. By carefully distinguishing both in chapters #1 and #4 between ***logical fictions*** (i.e. legal nonfiction) and ***legal***

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[2] As Fuller might have put it. Fuller described the legal fiction as a skeleton in the closet. "Keeping it in the closet is both dangerous and unbecoming." [Fuller, Legal Fictions, Stanford University Press, (Stanford: 1967), p.5]

fictions, I have attempted to demonstrate why this is a *non sequitur*. Although our common law system could not exist in its present form without the institutional existence of rights, duties, legal persons, contracts, etc., there is no reason to think that the castle would crumble without the particular judicial device known as the *legal fiction*. As Maine pointed out, there are a number of other legal constructs that can be used to renovate the castle for its modern inhabitants. In chapter #3, for example, we saw that the English Parliament enacted a statute that completely eliminates any need for the legal fiction which treats the child *en ventre sa mere* as though it were already born.[3] To put this into the language of chapter #4, our modern legal needs can be accommodated by creating new institutional facts in a way which does not require feigning them. Of course, this is not to say that the use of legal fictions is completely superfluous. After all, as we saw in chapter #3, the need for new institutional facts was realized only as a result of the utilization of a legal fiction.

Although it is true that judges could easily do without a great number of legal fictions if they stopped 'brutalizing the facts', legal fictions might be necessary to the extent that the institutional existence of certain legal rules obstructs the possibility of a just outcome in a particular case. As we have already seen above, in cases where the rule is clear, the judge cannot claim to be exercising discretion.[4] With this in

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[3] See Congenital Disabilities (Civil Liability) Act, chapter #3, footnote 52.

[4] One of the things that I have not discussed in great detail is the extent to which we are able to cease treating certain institutional objects as though they have a brute existence. Sometimes a judge has no choice. For example, a statute might be enacted that requires a judge to treat a debt as though it is located in the place where a particular piece of paper is signed. In such a case,

mind, though our legal system would not crumble without them, Bentham's call for an eradication of all legal fictions would require us to forfeit one device that helps remedy the injustice that would otherwise flow from the existence of certain institutional facts. Having said this, it is not difficult to imagine a perfectly intelligible (though perhaps less just) legal system in which the legal fiction has no place.[5] If this is correct then the legal fiction is an eliminable instrument of legal thinking. The question then becomes whether there is good reason to eliminate it. Does the legal fiction do more harm than good? To answer this question we need to know whether the fiction has a proper function and, if so, what its potential dangers are.

5.2 What is the Proper Function of Legal Fictions?

The second major issue seen in the historical exchange centered around a description of the proper function of legal fictions. In chapters #2 and #3 I have argued that the only possible justification for fictionalizing the facts of a case is to achieve a just outcome while, at the same time, leaving intact existing legal rules that are likely to be transmuted or abandoned if the fiction was not employed. As

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since the judge cannot honestly say that the rule has run out, the only way to circumvent the statutory rule when it clearly leads to an absurd or unjust result is to employ a legal fiction which allows the judge to pretend that it was signed elsewhere. Since so many of our legal rules require us to treat institutional facts as though they have a brute existence, legal fictions will likely continue to play at least some role in our legal theory, at least for those judges who are concerned about justice. Of course, those judges would have to provide a more elaborate justification for ignoring clearcut institutional facts. As I will mention below, this interesting project is beyond the scope of the present one.

[5] Other examples include the autocratic legal system cited in section 2.3.1 and what I referred to in section 3.5.1 as the approach of the deductivist, who thinks that since legal outcomes are simply deduced (by applying a rule to the facts) there is no such thing as a 'desired result' and therefore no need for legal fictions.

Vaihinger put it, the fiction must drop out of the final reckoning. This is the proper function of both brute and institutional fictions. One question that arises is whether, practically speaking, this is even possible.[6] Assuming for the moment that it is, one sees that the need for a legal fiction would require a rather unusual set of circumstances. It requires a situation so novel or unique that the application of any established rule will not work while, at the same time, it would be impossible to exercise discretion without substantially affecting those rules already in existence. Such situations are extremely rare in a well-developed legal system since it is usually possible to operate within the framework of the existing rules or to exercise judicial discretion without harming the existing framework.

