Legal Fictions and Common Law Legal Theory

Some Historical Reflections

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I. Introduction

In writing about the role of legal theory in the study of the common law the difficulties begin with the meaning of the phrase "legal theory" itself. Perhaps Twining is correct in calling legal theory "the theoretical part of law as a discipline,"[1] but this seems to emphasize unduly the sense in which law is an academic enterprise, subject to the forms of professional organization which have dominated the study of the social sciences and humanities since the late nineteenth century. It is only in such social contexts that it makes sense to speak of law as a "discipline." Our legal history is long enough, as the common law approaches the close of its first millenium, to exemplify alternate social models for the intellectual activity called law; in its time it has been a craft, a mystery, and a domain of entrepreneurial business—it was only the day before yesterday that law could be called a discipline for the first time.

In its various prior social contexts, the common law was a splendidly anti-theoretical contrivance. The reasons are many, but the basic fact stands out above the background of speculative explanation; the distinguishing marks of the common law as an intellectual tradition are its resistance to systematization, its refusal to consider more than the case at hand, and the extraordinary weight of inertia with which it resisted attempts at "academic" or comprehensively analytical statements of substantive rules and their presuppositions. The great collaborative enterprise of the mid-thirteenth century which we know as *Bracton* seems a brilliant step towards the synthesis of general jurisprudence and common law results, but the jurisprudence is Roman and the treatise represents not the start of a tradition but a stillbirth. Thereafter, with the exception of Littleton's *Tenures* at the close of the fifteenth century, the notion of a comprehensive description of substantive doctrine disappeared from the literature for more than five hundred years. A textbook on torts, or contracts, or trusts, became an intellectual possibility only as the eighteenth century gave way to the nineteenth.

Nor is this all, for the common law's hostility to theory has been active, not merely passive. Over the long term, it is hard to question Professor Milsom's observation that:

> The life of the common law has been in the abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. … If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.[2]

1. Twining, *Evidence and Legal Theory*, in **Legal Theory and Common Law** 62 (Twining ed. 1986).
2. **S.F.C. Milsom, Historical Foundations of the Common Law** 6 (2d ed. 1981).

In this context, with the wilful and seemingly disingenuous shifting of categories serving as the engine of major legal change, the notion of doing theory seems as precarious as walking on ice floes. But writing about common-law legal theory, attempting to understand the prepossessions and presuppositions of something called the common law mind, requires precisely that we enter into that dangerously unstable territory.

For this reason, the theorist's attention needs to be drawn to the atheoretical elements of common law thought; they challenge the presuppositions that underlie almost all jurisprudential writing. The purpose of this paper is to suggest a reading of the history of the common law which emphasizes these elements, and which therefore offers to the theorist the opportunity to describe the process of common law adjudication not as philosophers have supposed it to be, but as it actually was; the difference, I argue, is extreme.

The starting point for this reconception of the common law's history is the device of reasoning which we call the legal fiction. What follows is an attempt to make some suggestions, arising from an ongoing investigation of legal fictions in the history of common-law thought, concerning the significance of legal fictions for the theorist attempting the analytical description of the common law process. When the roles played by fiction in common-law thought are taken into full account, I believe, the problem for the theorist is much more difficult than the existing literature acknowledges.

II. Theory and the Uses of Fictions

The observation that advocates and judges in the common law tradition frequently resort to pretense in the process of legal argumentation occurs to even the casual onlooker. Few perhaps will react as strongly as Jeremy Bentham, whose expostulations on the subject include "[f]iction of use to justice? Exactly as swindling is to trade,"[3] and the statement that each of the law's fictions "affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed,"[4] but the insight is none the worse for being less vituperatively expressed. The persistence of the technique of make-believe under the pressure of adverse comment both inside and outside the boundaries of the profession is a clue to the centrality of fictionalization in common law thought. It is also a formidable challenge to the theorist who must eventually confront and attempt to explain the institution. The basic question, for the theorist as well as the historian is what do fictions *do* in the process of common-law reasoning,

3. 7 **Jeremy Bentham, Works** 283 (Bowring ed. 1843).

4. 9 *id*. 77.

and how do they achieve results which the traditional criteria of judgment define as superior to those obtainable without resort to factual distortion? The question cannot be briefly answered, and from the very beginning the inquiry is bedeviled by definitional problems, to which some attention should now be given.[5]

A. *Definitions and Preparations*

A legal fiction is a proposition about the substance or procedure of the legal system, purporting to be a principle or rule material to the determination of cases, which rests in whole or in part on factual premises known to be inaccurate at the time of the fiction's invocation. Each fiction, *qua* fiction, may be said to have a subject matter, comprised of the premise or premises counterfactually maintained. Fictions may have as their subject matter the parties' status or prior transactions in the case before the court; or the existence or relationship of third parties, places, or things not before the court; or they may assert facts about the tribunal, or about the history of the law itself. The famous bill of Middlesex, viewed as a fiction, has as its original subject matter a trespass by defendant, followed by defendant's arrest and bail in the King's Bench, all of which never occurred. The court itself becomes the subject matter when the King is said to be always in it;[6] when the island of Minorca is said to be located within the parish of Mary-le-Bow in the ward of Cheap in the city of London, the subject matter of the fiction is obvious.[7]

