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Maksymilian Del Mar • William Twining
Editors

Legal Fictions in Theory and Practice

Springer

Editors
Maksymilian Del Mar
Department of Law
Queen Mary University of London
London
United Kingdom

William Twining
Faculty of Laws
University College London
London
United Kingdom

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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 Friedman'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 entities[3] 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 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.

William Twining

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[4] See Del Mar, Introduction, below.

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Introducing Fictions: Examples, Functions, Definitions and Evaluations

Maksymilian Del Mar[1]

Faced with the obstinacy of reality, litigants and judges have sometimes, if not often, sought refuge in legal fictions. The motivation for seeking refuge has been multifarious, e.g. from the perspective of a litigant, seeking a remedy despite not meeting the requirements of the relevant form of action or rule, or minimising costs by attempting to bring his or her claim via a cheaper, more convenient route—or, from the perspective of the judge, introducing a tentative change in the law without dismantling pre-existing rules and principles, or trying to do justice to a claimant who, for want of better (or any) evidence, simply could not prove certain operative facts.

It is not only motivations that are multifarious: multiple, too, are the examples offered of so-called paradigmatic or typical fictions, and there as many definitions of fictions as there are apparent functions of them (i.e. jobs they perform or enable) and alleged benefits and disbenefits they bring. Add to this the broader epistemological and ontological context in which discussion of fictions inevitably must occur,[2] and also the issue of the place of fictions in legal history, and the entire experience of thinking about fictions becomes a seriously vertiginous business.

The epistemological and ontological context referred to above requires some unpacking. Any reader pursuing the topic will quickly discern that there is an oscillation in the literature between those who think legal fictions are an illusory category because there is no sense in which law makes claims on what is real (instead, it simply regulates conduct), and those who see legal fictions everywhere, claiming that law is awash with artificial mental constructions that contradict reality (treating

[1] Precious thanks go to David Foster for his help with the preparation of the text of this volume, and to Andrew Bell for his assistance with the translation in Chap. 1. I would like to add personal warm thanks to William Twining, whose support and enthusiasm for this project from the beginning has seen it through and made it incomparably better than it would have been. It should be noted that a smaller version of this project had an earlier life as a workshop at the IVR (International Association of Legal and Social Philosophy) Congress in Frankfurt in the summer of 2011, which resulted in four of the chapters published being published in earlier versions in the *International Journal of Law in Context* (see Nr. 4 of Volume 9, December 2013). The chapters in question are by Del Mar, Gordon, Petroski and Quinn.

[2] This is not to say that it must occur under those terms, or indeed that it must accept any distinction between ontology and epistemology.

corporations as if they were persons, kings as if they had two bodies, and other such marvels). Clearly, whether one sees fictions everywhere or nowhere is going to depend on certain intuitions (or, naturally, well worked out theories) of what we know (and how we can know it) and what exists. Part and parcel of that is going to be an attitude to language, including the status of specialised languages such as that of law, e.g. one will need to ruminate over the extent to which, if at all, legal language is to be held up to the standards (or, better, the rough ground) of ordinary discourse.

An important early decision anyone thinking about legal fictions has to make is to consider whether one is primarily interested in fictions in legal practice or fictions in legal theory. Is one going to analyse the construction of explanatory devices (possibly with normative purposes) by legal theorists seeking to understand (and, again, possibly, on normative grounds, seeking to recommend a certain understanding of) the nature (or history) of law and legal reasoning? Or is one going to focus on the use of fictions (whether flagged in that way or not) by—and here too there are decisions to make—actors within the world of legal practice: by litigators, lawyers, and/ or judges?[3] This decision as to the object of one's inquiry connects up with the above-mentioned epistemological and ontological context: for example, one can see fictions everywhere in theory, but nowhere in practice, based on different criteria one attaches to what is being claimed (or not) in one or the other domain.

This volume tackles these and other problems head on. Its focus is on legal fictions in practice, though without entirely neglecting the fictions of legal theory. Chapters were commissioned from different traditions of inquiry—though with particular focus on the major players in this field: William Blackstone, Hans Vaihinger, Jeremy Bentham, Sir Henry Maine, Hans Kelsen and Lon Fuller—as well as from a variety of different traditions of practice, including from different times and places: covering, for example, the early and contemporary common law, Roman law, Rabbinic Law, as well as fictions in such areas of law as intellectual property law, tort law, land law, criminal law and class action procedure. Of course, even this depth and breadth is inevitably very selective: many areas of practice of great relevance to legal fictions are only discussed incidentally (e.g. tax law),[4] as are many traditions of practice (e.g. Islamic law, to mention but one example). Nevertheless, it is hoped that sufficient resources are offered for future excursions into this topic in those other areas.

Particular care has been taken here to bring together both legal theorists and legal historians. This is not only because dialogue between those two disciplines is much needed—but also, and indeed primarily, because the topic of legal fictions necessitates it. Any argument about fictions—whether that is at the level of definition or evaluation—must, surely, take into account their role in the practice of law over time.[5] As is well known but too easily forgotten, legal fictions were a hot topic

[3] No doubt one can complicate this picture further and broaden out to a greater range of actors, e.g. tax consultants.

[4] But see Prebble 2011.

[5] This is in addition to anything one might learn from a comparatively historical exercise, comparing instances of reliance on legal fictions in different times and places.

in the days when historical jurisprudence was in vogue: one read Blackstone and Maine and mused over the role of fictions in the development of law, considering, for instance, whether they are best thought of as temporary scaffolding, to be discarded once their modest (but necessary) function has expired, or as a more permanent feature of the legal phantasmagoria. In part, then, returning to legal fictions as this collection has done is a reminder of that much-too neglected meeting place of theory and history.[6]

This introduction goes on to provide a glimpse into the riches of the subsequent chapters in the following way: the first part offers a smattering of examples of fictions that appear in the collection; second, some of the functions (or jobs) that fictions are said by the contributors to play are highlighted; third, the definitions of fictions offered or relied on by our contributors are mentioned; fourth, a flavour is provided of the debates in this collection over the advantages and disadvantages—the good, the bad and the ugly—of fictions; and fifth, some further themes and questions for future work are identified. The hope is that this approach is more conducive as an introduction to the volume than the usual parade of chapter summaries.

I. Examples of Legal Fictions

Before one can proceed to offer and evaluate opinions about the utility, or otherwise, of fictions, one needs to get a sense of the examples associated with the term. As noted above, the focus of this collection is on fictions in practice, and thus the examples given below focus on these. Fictions of legal theory are returned to briefly in the fifth part of this introduction, as devices deserving of greater attention than has hitherto been devoted to them. When they are mentioned in what follows, it is as but contrasts or comparisons to fictions in practice. It is important to underscore, though, that the distinction between fictions of theory and fictions of practice is an important one, and to some a fundamental one: for example, Kelsen argues that Vaihinger fails to make this distinction, and as a result, classifies as fictions (those in practice) that are not fictions at all, while not spending enough time on those that are genuine fictions (i.e. the fictions of legal theory).[7]

Putting aside, then, the issue of whether they ought to be thought of as fictions at all, these are the examples of legal fictions in practice that appear in the collection:

- A number of contributors in this collection use the example of the legal person, but there is also disagreement about classifying this as a fiction.[8] The chapter in

[6] See also Del Mar and Lobban 2014.