However, if a situation arises in which a judge feels compelled by a sense of justice to fictionalize the facts, the judge must do so openly. This requires a public acknowledgment of its falsity. If a judge does otherwise it could result in a dangerous misuse of the fiction as a precedent, as we saw in chapter #3. Consequently, Maine, Mitchell and all of those who have claimed that legal fictions are used to conceal the fact that the law has undergone some change at the hands of the judiciary are describing an improper function of legal fictions. Thus the Romanists were correct to conclude that the construction of the fiction itself must include an acknowledgment of its falsity. This and only this will prevent its misuse in future cases.

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[6] Upon a careful study of the use of brute fictions in the Canadian courts, it appears not to be. However, I think that the fiction could fulfil this function if used properly. See section 5.3 below.

This raises an interesting question *vis-à-vis* the judge who uses the fiction as a result of discretion, i.e., the so-called "closet Hartian". Is this an improper use of the fiction? On the positivist model that we have assumed, it cannot be. Since, by hypothesis, the judge is exercising discretion, the judge is not required to follow a legal rule. But one might well ask, why stay in the closet? What is the judge trying to hide? Perhaps the "closet Hartian" is not trying to conceal anything. By using the legal fiction openly, maybe the judge is simply trying to understand the problem *as* a legal problem, even though, strictly speaking, it is not one. This is how most people solve problems, they try to make them understandable.[7] The question then becomes whether the fiction characterizes the problem in the best manner. Of course, this is not a legal question – at least not for the positivist. For the positivist, there would be no legal way to determine whether the fiction is the best approach since the type of reasoning employed is *unrecognizable* under the rule of recognition. Therefore, within a positivist framework, there is nothing improper about employing a legal fiction in a hard case, although from other frames of reference there might be better ways of solving the problem.[8] Of course, it is only once the judge is willing to admit to being in the realm of discretion that the door is opened to all of these other options.

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[7] As we saw in section 2.3.2 of chapter #2, Fuller called this an "expository" fiction.

[8] From other frames of reference we might wish the decision to accord with some 'principle' or to 'maximize utility', etc.

5.3 Is There Danger in the Use of Legal Fictions?

Historically, most jurists have recognized a certain danger in the use of legal fictions. However, other than simply citing the usual preference for truth over falsity, no one has ever provided a concrete analysis of what exactly these dangers are or how they become manifest. Although Fuller attempted to address this issue to some extent, such a project cannot be achieved by theory alone. Fuller's investigation lacked a practical examination of the manner in which legal fictions are employed by judges in actual cases. By tracing the use of a particular brute fiction in the Canadian courts I have tried to demonstrate the dangers that can occur with a repeated use of the same fiction. In chapter #3 I concluded that, from a practical point of view, Fuller was incorrect in thinking that the use of a brute fiction might actually reconcile a conflicting legal rule with a desired result. This is because the utilization of a particular brute fiction is not usually confined to a single instance. As we have seen, fictions are employed repeatedly via the doctrine of precedent and eventually acquire a more general application. The original fiction will almost inevitably result in the feigning of institutional facts thus giving rise to a new legal rule. By feigning brute facts, the judge who first employs the fiction closes the door to developing a more refined rule. Instead of building appropriate exceptions into the rule by attempting to create a new institutional fact, the judge simply feigns brute facts. Ironically, the rule that is produced after an extended use of the fiction is contrary to the very institutional fact that the judge employing the fiction meant to preserve by its circumvention. In hindsight, then, the judge who first employed the

fiction did not truly reconcile the ***rule*** with the result, as Fuller had anticipated. Practically speaking, there is no such reconciliation. Ultimately the original rule is either transmuted or abandoned. Worse yet, the original rule will remain intact, creating a state of confusion for judges who are now forced to choose between two conflicting rules.

An important conclusion to be gleaned from this analysis is that the danger created by the use of legal fictions is not an inherent feature of the fiction as Bentham, Smith and others had thought. The danger is purely incidental. Notice that it is not the falsity of the fiction but rather its improper application in future cases that results in mischief. Thus if a judge were to make it perfectly clear in the ***ratio decidendi*** that the fiction was meant to be employed only on the particular facts of the case at bar and that the fiction is not to be considered of general application, then its potential for danger could be alleviated.[9] If this simple point were recognized by all lawyers and judges then in certain specified instances there would be a legitimate use for the fiction. Again, their use must be limited to situations so novel that a judge is unable to articulate the particular result in any other way. This can happen from time to time. After all, as Fuller pointed out, "[t]he situations that may be presented to a judge for decision are infinite in number; the intellectual equipment of rules, distinctions, concepts and words, upon which the judge must rely in dealing with these situations, is limited and finite."[10] Legal fictions

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[9] Of course, it would always be susceptible to misappropriation by an ***improper*** application of precedent. But, then again, so is any other judicial decision.