In addition to its subject matter, the fiction as fiction may be said to have the additional attribute of technique, or the device by which the counterfactual is declared. The simplest technique is assertion: the truth of the subject matter is announced without more, or having been asserted by a party is adopted by the court without scrutiny. The assault alleged in the bill of Middlesex is the beneficiary of this latter version of the technique,[8] as are the allegations of

5. In the analysis which follows, I am deeply indebted to Lon Fuller's pioneering attempt to provide a philosophical account of the role of fiction in common law reasoning. First published as a series of articles in the *Illinois Law Review* in 1930-31, Fuller's essay was reprinted in book form in 1967. **L. Fuller, Legal Fictions** (1967). While, as is made clear at several junctures below, I find myself departing from Fuller's conclusions, his contribution to the inquiry is absolutely invaluable.

6. *See* 1 **W. Blackstone, Commentaries** *260.

7. *See* Y.B. Mich. 15 Edw. IV, fo. 14, pl. 18 (Calais in Kent); Y.B. Pasch. 20 Hen. VI, fo. 28, pl. 21 (Paris in London). One Exchequer Chamber case of 1626, extant only in a manuscript report in the Harvard Law School library, shows the fiction still operating at that comparatively late date. Woodford v. Wyatt, HLS ms. 106, fo. 263. *See also* **J.C. Gray, Nature and Sources of the Law** 34 (1909); **F. Pollock, The Genius of the Common Law** 71 (1912) (referring to Mostyn v. Fabrigas, 1 Cowp. 161, 164 (1774), in which the attempt to make use of the fiction failed).

8. The fiction can best be briefly described as follows: The power of the King's Bench to hear without writ causes arising in the venue in which it was sitting emerged naturally as a consequence of its being the court *coram rege*, for the King might of course hear pleas without Chancery's written authorization, and the necessary machinery of summons was immediately at hand. The first step to take advantage of this power, and the first fictionalization, is the commencement of an action by bill in which the wrong complained of is said to have occurred within the county of Middlesex, while in fact it occurred elsewhere. From success in this practice counsel will eventually reach the next plateau, in which the trespass never occurred at all. The intent of this maneuvering is to have the advantage of summons by the advantageous summary process called *latitat* on the actual claim. For this purpose, however, the bill need not ever have issued at all, and the final step in the process, reached sometime in the sixteenth century, is for the action to commence by *latitat*. At this point the bill of Middlesex itself, along with the trespass of which it complained, is purely fictional. The history is further complicated by the attempt, traditionally said to be at the instance of the

lease, entry, and ouster in ejectment and indebtedness to the Crown in *quo minus*.[9]

Closely related to assertion is the technique of presumption, perhaps the most frequent of the techniques of fiction. Here the subject of the fiction is made the object of a formal evidentiary rule, which either precludes or strongly discourages denial of the subject's truth. Fictions originating by assertion sometimes subsequently ripen into presumption, as litigants disfavored by the fiction put pressure upon the vulnerable assertion, which is then "strengthened" into a presumption. But this is not the only route. The presumption that all offspring of a married woman are the issue of her husband arose not from the conversion of an assertion, but rather from an argument of policy: that the law presumes legitimacy in order to avoid the high social costs of permitting parties to attempt proof of bastardy.[10] Presumptions are ordinarily divided into the rebuttable and the irrebuttable. The irrebuttable presumption is only the assertion in a more technical guise, while the rebuttable presumption need not be fictional in our sense. The determination in the case of rebuttable presumptions must be based upon the showing which the law regards as sufficient to rebut, for if those grounds are artificially narrow, the presumption continues to operate fictionally, by ascribing significant legal consequences to false assertions of fact. Thus, where the only possible rebuttal of the presumption of legitimacy goes to the absence of any opportunity for conjugal intercourse (as when the husband is at sea throughout the relevant period) the presumption has retained its fictional quality.

