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Bentham's Theory of Fictions – A “Curious Double Language”

Nomi Maya Stolzenberg

I. Introduction

This is a story about Bentham's theory of fictions. But it is also a story about Bentham's theory of facts because, as Bentham painstakingly demonstrates, fiction and fact are inseparable aspects of the same cognitive process. This part of Bentham's work has been obscured by the common misapprehension that “positivism,” which Bentham endorsed and indeed in some sense “fathered,” commits us to making a sharp distinction between fact and fiction, much like the one he argued for between value and fact. In practice, fiction is indeed defined in contradistinction to fact, but Bentham's conception of the link between the two went much further. In his view fictions *create* facts, which *are* fictions, as these terms are properly understood.

This view of Bentham is wholly at odds with the standard view of him as the arch-critic of, specifically, *legal* fictions. Bentham was indeed a scathing critic of the use of fiction in the discourse of law. But when one understands the broader sense in which Bentham classified legal facts as species of fiction, it is clear that his criticisms of legal fictions are more qualified than is commonly thought. From this point of view, legal fictions can be seen as the soft underbelly of the law of evidence to which Bentham devoted himself to systematizing, and therefore cannot be adequately comprehended apart from his views about the nature of evidence, and his general theory of fiction and fact.

Bentham's theory of the fictional nature of facts, which I will refer to here as “fictionalism,” or alternatively, “fictionalist realism,” exemplifies a broader intellectual tradition that is characterized by several interlocking themes, only one of which is the focus of attention here – namely, a duality of perspectives regarding fiction and fact. According to Robert Newsom, the key to the nature of fiction is the nature of belief engendered by fiction – neither simple credulity, nor the complete absence of

belief. For Newsom, fiction depends not simply on a “suspension of disbelief,” but rather, the simultaneous existence of “two separate frames of reference... and with them two separate bodies of evidence,” which are “implicitly considered” at the same time.”¹ “The essence of entertaining fictions is to inhabit a dual standpoint while denying that there is more than one frame at all.”² Thus we “split ourselves between real and fictional worlds,”³ or more precisely, “we divide our beliefs between real and fictional worlds.”⁴ But “such a split... is invisible to the game of entertaining fictions, for to recognize the split is to end the game.”⁵ Which is to say that to think seriously *about* beliefs is to adopt a standpoint external to them, which renders the duality of perspectives perspicuous and inescapable. But by the same token, to adopt a standpoint internal to belief – in other words, to believe – is precisely to *forget* (or refuse to credit) the other perspective.

Newsom is careful to distinguish the literary fictions that are the subject of his analysis from the kinds of fictions of concern to Bentham, which operate in the so-called “real world” (e.g., those used not only in law and politics, but also in the discourse of the natural sciences, psychology, and most ordinary conversation). However, the thesis defended in this essay is that the dual standpoint that Newsom perceives to be the essence of literary fictions is equally the essence of legal fictions – an observation that lies at the core of Bentham’s theory of fiction. This is not to deny the important distinction between literary and legal fictions, but rather to affirm that the affinities between them subsist at the deep and slippery level of belief.

This essay is limited to a consideration of the role of the dual perspective in Bentham’s theory of fact and fiction. In another work I will examine the broader framework of his thought into which, I believe, the double perspective fits. But I need to present at least a rough sketch of it here. This is firstly because it is difficult to talk about the dual perspective of legal fictions without making *some* reference to other core ideas on which it relies – for example, the idea that probability is a satisfactory substitute for certainty. Secondly, I want to try to stir up interest in drawing connections between the double perspective of legal fictions and a body of related concepts that historians of science, literary theorists and scholars of classical rhetoric have been exploring over the last several decades.⁶ Analysis of legal fictions has been almost at a standstill since the early

1930s (at least in the Anglo-American sphere), and the few serious studies of the subject since then have not benefitted from the insights generated by the developments in the study of the history of science and rhetoric.⁷

The constellation of ideas that I think define the fictionalist tradition, and thus form the intellectual context for the idea of the double perspective,⁸ must include, first, some version of a theory of legal positivism, according to which law is, in essence, a human artifact, the product of a political process of legislation;⁹ second, a functionalist approach to analyzing concepts, on which linguistic terms are defined in terms of their uses, their social functions and effects; and, third, a pragmatist theory of knowledge, which might be thought of as a “doctrine of adequacy.” Different versions of this doctrine have been expounded, all of which assume the inherent uncertainty of human knowledge, while purporting to identify a level of useful albeit less-than-certain knowledge, which is nonetheless sufficient to justify particular courses of action and beliefs. The test for such “good enough” beliefs is their utility. Thus, doctrines of adequacy have always been married to some version of utilitarianism, broadly construed.

The doctrine of adequacy in turn rests on three basic concepts – probability, economy, and accommodation – which received their most un-ambivalent and systematic formulation in classical rhetoric.¹⁰ The valorization of probabilistic thinking and the concept of probability itself are central themes in classical rhetoric, alongside the basic principle that effective communication must express ideas “economically,” and be “accommodated” to the limits of the audience’s understanding. In fields ranging from psychology and literature to experimental and theoretical science and law, these three concepts continue to operate together to define a standard of adequacy that sanctifies the merely probable as a practically reliable species of scientific proof. In law, such a doctrine came to be encapsulated in “the best evidence rule.” Less a doctrinal rule than an enshrined attitude toward evidence, it holds that in the perpetual absence of certain factual knowledge, legal rulings (including convictions) must be delivered on the basis of the “best” evidence available, where “best” connotes not the objective best but rather the probable, hence the good enough.¹¹

In this essay I will focus on one intellectual consequence for the theory of legal fictions of adopting the doctrine of adequacy. This doctrine has

always contained within it a tension between, on one hand, notions of probability as objective, empirically observed statistical frequencies pertaining to external occurrences and things and, on the other hand, notions of probability as nothing other than the observer's own beliefs and degree of confidence in his perceptions.¹² This tension between objective and subjective conceptions of probability reflects a more general tension between conventional realist and subjectivist perspectives on the nature of the truth-claims produced in conformity with the doctrine of adequacy. Nothing could be more characteristic of the fictionalist tradition than its oscillations between the objective standpoint that we ordinarily assume and the more radical perspective, according to which the perception of facts that exist independently of our constructions is an illusion.

Many theorists could be used to exemplify the subjectivist point of view, and the fictionalist doctrine of adequacy. But Bentham provides an especially surprising and illuminating window because he not only exhibits the duality of the two perspectives but made it the subject of rigorous analysis. More systematically than any other modern scholar of legal fictions, at least in Anglo-American law,¹³ Bentham presented a theory of fictions that sought to account for the persistence of the duality, rather than simply endorsing one perspective against the other. Of course, by embracing both, Bentham ultimately repudiated the conventional realist point of view. But he did so in a way that enabled him to offer to posterity practical ideas about fact-finding and legal evidence that are founded on a "positivist" conception of facts.

As the protagonist in our story, Bentham is surrounded by a supporting cast that features C.K. Ogden, a Cambridge don who toils to resurrect Bentham's long-buried theory of fictions almost a century after his death, and Lon Fuller, the well-known Harvard law professor and author of his own study of *Legal Fictions*, who manages, despite Ogden's efforts, to overlook Bentham's theory, while more or less re-inventing it. Both drop out of the story once they have completed their cameo performances, but future investigations of the fictionalist tradition may find them ready for their close-ups.

II. The Two Benthams

Bentham's views about legal fictions are well known. His contempt for these peculiarities of legal discourse bordered on an obsession.¹⁴

Bentham held, to put it mildly, “a highly critical view of the administration of justice”¹⁵ in early nineteenth-century England, and he made his critique of legal fictions the centerpiece of his more general criticism of English common law. Like all good centerpieces, Bentham’s treatment of legal fictions was eye-catching, even eye-popping, replete with florid motifs and arresting images so striking that they continue to be widely quoted to this day.¹⁶ Around a simple core – “By fiction, in the sense in which it is used by lawyers, understand a false assertion of a privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true”¹⁷ – Bentham’s objections fanned out in his purplest prose:

It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed. [...]

The case is this. A large portion of the body of the Law was, by the bigotry or artifice of Lawyers, locked up in an illegible character, and in a foreign tongue.... Fiction, tautology, technicality, circuitry, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near. [...]

Thief to catch thief, fraud to combat fraud, lie to answer lie. Every criminal uses the weapons he is most practised in the use of; the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys; licensed thieves use fictions.¹⁸

What the *hatchet* is to the Russian peasant, *fiction* is to the English lawyer – an instrument of all work.¹⁹

In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.²⁰

And on and on. More epithets than arguments,²¹ Bentham heightened the effect of such statements by embedding them in an inflammatory narrative concerning the causes and effects of legal fictions

and what he called the “Technical System” of law, a tale featuring villains (“Judge and Co.”),²² victims, “folly,” “wickedness,” and “vile lies,” all involved in a “sinister” plot to “cheat” the “heirs” of England, to “steal business”²³ and line the pockets of judges and lawyers,²⁴ to deceive and mystify the “bulk of the people” by “wrapping up the real dispositions of the law in a covering of nonsense,” and generally to subvert the administration of justice. “Fiction of use to justice? Exactly as swindling is to trade.” Thus Bentham memorably described the effects of the courts’ “mendacity-license” on “the people.”²⁵

As for its causes, Bentham advanced a theory based on self-serving economic interests that would gratify today’s most hard-boiled theorists of “rent-seeking” officials,²⁶ or, for that matter, any garden-variety conspiracy theorist. As recently summarized by William Twining, a leading Bentham scholar,

Much of Bentham’s analysis could, with a few adjustments of terminology and emphasis, be adopted by a modern Marxist: the characteristics of the technical system are directly attributable to the material interests of a powerful class, interests which by and large conflict with those of the rest of society; the system is conserved through a combination of falsehood, mystification and self-deception and is cemented by an underlying liberal ideology. The system is so rotten that it requires complete restructuring, including a radical change in the attitudes of its functionaries. An important preliminary to such a change is exposing its defects by means of a systematic radical critique.²⁷

Outrage is the unvarying tone of the critique of legal fictions put forward by Bentham, expressed in frequent apostrophes, righteous indignation and moralizing, overwrought solicitude,²⁸ and sheer, dripping scorn.