[10] Fuller, ***supra***, at note 2 at 65.

sometimes allow judges to feel their way toward the proper development of a new and comprehensive legal principle without opening the floodgates to a rush of potential misuse. If used carefully and only in situations of desperation, then perhaps there is a legitimate use of the legal fiction. In such situations it is even possible that the fiction could, as Vaihinger predicted, "drop out of the final reckoning."

However, if legal fictions are to do less harm, then judges must learn to think carefully about how to use them. As we saw in chapter #3, this includes cultivating an ability to recognize ***that*** they are being used. Further, judges must develop theories to justify the use of fictions in particular cases. And they must do so in such a way as to give guidance to other judges as to their application in future cases. For example, if the judge who initially employed the property law fiction[11] discussed in chapter #3 had made it clear that it was being used solely to achieve the intentions of the testator in the instant case, it would never have been bootlegged into the law of tort or family law where there is now much confusion about the so-called rights of the unborn and unconceived.

So far judges have been uncritical, unclear and unconvincing when employing legal fictions.[12] Yet they continue to rely on legal fictions with increasing

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[11] Which treats the child ***en ventre sa mere*** as though it were born.

[12] See also, R. A. Samek, "Fictions and the Law," 31 University of Toronto Law Journal 290 (1981); J. Stoneking, "Penumbras and Privacy: A Study of the use of Fictions In Constitutional Decision-Making," 87 West Virginia Law Review 859 (1985); A. Soifer, "Reviewing Legal Fictions," 20 Georgia Law Review 871 (1986); K.S. Hamilton, "Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies," 35 The Wayne Law Review 1449 (1989) ; Louise Harmon, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 Yale Law Journal 1 (1990).

frequency.[13] In order to avoid their potential for danger we must revive the study of legal fictions. In particular we must continue to scrutinize the many untold effects of their implicit use in the courts. Otherwise, as an American author recently stated, "[j]udicial artifice can render the exercise of state power invisible."[14] We must also continue to expose the link between the misuse of legal fictions and the accompanying confusion. Additionally, great efforts must be taken to avoid reasoning in such a way that demands a frequent need for legal fictions. By averting wherever possible the temptation to treat institutional facts like brute facts, we can diminish the likelihood of confusion by keeping the nonfictional elements of the common law system notionally separate from legal fictions.

There is much that remains to be said about the role of legal fictions in law. The next crucial issue that needs to be addressed concerns the so-called desire to achieve 'a just result' (where 'justice' is said to conflict with an existing rule of law). As a matter of institutional fact, what exactly is 'a just result' from within the context of the judiciary? Which conception of justice best fits within the positivist framework that legal fictions seem to entail? No work, including the work of this dissertation, has addressed these important questions. Even if scholarly interest in the legal fiction has faded considerably in the last century my hope is that this dissertation, or its aftermath, will help resuscitate an appreciation of the importance of this unique judicial device.

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[13] In at least 96 Canadian appeals since 1985 the judiciary have considered legal fictions and their role in law. See note 87 in chapter #2 for further elaboration.

[14] Harmon, ***supra***, at note 12 at 71.

And it echoes with the sounds of salesmen
of salesmen
of ***salesmen***

Neil Peart
The Spirit of the Radio

APPENDIX I

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APPENDIX II

LYRICS TO JEREMY BENTHAM"S HEAD[1]

Jeremy Bentham

Don't wanna be like the fat-man
Don't wanna be stuffed and dead
Don't wanna be like the wax-man

Don't wanna lose my head!

Jeremy Bentham's Head
Jeremy Bentham's Head
Jeremy Bentham's Head[2]

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[1] ***Jeremy Bentham's Head*** was indisputably *the* driving rock-n-roll force in the history of The University of Western Ontario, Faculty of Law. The members of ***Jeremy Bentham's Head*** are:

Guitars	Christopher Van Barr
Vocals	Ivan Schneeberg
Keys	Michael Filek
Bass	Jordan (***ham-bone***) Slator
Drums	Ian Kerr

[2] Although the beloved Jeremy Bentham is no longer with us, his head lives on. For further information, please contact The University of London. Long live the head.

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