[7] See Chap. 1, and see also the chapters by Kletzer, Samuel and Gama.

[8] Kelsen refers to the fiction of the 'legal subject' as a fiction of legal theory, saying of it (and of the other example he gives: 'subjective right') that 'These are fictions of the attempt to know the law, fictions of the intellectual mastery of the legal order': see Kelsen, Chap. 1 below, p. 5. Kelsen does not elaborate on what he means by 'legal subject', so we are left to ponder whether it is the same as 'legal person' for our contributors. This raises the broader issue of how to determine whether

which this fiction is perhaps most prominent is Lind's, where both the alleged fiction of the corporation as a person, and that of the 'personality of the ship', receive extensive discussion. Schauer is an example of a contributor here who expresses doubt as to whether the corporation-as-person is fictional, arguing that 'at least for some purposes' it is not because 'corporation' is a term constituted by law—unlike, for instance, 'Minorca' which is not so constituted (see Schauer, Chap. 6, below, p. 123, n. 17).

- It is useful to mention examples offered by Vaihinger, which are in turn criticised by Kelsen as not being fictions at all. Thus, for example, Vaihinger offers as an example Article 347 of the *German Commercial Code* 'where it is stipulated that a good which is not in time returned to the sender has to be treated as if it had been approved and accepted by the receiver'. According to Kelsen (see Chap. 1 below, p. 9), there is nothing fictional here, for what is being done by this article is the creation of a norm of action where 'neither actuality nor anything else is intended to be comprehended'. Similarly, the example of a rule thanks to which the offspring of an adulterous wife is treated as the child of the husband is, says Kelsen, not a 'claim that under certain conditions the husband is the father … the law does not assume a matter of fact … Rather it only regulates for certain reasons and to certain ends, that under certain circumstances the husband has the same duties and rights in relation to a child which was conceived by his wife in an adulterous relation and that this child has the same duties and rights in relation to this husband as they exist between the husband and his own children which were conceived in wedlock' (Kelsen, Chap. 1 below, pp. 10–11).
- Bentham, in turn, categorises fictions into the following categories: first, 'legal/ moral fictitious entities', such as obligation and power; second, procedural or linguistic expedients used by courts, e.g. jurisdictional devices such as those treating foreigners as if they were Roman citizens under Roman law; and third, 'fallacies' or theoretical fictions, e.g. assertions that judges do not make law. For our purposes, the second is the category of most interest.[9]
- Continuing from the example given above, many contributors in this volume identify jurisdictional fictions. An oft-mentioned case is that of *Mostyn v Fabrigas* (1773) in which Lord Mansfield, 'recognising that denying jurisdiction here would leave someone who was plainly wronged without a legal remedy, concluded that Minorca was part of London for purposes of this action' (Schauer, Chap. 6 below, p. 122). As Schauer adds, 'That conclusion was plainly false and equally produced a just result', and Schauer takes this to be 'a paradigmatic example of using a fiction to achieve what might in earlier days have been done through the vehicle of equity' (Ibid). An analogous example is that of the Bill

something is a fiction of practice as distinct from a fiction of theory: it seems that for Kelsen, the nub of the distinction lies in who is using the term, for this will determine whether they can be said to be making a claim which might contravene reality (so a theorist/ scientist using the term might be said to be employing a fiction, whereas a judge would not). For further discussion, see Kletzer, Schauer and Samuel in this volume.

[9] For a detailed discussion of Bentham on these fictions, see Quinn in this volume. For the jurisdictional fiction in Roman law, see Ando in this volume.

of Middlesex and the latitat procedure (which was premised on fictitious arrest) used by the King's Bench (very successfully, its business increasing ten-fold over the period 1560–1640) to acquire jurisdiction (for a discussion, see Lobban's chapter).[10]

- Lind (see Chap. 5 below, pp. 104–5) offers two examples of what he calls 'falsification fictions' (which, as we will see below, he is not fond of): first, the fiction of the contract ideal, which is 'premised on agreements with mutuality of benefits and burdens, entered into voluntarily and at arm's length, by rational agents with knowledge and understanding of the commitments they are making' (this being something that 'clashes with everyday social experience'), and second, *terra nullius*. These fictions are returned to below.
- Two further examples from Schauer's chapter are as follows: first, from American laws of inheritance, where two people own property jointly, and one of them kills the other in order to secure full ownership, several courts have proceeded as if the killer died before the victim. As Schauer says, 'in almost every situation this conclusion will be patently false', and he classifies this as a 'false statement of fact' (see Schauer, Chap. 6 below, p. 122); second, and a very recent example, comes from *R (on the application of Robinson) v Torridge District Council* (2006), where 'in order to allow R his relief the court concluded that the blockage caused by the bridge was to be treated as having 'choked' the watercourse, even though it plainly had not done so according to any of the definitions of what it is to choke a watercourse' (see Schauer, below, 17).[11]
- Examples that one often finds in the literature on fictions often come from Fuller amongst those being: constructive notice, constructive fraud, vicarious liability, the doctrine that children lured by attractive nuisances had been invited onto the land, and implied conditions in contract as resting on agreement of the parties—and these are indeed mentioned by some contributors here (see, e.g. Schauer and Lobban).[12] On the whole, though, these are not leading examples in this volume.
- An interesting category of examples are classified under the term 'metaphysical fictions' by Lobban, where, Lobban explains, 'courts treated something which

[10] Jurisdictional fictions receive a strange twist in Gordon's chapter, where a judge employs the re-narration of the facts of the case before him in order to deny the jurisdiction that he would otherwise have acquired. The Judge did so by saying that 'the jurisdictional objection was filed first, and the entry of appearance was merely a motion for an extension of time' (whereas it was in fact the other way round): see Gordon, Chap. 18 below, p. 387). As far as I can tell, this is the only instance of a re-narration of the present facts in this volume, and one in which no generalisation (of a possible rule for future cases) is even attempted—it is a particular way to solve a particular problem.

[11] There may be an interesting distinction between these two examples: the first has developed, or is clearly developing, into a rule (or an exception to the rule), and can confidently be generalised; the second, reads more like a one-off decision, though with the (perhaps in this case, questionable) potential that other courts will see fit to extend the meaning of 'watercourse' by analogy with the way it is extended in that case. This distinction, if one accepts it, shows the importance of looking at the use of fictions over time, and not at one isolated instance (though, of course, in some cases, there may only be one use, not picked up on by future courts).

[12] Lobban adds the 'implied warranty of authority', an example provided by Pollock: see Lobban, Chap. 10 below, p. 218.

had happened at one time as having occurred at another, or where something which no longer appeared to exist was deemed to have a continued existence' (Lobban, Chap. 10 below, p. 200). Lobban's examples here come mainly from a list offered by Dodderidge J in 1625: 'abeyance, relation, representation, re-mitter, and presumption' (Lobban, Chap. 10 below, p. 204). For example, the treatment of a husband and wife as one person is an example of the metaphysical fiction of 'representation'. To give one more: 'The doctrine of remitter allowed a person who had both an ancient and a more recent title to property, but who had entered by the recent title which turned out defective, to be taken to hold it by virtue of the older and surer right' (Lobban, Chap. 10 below, p. 205).