All of this stands in sharp contrast to the dry, sober, scholarly tone adopted by Bentham in most of his vast corpus of writings on government and law. In addition to his best known works on government and the political theory of utilitarianism,²⁹ Bentham produced a lengthy analysis of the law of evidence, *The Rationale of Judicial Evidence* (1827), of which his theory of fictions forms an integral part.³⁰ His theory of fic-

tions, which was elaborated in several different places, goes far beyond his more familiar diatribes against specifically *legal* fictions. Legal fiction was just a subset of the more general category of fiction that became a subject of lifelong, consuming interest. According to C.K. Ogden, the most devoted redactor of Bentham's ideas about fiction, Bentham's interest in the general topic of fictions was sparked by his youthful encounter with legal ones, in the baneful form of Blackstone's lectures at Oxford.³¹ But "Ghosts, no less than his horror of Legal Fictions, can be shown to have played their part in determining the intensity and pertinacity of his researches [into the general topic of fictions]."³² Legal fictions remained the subject of ceaseless invectives, but, says Ogden, "[i]t was to an analysis of Language that Bentham turned in the first instance for weapons against an evil that had its origin primarily in Word-magic,"³³ and, according to Twining, this led Bentham to develop nothing less than a "remarkably sophisticated theory of language."³⁴

Just how sophisticated Bentham's theory of language is has been a subject of dispute. At one extreme, Ogden holds that it anticipates, and indeed surpasses, the linguistic theories of such celebrated twentieth-century philosophers as the German pragmatist, Vaihinger,³⁵ whose turn-of-the-century *Philosophy of As If* ("Die Philosophie des Als Ob") briefly took the academy by storm,³⁶ and the "logico-analysts" of the English school, such as Bergson,³⁷ Wisdom,³⁸ and Russell.³⁹ Other Bentham scholars have claimed him as a forerunner of Frege and Wittgenstein,⁴⁰ of the Vienna Circle,⁴¹ and of modern semiotics. But it was Ogden, first and foremost, who, in the early 1930s, put Bentham's theory of language on the map with his publication of *Bentham's Theory of Fictions*. In it, Ogden gathered together writings that Bentham had produced over the course of his lifetime and scattered about in the nooks and crannies of his voluminous writings on legislation, government, psychology, logic, and evidence,⁴² and tucked into his more pointed critiques of such "nonsensical" ideas as natural rights and the social contract.⁴³ Indeed, it could justly be said that it was Ogden who wrote *Bentham's Theory of Fictions*.⁴⁴

But while Ogden endeavored to show that Bentham was the forefather of twentieth-century English analytic philosophy, others have been more dismissive concerning Bentham's authorship of a genuine philosophy of language. According to Lon Fuller, who was completing his own

essays on legal fictions shortly before Ogden published "Bentham's Theory of Fictions" in 1932, "Bentham's turn of mind was inimical to the painstaking analysis demanded by these subjects."⁴⁵ Others also have expressed doubts about whether Bentham is properly to be regarded as a "real" philosopher, and, more particularly, whether Bentham's writings about fiction really amount to a systematic *philosophy* of language, as opposed to mere scattered, undeveloped thoughts.⁴⁶

What all agree is that Bentham expounded ideas about the general nature of fiction that seem deeply at odds with his exclamations about *legal* fictions. Whereas Bentham never spoke of legal fictions without reviling them, he regarded the more general category of fiction approvingly as an essential and constitutive feature of human language and thought. Aware of the pejorative sense that often accompanies the term, Bentham explicitly directed his editor to "omit ridicule" from his treatment of fiction.⁴⁷ Even as he loudly proclaimed the necessity of ridding legal discourse of legal fictions, he insisted to readers of his discussion of fictions of the psyche that "what is here meant is, not that no such fictions ought to be employed."⁴⁸ Likening the use of "fictitious entities" in the discourse of physicists to "a sort of innocent falsehood, the utterance of which is necessary to the purpose of discourse,"⁴⁹ Bentham emphasized that thinking and communication about the physical world were impossible without them.⁵⁰ As Ogden notes, "Bentham believed that language must contain fictions in order to remain a language,"⁵¹ or, as another commentator puts it, that fictions are "a discursive necessity."⁵² In Bentham's own words: "To language, then – to language alone – it is that fictitious entities owe their existence; their impossible, yet indispensable existence."⁵³ Without fictions there could be no language (at least, not "of any form superior to that of the language of brute creation"⁵⁴). And, Bentham seems to suggest,⁵⁵ without language there could be no thought. Thus he goes so far as to state that: "[o]f nothing ... that has place or passes in our mind can we speak (or so much as think), otherwise than in the way of *fiction*."⁵⁶

Fiction, in this view, stands in a much more complicated relationship to the apprehension of truth or reality than the simple opposition of fact to fiction implied by Bentham's condemnation of legal fictions as falsehoods and lies. This condemnation seems to assert a clear-cut fact-fiction distinction that is strikingly at odds with the theory of language he

advanced; conversely, his sophisticated theory of fictions seems at odds with the view of truth implied in his legal critique. As Ogden and other Bentham scholars have concluded, Bentham's conception of fiction as an indispensable feature of language reflects a belief "that a language which 'mirrored' reality would be impossible."⁵⁷ In the parlance of contemporary philosophy, he rejected a "correspondence" theory of truth.⁵⁸ Yet his habitual treatment of legal fictions as statements that are inherently deceitful seems to presuppose just such a theory.⁵⁹ After all, if language is not supposed simply to mirror an external reality – if reality is not supposed to be knowable independently of language – then why automatically equate fiction (in the legal context) with falsehoods and lies? If perception and cognition are necessarily mediated through the fictions inherent in language, then what makes legal fictions pernicious distortions? In what sense are they distortions and in what way are they pernicious?

These riddles remain unsolved in part because of the general neglect of Bentham's theory of fictions. Notwithstanding Ogden's efforts to rectify the historical record, Bentham's theory of fictions (or, if you will, Ogden's "Bentham's Theory of Fictions") remains largely forgotten, overshadowed by his simpler and showier railings against the fictions peculiar to legal discourse. It is true that in recent years Bentham scholars and students of evidence law have at long last begun to pay attention to Ogden's publication, and to grapple with Bentham's more complex views.⁶⁰ But most scholars of *legal* fictions remember Bentham solely for his colorful fulminations against the use of fiction in law.⁶¹ Lon Fuller, whose essays on legal fictions from the early 1930s remain the leading Anglo-American twentieth-century treatment of the subject, is wholly typical in this regard. In the opening pages of his work, Fuller invokes Bentham's "unremitting ... attacks" on legal fictions as the quintessential example of what Fuller will shortly disparage as the "naive" view of fictions, a view predicated on a false distinction between fictions and facts, and a simple-minded glorification of the latter.⁶² Fuller presents himself as the champion of the supposedly new, more philosophically sophisticated view, according to which "[o]ur minds are not mere passive reflectors of the external world."⁶³ Such a view, according to Fuller, calls for a rejection of "the picture theory of truth"⁶⁴ and a corresponding recognition that fiction is "an indispensable instrument of human thinking."⁶⁵ Fuller associated this view with the Vaihinger As-If philosophy then in vogue –

conveniently neglecting to mention both Bentham's adumbration of similar views, and Ogden's claim that Bentham deserves credit for articulating Vaihinger's theory of fictions better and first.⁶⁶

Fuller's own essays on fictions appeared in an American law review in 1930 and 1931, just before the publication in England of Ogden's volume which made Bentham's largely unknown ideas about fiction and language easily accessible for the first time.⁶⁷ In his own review of Ogden's book in 1934 in the *Harvard Law Review*, Fuller pronounced Bentham's "turn of mind" to be unsuited to the sort of philosophical reflections on language and truth offered by the likes of Vaihinger and Russell.⁶⁸ Fuller's dismissive treatment of Ogden's claims about Bentham's views stands in sharp contrast to the generally laudatory reception of *Bentham's Theory of Fiction* that appeared in the pages of American law reviews.⁶⁹ Nearly forty years later, nothing seemed to have changed. On the very first page of the introduction to the 1967 republication of his essays, Fuller again conjures up "Bentham's unequaled capacity for excoriation,"⁷⁰ quoting his more colorful (and simplistic) attacks on legal fictions, while neglecting to admit the existence of the more positive appraisal and sophisticated analysis of fictions highlighted in the Ogden volume. The suspicion that Fuller was deliberately avoiding the philosophically sophisticated Bentham grows when we note that Fuller went so far as to provide his own translations of Vaihinger (a full third of his book on legal fictions is devoted to the German philosopher), rather than rely on the definitive English translation produced by none other than Ogden.⁷¹ The fact that Fuller ended his introduction to the 1967 publication by taking note of the "portents of change in our intellectual climate" since the original publication of his essays (he singled out Thomas Kuhn's *The Structure of Scientific Revolutions*⁷² and W.V. Quine's *From A Logical Point of View*)⁷³ makes his continued neglect of Ogden's thesis about Bentham all the more baffling.

III. The Double Language

Fuller's failure to acknowledge the sophisticated theory of fiction attributed by Ogden to Bentham, coupled with his re-invention of the "sophisticated" philosophy of fiction and language and repeated unwitting reversions to the philosophically "unsophisticated" view, producing a duality of perspectives or what Fuller elsewhere called a "curious double

language,” is *typical* of scholarly analyses of legal fictions. It also is typical of theoretical treatments of fictions in law to present readers with a contrast between a naive realism and what is invariably described as a more philosophically sophisticated view – as if it were a fresh discovery rather than a conception of fiction and truth that has been articulated before.⁷⁴ This is no less true of Bentham’s treatment of the general subject of fiction than of Fuller’s analysis of legal fictions a century later. Both Bentham and Fuller subjected conventional realism to critical analysis, calling into question the distinction between fiction and fact, challenging the prevailing conception of mind as a passive reflector of an objective reality and, ultimately, embracing fictions as “an indispensable part of language and thought.”⁷⁵ For both Bentham and Fuller, such an acceptance of fiction is a necessary corollary of a view of the mind as an *active* intellect, as a force which actively organizes and, indeed, creates its own reality in response to needs, interests and drives. Bentham and Fuller shared the view that “language does not provide us with a picture of reality, but with the tools needed to grasp and manipulate reality to our own purposes.”⁷⁶ In short, they both embraced what academic philosophers commonly refer to as a “pragmatist” picture of cognition and truth.⁷⁷ Moreover, each of these thinkers linked the pragmatist conception of mind and language to a firm commitment to naturalism, empiricism as a method of scientific investigation, and utility as the standard of scientific validation.⁷⁸

Besides sharing a conception of language and truth that is at once subjectivist and pragmatist, Bentham and Fuller also had in common a failure to take note of the repudiations of conventional realism made by thinkers in the past, as well as a tendency to slip into the discourse of that supposedly repudiated point of view. These two features of Fuller’s and Bentham’s thought – neglecting challenges to conventional realism that were leveled before, and forgetting to maintain the subjectivist standpoint throughout their own writing – are, I would argue, deeply linked, to each other, and to the subjectivist position itself. Indeed, both of these forms of forgetting frequently, if not invariably, accompany the articulation of the subjectivist-pragmatic conception, according to which fiction is an ally, rather than the enemy, of truth.