The last of the common techniques of fiction is the type which is commonly undertaken in judicial opinions under the label of "deeming." In the technique of deeming we find the conscious expression of the fictional nature of the subject matter, for when X is "deemed" to be Y it is ordinarily conceded that X is not Y, and is known not to be Y. Fictions of deeming thus illustrate for us a court which treats the creation of fictions as a legitimate part of the judicial process; an activity which may be carried on, discreetly to be sure, but without concealment.[11]

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judges of the Common Pleas, to derail the fiction by statute, 12 Car.II, s.2, c.2 (1661), permitting arrest only if the true cause of action was disclosed on the face of the summons. The statute having failed to halt the use of streamlined procedure in the King's Bench, the conventional wisdom reports, the Common Pleas decided to create a parallel fictional procedure of their own, leading to the use of the *ac etiam* clause in the writ of trespass *quare clausum fregit*; in the subsequent stage the *quare clausum fregit* disappears as thoroughly as the bill of Middlesex, and a personal action in the Common Pleas commences with *capias*, parallel to the *latitat* in King's Bench. *See* **T.F.T Plucknett, A Concise History of the Common Law** 386-87 (5th ed. 1956); 1 **W.S. Holdworth, History of English Law** 219-222 (7th ed. 1956). *See also* **M. Blatcher, The Court of King's Bench, 1450-1550**, at 114-37 (1978). There is some reason to believe the conventional wisdom is mistaken on this latter point. *See infra* note 18.

9. The judicial cognizance of the Barons of Exchequer extended to cases involving the revenue interests of the Crown. In the first instance, therefore, Exchequer might adjudicate only those debts owed to or by the Crown itself. But in order to have the advantage of the expedited process and smaller docket in Exchequer, plaintiffs seeking enforcement of purely private debts would plead that *they* were indebted to the Crown, and were so much the less (*quo minus*) able to pay those debts because their debtors hadn't paid up. *See* Wenzel, *Origin of Quo Minus*, 49 **Yale L.J.** 39 (1939).

10. *See* **J. Thayer, Preliminary Treatise on Evidence at the Common Law** 346-47 (1898).

11. Though in this context one is tempted to recall the position of that acute, though fictional, jurist Lord Mildew, who said: "There is too much of this damned deeming." Travers v. Travers, *noted in* **A.P. Herbert, More Uncommon Law** 80 (1982).

It should be clear even from the examples necessary for the purpose of securing a working definition that the legal fiction as a trope of common-law thought is chronologically persistent. Indeed, as I have argued elsewhere, it is represented throughout the history of the common law, and while the fecundity of judges and lawyers has varied, there are no barren periods. In every generation, including our own, the process of lawsuits involves the consensual alteration of fact; agreements to vary, to ignore, or to invent the factual context of quarrels are apparently an indispensable part of our system of adjudication.

This observation alone should be sufficient to place upon the theorist the burden of accounting for the fiction in an active sense, rather than merely, Bentham-like, excoriating the resort to fiction as a deviation from the well-ordered world, consisting of applications of changeable rules to stable facts, that the theorist himself created. But persistence is not the only signal that fictions, far from being a peripheral feature of common-law adjudication, are central to the process of "doing" common law. Fictions are clustered thickly at precisely those spots in the topography of the common law which are otherwise most resistant to theoretical delineation. They are, for example, essential to an accurate description of the process by which legislation was accommodated to the existing corpus of common-law rules and by which the traditional overlapping jurisdictions of the courts were maintained and altered. Some discussion of the role of fiction in each of these areas suggests the centrality of fictions to the most important theoretical issues in the study of the common law.

B. *Interstitial Legislation*

It has been a frequent observation, made as one might expect in the most negative terms by Bentham, that resort to fiction amounts to a form of legislation, in which variation of fact can be used to alter the incidence of a pre-existing rule:

> A fiction of law may be defined as a willful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it.[12]

Whether offered in Bentham's terms or in a more neutral form, in which the courts are said to be filling the "interstices" of the legislative scheme,[13] the idea expresses a presupposition that the archetypal form of law making is (and in Bentham's view, ought emphatically to be) legislation—that is, the prospective declaration of abstract "rules" for the resolution of disputes

12. *Quoted in* **C.K. Ogden, Bentham's Theory of Fictions** xviii (1932).

13. The notion of incremental or interstitial legislation by means of fiction is expressed without moral disapprobation in Maine, **H. Maine, Ancient Law** 16-18 (1917 ed.), and the works of many other commentators. *See, e.g.*, Smith, *Surviving Fictions*, 27 **Yale L.J.** 147, 150 (1917); **L. Fuller**, *supra* note 5, at 6.

by a body, called a legislature, politically charged with that responsibility. In the jurisprudential model which follows naturally from the presupposition, these rules are then applied to "facts," which are reported data about the state of the world that are in one way or another "proved" to the decision-making authority. The processes of fact determination and rule application are thus seen to be completely independent of the process of rule formation.

Even for those who do not share Bentham's moral outrage at the process of rule-making by fiction, the qualifying adjective "interstitial" is somehow comforting. It suggests that the ultimate contours of the system of rules are determined by the visible process of legislation, and that the extent to which rules are altered in practice by the consensual varying of the facts to which the rules are applied is proportionately small. But this is a matter of emphasis without evidence, arising in the first instance from an imagined, and desired, picture of the legal universe, and nothing other than the unfamiliarity of doing so prevents us from adopting the alternative perspective, in which the processes of formal legislation are seen as the less significant method for the declaration of rules.