- A fiction that re-appears several times in this volume, and that receives extensive attention in the chapter by Sparkes, is that of the action of ejectment (see also Lobban). Indeed, Sparkes calls this 'the ultimate legal fiction in the early nineteenth century' (Sparkes, Chap. 13 below, p. 275). What is particularly impressive about Sparkes' analysis is the attention he pays to the life-span of this fiction—showing how 'an action designed to secure the recovery of a leasehold term, *ejectione firmae*, was modified by a series of procedural innovations so as to become the primary means of recovering freehold land' (ibid)—an approach returned to below. Briefly, this is an example of a fiction because, at a certain point, the action comes to rest on a fictitious lease by a real claimant to a fictitious nominal plaintiff. In the declaration, it is claimed that the plaintiff enters onto the lands in question, and is 'therefore possessed', until another fictitious person, known as the 'casual ejector', enters 'with forces and arms' and ejects him. This may also serve as an example where introducing one fiction leads one to create others to hold it up.
- Turning from historical to contemporary examples in the common law, a number of contributors discuss the employment of fictions in tort law, as in the series of cases (beginning with *Fairchild v Glenhaven Funeral Services* (2002) and most recently arising in The 'Trigger' Litigation (2012)) dealing with negligence claims arising from asbestos exposure (see Del Mar and Lee in this volume).[13] The fiction here arises out of the unavailability, or perhaps better indeterminacy, of scientific evidence, with the result that one cannot choose between a number of possible hypotheses as to who caused the harm in question. In such circumstances, the court suspends the usual 'but for' test of causation, and instead proceeds on the basis as if the defendant caused the harm (potentially introducing a new test, requiring only that the defendant 'materially contribute to the risk of the disease'). Both Del Mar and Lee take it to be important to analyse and evaluate the use of this fiction over time.
- Fictions in Roman law have already been mentioned above, and they appear in a number of chapters, though they receive extensive and focused analysis in Ando's chapter. Ando says fictions are 'ubiquitous' in Roman law, and given

[13] Lee also discusses the relevance of counter-factual scenarios to liability in the tort of self-imprisonment, the intuition being that there is something fictive about not considering or ignoring the fact that the claimant in these cases would have been imprisoned anyway.

their importance, here are five examples from his chapter (see Ando, Chap. 14 below, pp. 297–8):

- *Actio Serviana*: a purchaser or would-be possessor of the goods of a deceased had no action in statute law against those who held the decedent's property or owed the decedent money, and so was allowed by the Praetor to sue as if he were heir to the property in question;
- *Actio Rutiliana*: such a purchaser or possessor might be allowed to sue in the name of the decedent for recovery of goods or payment of debts, but the defendants would be condemned in the name of the purchaser, and so upon victory the goods or debt would be delivered to him;
- *Actio Publiciana*: a person who had acquired possession lawfully but not yet completed the time period for usucapion could not, upon losing possession, sue for the item in statute law, and so a Praetor allowed such persons to employ the fiction that they had in fact completed the period of usucapion and might sue as owners;
- Citizenship could be fictively attributed to an alien, thereby bringing the alien's claim with jurisdiction of the court, 'provided that it is just that the action in question be extended to an alien' (here Ando is quoting Gaius); and
- If one's opponent in a lawsuit had suffered a penalty entailing a diminishment in legal rank and concomitant inability to appear in a Roman court, Praetorian law permitted the fiction that the diminution of status had not occurred.

- In Rabbinic law, analysed in Moscovitz's chapter, examples of fictions included: treating, for the purposes of determining whether a liquid could be used to sprinkle on the altar, wine as if it were water—because if blood was mixed with water and this still looked like blood, then it was acceptable to use (see Moscovitz, Chap. 15 below, p. 329; who classifies this as an 'assessive' fiction); and being asked to disregard certain facts or objects, or to treat them as non-existent, as where the general rule was that two rows of six loaves were required, where there was one row of an equivalent number of loaves, one could ignore the fact that there were not two rows, or where there was reference to 'a beam', one could treat two beams as if they were one (see Moscovitz, Chap. 15 below, pp. 330–2).
- Finally, there is a range of examples from criminal law, courtesy of the chapter by Alldridge. In fact, Alldridge asserts in his opening sentence that 'The criminal law in England arose from the fiction that particular incidents between subjects violate the King's Peace' (Alldridge, Chap. 17 below, pp. 367), thus immediately emphasising the importance of the topic of fictions for an understanding of that area of law. His examples include (see Alldridge, Chap. 17 below, pp. 378–80):

  - Jury nullification, which involves the jury finding facts in order to acquit in the face of the evidence, thereby avoiding the judge's direction to return a guilty verdict, as was the case for instance in relation to the crime of manslaughter by driving a car (here, the jury's unwillingness to convict resulted in a change in the law, changing the relevant crime to that of causing death by driving dangerously);

- various fictions designed to avoid the death penalty, as exemplified in the fictional uses made of the benefit of clergy (e.g. at one point becoming available to all first-time offenders of lesser felonies); pleading the belly (where it was clear many women who benefited from this were not pregnant) and the insanity defence;
- The 'ancient fiction underlying forfeiture', where there was said to be something 'criminal about the thing itself' (see Alldridge, Chap. 17 below, pp. 378–80)

There is, then, considerable variety in the examples relied upon in this collection. Does this mean it is fragmented and does not form a cohesive whole? Hardly—first, there is some overlap in the examples the contributors work with; but further, the richness of examples is a strength and offers excellent resources for thinking through certain fundamental questions concerning the role of law—especially concerning the extent of its autonomy from everyday social experience and discourse. Time, then, to delve into those questions, all the while keeping an eye on common themes and issues as well as disagreements amongst the contributors.

II. Jobs for Fictions

A good initial way into the thicket is to consider the functions—or jobs, both enabled and performed—by fictions.[14] As will become clear, what the contributors identify as the function(s) of fictions, and how they phrase them, already offers some insights as to how they are likely to be evaluated. Here is a selection:

- According to Lind, fictions are often used to combat evasions of responsibility (Lind, Chap. 5 below, e.g. p. 95 and p. 103)[15]—thus, for example, thanks to the use of a fiction (the personality of the ship), the 'admiralty proceeding in rem was relaxed, such that actions for condemnation and forfeiture could proceed without proving the ship-owner's involvement in a vessel's wrongdoing' (Lind, Chap. 5 below, p. 96). The point here was that ship-owners' were evading responsibility because it was virtually impossible to prove their involvement. However, Lind also recognises that fictions can sometimes work the other way, i.e. enable evasions of responsibility—thus, for example, the fiction of the contract ideal allows companies to evade responsibility because it hides from view the fact that consumers do not enter into many contracts voluntarily and at arm's

[14] In focusing on functions, we are putting aside the question of motivation (without deriding its importance)—on motivations, see Fuller (1930–1), whose list of exploratory, emotive, expository, descriptive, historical and apologetic/ merciful motivations is instructive.