Fuller himself took note of the “curious double language” that results when an exponent of subjectivism lapses into the discourse of ordinary

realism.⁷⁹ He attributed such a double language to Vaihinger, but he could just as well have been talking of himself. He also might have used the same term to describe the curious division between Bentham's general approbation of fictions and his consistently negative view of legal fictions as "falsehoods" and "lies." Fuller's failure to recognize the "curious double language" running through his own discourse (an instance of the second form of forgetting) was reinforced by his refusal to acknowledge its appearance in Bentham (an example of the first). Had Fuller appreciated the duality of perspective in his predecessor, had he sought to understand *why* the conflicting perspectives of conventional realism and subjectivism (more often called "anti-realism") coexisted in the very same theoretical work, he might have exhibited more self-awareness and sensitivity to the tension between the conflicting perspectives that surfaced in his own work. By the same token, he might have attained a fuller understanding of both the nature and the function of legal fictions – the two matters he set out to investigate. Indeed, Fuller's slender collection of essays on legal fictions is bursting with insights into these subjects, but it is marred by his failure to address the relationship between the two perspectives that continually reappear *together* in the long tradition of literature on legal fictions, a tradition extending far beyond Bentham to classical antiquity, beginning with Aristotle's defense of legal, along with poetic, fictions in response to Plato's attack.⁸⁰

This tradition of thought, which I call "fictionalism," or better, "fictionalist-realism," is characterized precisely by the coexistence of the conflicting perspectives (Fuller's "curious double language"), coupled with an attempt to distinguish good from bad fictions on essentially pragmatic functional, or utilitarian grounds. The fictionalist tradition has also been characterized by frequent instances of forgetting (or at least neglecting to mention) that the subjectivist defense of fiction has been expounded before. In other words, the various exponents of this tradition generally demonstrate relatively little awareness that it *is* a *tradition* that they are expounding. The subjectivist view of truth and language, which ratifies fiction, is continually being forgotten and discovered anew by the theorists of legal fictions, who bear a strangely opaque relationship to one another.

Thus, Bentham, no less than Fuller, failed to identify prior exponents of the subjectivist-pragmatist defense of fiction that he put forward. This is not to say that Fuller and Bentham generally failed to acknowledge

their intellectual debts. Quite to the contrary – both writers acknowledged numerous intellectual influences, and conscientiously cited their sources of inspiration. For his view of the “active powers of the mind,” as well as his general commitment to “common sense empiricism,” Bentham made clear his intellectual debts to Locke in addition to d’Alembert and Voltaire.⁸¹ He also regularly credited the legal theorists, Montesquieu, Helvetius, and Beccaria, the last of whom seems to have provided the inspiration for Bentham’s seminal idea that fictions are a sort of economical shorthand, or linguistic abbreviation, for complex normative propositions.⁸² Fuller of course cited *Vaihinger*, along with several other German and French legal philosophers, on the subject of fictions in legal and other branches of human thought. (He was particularly fond of quoting the more radically subjectivist formulations of the French, which he alternately repudiated and affirmed.)⁸³

But neither Fuller nor Bentham specifically acknowledged the long-standing tradition of recognizing and affirming the fiction-laden basis of human (and more specifically, legal) thought that preexisted their own generational cohort’s skeptical formulations.⁸⁴ Indeed, it is questionable whether either man was aware of the existence of such an intellectual tradition.⁸⁵ The whole phenomenon of forgetting the precursors could be viewed as a manifestation of the double language, attesting to the overwhelming dominance of the conventional realist perspective, which is so entrenched in the experience and perspective of ordinary language that prior formulations of the subjectivist position tend always to recede from sight.

Bentham’s theory of fictions is useful because it exhibits these features which are typical of the fictionalist tradition, but also because it provides us with tools for understanding them. More systematically than Fuller – more systematically perhaps than any other modern scholar in Anglo-American law – Bentham offered up a theory that accounts for the duality of perspectives that gives rise to the “curious double language” of fictionalist and conventional realism in the study of fictions. This is not to deny the considerable obscurity of Bentham’s analysis, nor by any means to claim that he “solved” all the riddles of fiction and language in relation to claims of realism and truth.⁸⁶ It has been noted that Bentham failed to provide a clear account of the relationship between his derogatory view of legal fictions and his general theory of fictions, and he hardly resolved the major epistemological and ontological controversies surrounding the sub-

jects of language, realism, and truth. Nor did he purport to. There is more than a little merit to the contention that Bentham was not a “real philosopher” of language⁸⁷ so much as a theorist of politics: apart from the fact that he (unlike Ogden) never presented a “theory” of language or fictions as such, nor did he set down his thoughts about language and fiction in one place, his writing about these matters is abstruse, some of the ideas seem muddled or not fully developed, while others are quirky if not downright bizarre.⁸⁸ Nonetheless, what Bentham provides more than any other theorist of legal fictions in the modern period is a *comprehensive* account of the role of fictions in human thought.⁸⁹ Indeed, Bentham’s theory of fictions is notable less for its *innovations* than for its *inventory* of virtually all of the key components of the subjectivist theory of fictions articulated before Bentham and since. This is in no way to denigrate Bentham’s achievement, but rather to understand him as an exponent of a venerable, though obscure, intellectual tradition, a link on the chain of transmission, who assiduously labored to assemble all of the core ideas into a coherent whole. Other theorists of legal fictions, such as Fuller, also produced works which were essentially compendiums of ideas, but few went as far as Bentham did in putting the pieces of the puzzle together.⁹⁰

We have already made passing reference to Bentham’s use of the principle of economy in his theory that legal formulations of rights and obligations are linguistic abbreviations for complex propositions about social policies adopted for normative reasons by government officials. This notion that apparently false descriptive statements serve as a sort of “convenient shorthand” or economical linguistic “placeholder” for complex normative propositions would later become the heart of the “functionalist analysis” proposed by American legal realists,⁹¹ and it can be observed to have played a seminal role in Fuller’s theory of legal fictions.⁹² Indeed, nothing could be more familiar to contemporary legal scholars of fictions than the notion that ostensible legal fictions are really just a sort of technical shorthand, which, when properly decoded, express perfectly accurate, factual statements of what official legal policy *is*.

But this notion of a technical language, adopted by Fuller and the legal realists, represents a curious inversion of the original understanding of the classical principle of economical rhetorical expression. In the classical conception, the idea of linguistic economy was virtually synonymous with “the principle of accommodation.”⁹³ Both terms originally carried

the sense of familiarization, of making the new or the strange comprehensible by translating it into familiar terms.⁹⁴ Both terms accordingly referred originally to the classical rhetorical practices of persuasion, to the art of gaining acceptance and credibility by appealing to the audience's preconceptions, which were well understood to have been shaped and limited by its historical situation and perspective.⁹⁵ Axioms (or "indices") of probability served, in this framework, as formalizations of the preconceptions which the auditors of a legal argument inevitably brought with them to the table – views about what usually happens, what ordinarily follows from what, that together compose "background knowledge" and "common sense." Classical rhetoric understood that to constitute *practically* adequate knowledge, proof must be based on inference, and accordingly, persuasion must be accommodated to the auditor's understanding of the way things usually go by "economically" arranging an argument as it were in a circle, leading from the pre-existing cultural horizons of the auditor out to new and unfamiliar territory and back to familiar (likely) territory again.⁹⁶

Probability and economy thus work together in the classical conception to achieve the basic rhetorical goal of persuasive accommodation. By contrast, in Fuller, the principles of accommodation and economy pull in opposite directions, with "accommodation" serving its historical function of persuasion, and "economy" in the form of technical jargon serving just the opposite function of delivering coded (but perfectly accurate) messages about policy analysis to the legal professionals trained to decipher them, while leaving the general audience baffled and mystified. Fuller never resolves the resulting tension in his analysis between his understanding of the "persuasive" and "expository" functions of law,⁹⁷ nor does he make his attitude toward the mystifications of technical jargon fully clear. At many points he appears to embrace the idea of a professional "shorthand" – an application of the principle of economy which has veered far off course from its original function of promoting comprehension – as at once a justification and a denial of the fictional aspect of law.

Not so Bentham. Bentham's theory presents all of the classical elements of the doctrine of adequacy in more or less their original relation, at the same time that it imports modern notions of the science of probability. All of this is laid out in Bentham's copious writings: the need for *economy* in the expression of legal doctrines; the need to base proof on

inferences from *probability*; and a finely tuned sensitivity to the persuasive function of language (i.e., the principle of *accommodation*.) All of these ideas appear and *hang together* in Bentham's writings to explain and justify the general use of fictions, i.e., social and political constructions (of facts) that are based upon probabilistic assumptions, and designed to serve the needs of the occasion. The concept of probability, in particular, receives sustained attention from Bentham who views it as itself nothing but a fiction, albeit a highly useful one for accomplishing many important tasks (e.g., physics, mathematics, medicine, law).⁹⁸ Bentham understood that legal proofs must be largely based on presumptions and inferences from circumstantial evidence, and he further understood that presumptions and inferences rest on judgments of probability, and that such judgments themselves constitute a species of fiction. Rather than a conventional realist view of probability, which treats observed statistical frequencies as objectively existing properties of the external, physical world, Bentham adopted a subjectivist view of probability, equating degrees of probability with degrees of subjective belief, and equating degrees of proof with degrees of (subjective) probability. This is not to deny that Bentham maintained that degrees of confidence in one's belief could be subject to rational assessment.⁹⁹ But his conception of rational assessment assumed that both specific assertions of probability and the concept of probability in general are intrinsically subjective judgments, and the stuff of fiction.

In all of these respects, Bentham's theory of probability and fiction closely resembles the more compelling theories of literary fiction articulated today, which understand probability-based beliefs to be central to the constitution of literary fictions.¹⁰⁰ Where Bentham goes beyond these literary theories is in recognizing that, at least outside the realm of literature, fictions do as much to create the probabilities they presume as probabilities do to create them. In other words, he recognizes the *prescriptive* aspect of fictions: the regulative power they have to induce people to behave in conformity with the announced norms. In this essentially legislative capacity, Bentham saw, fictions make statements about what is probable into self-fulfilling prophecies, thereby turning subjective probabilities into observably objective ones – literally turning fictions into facts.¹⁰¹

Within this intellectual framework, Bentham employs utilitarianism to assess the worth of various fictions, to sort out the good fictions from

the bad. Once we understand this, it does not require any great leap of the imagination to construct a way of reconciling Bentham's generally positive assessment of fictions with his relentless attacks on the use of fictions of law. It seems fairly clear that Bentham thought that the particular fictions adopted in English law when judged by the standard of utility served bad purposes or no purpose at all. In general, Bentham favored the view that English legal fictions served "sinister" purposes all too well. But despite his often overheated rhetoric, Bentham surely did not think that the law should (or could) purge itself of legal fictions altogether. Far from promoting a "positivist" view of facts and factual knowledge, as that term is commonly understood, he accepted the fundamental principles of the tradition of fictionalist realism and the doctrine of adequacy, according to which facts *are* in essence fictions, a perfectly acceptable state of affairs, so long as the factual fabrications really are "sufficient unto the day."