Nor will this shift in perspective do violence to our sense of the realities of life, for it is a plain fact about legislatures, as Alan Watson has recently pointed out, that they do very little of the work that we call legislating.[14] Even in the extremely active legislative culture of twentieth-century America, the volume of prospectively enacted private law rules (along the lines, for example, of the Uniform Commercial Code) is extremely small when viewed against the backdrop of the endless extrusion of budgetary and revenue measures. The absence of legislative enthusiasm for the business of legislating is not, perhaps, hard to understand. The work is difficult, the demands upon prudence and foresight heavy, and the political rewards comparatively slight.

In our legal culture, moreover, the notion of statutes as the primary source of law is a recent development, and behind the burgeoning corpus of statutory language of the past seventy-five or one hundred years lies the bulk of the common law, for which no moment of legislative origin can be assigned. Only through a process of fictionalization, such as that in which Coke excelled, is it possible to make the common law—that collection of customary practices—fit within the Procrustean framework of the positivist's paradise, in which an identifiable and sovereign legislature makes all the rules by which disputes are resolved. Three times in the long history of the common law—once in the thirteenth century, once in the

14. *See* **A. Watson, Failures of the Legal Imagination** 37-40 (1988). The precise form of Alan's proposition, which should be stated in order to prevent his bearing the burden of my own exaggeration here, is that "at least until recent times, legislation has played a very restricted role in developing private, commercial, and criminal law." *Id.* at 37. The evidence upon which he draws is intended to establish the proposition for the Roman Republic, the common law, and medieval Europe.

sixteenth, and once in the twentieth—has the primary onus for the making of rules shifted into the legislature. The reasons for these three outbursts of legislative activity are hard to define, and the present paper is not the appropriate venue for the offering of even tenuous suggestions. What matters, however, is not arriving at a normative judgment, or even a descriptive account, of the occasional feast and conventional famine of legislation, but rather an acknowledgment that the theorist must confront and explain a system which has historically preferred to make law by adjudication (along with its associated fictions) than by legislation.

So far the theoretical position seems not to have grown much more complicated; the question of how common-law judges decide cases is, after all, close to the heart of traditional jurisprudence, and the recognition of judicial legislation was made long ago. But the replacement of the statute as the archetype of law-making has profound consequences, for it requires us to consider that the bulk of law is made not with the understanding that rules devised today will be applied across a spectrum of obscurely forseeable but nonetheless determinate states of fact in the future, but rather in a context in which the facts are at least as malleable as the law. In such a system, particularly in its historically early stages, the process of altering the facts is far easier than the process of altering the rules, and is more frequently undertaken. The analogy, which treats fact A for some purposes as like enough to fact B to justify similar treatment, is only a small and often insignificant analytical step from the overt act of deeming A to be B. Let us examine, on this point, a reported case from the third year of Edward II:

Westley *v*. **Fulewelle**

> A. complains that R. wrongfully rescued his beasts, to wit [fourteen] geese and [ten] ducks.
>
> *Ruston*. Judgment of the variance between his writ and his count; for his writ says "beasts," and he has counted of geese and ducks, which are not beasts.
>
> **Stanton, J.** He has kept to his writ. If he had wished to bring a writ for the taking of "his geese," he could not have had such a writ in the Chancery.
>
> [Issue joined on whether the birds rescued had been taken damage feasant.][15]

What has happened in this interchange? Has the Common Pleas legislated, so as to broaden the writ of rescue to cover the tortious conduct of reclaiming impounded birds, by fictively deeming geese to be beasts? Or is it Chancery which undertook to legislate, extending the writ by licensing the false statement that plaintiff had impounded "beasts"? Perhaps the problem is that we are asking modern questions of a system which does not acknowledge modern theoretical constraints. The theorist, like the historian, cannot be wise beyond the wisdom of his evidence.

15. Y.B. Mich. 3 Edw.II pl. 50, p. 149 (1309) (Selden Soc.).

But it will not do merely to think of legislation and "interstitial legislation" by fiction as alternatives, acknowledging the historical primacy of the latter over the former in most periods of the common law's development. For while the two forms of rule-making are alternative, they are not mutually exclusive, and the gravest of theoretical issues posed by fictions arise from the interaction of fiction and formal legislation.