[15] One can put this point in different terms, and it might be interesting to consider whether this makes a difference to how we understand the jobs fictions do—e.g. is there a difference between saying that fictions are employed to do justice to a worthy claim by a litigant, and saying that fictions are used to avoid injustice (or harm) to either that litigant or another party (or group of persons)? Might the former be, for example, more expansive than the latter?

length with knowledge and understanding of the commitments they are making (Lind, Chap. 5 below, p. 104).[16]

- Picking up on this first function, it is worth adding here that a number of the chapters in this volume consider the link between legal fictions and difficulties of proof—perhaps most robustly, Del Mar claims that legal fictions are one means of coping with problems of proof, especially concerning proof of causation and intention. Legal fictions, on his view, are ways of enabling the temporary suspension of an otherwise required operative fact—very often, precisely one requiring proof of causation or intention (see also Lee).
- Further, according to many—for instance, Lind—fictions perform the function of mitigating the harshness of a rule,[17] while still leaving the rule intact, e.g. the fiction of constructive eviction was 'fashioned to redress the often bitter results induced by the common law doctrine that lease covenants were independent obligations', and it did so by 'treating a breach of the implied covenant of quiet enjoyment as a constructive eviction, thereby relieving a tenant of the obligation to pay rent' (Lind, Chap. 5 below, p. 102).
- Other contributors also stress the capacity of fictions to retain and keep intact, or not undermine, a pre-existing rule (or body of rules),[18] but less for the sake of mitigating the harshness of a rule, and more for the sake of neutrally pragmatic concerns—enabling disputes to be decided (for example, through jurisdictional fictions: see Stern) or creating a more convenient, cost-effective route to a remedy (see Lobban, below, 6, on the *indebitatus assumpsit*).
- For some, in the context of jurisdictional fictions,[19] for example, what is crucial is not so much that fictions do not undermine pre-existing rules, but that they allow a dispute to be decided without creating a new rule. This is a point made powerfully

[16] One might argue the two are not equivalent: in the first one, there is a judicial determination to treat the ship as having a personality for purposes of resolving particular cases; in the other, there is a general rule that, over time, we discover clashes with social realities. The second seems less a strategic intervention in the law, and more a failing of the law we (scholars) discover (or claim there to be) in light of changing commercial practices.

[17] A more general way to put the point is that fictions enable the decision-maker to escape the consequences of an existing specific rule of law but without putting the entire rule into question: (as articulated by Fuller and endorsed by Gordon in this volume). Here, it is also important to recognise that it is not just harshness to the present litigants that may be in issue: as Lobban points out, fictions were sometimes used 'to prevent a third party [from] being harmed' (see Lobban, Chap. 10 below, p. 212).

[18] Of course, the line between keeping a rule intact and undermining it is blurry. In his chapter on the uses of fictions in Roman law, Ando observes that sometimes it seems that the principle is in fact being subverted: e.g. as when provincial land is being treated as if it were sacral—thus subverting the principle that that alone that is consecrated by the authority of the Roman people, either by law or by decree of the Senate, is sacred (see Ando, Chap. 14 below, p. 307). There is a very interesting question here as to the criteria we might employ to judge whether we think the principle has been disturbed or not, undermined or not.

[19] Ando refers not to 'jurisdictional fictions' but to fictions as a means of dealing with 'justiciability issues': 'the case coming before the court fell short of some threshold. What was at stake, therefore, was the transfer of an individual, action or thing across some taxonomic divide: from purchaser to heir; from possessor to owner; from alien to citizen' (see Ando, Chap. 14 below, p. 298). There is an interesting sub-function identified here: fictions as enabling travel across legal categories.

by Stern, who uses it to show the difference between employing fictions and analogy: the former's 'ability to yield consequential effects is radically limited' (see Stern, Chap. 8 below, p. 158). If, for instance, the court acquired jurisdiction by pointing out similarities between Minorca and London, it would be offering more robust resources for future courts, for future courts could use those statements on similarity to attain jurisdiction in other claims originating outside England. The fiction, in this sense, is a device that allows one to seal off the normativity-producing capacity of a decision. Stern thus emphasises the 'purpose-built role and tightly restricted application' of fictions (see Stern, Chap. 8 below, p. 169). A similar point is made by Schauer, who says that judges will often recognise that 'modifying the law to produce the right result in the case at hand will have greater effects on future cases than will mis-describing the facts in order to accomplish the same result' (see Schauer, Chap. 6 below, pp. 121–2, n. 12).[20]

- Several contributors in this volume continue the long tradition of associating (at least some)[21] fictions with enabling change and the development of law (for instance, in Maine). Thus, Lobban points to how 'procedural fictions' 'allow litigants to use an historically-established form of procedure for purposes for which it was not originally designed' (Lobban, Chap. 10 below, p. 200), and in doing so pave the way for new areas of the law to be developed. For example, 'the medieval action of *trespass vi et armis*, which was a remedy for forcible wrongs contra pacem regis could give birth over time to a general action for torts … a contractual action … and an action to recover property' (ibid; see also Sparkes, Lee and Del Mar). An interesting twist on this theme of change and development (especially the latter), occurs in Ando's chapter, where he points out that fictions enabled 'the reduplication of institutional structures, without the necessity for constitutional innovation', e.g. the fiction of 'prorogation', which served 'to

[20] Schauer links this both to statutory interpretation—as when one uses a fiction to 'avoid a direct judicial rewriting of a legislatively enacted statute'—and interpretation of past cases, as when a judge recognises that 'Legal rules typically exist as part of an interlocking network of other rules, and so there may well be times when changing one rule will have indirect effects on other rules in ways that simply misapplying rules will not' (see Schauer, Chap. 6 below, p. 124). The idea that employing fictions is a matter of misapplying rules appears to be a more negative way of saying the same thing that could be put more positively, e.g. temporarily suspending one or more requirement(s) of a rule. Elsewhere in his chapter, Schauer says that a fiction is a 'justificatory manoeuvre in order to avoid simply saying that they [the judges] are not following the rule' (see Schauer, Chap. 6 below, p. 114). One could here ask: what is the difference between misapplying and not following the rule?

[21] Lobban argues explicitly that not all fictions are about enabling legal change and development, e.g. 'metaphysical fictions' (see above, in part 1), are instances 'where courts treated something which had happened at one time as having occurred at another, or where something which no longer appeared to exist was deemed to have a continued existence' (Lobban, Chap. 10 below, p. 200)—none of which need be connected to any change or development of the law in general. Lobban also wisely asks us to be on our guard when seeing the term 'fictions', for sometimes the term is used simply to explain or describe legal effects, there being in those cases no distinction between fictions, analogies or metaphors (see ibid). For example, the 'conceptual fiction' of a King having two bodies, which generated the other 'fiction' that 'the King never dies' was in reality a metaphor, for there was in fact legal disruption when the King died: see Lobban, Chap. 10 below, p. 207).

create individuals with the powers of magistrates although they were not such', precisely enabled this institutional growth (see Ando, Chap. 14 blow, p. 310). Fictions, then, might allow for both doctrinal and institutional development.