Of course what is sufficient to one man, on one day, is insufficient to another, adequacy being an inherently relative standard, as Bentham well understood. It is easy to see how the intellectual props of the fictionalist doctrine of adequacy (*mere* probability; "economical," i.e., *artful* arrangements of words, tailored to "accommodate," i.e., *convince* people to accept certain decisions) can readily be flipped to support the contrary doctrine, namely, that the practically achievable level of "knowledge" is *insufficient* to justify any course of conduct, either in general or in the particular case.¹⁰² The doctrine of adequacy, which represents the "pragmatic," action-enabling response to the problem of uncertainty is, after all, just the flip side of the skeptical response which maintains that the problem is insoluble. The pragmatic doctrine of adequacy and the defeatist doctrine of skepticism are joined in the shared recognition that true factual and moral certainty is unattainable;¹⁰³ they differ only in their moral assessment of what merely probabilistic inferences warrant. But these differing assessments do not turn on any real philosophical difference in the understanding of human cognition; rather they turn on the variable readiness of human beings to accept particular fictions as facts. They turn, in short, on the variable readiness of human beings to believe.

IV. Bentham's Analysis of the Double Language

This returns us to Bentham's account of the duality of perspectives which characterizes thinking about fictions: on the one hand, the con-

ventional realist perspective which denies the credibility of fictions, while insisting upon the existence of real, believable facts; on the other hand, the subjectivist perspective, which regards such “realism” as itself an illusion, the very hallmark of fiction, while recognizing that fictions, to be fictions, necessarily require belief.

Unlike Fuller, Bentham took the duality of perspectives that produces the “curious double language” as the starting point of his analysis.¹⁰⁴ As Ogden stressed, Bentham’s “most important insistence is that words, no matter what their other developments in use may be, must, in so far as they are names used to refer beyond themselves, be interpreted as referring ultimately to something real and observed.”¹⁰⁵ Or, in Bentham’s own words:

Words – viz. Words employed to serve as names – being the only instruments by which, in the absence of the *things*, viz., the *substances* themselves, the ideas of them can be presented to the mind; hence, wheresoever a word is seen, which to appearance, is employed in the character of a *name*, a natural and abundantly extensive consequence is a propensity and disposition to suppose the existence, the real existence, of a correspondent object – of a correspondent thing, of the thing of which it is the name, of a thing to which it ministers in the character of a name.¹⁰⁶

Simply put, according to Bentham, the viewpoint of conventional realism is inescapable. It is inescapable because it is built into the way we use language. It is, as it were, woven into the very fabric of speech. The view that objects have a “real existence,” independent of the observer is “a natural and abundantly extensive consequence” of the way we naturally “employ” words.

In a number of passages, Bentham seems to go further in implying that conventional realism is not merely a mental “disposition,” but a *correct* attitude. But these passages are more than offset by others, in which Bentham resists or even refutes such an evaluation. Thus, while he commences by positing a distinction between “real” and “fictitious” entities,¹⁰⁷ the category of the fictitious effectively swallows up the domain of the real by the time Bentham finishes his analysis. As Bentham defines it, the category of the fictitious includes all of the basic subjects of scientific

investigation: time, motion and matter, quantity and quantities, quality and qualities, figure and form.¹⁰⁸ Even as fundamental a notion as “relation” is, in Bentham’s understanding, “a fictitious entity” “produced” by being “regarded by the mind.”¹⁰⁹ Elsewhere Bentham reproduces Aristotle’s list of the 10 types of physical entities (“1. Substance. 2. Quantity. 3. Quality. 4. Relation. 5. Places. 6. Time. 7. Situation. 8. Possession. 9. Action. 10. Passion or Suffering.”) as a classification of fictitious entities.¹¹⁰ In addition to such “physical” fictitious entities, Bentham also recognizes “psychical ones,” issuing the sweeping statement that: “[f]aculties, powers of the mind, dispositions: all these are unreal; all these are but so many fictitious entities.”¹¹¹

Bentham does verbally gesture at the existence of a category of “real,” as opposed to “fictitious” entities, but upon inspection the former category dissolves under Bentham’s analytic lens. Thus, speaking of psychical entities, he starts off with the suggestion that “it will be seen how perfectly distinguishable, among psychical entities, are those which are recognized in the character of real, from those which are here referred to the class of fictitious entities.”¹¹² But he quickly goes on to register “doubt whether, to a perception of any kind, the appellation of a real entity can, with propriety, be applied.”¹¹³ Attaching the stigma of doubt to the category of perceptions turns out to be absolutely fatal to the category of the real. Up until this point in the analysis, perceptibility had appeared to serve as a hallmark of the real – for all practical purposes, as the only hallmark of the real.¹¹⁴ Bentham’s description of the category of real, perceptible entities begins in a deceptively fashion:

Under the head of perceptible real entities may be placed, without difficulty, individual perceptions of all sorts: the impressions produced in groups by the application of sensible objects to the organs of sense: the ideas brought to view by the recollection of those same objects; the new ideas produced under the influence of the imagination, by the decomposition and recomposition of those groups:—to none of these can the character, the denomination, of real entities be refused.¹¹⁵

But refuse to bestow the denomination of “real” to the category of perceptible entities is just what Bentham is about to do. Indeed, he has

already done so.

In order to appreciate what Bentham is up to, we need to remind ourselves of the distinction between perceptions and perceptible entities – between the perceptions that a perceiving subject has and the *objects* of her perception. In the passage just quoted above, Bentham has collapsed this distinction (“under the head of perceptible real entities may be placed perceptions of all sorts”). Bentham evidently means what he says when he states, at the end of this passage, that the “character and denomination of real” cannot be refused to *perceptions*. But by bestowing the title of “real” upon perceptions he is, by the same token, withdrawing it from the supposed objects of perception, the entities hitherto treated as real. Bentham makes this correlation quite plainly, stating:

Whatsoever title an object belonging to the class of bodies may be considered as possessing to the attribute of reality, *i.e.* of existence, every object belonging to the class of *perceptions* will be found to possess, in still higher degree, a title established by more immediate evidence: it is only by the evidence afforded by perceptions that the reality of a body of any kind can be established.¹¹⁶

Perceptions, in other words, are more real (if by that we mean more perceptible) than the objects of our perceptions. After all, we do not perceive the objects of our perceptions *directly*, but only through the medium of our perceptions; what we *perceive* directly is, strictly speaking, nothing but our perceptions themselves. Following this logic to its bitter end, Bentham concludes that “Of *Ideas* our perception is still more direct and immediate than that which we have of corporeal substances,” indeed, “ideas might perhaps accordingly be spoken of as the *sole perceptible [entities]*”¹¹⁷

Thus Bentham completely inverts the scheme of classification with which he began: perceptible objects, “hard corporeal substances,” *things*, have been reclassified as merely inferential (*i.e.*, imperceptible and probabilistic) entities, while ideas and perceptions have become the sole perceptible objects “of [whose] existence our persuasion is more necessary and irresistible than that which we have of the existence of corporeal substances.”¹¹⁸ But if ideas and perceptions emerge from this analysis (along with the bracketed category of the supernatural) as the most real of entities, Bentham makes it perfectly clear that he also regards ideas and

perceptions (unlike God, ghosts, souls and the devil) as fictitious – indeed, as the paradigmatic fictions.

As Gerald Postema explained in his astute analysis of the theory of fictions, Bentham viewed all ideas and perceptions as fictitious, not just (as many philosophers have held) the more abstract ones. The view that abstractions, or abstract ideas, are the product or artifact of mental operations – and are in that sense artificial constructions or fictions – was in fact, as Postema reminds us, fairly commonplace, and would have been familiar to Bentham from (among others) both Hume and Locke.¹¹⁹ According to this widely shared view, (as summarized by Postema), “All ideas are derived from (or have their roots in) immediate sense impressions. Concrete material objects ... impress sensible images on the mind. But the concrete object presents a vastly complex, composite impression.”¹²⁰ No perceptions emerge, however, without one or a number of “‘mental operations’ (attention, analysis, abstraction) [being] performed on the sensory manifold.”¹²¹ The product of these mental operations will be ideas, upon which “further mental operations may be performed (e.g., composition, synthesis, judgment or inference, arrangement or ‘methodization’, etc.), and the resulting product will be more fictions, i.e., more ideas, some more complex, some, as we shall see, simpler.”¹²²

Postema points out that what distinguishes Bentham’s view from this more commonplace understanding is precisely his insistence that even the simpler ideas and perceptions be regarded as fictitious. According to the commonplace view, “the mind may be actively involved in creating *abstract* ideas ... but the initial, discrete, simple ideas wait to be discovered by the mind.”¹²³ By contrast, “Bentham’s mature theory assigns a more radically active role to the mind than this view allows,” holding that:

concrete material objects – or particular events in which such objects figure – impact upon the sense, creating a complex, but undifferentiated sensory manifold. The mind, driven by its needs and interests, analyzes this sensory manifold, carving out one part or another for special attention, and thus fashioning so many discrete, simpler, impressions or ideas. ... It is only *after* this analysis or partitioning of primitive sensory experience, and its subsequent synthesis, that the images yielded by events can

be regarded as bundles of determinate, assignable simple ideas.¹²⁴

The upshot is that “[f]or Bentham, simplicity is not a sign of an idea’s being primitive or basic; on the contrary, it is a sign of the idea’s being the product of a sophisticated intellectual process.”¹²⁵

And if even (or, as Bentham sees it, especially) simple ideas “are not the work of nature, passively received by the mind, but rather the artificial products of an active and sophisticated human mind, seeking to satisfy its needs and pursue its interests,”¹²⁶ then one has to conclude that the category of real corporeal entities – “work[s] of nature passively received by the mind” – has effectively been emptied out.

We are now in a better position to take in the definition that Bentham initially supplied for real entities. In the very first sentence of his discussion “Of Real Entities,” Bentham makes the categorical assertion that “A real entity is an entity to which, on the occasion and for the purpose of discourse, existence is really meant to be ascribed.”¹²⁷ Existence, in other words, resides in the ascription, or more precisely, in the intention to ascribe. Moreover, the ascriptions of existence are made for certain purposes, suited to particular discursive situations. But in these respects, there is no difference between real entities and fictitious ones since a fictitious entity, as Bentham defines it, also is one to which existence is ascribed “by the grammatical form of the discourse employed in speaking of it.”¹²⁸ Indeed, this was Bentham’s starting point: the idea that language commits us to a belief in the objective existence of objects, events or states of being corresponding to the words that have been used – or, if not exactly a *belief* in their existence, then some sort of “a propensity and disposition to suppose the existence, the real existence, of a correspondent object,” such a mental disposition being the “natural and abundantly extensive consequence” of the use of words as referents for absent things.¹²⁹ (This idea of a mental disposition corresponds almost exactly to the definition of “fictional belief” articulated by recent literary theorists.)¹³⁰

We thus return to where we started, with Bentham’s “insistence ... that words, no matter what their other developments in use may be, must, in so far as they are names used to refer beyond themselves, be interpreted as referring ultimately to something real and observed.”¹³¹ We first

understood this as an insistence on the inescapability of the perspective of conventional, everyday, realism. We are now in a position to see that Bentham is not endorsing such realism as a correct viewpoint, but rather as a necessary one. He has, by the same token, shown that this viewpoint is essential to the construction of fictitious entities, just as it is essential to the employment of language. Fictions would not be fictions without words being used in a way that produces the “propensity and disposition to suppose the existence, the real existence, of a correspondent object.” And language would not be language without making use of fictions.¹³² Hence, in Bentham’s view, the fact that conventional realism is, as we might say today, “wired” into our brains and human language no more warrants its correctness than do particular assertions of facts warrant their truth-value (unless, that is, we are prepared to understand “truth-value” as nothing more than our assertions of such). This explains why we are able to shift in and out of a particular belief (or perhaps it would be more accurate to say that we are *unable* to *resist* shifting in and out of particular beliefs) – hence, the “curious double language,” which reflects the perspectives external and internal to belief. Refuting conventional realism, Bentham showed that fictions rely internally on the same sort of perspective and assertions that purportedly non-fictitious (factual) statements do. In so doing, he demonstrated that realism (“the propensity to suppose the existence of a correspondent object”) is itself a perspective we adopt, an “impression,” a “perception,” an “illusion” that we form from time to time (and from time to time switch out of). Adopting this outside perspective on realism, Bentham fully entered the subjectivist point of view.