Two examples will have to suffice to sketch the contours of the problem. The first concerns our archetypal fiction, the bill of Middlesex. As I have previously observed, the development of the fiction whereby King's Bench acquired a general jurisdiction over personal actions, accompanied by procedures of superior convenience to plaintiffs, was interfered with by the statute of Charles II that required process leading to arrest in civil cases to state the true cause of action.[16] The drafter's intention here was clear, and his method of approach unexceptionable. Since the evil to be remedied was the fact that arrest on *latitat* was occurring without the description of the cause of action actually claimed by the plaintiff, the remedy was to prohibit obscurity in the papers. But if, as the conventional wisdom claims,[17] the statute was also intended, at the behest of the Common Pleas, to rein in the procedural imperialism of the King's Bench, it failed of its object.[18] The domain of the statute, after all, was the domain of rules of procedure; the statute necessarily stopped short of prohibiting states of fact from existing in the future. For the court, on the other hand, varying facts was easier than altering rules, and nothing prevented a plaintiff from suing on two causes of action—the one which gave bill jurisdiction to the King's Bench, "and also" (*ac etiam*) the cause of action he really wanted to try. The result was that a statute evidently intended to control the consequences of an existing legal fiction was itself subverted through the same process—the facts upon which the statutory rule operated were assumed away by the courts.

For a second example of the complex relationship of legislative changes in rules to fictional changes in fact, let us take (in highly compressed form) the long history of the entail. By the late thirteenth century, the common law courts had decided that the grant "to A and the heirs of his body" would, if not subject to some form of legal restriction, unacceptably burden lands against transfer. The grant was thus taken to convey the fee to the grantee, but only upon birth of issue. While this solved the problem of permanent restraint on alienation, it did so only

16. *See supra* note 8.

17. *See, e.g.,* **T.F.T. Plucknett**, *supra* note 8, at 387.

18. There is in fact some reason to doubt the traditional view that the Common Pleas procured the statute of 1661 in order to bring the Bill of Middlesex to an end. The preamble to the statute recites the harm done by arrest "upon general writs of trespass, *Quare clausum fregit*, bills of Middlesex, Latitats, and other like writs issued out of the courts of King's Bench and common pleas, not expressing any particular or certain cause of action." This suggests that Common Pleas had already begun to make use of trespass *quare clausum fregit* as a competitive alternative to the bill of Middlesex before 1661. I know of no research conducted in the plea rolls to date which would resolve the matter.

at the cost of defeating the expectations of grantors, which meant in contemporary terms upsetting the estate planning arrangements of the most powerful players in the political economy. The result, in 1285, was the statute *De Donis Conditionalibus*,[19] which proclaimed that the intent of the grantor in such gifts was to be strictly observed.[20]

The effect of this provision required some time and ingenuity to settle, but by the middle of the fourteenth century it was clear that the statute created an estate which permanently restricted alienation by the heirs of the grantee.[21] Yet this development, possibly unforeseen by the drafters of *De Donis*, went too far in precisely the direction—restraint upon alienation—with which the courts had previously been concerned. And so begins the process whereby the courts shaped technology for barring entails. While much of the history is obscure, one matter is clear—the technology always took the form of fiction. The fine and the common recovery thus had in common the use of pretenses of fact to overcome perceived inconveniences in the legislature's hard-won general rule. The fine might be regulated legislatively, by specifying the degree to which third-parties could have their rights concluded,[22] but, as Milsom pithily points out, the situation was different in any attempt by the legislature to constrain the effectiveness of devices, generically known as recoveries, which depended upon the preclusive effect of a sham lawsuit: "they could not, as they did with the fine, regulate its effects as an identifiable act in law, because it was not an entity distinct from genuine actions."[23] This is the heart of the problem—the legislature could only act, through its power to declare prospective rules, upon states of fact which could be isolated and defined; the courts, for their part, could through the elaboration of fictions alter the substrate of fact upon which any and all legislative interventions depended. It is this control over what might be called the epistemology of the legal system that fiction provides.

C. *Maintenance of Jurisdictional Diversity*

One feature of the common law system to which we might expect to see theoretical attention devoted is that there have always been, in both England and America, significantly overlapping jurisdictions among the different courts having authority to hear and determine

19. Stat. 13 Edw.I (Statute of Westminster II), c. 1.

20. The compression of this discussion inevitably foreshortens much terribly important detail. For a brief but somewhat more responsible recounting of these matters, see **S.F.C. Milsom**, *supra* note 2, at 172-87; *see also* **A.W.B. Simpson, An Introduction to the History of the Land Law** 77-82 (1961). Some technical questions relevant to the story are resolved in Milsom, *Formedon Before* De Donis, 72 **L.Q. Rev.** 391 (1956).

21. *See* **A.W.B. Simpson**, *supra* note 20, at 79-80.

22. This is in fact the route that was traveled. *See* Stats. 1 Ric.III c.7 (1484), 4 H.VII c.24 (1490) (fine with proclamation bars strangers with immediate claims after five years; remaindermen five years after accrual of interest).

23. **S.F.C. Milsom**, *supra* note 2, at 183.

disputes. Instead, theorists have almost entirely ignored the problem. With attention given to the courts rather than the legislature as the primary locale for rule formation, the proliferation of overlapping jurisdictions may perhaps be ascribed some functional significance, but the theoretical simplification which allows the theorist to concentrate on a world containing a single law-maker and a single adjudicator is so attractive that it has overwhelmed the obvious descriptive pressure for a richer analysis.