- Connected to this theme of change and development is the idea that fictions may be used not so much to introduce change, as to test whether it should be introduced. This is the major point made by Del Mar: that we need to analyse the role of fictions over time, thereby seeing that some fictions are picked up on by future courts and expanded while others are left behind and further quarantined. Alldridge, too, in his chapter notes that fictions may be understood 'As means of testing out possible moves towards a better legal structure' Alldridge, Chap. 17 below, p. 368). Another way to put the point is to say that a fiction does not necessarily *make* a change—it can be seen to be something that enables a 'let's wait and see' attitude.
- There are also a number of less traditional functions identified by contributors. One is the idea that 'legal writers seem generally, and increasingly over time, to have used the "legal fiction" label to signal their sense of the futility of further justification to a non-legal audience' (Petroski, Chap. 7 below, p. 132). On this view, legal fictions are forms of communication or communicative devices for signalling the technicality (the semi-autonomous character) of legal language. Perhaps in a similar way, Ando points out that legal fictions in Roman law may have provided 'a cognitive apparatus to assess the gap between social reality as the Romans perceived it and the world the law at once described and called into being' (Ando, Chap. 14 below, p. 296).
- According to Lobban, some fictions are used more for the purpose of either explaining, justifying or making sense of the law—for example, 'historical fictions' are used to justify a rule that looked anomalous, as when one used the fiction of all lands being securely fenced (in the past) to explain why a more severe penalty is imposed on the seemingly lesser offence of stealing already cut corn (as opposed to also cutting it) (see Lobban, Chap. 10 below, pp. 10–11). Here, there is no clear connection either to doing justice, or avoiding harm, or enabling change or development—instead, there is a concern for the rational intelligibility of the law.
- Fictions need also not be seen as exclusively related to resolving disputes. Sometimes, a litigant may employ a fiction in order to enable a legal act, such as transferring property or resettling estates. Lobban provides the example of 'common recovery, a device that involved a collusive real action, in which the tenant in tail would grant the land to another in fee simple. That grantee would then bring a real action claiming title to the land against the tenant, who would vouch a third party to warrant his title' (Lobban, Chap. 10 below, p. 203). This 'vouchee … would request a delay but then not appear to defend the case … the vouchee was a man of straw' (ibid).
- Finally, in those traditions where law permeates everyday life, such as Jewish law, fictions may be used not in order to do justice or avoid injustice, but simply as a matter of practicality, or 'common sense'. Thus, Moscovitz in this volume says that 'the vast majority of legal fictions in rabbinic literature do not seek to further moral, legal or utilitarian goals or to amend unsatisfactory existing law' (see Moscovitz, Chap. 15, pp. 334–5). Thus, where there are pre-existing rules

that are phrased in very concrete terms—e.g. requiring two rows of six loaves—a fiction may be employed to allow different versions of this (e.g. one row of twelve), meeting the same substantive aim of the rule.[22]

We see, from the above analysis, some common themes developing—although, still at a level of great variety of different functions/ jobs for fictions. Further, some of the jobs may be simultaneous, e.g. a court may be seeking to acquire jurisdiction but also seeking to do justice to an otherwise worthy claim or avoiding harm to a third party.

III. Defining Fictions

A decision was made at the outset of this project that no attempt would be made to impose any one example or function, or indeed definition, on the contributors—the point being to see how they carved out the object of their inquiry. In other words, the idea was to capture the variety of phenomena referred to as 'fictions' and the complexity of the different functions they play in different contexts (including different areas of the law).

In the result, the following possible definitions of legal fictions appear in the collection:

- First, it may be beneficial to recall some of the classic definitions, made by authors who the contributors here discuss. Thus, as reported by Kelsen in this volume (Chap. 1 below, p. 20), for Vaihinger in the 'formula [of the fiction] it is stated, that some given actual entity, some particular thing was likened to something legal, the impossibility or non-reality of which is at the same time claimed … e.g. in the juridic fiction the formula is as follows: this heir is to be treated as he would have been treated had he died before his father, the bequether, i.e. he is to be disinherited'. Further, as Kletzer spells out, for Vaihinger there were four features of fictions: '1) they include a contradiction with reality or a self-contradiction; 2) the fiction has to be fundamentally provisional, i.e. it has to disappear later on or be logically eliminated; 3) the awareness of the fictivity has to be expressly stated and 4) the fiction has to be expedient' See Kletzer, Chap. 2 below, p. 24). As noted above, for Kelsen, many of the fictions Vaihinger identifies with the above definition and features are not fictions at all—accepting, for the sake of argument, Vaihinger's criteria, Kelsen only identifies theoretical fictions (fictions of legal theory) as genuine fictions.[23]

[22] There is an interesting question here concerning the link between the style of expression of rules and principles (especially their degree of concreteness) and the popularity of recourse to fictions. Are fictions, for instance, more likely to be popular when the pre-existing rules and principles are highly concrete?

[23] One point one might make here is that Kelsen is working with a very small sample of fictions in practice—one wonders what he would have said about some of the fictions identified in part 1

- Fuller's definition, mentioned by many of the contributors here, was that a 'fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility' (see Fuller, 1930–1931, 369). There is, however, considerable controversy in this volume over whether or not fictions are (1) false (see e.g. Lind, who argues that they are true statements);[24] and (2) require any consciousness of falsity (thus, for instance, Del Mar does not look at fictions through the prism of truth or falsity, but through the prism of what can or cannot be proved). Of course, and as noted above, much here will depend on whether one thinks, for instance, there is any sense in holding law up to the standard of reality, of thinking of law as a cognition of reality (to use Kelsen's language). A sophisticated discussion of these issues appears in Quinn's chapter, in which he shows the oscillation between realism and constructivism in Bentham[25]—on the one hand, Bentham recognises that there can be no mirroring, by language, of the external world (no correspondence in that sense), but on the other hand, for the sake of showing the superiority of utilitarianism over other moral philosophies, Bentham needs some kind of realist standard (he needs, in other words, to be able to say that the entities of pleasure and pain are real, or more real, in ways that other terms employed by other moral philosophies are not). Again, there is disagreement in this volume over whether, and the extent to which, one ought to hold legal language up to, for instance, the standard of common or everyday experience (e.g. consider Lind, Schauer, Petroski and Schafer and Cornwell). It might be possible to say that our contributors are largely constructivists, nevertheless recognising that there are cases where realism ought to come in to keep in check law's enthusiasm for its own metaphysics. In this respect, it is worth quoting Schauer:

> …legal language cannot be understood as entirely technical … Legal fictions are thus parasitic on a gap between legal language and all-things-considered sound results. Without this gap, we would be unable to understand the idea of a legal rule, and unable to understand the way in which law, however technical it may at times get, must remain tethered to the language in which it is written, and thus tethered to the language of the community in which the legal system exists. (See Schauer, Chap. 6 below, p. 127).[26]

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above. Is it the case, for instance, that all of them can be seen to be but abbreviations of functional equivalences?

[24] One wonders whether there are sometimes different kinds of falsity appealed to: one possible sense of falsity is that of using a category in a way that conflicts with everyday discourse, and another that there is something false in pretending one has not changed the law. Most theorists have the first kind of falsity in mind, but clearly the second kind has played a major part in the literature on fictions. Thus, for example, Maine defines a fiction as 'any assumption that deliberately "conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified" (Lind, Chap. 5 below, p. 86, and see Maine (1931) [1861], 22). Perhaps it is better to call this second kind 'pretence', restricting 'falsity' to the first sense mentioned above.