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Epilogue (Food For Thought)

Who actually cares what Bentham (or, for that matter, Fuller) thinks? What does it matter whether they shared a common viewpoint, whether they both spoke a double language?

This essay is dedicated to the proposition that the subjectivist-fictionalist perspective, the doctrine of legal adequacy, and the “curious double language” that they produce are not unique to Bentham or Fuller, but are widely shared though not well recognized features of legal thought

about facts. Together, they constitute a nearly invisible but hugely influential intellectual tradition, one that informs the actual practice of legal fact-finding, and one that links the legal practice of fact-finding to the theory and practice of fact-finding in other intellectual domains.

The project of excavating the intellectual tradition of fictional realism in law has barely begun. Legal scholars have yet to mine the veritable mountain of studies in the history of science, rhetoric and literary theory that suggest linkages between these domains and law. Many topics remain to be investigated including not only the intellectual content but the very nature of the tradition. Its obscurity, fostered by its confusing double language, suggests to some a resemblance to the esoteric traditions described by Leo Strauss, which deliberately conceal the doctrines they promote from the mass of readers. This raises the question whether fictionalism should be regarded as such a tradition and, if so, what are its hidden aims, and what are the political and social forces of persecution which have thwarted their direct expression? I myself rather doubt that fictionalism is an esoteric tradition in the Straussian sense.¹³³ (The difficulty with reading Bentham is not that he failed to express his views directly but rather that he did so with such excruciating precision and detail.)¹³⁴ Nonetheless the question remains: what sort of intellectual tradition is it whose expositors exhibit so little awareness of their precursors? What *are* the social and political forces which have shaped its development, what are its adherents attempting to achieve, and what are the forces which have blocked its reception?

Apart from these general questions concerning the status of the tradition as a whole, much more work remains to be done exploring how the particular concepts developed in fictionalist theory (e.g., probability, economy, accommodation, utility, and legal positivism) fit together. The relationship of the theory of legal fictions to legal positivism seems particularly worthy of investigation, considering that the major characters in our story (e.g., Bentham and Fuller) were also major figures in the legal positivism debates, albeit on seemingly opposite sides of the fence. Ironically, traditional jurisprudence devoted to the philosophical controversies over realism and positivism fell out of fashion just when these topics were becoming a major focus in history and literary theory.¹³⁵ Outside legal academia, scholarship devoted to the "history of the fact" is burgeoning, and increasingly this literature is pointing to the central role

played by law in the creation of the fact, as we know it.¹³⁶ The old jurisprudential chestnuts – the fact/value distinction, the fact/law distinction, and the distinction between fiction and fact – have fallen by the wayside even as the theme of “social construction” in law has come to the fore. Returning to the questions of traditional jurisprudence may help us to gain further insight into the claims about the social and legal construction of knowledge, particularly if we are prepared to look at the received tradition in a fresh way, in light of the new historical studies. Further explorations of the relationship between the doctrines of legal positivism, pragmatism, utilitarianism, and the “doctrine of adequacy” may well shed light on current controversies surrounding the “social construction” of law in the fields of race, gender, sexual and cultural identity, as well as on more general questions concerning the nature of evidence and proof, and the constitution of legal facts.

Returning to classical figures, like Bentham, confirms that the debates about social construction and realism in law are not only longstanding but inseparable from debates about these issues that take place in philosophy, science, literature, psychology and virtually every intellectual domain. To take just one example, surely a straight line runs between the good-enough facts yielded by the best evidence rule and the good-enough mother embraced by modern psychoanalytic theory. The good-enough mother was defined by D.W. Winnicott as one who is capable of inducing in her infant-child “moments of illusion”, or more generally, “illusionment,” an experience he regarded as necessary, if not identical, to developing a sense of reality.¹³⁷ As his biographer, Adam Phillips, observes, Winnicott’s use of the term “illusion” is “idiosyncratic,” judged by the standards of conventional realism,¹³⁸ but it bears all the hallmarks of a fictionalist conception, including the double language. As Phillips explains:

We usually think of an illusion as something deceptive, or as something we may believe in to protect ourselves from a more unacceptable reality. In Winnicott’s idiosyncratic use of the word it is by way of illusion, and indeed only by way of illusion, that the infant can get to reality. Winnicott imagines that when the infant is hungry he fantasizes a satisfying breast, at which point the real

breast is made available by the mother. In this moment of illusion it is as though, from the infant's point of view, he has created the mother he eats. "At the start," Winnicott writes, "simple contact with external or shared reality has to be made by the infant's hallucinating and the world's presenting, with moments of illusion for the infant in which the two are taken by him to be identical, which in fact they never are.' By virtue of [the mother's] 'sensitive adaptation,' fantasy, in its original form, is the infant's route to reality So development begins for Winnicott with a magical act: the infant's purely imaginative process of conjuring up a mother he needs. At the very beginning fantasy is not a substitute for reality but the first method for finding it."¹³⁹

What is this but a theory of fiction? – one that contains the now familiar notions of adequacy, accommodation, economy of communication, utility, pragmatism, probability and (the one new ingredient) play.¹⁴⁰

Discovering intellectual affinities between as incongruous a pair as Winnicott and Bentham is a sign of the surprises that may be in store when we unearth the tradition of fictionalism that joins law together with literature, psychology and other disciplines. Much more work remains to be done to work out how the various components of this tradition fit together, and to fully appreciate the "subjectivist," "positivist," "empiricist," "fictionalist" understanding of factual knowledge that it yields. For now, we can give Winnicott the penultimate word regarding the everlasting controversies over "the meaning of the world 'real'":

I would put it this way. Some babies are fortunate enough to have a mother whose initial active adaptation to their infant's need was good enough. This enables them to have the illusion of actually finding what was created (hallucinated). Eventually, such a baby grows up to say "I know that there is no direct contact between external reality and myself, only an illusion of contact, a midway phenomenon that works very well for me when I am not tired. I couldn't care less that there is a philosophical problem."

Babies with slightly less fortunate experiences are really bothered by the idea of there being no direct contact with external reality. A sense of threat of loss of capacity for relationships hangs over them all the time. For them the philosophical problem becomes and remains a vital one, a matter of life and death, of feeding and starvation, of love or isolation.¹⁴¹

Or, as Bentham said of his early childhood experience, explaining the origin of his interest in fictions:

[I]n the almost solitude of which so large a portion of my life was passed, every spot that could be made by any means to answer the purpose was the abode of some spectre or group of spectres. I suffered dreadfully in consequence of my fears and, when the suffering was intolerable, I fled to the fields.¹⁴²

How much less unhappy I should have been, could I have acknowledged my superstitious fears! but I was so ashamed. Now that I know the distinction between the imagination and the judgment I can own how these things plagued me, without any impeachment of my intellect.¹⁴³

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1 Robert Newsom, *A Likely Story: Probability and Play in Fiction* (New Brunswick: Rutgers University Press, 1988), p.103.

2 *Id.*, at 190.

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- 3 *Id.*, at 10.
 - 4 *Id.*, at 134.
 - 5 *Id.*, at 10.
 - 6 See Henry G. Van Leeuwen, *The Problem of Certainty in English Thought, 1630-1690* (The Hague: Martinus Hijnof, 1963, with a preface by Richard H. Popkin); A.W.F. Edwards, *Likelihood* (Cambridge: Cambridge University Press, 1972); Stanley E. Fish, *Self-Consuming Artifacts: The Experience of Seventeenth-Century Literature* (Berkeley: University of California Press, 1972); Ian Hacking, *The Emergence of Probability* (Cambridge: Cambridge University Press, 1975); L. Jonathan Cohen, *The Probable and the Provable* (Oxford: Oxford University Press, 1977); Barbara Shapiro, *Probability and Certainty in Seventeenth-Century England* (Princeton: Princeton University Press, 1983); Douglas Lane Patey, *Probability and Literary Form: Philosophic Theory and Literary Practice in the Augustan Age* (Cambridge: Cambridge University Press, 1984); Steven Shapin and Simon Shaffer, *Leviathan and the Air Pump* (Princeton: Princeton University Press, 1985); Amos Funkenstein, *Theology and the Scientific Imagination From the Middle Ages to the Seventeenth Century* (Princeton: Princeton University Press, 1986); Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 1986); Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton: Princeton University Press, 1988); Newsom, *A Likely Story*, *supra* note 1; Eva T.H. Brann, *The World of the Imagination: Sum and Substance* (Maryland: Good, 1991); Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992); Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 1994); Kathy Eden, *Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy & Its Humanist Reception* (New Haven: Yale University Press, 1997).
 - 7 See Kim Lane Scheppele, "Facing Facts in Legal Interpretation," in *Law and the Order of Culture*, Robert Post, ed., (Berkeley: University of California Press, 1991); Aviam Soifer, "Reviewing Legal Fictions," 20 *Georgia Law Review* 871 (1986).
 - 8 A full fleshing out of this intellectual context would provide an "internalist" perspective on the tradition. An "externalist" perspective would take up the question of the social and political factors which affected the development of the tradition. Both are important subjects, which extend beyond the scope of this essay, and remain to be explored.
 - 9 The legal philosopher H.L.A. Hart expounded a version of legal positivism that rejected the equation of law with the commands of the legislative sovereign. The relationship of Bentham's theory of fictions to the natural law-positivism debates requires further investigation.
 - 10 See Kathy Eden, *Poetic and Legal Fiction* and *Hermeneutics and the Rhetorical Tradition*, *supra* note 6. While Eden traces the roots of these three concepts to classical antiquity, beginning with Aristotle, and shows their systematic development in Patristic, Catholic and Protestant thought, Amos Funkenstein has suggested that the principle of accommodation derives from Jewish antiquity. See Funkenstein, *Theology and the Scientific Imagination*, *supra* note 6 at 11-12, 213-221. Religious polemics, e.g., between Christians and Jews and between Catholics and Protestants, are an important part of the formative context in which "the doctrine of adequacy" and the tradition of "fictional realism" developed.