For our purposes, it is sufficient to observe that here again, in an area insufficiently studied by the theorists, the fiction has a powerful role to play. For at the boundaries of these overlapping and competing jurisdictions fictions have performed a regulatory function. The questions of interest to the theorist are two: first, why does multiplicity of jurisdiction arise and what function does it serve; and second, why is fiction, or the alteration of law through variation of fact, used to police the boundaries? I am not in a position to supply answers to either question, but once again the historical record provides a couple of brief examples whose elements may give rise to fruitful speculation.

The first class of examples are those which arise from the presence in the common-law system, throughout its history, of courts of highest prestige and power which were not courts of general jurisdiction. Both the royal courts and the American federal courts imposed barriers to entry, and plaintiffs undertook substantial effort in order to meet, or seem to meet, those requirements in order to achieve the benefits of litigation in the highest forum.

The simplest mechanism is an assertive fiction which declares as its subject matter a false characterization of the facts of the transaction upon which suit is brought. This type of fiction can be clearly perceived in the fourteenth-century case in which plaintiff wishes to sue in the royal courts for allegedly watered wine purchased (not surprisingly) without a contract under seal, and is forced by the circumstances to plead that the defendant vintner "with force and arms and against the peace of the King, to wit with swords and bows and arrows," put water in the wine.[24]

The same technique is to be found in use in the federal courts today; the pivot of the fiction is no longer trespass *vi et armis*, but rather the civil action provisions of the Racketeer Influenced and Corrupt Organizations Act. Plaintiff wishes to sue his stock-broker, who refused to make a purchase for plaintiff's account on margin, under the erroneous impression that plaintiff was fully "margined-up." Rather than bringing an action for breach of the brokerage agreement (a state court action if no diversity of citizenship exists), plaintiff pleads that he called the broker

24. Rattlesdene v. Gruneston, Y.B. Pasch. 10 Edw.II pl. 37, p. 140-41 (1317) (Selden Soc.).

and asked to buy, the broker called back and said no, and this was two wire or securities frauds within ten years, thus bringing the alleged conduct within the purview of civil RICO. The plaintiff not only secures a federal forum, but also the possibility of treble damage recovery, and enjoys as well the enviable privilege of extorting a favorable settlement through the enormous nuisance value of publically describing his opponent as a racketeer.[25]

The mechanism of both fictions is a false assertion about triable matters of fact (the use of bows and arrows to water the wine, or the presence of a scheme or artifice to defraud advanced by the broker's failure to buy) which carries as a collateral consequence the imputation of sufficient royal or federal interest to secure access to courts otherwise uninterested in hearing the plea.[26]

The second class of examples arises from the decay of jurisdictions, for it is also true that the history of the common law includes many occasions on which systems of competing jurisdiction have disappeared. One of the most far-reaching of the jurisdictional fictions resulting from the disappearance of courts is benefit of clergy.[27] The essence of the process by which the protection for the criminal jurisdiction of the ecclesiastical courts became a general device for the separation of first offenders from recidivists can be readily described. The controversy which terminated in the murder of Becket concerned in part the effect of the Constitutions of Clarendon (1164), which confirmed that criminous clerics, after degradation in church courts, should be returned to the royal courts for punishment by the secular power. After Becket's death, however, the crown retreated from its position, and clerics became for all practical purposes immune from the sanctions of the secular criminal law. That absolute immunity provided that a clerk (operationally, someone who could read) was to be released for trial and punishment in the ecclesiastical courts. Long before the Reformation this immunity had begun to be qualified, however, and the subjection of the Church in England to royal control terminated the significance of benefit of clergy in its original context.

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25. The pattern described in the text is to be found in great profusion since the decision of the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985), substantially encouraged the fictional use of civil RICO pleadings. One instance of a factual configuration closely similar to that offered in the text with which I have a passing familiarity may be found in Nevitsky v. Manufacturers Hanover Brokerage Servs., 654 F. Supp. 116 (S.D.N.Y. 1987).

26. It should be obvious that the bill of Middlesex, which has been our constant resort throughout this investigation, can also be characterized as a jurisdictional fiction, though the goal was not to secure access to the royal as opposed to local courts, but rather to achieve entry to one of the competing royal jurisdictions offering better procedural terms to plaintiffs.

27. Again I am here forced to compress a somewhat lengthy history into an almost unrecognizable compactness. The conventional wisdom as to the history of benefit of clergy can be found in slightly less exiguous form in **T.F.T. Plucknett**, *supra* note 8, at 439-41. For the full efflorescence of the fictional rules in the seventeenth century, the best source is 2 **M. Hale, History of Pleas of the Crown** c.44 (1800); *see also* 4 **Blackstone, Commentaries** *358-67.