[25] If one is after a one-sentence definition from Bentham, one could quote: 'a legal fiction is an assumed fact, notoriously false, upon which one reasons as if it were true' (Bentham 1840, p. 91).

[26] If Schauer is right, this shows why we cannot just be hard-nosed constructivists—even if one disagrees that the very idea of legal fictions requires some modicum of realism to make sense, one

- For Lind, as hinted at above, the dominance in the literature of the association of fictions with 'consciously false assumptions' is 'regrettable'. Lind suggests 'instead that legal fictions be understood as true legal propositions asserted with conscious recognition that they are inconsistent in meaning or otherwise in semantic conflict with true propositions asserted within some other linguistic system (or elsewhere within the law)' (Lind, Chap. 5 below, p. 100). On this approach, 'the legal fiction is simply a form of creative lawmaking,[27] a phenomenon of legal (primarily judicial) technique employed to resolve trouble in the legal environment' (ibid). For Lind, to 'claim that legal fictions are consciously false assumptions depends on viewing legal propositions outside the linguistic jural systems within which they originate and are used. It presumes a realm of reality that services as *the* yardstick against which every legal claim can be tested for truth value' (see Lind, Chap. 5 below, p. 93; original emphasis).
- The statement of Schauer's that comes closest to a definition is that the fiction is a 're-description of the facts of some event in order to make those facts compatible with the rule while at the same time permitting what appears to be the right result' (see Schauer, Chap. 6 below, p. 115). One concern one might raise for this definition is that in some cases, courts may not be re-describing the facts of the present case but accepting those facts and treating them as temporarily equivalent to the operative fact of the rule. Whether this amounts to the same thing is a matter for further discussion.
- According to Petroski, we ought to go further in rejecting the traditional way of thinking about fictions—we need to question the various assumptions behind the traditional way of defining them, namely assumptions 'that there is a sense in which propositions can be true about the world, or "factual", as well as counterfactual … [assumptions] about the nature of legal communication, and related assumptions about the extent to which propositions generated within a legal system can be factual in the same sense as non-legal propositions' (Petroski, Chap. 7 below, pp. 135–6). For Petroski, the idea that fictions are 'consciously counterfactual propositions is historically contingent and incomplete' (Petroski, Chap. 7 below, p. 132). As noted above, Petroski prefers to think of fiction as a communicative device, signalling the futility of further justification to a non-legal audience.
- For Del Mar, legal fictions may be defined as 'any suspension of one or more of the required operative facts leading to the imposition of an associated normative consequence, whether this suspension is introduced because of (1) the absence of proof of some previously required fact; or (2) the presence of proof to the contrary' (Del Mar, Chap. 11 below, p. 225). In a way, for Del Mar legal fictions are also (as they are to Petroski) communicative devices—though less with

might think it is useful to retain a level of realism in order to assess when the law has moved too far from everyday use. Whether, phrased this way, it is still appropriate to refer to 'realism' is a good question to raise.

[27] As flagged above, not everyone in this collection would agree that legal fictions necessarily are forms of law-making: Del Mar would insist that fictions may be a way of testing the waters, inviting future courts to consider whether a change is appropriate/ desirable.

non-legal audiences and more with future courts (inviting the courts to consider whether to make that suspension more permanent and introduce a new rule or principle). But it is also important to recognise that the fictions used are making a difference in the present case: they are, for example, allowing the claim to be made under the rubric of a particular rule.

- Gama, in his chapter, raises the interesting issue of where, if anywhere, to draw the distinction between fictions and presumptions. This is a theme that is entertained by a number of contributors (e.g. Del Mar and Moscovitz)[28], but receives systematic treatment in Gama's chapter. For Gama, fictions are 'neither statements nor assertions', and nor are they 'consciously false assertions or statements formulated with consciousness of their falsity'—and this is because 'fictions created in the application of law are not assertions that pretend to express an empirical truth' (Gama, Chap. 16 below, p. 362). Instead, fictions 'are operations at the level of rules by which, irrespective of their legitimacy or illegitimacy, a judge extends the application of an existing rule to a situation of fact that cannot be subsumed under that rule, and in so doing so he creates a new rule' (ibid).[29] Looking at fictions at the level of rules, says Gama, means that we see that there is much more overlap (if not outright identity) than we might have otherwise thought between fictions and presumptions.

There remains considerable disagreement amongst the contributors at the level of definition. For instance, there is disagreement as to whether to think of fictions as 'false', with a number of contributors (Lind, Petroski) urging we drop this so-far dominant assumption in the literature, and others suggest retaining some level of realism is needed, if only to keep law's tendency to run away with language in check (Schauer, Schafer and Cornwell). There is also disagreement as to the extent to which one thinks using legal fictions is necessarily a matter of creating a new rule or principle (e.g. Gama thinks it is, while Del Mar and Lee think it is not). No doubt evaluative considerations creep in here, e.g. the extent to which one thinks that legal language ought to be held against the standards of everyday life, which is a value judgement, will influence one's definition of fictions.[30]

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[28] For Moscovitz, a fiction is 'the assertion for legal purposes of "facts" which are clearly untrue: this distinguishes them from presumptions since the facts which they presume are not clearly or necessarily untrue' (Chap. 15 below, p. 327).

[29] At the risk of repetition, let us recall that there is thus disagreement here between Gama and Del Mar: for Del Mar, a fiction does not necessarily create a new rule—it is more of an invitation (which may never be taken up) to a future court to consider whether to generalise/abstract the temporary suspension of an operative fact into a rule.

[30] According to Quinn, the 'central disagreement' between Vaihinger, Bentham and Fuller concerned 'the degree to which, and the manner in which, such falsehood can be removed from language' (see Quinn, Chap. 4 below, 62). This was in part an ontological issue, but also in part a value-based judgement as to the appropriate extent to which the law might be sealed off from everyday discourse. Of course, this is not to say this is the only disagreement between those thinkers: at another point in his chapter, for instance, Quinn points to another, arguably more fundamental disagreement (at the ontological level): namely, that although Bentham anticipates Vaihinger in regarding many of the basic categories with which thought seeks to understand the world as ficti-

IV. The Good, the Bad and the Ugly: Evaluating Fictions

It will be instructive to continue our inquiry into the themes of the volume by pointing out some of the positive and negative claims made about fictions:[31]

- As with definitions, many of the contributors in this volume look back to the evaluative statements made by classic authors on fictions. Thus, many observe that for both Vaihinger and Fuller fictions are necessary and useful elements in legal thought. Bentham is more complex, though he too, says Quinn, recognised that some fictions were inevitable, and did not need to involve any intention to deceive.[32] What this raises is something common to virtually all the contributors in this volume, namely, that some fictions are better than others—or, put differently, that there can be good and bad fictions.[33]
- Perhaps the best example of this balanced analysis of the merit of fictions appears in Lind's chapter. It is worth quoting the following passage at length:

> Questions about the merits of a legal fiction should go to whether the fiction damages established truths, meanings, or understandings in some extralegal realm or within law itself as a result of collision in meaning. Used well, legal fictions inflict no damage while producing workable and beneficial doctrines or rules. Used nefariously, they upset settled meanings or truths, work injustice, or mask underlying process of legal reasoning. As with other modes of creative legal technique, legal fictions must be evaluated case-by-case in context. The technique as such is neither sickly nor sinister. (Lind, Chap. 5, p. 84–5)