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- 11 For discussions of the “best evidence rule,” see William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford: Stanford University Press, 1985), pp.1-2, 12, 151; Barbara Shapiro, *Beyond Reasonable Doubt*, *supra* note 6 at 234, 317; Welsh, *Strong Representations*, *supra* note 6 at 14-15.
 - 12 For discussions of subjective versus objective conceptions of probability, see generally Newsom, *Likely Story*, *supra* note 1 at 5-7, 26, 48-57, 94, 135-36; Gerald J. Postema, “Facts, Fictions, and Law: Bentham on the Foundations of Evidence,” in *Facts in Law*, William Twining, ed. (Wiesbaden: Harrasowitz, 1983), pp.37-64; William Twining, “Rule-Scepticism and Fact-Scepticism in Bentham’s Theory of Evidence,” in *Facts in Law*, *supra* at 65, 70-72; Twining, *Theories of Evidence*, *supra* note 11 at 56-66; Hacking, *Emergence of Probability*, *supra* note 6 at 11-17.
 - 13 I cannot comment on the continental or other legal traditions.
 - 14 Cf., William Twining, *Theories of Evidence*, *supra* note 11 at 19 (introducing Bentham’s theories of fiction and evidence as “lifelong obsessions that underlay his voluminous writings on adjective law.”).
 - 15 *Id.*, at 21.
 - 16 See, e.g., Lon Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), pp.2-3; Joel Levin, “The Concept of the Judicial Decision,” 33 *Case Western Res. L. Rev.* 208 (1983); Louise Harmon, “The Day the Dogs Died: A Mad Essay on the Perils of Alien Scholarship, or an Alien Essay on the Perils of Mad Scholarship,” 23 *Legal Studies Forum* 1 (1999); Allen Boyer, “The Antiquarian and the Utilitarian: Charles Dickens vs. James Fitzjames Stephen,” 56 *Tennessee Law Review* 595 (1989). The lushness of Bentham’s rhetoric in this context has been noted elsewhere. See, e.g., Hessel E. Yntema, “Bentham’s Theory of Fictions,” (Book Review), 33 *Columbia Law Review* 1082, 1083 (1933) (referring to Bentham’s “well known and really gorgeous attack on legal fictions).
 - 17 Jeremy Bentham, “Constitutional Code,” *Works*, Vol. IX, Bowring, ed., at 77-8, reprinted in C.K. Ogden, *Bentham’s Theory of Fictions* (New York: Kegan Paul, 1932), cxvi (hereinafter cited as *Theory of Fictions*).
 - 18 *Theory of Fictions*, *supra* note 17 at cxvii, xvii, 146.
 - 19 Jeremy Bentham, *Peers and Senates*, IV, 447, quoted in Ross Harrison, *Bentham* (London: Kegan Paul, 1983), p.24.
 - 20 Bentham, *Works*, Vol. I, at 92, quoted in Fuller, *Legal Fictions*, *supra* note 16 at 2-3.
 - 21 Cf., Bernard S. Jackson, “Bentham, Truth and the Semiotics of Law,” 51 *Current Legal Problems* 493, 494 (1998)(“[Bentham] took some distinctive positions in the philosophy of language, though their unpolished form, in the state in which we find them in the late essays in the Bowring edition, has many of the features of the legal style of which he was so critical: dogmatic assertion rather than reasoned argument, poor structure, complex expression – not excluding, of course, some Benthamite neologisms.”).
 - 22 See, e.g., Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 3 (London, 1827), p.622, cited in Alexander Welsh, *Strong Representations*, *supra* note 6 at 36.
 - 23 *Theory of Fictions*, *supra* note 17 at 141-145.
 - 24 See Twining, *Theories of Evidence*, *supra* note 11 at 41-42.
 - 25 *Theory of Fiction*, *supra* 17 at 141-148.

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- 26 On economic theories of rent-seeking, see James M. Buchanan, Robert D. Tollison and Gordon Tullock, *Toward a Theory of the Rent-Seeking Society* (Austin: University of Texas, 1980) (defining rent-seeking as “the resource-wasting activities of individuals in seeking transfers of wealth through the aegis of the state”); *The New Palgrave Dictionary of Economics and the Law*, Vol. 3, Peter Newman, ed. (defining rent-seeking as “the socially costly pursuit of wealth transfers”).
- 27 Twining, *Theories of Evidence*, *supra* note 11 at 75.
- 28 See *Theory of Fictions*, *supra* note 17 at 141: “Lawyer! Escape from it if you can.... Your fiction is a wicked lie.” *Id.*, at 149: “To what state of debility and depravation must the understanding of that man have been brought down, who can really persuade himself that a lawyer’s fiction is anything better than a lie of the very worst sort?”
- 29 See Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, J.H. Burns and H.L.A. Hart, eds. (London, 1982).
- 30 Jeremy Bentham, *Rationale of Judicial Evidence* (London, 1827, John Stuart Mill, ed.). Accord Twining, *supra* note 11 at 20 (“Bentham’s theory of fictions is the main philosophical basis of his theory of evidence. It is not a coincidence that the main period of work on evidence (1803-12) immediately precedes that of the most complete works on metaphysics and language.”). See also *id.* at 25 (“his ideas on evidence are intimately related to his theory of fictions.”) Just as Bentham’s theory of fictions forms an integral part of his theory of evidence, “Bentham’s theory of evidence is an integral part of his grand design for an ideal system of laws in a utilitarian polity.” *Id.* at ix.
- 31 Ogden Introduction in *Theory of Fictions*, *supra* note 17 at xvii (“At the age of sixteen, while Bentham was still at Oxford and attending Blackstone’s lectures, a new and even more sinister symbolic product was forced on his attention; for in Blackstone’s approach to jurisprudence he found at all points a direct antithesis to the orthological clarity which his early horror of darkness made imperative.”).
- 32 *Id.* at ix-x. Twining notes that “Bentham himself is responsible for the idea that his views on the nature of the real world, of belief and of language – brought together in his theory of fictions – grew directly out of his childhood fear of ghosts and phantoms.” Twining, *Theories of Evidence*, *supra* note 11 at 19. Ogden lists “Literature,” especially *The Pilgrim’s Progress*, as the third source of Bentham’s childhood horror of fiction. Ogden Introduction, in *Theory of Fictions*, *supra* note 17 at xiii.
- 33 Ogden Introduction, *Theory of Fiction*, *supra* note 17 at xix.
- 34 Twining, *Theories of Evidence*, *supra* note 11 at 81.
- 35 Ogden, *supra* note 17 at xxxi. Bernard Jackson notes that the relationship between Bentham and Vaihinger is “complex and disputed,” in Bernard S. Jackson, “Bentham, Truth and the Semiotics of Law,” 51 *Current Legal Problems* 493, 494, Fn. 3 citing C.K. Ogden, “Bentham’s Philosophy of As-If,” *Psyche* 9/1, reprinted in W.T. Gordon, ed., *C.K. Ogden and Linguistics, Vol. II: From Bentham to Basic English* (London: Routledge, 1994), p.1ff; Jerome Frank, *Law and the Modern Mind* (Garden City: Coward-McCann, 1963), App. VII 338-50; E. Mari, “Jeremy Bentham: Du ‘soufflé pénitentiel de la fiction’ dans le droit, à la théorie du droit comme fiction,” in P. Gérard, F. Ost and M. van de Kerchove, eds., *Actualité juridique de la pensée de Jeremy Bentham* (Brussels: Faculté Universitaires Saint-Louis, 1987), pp.372-79; K. Lee, *The Legal-Rational State*. A

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- Comparison of Hobbes, Bentham and Kelsen* (Aldershot: Scolar Press, 1990), p.110ff.
- 36 Hans Vaihinger, *The Philosophy of 'As If'* (translated by C.K. Ogden, London, 1924). On the reception of Vaihinger, see Lon Fuller, *Legal Fictions*, *supra* note 16 at 94-96.
- 37 Ogden Introduction, *Theory of Fiction*, *supra* note 17 at xlvi.
- 38 *Id.*, at xlviii.
- 39 *Id.*, at xlix-liiii.
- 40 Several commentators stress the significance of Bentham's insight, that meaning inheres in phrases and sentences, rather than single words. See Hart, *supra* note 27 at 10; Harrison, *Bentham*, *supra* note 19 at 66. A. Strowel, "Analyse et Utilitarisme dans les pensees juridiques de Bentham et de Hart," in Gérard, Ost and van de Kerchove, at 311 ff, noted in Jackson, *supra* note 21.
- 41 See Mari, *supra* note 35 at 357f.
- 42 See Ogden's section on sources at xxxii-xxxiii.
- 43 See Jeremy Bentham, *Anarchical Fallacies; Being An Examination of the Declaration of Rights Issued During the French Revolution*, in *The Works of Jeremy Bentham*, Vol. II (Bowring, ed., Edinburgh 1843); see also Bowring, *Works*, II at 491, 524; *Works*, III at 160-61, 184, 218-21, 309-10, 332-7.
- 44 My thanks to Hilary Schor and Robert Newsom for this formulation.
- 45 L.L. Fuller, "Bentham's Theory of Fictions" (book review), 47 *Harvard Law Review* 367 (1933).
- 46 See, e.g., Michael Oakeshott, "The New Bentham," I *Scrutiny* 114 (1932)(quoted in Jackson, "Semiotics of Law," *supra* note 21 at 495 ("No man with so little interest in or aptitude for philosophy has ever taken so large a place in the history of philosophy as Bentham."); James Steintrager, *Bentham* (Ithaca: Cornell University Press, 1977), pp.23-24. See also Twining, "Rule-Scepticism and Fact-Scepticism," in *Facts in Law*, *supra* note 12 at 66 ("I suggest that it is nearer to the truth to say that in the *Rationale*, the *Introductory View* and Dumont's *Traité* what we have is a few rather incoherent thoughts on the nature of judgments of probability involved in adjudication.")
- 47 Ogden Introduction, *Theory of Fictions*, *supra* note 17 at xxx.
- 48 Ogden Introduction, *Theory of Fictions*, *supra* note 17 at xliii.
- 49 *Id.*, at xlii, quoting *Works* (Bowring, ed.) Vol. III, at 129.
- 50 See *id.*, at lxx-lxxi.
- 51 *Id.*, at l.
- 52 Jackson, "Semiotics of Law," *supra* note 21 at 503.
- 53 *Theory of Fictions*, *supra* note 17 at 15; see also Ogden Introduction, *supra* note 17 at xxxii. Elsewhere Bentham states "that we should recognize the 'constitution of human language as the source from whence the illusion flows', the illusion that to each distinct word there corresponds a distinct real entity; the idea that 'whenever there is a word, there is a thing.'" Bentham, *Rationale of Judicial Evidence* i,115, quoted in Harrison, *Bentham*, *supra* note 19 at 67.
- 54 *Theory of Fictions*, *supra* note 17 at 16.