But the institution did not die. After 1490, anyone receiving benefit of clergy was to be branded,[28] and the device in its new, secular guise in the sixteenth century thus functioned to differentiate felony first offenses (which were not capital for those who could successfully invoke the benefit by reading or pretending to read) from felonies committed by recidivists. Through the manipulation of a single fact concerning the offender, the courts could therefore control the actual incidence of the capital statutes. Parliament too learned to use the institution of benefit of clergy for the fine-tuning of the system of criminal justice, since particular offenses could be declared non-clergyable if the intention was to punish first offenders on the gallows. Like many fictional devices, this one had significant unintended consequences, but we need not at this point inquire how it came to be that a felon's life was forfeit if he had in the past married a widow, but not if he had wed a virgin.[29] It suffices to observe one of the numerous instances in which changes in the complex system of interlocking jurisdictional relationships were accommodated by the creation of fact-varying practices which ameliorated the otherwise necessary burden of legal alteration.[30]

III. Reconceiving the Common-Law Tradition

So far, the argument as it stands may be reduced to the proposition that legal fictions and related techniques of legal reasoning pose a graver problem to theoreticians of the common law than has usually been acknowledged. The deficiency in theory results, I claim, from the theorists' tendency to think of the archetypal common-law system as containing four players—a legislature, a judge, a plaintiff, and a defendant. The legislature makes prospective general rules for the resolution of disputes. The parties turn up in court and "prove" facts about their relationship and the world to which the judge then "applies" the rules. Most theoretical analysis of common-law adjudication centers around two qualifications of this simple archetype: first, that some of the rules were made not by the legislature, but by some traditional or customary process; and second, that the process of rule "application" by judges necessarily involves a degree of rule variation, as the judges bring to bear on the task of interpreting the rules a set of personal and societal value preferences. The theorist, in other words, has been primarily concerned with the apparently inescapable process of judicial law-making in the common law system. So far I have presented evidence that the theorist ignores at his peril the importance not of judicial law-making but judicial fact-making, or more precisely fact variation, in the

28. Stat. 4 H.VII c.13.

29. *See* Y.B. 30 & 31 Edw.I 530 (R.S.).

30. A similar, though substantially more complex, régime of fiction resulted from the merger of law and equity in American courts beginning in the middle of the nineteenth century. Study of these developments is continuing, but the terrain is spongy at best and there are no preliminary results to report.

adjudicatory process. The theorist needs to account—in several different contexts—for the common law's characteristic preference for devices which vary the facts of individual lawsuits rather than the prospective "rules" which are said by convention to determine the outcome of disputes.

The implication is that the traditional archetype of common-law process is wrong in detail, because it fails to reflect the bending force which the system applies to facts. The picture of the parties proving facts to which the law is subsequently applied must be in some degree mistaken, and the theorist has a justified complaint against the historian, who has failed to present a narrative of legal development which gives due weight to the fact-varying element of adjudicatory behavior. If the story of the development of the common law that we have used in the past is inadequate for theoretical purposes, what is the story that should replace it?

Let us begin, then, with a community in which the legal culture submits all disputed matters of fact to a supernatural process for resolution. Whether Harry did or did not kill Dick, whether Roger does or does not owe Hugh five marks on a promise made last Martinmas, whether Adam wrongfully ejected Tom from his estates—all of these questions will be answered by a process through which God can declare his infinite knowledge of the world. In this community the facts of the disputes themselves matter only to the extent necessary to determine which of the forms of divine intervention should be used. Should this question be answered by an ordeal of fire, a battle in which God will defend the right, or an examination of the flight of birds? Here the community may need to consult its traditions, which will declare that in some cases they use battle, in others ordeal by water, and so forth. But much of what we take to be matter of law—whether Harry killed by accident or in a drunken rage, whether Roger's promise was gratuitous, whether Adam was the right heir of the prior occupant—will be concealed by the blank result of the supernatural verdict. These "questions of law" are not questions at all, because there is no human agency of whom they can be asked.

The period in the development of the Roman law that corresponds to this state of affairs is lost to us entirely; by the time of the first surviving records the system had long since altered its methods of fact-finding. But the Second Lateran Council prohibited the active participation of the Church in processes of ordeal only in 1215, within the period embraced by our earliest legal records. The common law, by which I now mean the continuous intellectual tradition of law in the English-speaking world, thus begins in the very instant at which the processes of fact-finding were undergoing a revolutionary change.[31]

31. In this account, as in other matters, I must acknowledge the profundity of my debt to Professor Toby Milsom, without whose immense industry and fertility of insight the writing of the history of the common law would be inexpressibly more difficult. The particular points of view enunciated in this and the preceding paragraph may be found in **S.F.C. Milsom**, *supra* note 2, at 4-5.