Lind goes on to provide examples of good and bad fictions. To recall, the fiction of the personality of the ship was a good fiction, not only because it 'did not unsettle everyday understandings of ships or personhood' (see Lind, Chap. 5, p. 96), but also because it enabled courts to combat evasions of responsibility. There is recognition, here, then, that it is conceivable for a fiction to cause unacceptable inconsistency with everyday parlance, at least to the extent we subscribe to the ideal of a rule of law, at least in the sense of it not being a repository of cognitive surprise—of it being too remote from common sense (e.g. imagine that, for certain purposes, judges began to treat fruit as if they were cars, or cars as if they were fruit). Lind's examples, though, of nasty or 'pernicious' fictions are ones that are bad less on the semantic level, and more on the level of justice: thus, as already noted above, the fiction of the contract ideal enables the evasion of responsibility by companies;

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tious entities, he disagrees with Vaihinger's idea that the thing and its qualities are inseparable, preferring to think only of the bodies to which qualities are attributed as real (see Quinn, Chap. 4 below, p. 61).

[31] For an important relatively recent defence of fictions in the pre-existing literature, see Knauer 2010.

[32] For Bentham, to recall, it was the third category—theoretical fictions—that deserved the greatest disapprobation. But he also thought that procedural fictions, where they buttressed theoretical fictions, were best got rid of (for further discussion, see Quinn).

[33] I am putting aside here the issue of the comparative utility of fictions in different domains, e.g. law and science. Thus, one may be more sympathetic to fictions in natural science than in law or morality (as Bentham arguably was: see Quinn).

and the fiction of *terra nullius* leads to the dispossession of lands belonging to Aboriginal peoples in Australia and elsewhere. We might put in the same category the fiction of consent that underlies legal blindness to 'marital rape', which as Alldridge notes in his chapter, was only laid to rest in English law in 1991.

- In keeping with the jobs identified above, many contributors recognise that fictions can help avoid or at least mollify the rigidity of law—whether this be at a moral level or at a level of pure practicability (recall Moscovitz). To the extent they do so, and thus to the extent they allow us to avoid injustice, fictions are a good thing. Of course, a lot of what one thinks of fictions will depend on what one thinks counts as an appropriate justification for a legal decision: according to some, a legal decision cannot be justified in law unless it amounts to an universalisation properly tested by the requirements of coherence and consistency with existing and established rules of law.[34] Thus, it is not enough for a fiction to be good for it to avoid injustice in a particular case; its use, to be justified, must be universalised or at least universalisable. To enter into further discussion of this issue, however, would lead us into the thickets of theories of legal reasoning.[35]
- Apart from semantic and justice-based considerations in evaluating fictions, one might also consider—as does Lobban[36]—the doctrinal level. Thus, one can recognise that certain fictions may help explain doctrinal developments, but equally, one ought to see that fictions may also 'hinder the development of better models' (Lobban, Chap. 10 below, 219)—Lobban's example is that of 'the notion that the parties had implicitly agreed on what was to be done if the subject matter of the contract were destroyed', which was an useful way to explain the evolving doctrine of frustration, but was also constraining in many ways.[37] Similarly, one might also claim that some fictions—especially some of those fictions related to extended uses of certain forms of action (ejectment and the like)—were obfuscatory, for they 'hid the real nature of the dispute between parties' (see Lobban, Chap. 10 below, 216).
- Finally, there is the defence of fictions offered by Del Mar in this volume. According to Del Mar, legal fictions can be a useful instrument of careful experimentation—a way of testing the extent to which the potential introduction of a rule will be beneficial. On this view, fictions are not signs of the immaturity of a system (as they were, for instance, for Maine), but instead dynamic resources that allow courts, over time, to balance flexibility and responsiveness with stability and predictability. That balancing, of course, can be done well or badly—but

[34] See MacCormick 1978.

[35] There may, for example, be an interesting tension here between that universalised-based view of the justifiability of legal decisions and Del Mar's claim that there is value in a fictional solution that is only at best potentially universalisable (indeed, its value depends in part on the court not universalising it, at least initially).

[36] See also the sources from the eighteenth and nineteenth centuries mentioned in Lobban's chapter—as Lobban says, defences of fictions was quite common then (in contrast to today). It may be instructive to consider why that is so—to the extent it is!

[37] This was a point that was also recognised by Maine—fictions had to be got rid of at one point, for they could become the greatest obstacles to further development and understanding of the law.

the general point is that we would be much worse off if we did not have the resource of fictions.

The overall consensus here may be articulated as follows: that most, if not all, contributors recognise that there is some value in some fictions. There seems to be little enthusiasm for saying that fictions, in themselves, are either good or bad—instead, like other techniques, they are liable to be abused, but also to be put to good use. Further, there is, as everywhere, evaluative complexity here: a number of different considerations are often in play, including the level of semantics, justice, the practice of legal reasoning, and the intelligibility of doctrine. One's view of fictions will inevitably depend on the stances one takes in relation to each of those criteria.

V. Some Further Themes and Questions for Future Work

The above has but touched on the themes that appear in this collection. In this final part, some further themes are identified, together also with some questions that deserve further analysis:

- An important theme in this collection is the relationship between fictions and other devices and modes of reasoning. There are different ways in which one can pool devices, of course—one might want to put together all the different modes of argument, looking for example at fictional, exemplary, analogical, hypothetical and consequential reasoning in one pool; or, one can pool together only those that fall under the category of 'legal artifice' (see Stern), such as fictions, metaphors, exclusionary rules, and various narratological devices (such as parables); or one may have a more general—and perhaps anomalous—pool of devices such as: presumptions (conclusive and rebuttable), deemings, (false) hypotheses, lies, deceptions, errors and so on. One may wish to draw a line, for instance, between those devices and modes of reasoning related to issues of fact on the one hand, and those related to law on the other (see further Gama). Or, one may wish to focus on a particular relationship: e.g. between fictions and classification/ taxonomy (see Samuel); or between fictions and analogy (see Stern and Schauer); or between deeming and fictionalising (see Alldridge). Finally, and in a particularly creative turn, one may look at fictions through the prism of the way law treats fictional objects (such as characters in novels in intellectual property law): on this, see Schafer and Cornwell.
- In addition to comparing fictions to related devices or modes of argument, one might go on to consider how the topic of fictions fits into or clashes with some long-held views within theories of legal reasoning: what, for example, does the utility of legal fictions tell us about the idea of universalisation being the foundation of justification? Are fictions but misapplications of rules—and if not, what does this tell us about the very idea of application/ misapplication? At what point does a fiction subvert (rather than keep intact) a pre-existing rule or principle? Finally, do not legal fictions undermine the exclusive focus within legal reason-

ing on instances of decision-making—for do they not show that one must analyse and evaluate modes and devices of legal reasoning as they function over time?