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- 55 This is Jackson's interpretation, with which I concur. See Jackson, "Semiotics of Law," *supra* note 21 at 531. Accord Twining, *Theories of Evidence*, *supra* note 11 at 63 (summarizing Bentham's ideas as the following: "In order to express ... ideas we need language, but language requires us to talk as if they are entities which exist in reality. We know that such fictions do not exist, but we have to talk as if they do. For language is necessary to thought and fictions are necessary to language.")
- 56 *Works*, Vol. VIII (Bowring, ed.) at 199, quoted in Jackson, "Semiotics of Law," *supra* note 21 at 531.
- 57 Ogden Introduction, *Theory of Fictions*, *supra* note 17 at l. Accord Jackson, "Semiotics of Law," *supra* note 21 at 517-23, 531.
- 58 But see Twining, *Theories of Evidence*, *supra* note 11 at 13, 16 (maintaining that Bentham held a correspondence theory of truth.) On the correspondence theory of truth, see, e.g., Michael Devitt, *Realism and Truth* (Cambridge: Blackwell, 1991, 2d ed.), pp.26-30. For a discussion of the connection between legal and philosophical correspondence and coherence theories of truth, see Cathrine Wells Hantzis, "Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.," 82 *Northwestern University Law Review* 541 (1988).
- 59 Accord Harrison, *Bentham*, *supra* note 19 at 25 ("Bentham, in his criticism [of legal fiction], is supposing that there is, in principle, a way in which things can be made ideally clear and so described really as they are without any trace of fiction.")
- 60 See Twining, *Theories of Evidence*, *supra* note 11 at 18-20, 37, 50-52, 60-63, 79, 177; Gerald J. Postema, "Facts, Fictions, and Law: Bentham on the Foundations of Evidence" in *Facts in Law*, *supra* note 12; Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), at 295-3-1; Jackson, "Bentham, Truth and Semiotics," *supra* note 21; R.A. Samek, "Fictions and the Law," 31 *supra* note 40; Harrison, *Bentham*, *supra* note 19, 26-36; James Streintrager, *supra* note 46 at 22-30; Douglas G. Long, *Bentham on Liberty* (Toronto: University of Toronto Press, 1977), pp.38-40, 60-62, 127-34.
- 61 Space does not permit a complete list of citations to Bentham's critical statements about legal fictions in the legal periodical literature. For a sample, see, e.g., Gregory M. Silverman, "Dualistic Legal Phenomena and the Limitations of Positivism," 86 *Columbia Law Review* 823 (1986); Harold Berman and Charles J. Reid, Jr., "The Transformation of English Legal Science: From Hale to Blackstone," 45 *Emory Law Journal* 437 (1996); Louise Harmon, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 *Yale Law Journal* 1 (1990). There are a few exceptions in legal scholarship to the general neglect of Bentham's theory of fictions. See Aviam Soifer, "Reviewing Legal Fictions," *supra* note 7; Kim Lane Scheppele, "The Re-Vision of Rape Law" (Book Review), 54 *University Chicago Law Review* 1095 (1987); Scott Altman, "Beyond Candor," *supra* note 7; Jeanne L. Schroeder, "Death and Transfiguration: The Myth that the U.C.C. Killed 'Property,'" 69 *Temple Law Review* 1281 (1996); Lenora Ledwon, "Maternity as a Legal Fiction: Infanticide and Sir Walter Scott's *The Heart of Midlothian*," 18 *Women's Rights Law Reporter* 1 (1996).
- 62 Fuller, *Legal Fictions*, *supra* note 16 at 2.
- 63 *Id.*, at 103.

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- 64 *Id.*, at 104.
- 65 *Id.*, at 93.
- 66 See Ogden Introduction, *Theory of Fictions*, *supra* note 17 at xxxi-xxxii. Indeed, Ogden claims not only that Bentham developed the sophisticated theory of fiction *before* Vaihinger, but that Bentham's theory was *more* sophisticated philosophically than Vaihinger's because Bentham's theory, unlike the German philosopher's, "[a] stress on the linguistic factor in the creation of fictions." *Id.* The closest that Fuller came to acknowledging the complexity of Bentham's views was to acknowledge that "even Bentham could not escape making the cautious admission that, 'With respect to ... fictions, there was once a time, perhaps, when they had their use.'" Fuller, *Legal Fictions*, *supra* note 16 at 3. But this hardly does justice to Bentham's theory of fictions.
- 67 The essays were originally published in volume 25 of the *Illinois Law Review* (1930-31).
- 68 See Fuller, "Bentham's Theory of Fictions," *supra* note 45.
- 69 Fuller's review was by far the most scathing. Reviews praising Ogden's book ranged from lukewarm
- 70 Fuller, *Legal Fictions*, *supra* note 16 at vii.
- 71 My thanks to Ryan Hedges for pointing this out. The fact that Fuller also provided his own translations for other German texts (e.g., Ihering) perhaps diminishes the significance of this datum. But the omission of any reference to *Theory of Fictions* remains glaring.
- 72 Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).
- 73 W.V. Quine, *From A Logical Point of View* (Cambridge: Harvard University Press, 1953).
- 74 For recent examples of scholarship presenting "a fully interpretive attitude ... about the facts of legal cases," see Kim Lane Scheppele, "Facing Facts in Legal Interpretation," and Aviam Soifer, "Reviewing Legal Fictions," *supra* note 7. Both of these writers take for granted a "post-realist" perspective, but note the neglect of the problematic of facts in the "jurisprudence of interpretation."
- 75 The paraphrase is Postema's. See Postema, "Facts, Fictions, and Law," *supra* note 12 at 53. Postema is here describing only Bentham's views. For textual evidence that Fuller held similar views, see *Legal Fictions*, ch. 3.
- 76 Postema, *supra* note 12 at 54, describing Bentham's views.
- 77 Various terms are used in the philosophical literature to refer this basic philosophical position, including "pragmatist," "subjectivist," "constructivist," "anti-realist," and (the dreaded) "relativist." The confusion generated by this profusion of terms is exacerbated by the fact that they are understood differently, depending upon whether they are being employed by critics of this position or by its adherents. Critics tend to use all of these terms indiscriminately as so many aspects of a single, specious "anti-realist" doctrine, whereas adherents draw subtle distinctions between these different terms. For purposes of this essay, these distinctions are unimportant, but it should be stressed that adherents of so-called anti-realism generally understand themselves to be advancing an alternative conception of realism (*contra* the representations of their critics).
- 78 Accord Postema, "Facts, Fictions, and Law," *supra* note 12 at 54 (describing Bentham's

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- thought as being “as much pragmatist as empiricist.”) Whether either Bentham or Fuller would have accepted the conventional labels (like “pragmatism,” “constructivism,” or, most misleadingly, “anti-realism”) to describe their thought is another question, since neither man used these terms, and each laid to claim to realism as he himself conceived of the term.
- 79 Fuller, *supra* note 16 at 124 (“There runs through [Vaihinger’s] whole book a curious double language. He speaks of the ‘illusion of knowledge’ produced by the fiction and at the same time recognizes that this knowledge is real in the sense that it enables us to deal with reality and is in fact the only knowledge we ever knew or can know. He speaks constantly of ‘falsifying reality,’ and yet recognizes that the use of the word ‘falsifying’ is a retention of the very notions of truth which he is combating in his book.”)
- 80 See generally Kathy Eden, *Poetic and Legal Fiction*, *supra* note 6.
- 81 Bentham’s acknowledgments of his intellectual precursors have been painstakingly traced in Douglas G. Long, *Bentham on Liberty*: *supra* note 60, p.26.
- 82 See Jackson, “Semiotics of Law,” *supra* note 21 at 493, n.1.
- 83 See, e.g., Fuller, *Legal Fictions*, *supra* note 16 at 23, n. 46, (quoting Pierre de Tourtoulon, *Philosophy in the Development of Law* (New York: MacMillan, 1922), p.391): “If a jurist were found for whom it was difficult to grasp the exact import of fictions, one who was incapable of understanding what the artifice may legitimately give and what it may not, he would do well to renounce law, as well as every other abstract science”).
- 84 See generally Brann, *The World of Imagination*; Eden, *Poetic and Legal Fictions*; Eden, *Hermeneutics and the Rhetorical Tradition*; Funkenstein, *Theology and the Scientific Imagination*, *supra* note 6.
- 85 It is possible that Fuller (or Bentham) was not unaware, but rather suppressing his awareness of this intellectual tradition, either in order to heighten the sense of his own originality (as in Harold Bloom’s theory of creative misreading), or for other reasons. See Harold Bloom, *The Anxiety of Influence* (New York: Oxford University Press, 1973); *A Map of Misreading* (New York: Oxford University Press, 1975). Alternatively it is possible that exponents of the fictionalist tradition intentionally obscure their position and plant contradictions in their texts deliberately in order to at once convey their meaning to the initiates and conceal their meaning from the masses, as in a Straussian reading. See Leo Strauss, *Persecution and the Art of Writing* (Glencoe: Free Press, 1952). I am skeptical that Bentham’s and Fuller’s avoidance of their intellectual forbears and use of “the curious double language” is subject to a Straussian interpretation. I am less skeptical that it is subject to a Bloomian reading, but even if it is, I doubt that the “anxiety of influence” wholly explains the failure to acknowledge precursors. But the general question of awareness and motivation vis-a-vis precursors remains open and is worthy of further investigation.
- 86 H.L.A. Hart, in some ways one of Bentham’s greatest champions, begins his *Essays On Bentham* with Sydney Smith’s clear-eyed appraisal of Bentham’s writing style:
- Neither gods, men nor booksellers can doubt the necessity of a middle-man between Mr. Bentham and the public. Mr. Bentham is long; Mr. Bentham is occasionally involved and obscure; Mr. Bentham invents new and alarming expressions; Mr. Bentham loves division and subdivision,

and he loves method itself more than its consequences. Those only therefore who know his originality, his knowledge, his vigour and his boldness, will recur to the works themselves. The great mass of readers will not purchase improvement at so dear a rate but will choose rather to become acquainted with Mr. Bentham through the medium of the reviews – after that eminent philosopher has been washed, trimmed, shaved and forced into clean linen.

Sydney Smith, "Bentham's Book of Fallacies," *Edinburgh Review*, xliii (84) (1825) 367, quoted in H.L.A. Hart, *Essays on Bentham*, (Oxford: Clarendon, 1982), p.1.

