

Preface

It is legendary that Karl Llewellyn and Soia Mentschikoff fell in love over a shared passion for the beauty of the letter of credit. Whether this legend is fact or fiction or somewhere in-between is unclear. But it is clear that both were fascinated by the crafts and technology of law and emphasised the importance of imagination and invention in legal practice (Twining 2012, pp. 197–199, 2002, pp. 167–171).

This book explores in depth the history, theory and debates surrounding fiction(s) in law. Many writers treat legal fictions of all kinds as artefacts, a species of legal invention. Typically, such fictions have been responses to practical problems about jurisdiction or mitigating the results of formal rules or bringing about more or less covert legal change. However, some abstract or ‘theoretical fictions’, such as the social contract, the veil of ignorance or the mantra that judges ‘apply law, but do not make it’ seem to be of a different kind. So too do mythical characters such as ‘The Bad Man’, Hercules, ‘the reasonable man’, or ‘*homo juridicus*’. These are not technical solutions to practical problems, but rather devices for resolving intellectual puzzles. These feature in this book, but the main emphasis is on technical fictions. Do all of these give rise to different kinds of questions or do they belong to a single topic of ‘fictions in law’?

When I was a student in the 1950s one encountered talk of fictions in English legal history (for example, the action for ejectment), in Jurisprudence and Company Law (mainly in relation to legal personality) and in Roman Law. However, neither the books nor our teachers perceived them to be closely linked. As an undergraduate I wrote an essay on “Legal Personality” that concluded that English law did not have a theory of legal persons and did not need one. Each example of an extension of ‘legal subject’ needed to be explained in practical terms on a case by case basis. Similarly, exotic entities treated as subjects of rights and duties, such as Hindu idols, Caligula’s horse, artefacts, funds, ancestors, ghosts and unborn children needed to be explained by the context, beliefs and perceived problems of their inventors.¹ My paper made no links to Maine; it dismissed Continental theorising as ‘metaphysical’. Indeed, no hint of problems of epistemology or ontology sullied

¹ See further William Ewald’s incisive analysis of the case of the rats of Autun (Ewald 1995).

its pages—I did not even know what the words meant. The so-called ‘fiction theory’ explained nothing.²

By 1960 interest in historical jurisprudence had waned and, under the influence of Hart, analytical jurisprudence was becoming more abstract, though no more tolerant of metaphysics. For example, the index to Wolfgang Friedmann’s excellent *Legal Theory* (4th edition, 1960) has a one page reference to ‘Fictions in evolution’ and under a separate heading ‘Fiction Theory, see Corporate personality.’ Other student books of the time either had similar perfunctory entries or else no entry at all (e.g. Lloyd (1959), Dias (1964) and Wortley (1967)). Interest in Bentham’s theory of real and fictitious entities³ and feminist writings about personality developed later (e.g. Schofield (2006), Naffine (1990) (2002)). Thus, at least in England, for about 50 years there was a fallow period of scholarly and theoretical treatment of ‘fictions’, except in a few specialist enclaves. It was not recognized as a single topic. Later, when I studied Bentham’s frenetic attack on fictions in English Law (wilful falsehoods), this seemed to be difficult to reconcile with his epistemology, which treats ‘fictitious entities’ as useful, indeed necessary, constructed tools for grasping the real world. Either he was inconsistent or else he conceived the relevant passages as being concerned with two sets of only very loosely related questions—the first with pragmatic political concerns about the sinister interests and mystifications of the legal profession (Hart 1973), the latter with how we describe, explain and improve the world (see further Quinn, Chap. 4 below, pp. 67–68).

Accordingly, about 5 years ago I was surprised when Maks Del Mar asked my advice about organizing a panel on “Legal Fictions” at the World Congress of Legal and Social Philosophy in Frankfurt in 2011. I suggested that the label was unfashionable and dealt with disparate issues that should not be conflated. However, when I revisited some of the jurisprudential literature and learned more about Vaihinger and the early Kelsen, I began to see that these seemingly disparate concerns were closely related, but in quite complex ways. Moreover, this was a good time to revive interest in the area: some post-modernists had challenged the distinction between epistemology and ontology, feminists had challenged male-dominated assumptions about personhood, technical legal fictions were still very much alive (what else are the imaginative constructions of clever tax advisers?) and ‘globalisation’ had stimulated a wide range of new issues: e.g. do multi-national corporations exist? (Dine 2005); do MNCs have human rights? (Baxi 2006); are ‘indigenous peoples’ to be treated as legal persons or as politically fashioned constructs? (Kingsbury 1998);

² Lively debates in the United States e.g. Dewey (1926), Fuller (1930), Berle and Means (1932) appear to have faded earlier, perhaps because of Realist scepticism of abstract concepts and because it was recognized that corporate power had shifted from shareholders to managers (Twining 2009, Chap 15). Roscoe Pound’s *Jurisprudence* (1959) Vol. III, Chap. 17 has a lengthy discussion of fictions, but this was largely a synthesis of his earlier work.

³ Philip Schofield (Schofield 2006, p. 2, n 14) points out that ‘The use of the phrase “theory of fictions” to refer to Bentham’s thinking on ontology, logic, language and grammar is potentially confusing. Bentham did very occasionally use the term “fiction” to represent what he meant by the term “fictitious entity”, but the two terms normally referred to two distinct, but related ideas.’ On fictitious entities see *id.* Chap. 1 and Hart (1982), Chaps. 1 and 2.

and are all transnational legal actors to be treated as persons in a world of legal pluralism? (Alston 2005).

So Maks went ahead. He proved to be right. He did the work, I merely stirred. This book is the result. It brings together a wealth of contributions from legal scholars, legal theorists and historians from several countries. There is a wealth of concrete examples, some highly original analysis, cross-references that link seemingly disparate topics, and some differences in the interpretation of the ideas of ‘fiction’, ‘truth’ and ‘reality’. However, I suggest that many aspects of the area are less controversial today than they were 50 years ago. Indeed, it is not clear to what extent there is a broad consensus or real disagreements among the contributors and more generally.⁴ For example, few common lawyers subscribe to the view that ‘judges apply law, but do not make it’. Nearly all recognize that upper courts in the common law tradition are agents of at least interstitial legal change, but in ways that differ from legislation and vary by time and place and situation. Similarly, I know of no jurist who accepts Bentham’s characterisation of common law fictions as ‘wicked falsehoods’—for who was deceived? Fictions constructed by judges, litigants and their advisers have usually been devices to solve practical problems and surmount obstacles. Each needs to be interpreted and explained in its specific context. Few scholars, and none of the contributors, believe that fictions are a thing of the past, though some argue that employing fictions is usually a crude and unnecessary way of solving particular kinds of problem. Del Mar (Chap. 11 below) argues strongly that some kinds of fictions still have a positive role to play in legal change. The cat and mouse battles between tax collectors, tax avoiders and evaders (and their advisers) show that creating ingenious legal devices is still lucrative. Most agree that it is sometimes hard to differentiate fictions, presumptions, metaphors, models, and analogies; and that there is no avoiding fundamental philosophical issues about fact, fiction, truth and knowledge. On a more controversial note, I suggest that most contributors are committed to a constructivist view of both legal fictions as technical devices and of concepts as thinking tools. But some contributors and readers may disagree.

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⁴ See Del Mar, Introduction, below.

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