- The topic of legal fictions can also offer an interesting way to analyse the role of scientific evidence in law—including how one deals with that evidence often falling short of its own requirements (recall Del Mar and Lee on evidence of causation in asbestos claims). In this volume, both Petroski and Gordon offer some valuable insights as to the role and limits of scientific evidence in the law.[38]
- Another fascinating topic—picking up from the immediately preceding last question—is the life-cycle of fictions. The most brilliant exposition of this theme in this collection comes from Sparkes, who analyses the birth, development, and finally death of the fiction of ejectment. He shows, for example, how the fiction might have been born, with it being but a small step towards a fiction from a case in which a claimant for possession sued not the master, but the servant living on the property, for fear of the master absconding and thus avoiding the proceeds (see Sparkes, Chap. 13 below, p. 280). There are the twin energies here of fictionalisation and de-fictionalisation, and all the imaginative baggage that accompanies these processes (perhaps especially the first, involving as it does flights of nomenclature fancy). There is farce here, certainly, but also serious questions concerning the use of fictions depending on the trust (or distrust) the judiciary has in the legislature. It should be added that there is room, too, for disagreement: for example, where Sparkes sees scaffolding (fictions being built on fictions), Alldridge sees but ad hoc repairs and patches (see below, 2). In summary, what Sparkes shows is that there is great promise here in more historical work on legal fictions, continuing, though not necessarily agreeing with, the tradition of Maine, Milsom[39] and others.
- Related to this is the issue of the sociological conditions that might be said to accompany the utility and/ or popularity of fictions. For example, consider Ando's claim that there were two historic changes that may have led to more fictions: 'the creation of a new source of law in the early second century BCE, to wit, the granting to the praetor of not merely the power to hear cases but to create new legal actions'; and second, the expansion of the empire, which demanded the reduplication of institutions of governance, including both magistracy and jurisdiction (see Ando, Chap. 14 below, pp. 319–20). Further work on such sociological conditions, in comparative historical vein, would surely be highly desirable.
- Finally, let us observe that a great deal more work could be done on fictions in legal theory—on the use of fictional constructs in general jurisprudence, e.g. in modelling judges, in drawing on utopias or dystopias of various kinds.[40] As noted above, the focus in this introduction (and the collection as a whole) is on fictions in practice. Nevertheless, there are some very valuable contributions in this respect in this volume. The most extensive discussion appears in Samuel's chapter

[38] For some resources in this respect, see Del Mar and Schafer 2014.

[39] See Milsom, 2003, Chap. 2.

[40] This could be as part of an overall inquiry into the literary qualities of theorising about law—both today and in the past.

(though see also Gama, Kletzer and Schauer), where the following examples of purported fictions of legal theory are given: Dworkin's Hercules; Hart's Rule of Recognition (a controversial example, as Samuel realises); Hart's (and one might also add, Fuller's) King Rex; Kelsen's Grundnorm;[41] and Holmes' Bad Man. Mention has already been made that Kelsen thought that theoretical fictions were the only genuine fictions on Vaihinger's own criteria of them, and here it is difficult to resist quoting a lovely image from Kelsen's review of Vaihinger's *As-If*, in relation to the utility of these fictions of legal theory:

> And we have to speak of a fiction as soon as cognition (and especially juridic cognition) takes a detour in knowing its object (and in juridic knowledge this object is the law, the legal order, the legal ought) a detour in which it consciously sets itself in contradiction to this object; and be it only in order to better grasp it: just like a rock-climber, in order to avoid an obstacle and reach his goal more easily, is sometimes forced to temporarily climb downwards, i.e. in a direction directly opposed to his goal, the peak. (Kelsen, Chap. 1 below, p. 5)

Conclusion

It is hoped that the list offered in the final part of this introduction shows not only the riches to be mined in this collection, but also that the topic of legal fictions is a fascinating one, deserving of further treatment. Of course, this volume has not aimed at a final word—instead, an attempt has been made to look afresh at this topic. Valuable work has been done, but so much more remains to be considered, and what is so wonderful about the topic of legal fictions is that it forces one to dip one's paintbrush into many colours: epistemological, ontological, sociological, historical, cognitive, and linguistic, to mention but the obvious. Thus, if nothing else, it is hoped that the collection has shown the fruits for and the need for more work, especially within scholarship on legal reasoning, and particularly at the intersection of the conceptual, the evaluative and the historical.

Note on the Index In preparing the index we have tried to meet the interests of scholars interested in fictions in general or in particular examples. For that reason, we have been inclusive of examples that have been candidates to be called 'fictions' even if this categorisation is disputed or rejected. We have been similarly inclusive of authors who have written about fictions in general, but parsimonious in regard to other authors and proper names. Finally, rather than a full table of cases, we have only listed those cases that we consider particularly important for the topic.

[41] See also Schauer, who observes that 'The Grundnorm may be a legal fiction, but only in the sense that any assumption or presupposition is potentially fictional' (Chap. 6 below, p. 117). As he adds, the assumption is thought here to be 'afactual', rather than 'counterfactual' in the traditional legal fiction.

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Contents

About the Authors

Peter Alldridge is Drapers' Professor of Law at the Department of Law, Queen Mary, University of London, and author of *Relocating Criminal Law* (2000) and *Money Laundering Law* (2003).

Clifford Ando is Professor of Classics, History and Law in the Department of Classics at the University of Chicago, as well as Research Fellow in the Department of Classics and World Languages at the University of South Africa.

Hans Kelsen (1881-1973) was one of the twentieth's centuries most important legal theorists.

Jane Cornwell is Lecturer in Intellectual Property Law at the School of Law, University of Edinburgh.

Maksymilian Del Mar is Senior Lecturer in Law and Philosophy at the Department of Law, Queen Mary University of London, and Academic Fellow of the Honourable Society of the Inner Temple.

Raymundo Gama is Professor of Law at the Instituto Tecnológico Autónomo de México (ITAM).

Randy D. Gordon is an adjunct professor in the Dedman School of Law and a lecturer in English at Southern Methodist University. He is also a partner in the Complex Litigation Group of Gardere Wynne Sewell LLP.

Christoph Kletzer is Senior Lecturer in Legal Philosophy at the Dickson Poon School of Law, King's College London.

James Lee is a Senior Lecturer in Law at the Dickson Poon School of Law, King's College London and an Associate Academic Fellow of the Honourable Society of the Inner Temple.

Douglas Lind is Professor of Philosophy in the Department of Philosophy, University of Idaho.

Michael Lobban is Professor of English Legal History at the London School of Economics.

Leib Moscovitz is Professor and Chair of the Talmud Department in Bar-Ilan University, Israel. He specializes in the study of the Palestinian Talmud and jurisprudential aspects of rabbinic literature.

Karen Petroski is Associate Professor of Law at the Saint Louis University School of Law.

Michael Quinn is Research Associate at the Bentham Project, based in the Department of Laws, University College London.

Geoffrey Samuel is Professor of Law at the School of Law, University of Kent, and Professor *affilié*, Law School, Sciences-Po, Paris.

Burkhard Schafer is Professor of Computational Legal Theory at the School of Law, University of Edinburgh.

Frederick Schauer is David and Mary Harrison Distinguished Professor of Law at the School of Law, University of Virginia.

Peter Sparkes is Professor of Property Law at the School of Law, University of Southampton.

Simon Stern is Associate Professor in the Faculty of Law and the Department of English, University of Toronto.

William Twining is Emeritus Quain Professor of Jurisprudence at the Department of Laws, University College London.