- 87 This, of course, is not necessarily a mark of dishonor. For a recent example of criticism of academic philosophy, see, e.g., Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999).
- 88 Accord Hart, *Essays on Bentham*, *supra* note 86 at 10 (referring to Bentham's "characteristically sketchy genetic theory.") But see Ogden Introduction, *Theory of Fictions*, *supra* note 17 at li-ii (arguing that "[i]f Bentham's statements are approached from [the logico-analysts'] standpoint he will necessarily appear to be muddled," but that this is a misguided approach.)
- 89 Accord Hart, *Essays on Bentham*, *supra* note 86 at 2-3 (describing "the fatiguing and sometimes arid labours of 'the exhaustive method'" which distinguished Bentham's work from his predecessors.) The other major theorists of legal fictions in the modern period in the Anglo-American sphere, whose work would have to be included in a comprehensive study of the tradition of fictionalist realism, include Sir Henry Maine, see, e.g., *Ancient Law* (London, 1906), and Frederic Maitland, see, e.g., *Collected Papers* (Cambridge: H.L.A. Fisher, 1911), *Lectures on Equity* (Cambridge University Press, 1909), and Sir Frederick Pollock, see Pollock and Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1923). All of these writers advanced important ideas about legal fictions, particularly concerning the so-called "historical fictions," i.e., legal fictions used at once to achieve and conceal the introduction of changes in law by the judiciary. But none of these theories approaches the all-encompassing purview of Bentham's theory.
- 90 As his many sub-headings indicate, reading Fuller is like stepping into a veritable bazaar of ideas.
- 91 See Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia Law Review* 809 (1935).
- 92 See Fuller, *supra* note 16 at 30-36, 81-83, 106-112.
- 93 See Eden, *Hermeneutics*, *supra* note 6 at 27-28, 34, 41, 44, 52, 57, 66, 82-83.
- 94 See *id.*, at 3-4, 30-36.
- 95 *Id.*, at 2, 14, 17, 26-27, 55, 66 .
- 96 *Id.*, at 35-37.
- 97 See Fuller, *supra* note 16 at 51-56.
- 98 "So far as concerns probability and improbability, the fictitiousness of this group of qualities will scarcely, when once suggested, appear exposed to doubt." *Theory of Fictions*, *supra* note 17 at 55. The role of the concept of probability in Bentham's theories of fic-

- tion and evidence, and Bentham's conception of probability, are discussed in Twining and Postema, *see note supra* 12. On Bentham's probabilistic account of legal obligation (which hinges on the likelihood of sanctions), *see Hart, Essays on Bentham, supra* note 27 at 133-38, 141.
- 99 *See* Postema, "Facts, Fictions, and Law," *supra* note 12 at 56-59; *accord* Twining, *Theory of Evidence, supra* note 12 at 55-56.
- 100 *See* Newsom, *Likely Story, supra* note 1; *see also* Kendall L. Walton, *Mimesis As Make-Believe: On the Foundations of the Representational Arts* (Cambridge: Harvard University Press, 1990); Douglas Lane Patey, *Probability and Literary Form, supra* note 6.
- 101 This aspect of Bentham resembles Foucault's understanding of the regularizing, normalizing function of law. *See, generally*, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan, trans. (New York: Vintage, 1977); *The History of Sexuality*, Robert Hurley, trans. (New York: Vintage, 1975); *Madness and Civilization: A History of Insanity in the Age of Reason*, Richard Howard, trans. (New York: Vintage, 1988). *See* Francois Ewald, "Norms, Discipline, and the Law," in *Law and the Order of Culture*, Robert Post, ed. (Berkeley: University of California Press, 1991), p.138.
- 102 For historical examples of such flips, *see* Welsh, *Strong Representations, supra* note 6 at 22 (observing that "the interest in" what we here call the doctrine of adequacy "was clearly prosecutorial from the start, and it was surely given a boost by the successive movements toward crime prevention in the eighteenth century"); *id.*, at 30 (again noting that it was "a prosecutorial property" in the eighteenth century); *id.*, at 47 (describing how the theory which began with a "prosecutorial bent" was "redirected ... on behalf of the defense"); Shapiro, *Beyond Reasonable Doubt, supra* note 6 104-113 (describing the slipperiness of the standards of proof generated by the doctrine of adequacy, and relating shifts in its application to "a shifting from individual liberties to crime control").
- 103 Despite acknowledging that true certainty about the right course of action is unavailable, adherents of the doctrine of adequacy in the seventeenth and eighteenth centuries often used the term "moral certainty" as a label for the less-than-certain knowledge which they deemed reliable. *See* Shapiro, *Beyond Reasonable Doubt, supra* note 6 at 8 (equating "moral certainty" with a "species of probability"), at 21 (equating "moral certainty" with the "beyond a reasonable doubt" standard), at 25-36 (describing the absorption of the "moral certainty" standard into the legal treatise tradition); *see also* Shapin, *A Social History of Truth, supra* note 6 at 208-214 (describing the employment of the moral certainty standard in religious, scientific and legal contexts in seventeenth century England).
- 104 *Accord* Ogden Introduction, *Theory of Fictions, supra* note 17 at lii-liii ("Bentham's starting-point is, as we have seen, the noun-substantive, which may be the name either of a real or a fictitious entity.")
- 105 *Id.*, at xlvi.
- 106 *Id.*, at xxxv.
- 107 *See* "Bentham's Prolegomena," in *Theory of Fictions, supra* note 17 at xxxiv-xxxv.
- 108 *Theory of Fictions, supra* note 17 at xxxvii-xli and 19-28.
- 109 *Id.*, at 29-30.

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- 110 *Id.*, at 19.
- 111 *Id.*, at 10.
- 112 *Id.*
- 113 *Id.*
- 114 Bentham does make a bow to the possible existence of entities that are imperceptible yet real, which he refers to as “inferential entities,” for example: “The supreme, superhuman, inferential entity is God” and “a human inferential entity is the soul considered as existing in a state of separation from the body.” But while Bentham allows for the existence of such real incorporeal entities in theory, they form no part of his analysis. Instead he brushes them aside, tartly observing that: “By the learner as well as by the teacher of logic, all these subjects of Ontology may, without much detriment, it is believed, to any other useful art, or any other useful science, be left in the places where they are found.” Having thus “bracketed” the theological domain, as we say today, Bentham is left with only perceptible objects to flesh out the category of real entities as the subject of a *useful* analysis. *Id.*, at 8-10.
- 115 *Id.*, at 10.
- 116 *Id.*, at 10-11.
- 117 *Id.*, at 11.
- 118 *Id.*
- 119 Postema, “Facts, Fictions, and Law,” *supra* note 12 at 48-51.
- 120 *Id.*, at 48-49.
- 121 *Id.*, at 49.
- 122 *Id.*
- 123 *Id.*, at 50.
- 124 *Id.*
- 125 *Id.*
- 126 *Id.*
- 127 *Theory of Fictions*, *supra* note 17 at 10.
- 128 *Id.*, at 12.
- 129 *Id.*, at 23.
- 130 See sources in note 100, *supra* .
- 131 Ogden Introduction, *Theory of Fictions*, *supra* note 17 at xlvi.
- 132 “Fiction – the mode of representation by which the fictitious entities ... are dressed up in the garb, and placed upon the level, of real ones – is a contrivance but for which language, or, at any rate, language in any form superior to that of the language of the brute creation, could not have existence.” *Id.* , at 16.
- 133 See note 85, *supra*.
134. For a case study of how such a methodical approach can exhaust the ordinary human attention span and craving for the compressions of narrative, see Janet Malcolm’s *The Crime of Sheila McGough* (New York: Knopf, 1999).

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- 135 I do not mean to suggest that these traditional jurisprudential debates ceased, or that investigations into questions of evidence and the nature of the fact stopped entirely. Scholars continued to make contributions in these areas, particularly in Britain and, to a lesser degree, in America. See, e.g., Joseph Raz, "Liberalism, Skepticism, and Democracy," 74 *Iowa Law Review* 761 (1989); Dworkin, *Law's Empire*, (Cambridge: Belknap Press, 1986). In the specialized field of evidence scholarship, in particular, attention to the nature of facts and fact-finding has been uninterrupted. See, e.g., Ronald J. Allen, "Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse," 17 *Harvard Journal of Law & Public Policy* 627 (1994); James L. Oaks, "The Status of Sandstrom in the Second Circuit," 49 *Brooklyn Law Review* 641 (1983); and the contributions of Postema and others in *Facts in Law*, *supra* note 12. But the center stage, as it were, of legal theory, shifted away from the traditional debates over legal positivism and natural law, to which the fact/fiction, fact/law, and fact/value distinctions were central. As result, the considerations of the nature of legal interpretation and "social construction," which have occupied much recent legal theory and legal history, have tended to float free from philosophical inquiries into the nature of the fact in relationship to law. Likewise, law-and-economics scholarship has, until very recently, paid very little attention to questions of evidence and the nature of the fact. See Richard A. Posner, "An Economic Approach to the Law of Evidence," 51 *Stanford Law Review* 1477 (1999); Antonio E. Bernardo, Eric Talley, and Ivo Welch, "A Theory of Legal Presumptions," (publication forthcoming)(both noting and seeking to rectify neglect of questions of evidence in law-and-economics literature).
- 136 See, e.g., Shapin, *A Social History of Truth*, *supra* note 6; Barbara J. Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca: Cornell University Press, 1999).
- 137 See, e.g., D.W. Winnicott, *Playing and Reality* (London: Routledge, 1971); *Holding and Interpretation: Fragment of an Analysis* (New York: Grove, 1972); *Home Is Where We Start From: Essays by a Psychoanalyst* (compiled and edited by Clare Winnicott, Ray Shepherd, Madeleine Davis; New York: W.W.Norton, 1986); *The Family and Individual Development* (London: Tavistock, 1965); *Human Nature* (New York: Schocken, 1988).
- 138 Adam Phillips, *Winnicott* (Cambridge: Harvard University Press, 1988) at 82.
- 139 *Id.*, at 82-86.
- 140 Newsom also emphasizes play as an essential aspect of fiction and briefly mentions Winnicott's theory. See *A Likely Story*, *supra* note 1 at 173-85, 206, n.14. Echoes of many of the basic concepts of the doctrine of adequacy can be heard even in this brief synopsis from Phillips: including *accommodation* (the mother's "sensitive adaptation" to her infant's needs provides the infant's route to reality through fantasy), *economy* (the "mother's job" is "to protect her infant from complications that cannot yet be understood by the infant, and to go on steadily providing the simplified bit of the world which the infant, through her comes to know. The mother ... sustains the infant's capacity for illusion, for exchange with the external world, by keeping the world she presents him simple; she doesn't make demands upon him or subject him to experiences that are beyond his comprehension"); *utility* ("the essential moment of illusion requires the overlap of two desires: 'the baby has instinctual urges and predatory ideas. The mother has a breast and the power to produce milk, and the idea that she would like to be attacked by a hungry baby"); and *adequacy* to need (the good enough mother is the matrix which binds illu-

sion and reality together.) Phillips, *Winnicott*, *supra* note 138 at 82-86. Winnicott's theory of transitional objects links up to the longstanding tradition of psychological theories about the nature of object-perception, to which Bentham's theory also clearly belongs. On this tradition of psychological thought, *see generally* Brann, *The World of Imagination*, *supra* note 6.

141 Winnicott, *Human Nature*, *supra* note 137 at 114-15.

142 Ogden Introduction, *Theory of Fictions*, *supra* note 17 at xi-xii.

143 *Id.*, at xiv.