But this change was not instantaneous, and increasing reliance upon the jury by no means effected a sudden alteration to a régime of thought in which facts were first discovered through human processes and then subjected to the application of man-made rules of law. The jury itself was at first nothing but a different form of ordeal, and co-existed for almost six hundred years with other modes of fact resolution which, while not requiring the participation of the Church to be effective, nonetheless consisted in an appeal, however disguised, to supernatural forces. It is in this connection, for example, that the continuance into the nineteenth century of resort to wager of law and trial by battle must be of paramount importance to the theorist of common-law adjudication.

So the process of common-law development began from a world in which the facts never "came out" at all, in the sense that they were never used as the raw material for a decision process in which human beings made the decisions. The next step was from our point of view only a half-step, for it still left the jury to resolve factual disputes the precise nature of which had never been discussed (may never have indeed been known) by the body whose task it was to apply the law. Let us consider the progress of a lawsuit in the royal courts in that period (say, for the purposes of specificity, the middle of the fourteenth century) in which the common law reached its first flowering. The plaintiff had ordinarily purchased a writ which contained an authorisation for the court to hear his case and also contained a stereotyped version of the story he intended to tell. The details of that story were not entirely invariable before the court, but they significantly constrained what might be said, and if the facts were slightly other than those contained within the purview of the writ, the plaintiff would be compelled to tell not his own story, but the story long since decided upon by the clerks in Chancery.

If the plaintiff's recourse to fact was constrained, the defendant was still less free. His most likely position was to deny each and every statement the plaintiff made, and this, if it was the course selected, rendered him at once ready for "trial" and completely uninteresting to the Judges in Westminster Hall. For they were concerned only with the process of pleading, and the many technically demanding and logically involuted ways in which the defendant might seek to controvert only some specific part of the plaintiff's story. At all events, once either a general denial or issue on a specific portion of the plaintiff's count had been reached, the matter was sent off to be decided, and whether it was decided by an appeal to the supernatural—through oath-helping, battle, or the like—or through a process involving that little band of distant witnesses called the jury, the ultimate results of the process of fact-finding were of no concern to anyone within the charmed circle of the legal culture.

For the judges, the rules of pleading *were* the common law. They were traditional, customary, and largely impervious to change. The decisions of courts were not law, but merely evidence of what the law had always been. The breathtaking and beautiful informality of the Year Books, the free-wheeling and speculative quality of the colloquy which is, as Maitland first recognized, unique in all the literature of medieval Europe, resulted from precisely this fact: What was said in the courts was not part of the process of making law, but rather a discussion among all those who could possibly know about what the eternal verities of the arrangement were. What was actually said to juries, or what it was they did when they decided cases, was of distinctly inferior concern, as is shown conclusively by the fact that nobody, in a system that lived by writings of every kind, bothered to write it down. All the questions that the jury was compelled to answer—was it murder if you were drunk, was it an accident for which defendant wasn't liable if his horse suddenly bolted, could the defendant exonerate himself from his debt if he had paid but neglected to take a receipt—were hidden behind the single word *postea*; "afterward" the jury came and said whatever it was that represented the net of all the facts and all the law.

It is in this environment, then, that it makes sense to talk about a legal culture in which the facts are variable and the law is not. For what the plaintiff and defendant said initially about the facts was no more than was necessary to set up their submission of factual questions to an agency which operated later than, and spatially and intellectually separate from, the agency that applied the law. If what was said to the jury differed as to fact from what had been said in the writ, the count, or the colloquy at Westminster, the variance was both insignificant and, for the most part, invisible. In this world what from our perspective is called fiction was neither more nor less than a foreseeable consequence of standard operating procedure.[32]

At no time did the system operate solely with the pristine and (to our eye) perverse separation between law and fact here outlined. Always there were qualifications, including the evolution of a process of appeal by writ of error and eventually a concern with the sufficiency of the evidence and even the instructions received at *nisi prius* by the jury. The special verdict too, by reversing the order of determination of law and fact toward the sequence which we find "natural," played a significant role in correlating fact and law. But my goal here is not to show that the common law in its formative era consisted only of fiction; it is rather to provide a narrative context in which the claim that variation of fact, rather than alteration of law, was the

32. This intimate relation between modes of fact-finding and the nature of a system's legal fictions was observed by Fuller in his attempt to explain John Chipman Gray's distinction between the "assumptive" fictions of the Roman law and the "assertive" fictions of the common law. *See* **J. Gray, Nature and Sources of the Law** 31 (2d ed. 1921). Having seen the connection, however, Fuller did not pursue the full reach of its implications. *See* **L. Fuller**, *supra* note 5, at 37-38 n.71.

fundamental product of common-law adjudication for much of the tradition's history will not seem so fantastic.

Gradually, through institutional changes some of which have already been mentioned, the process of disputation at law turned on its pivot, and the facts came out first. In such an environment, every instance of the older thought-ways seems peculiar, unjustifiable, or (for such as Bentham) maddening. For the theorist, the easiest and most comforting response is to wave all such instances aside, to treat them as occasional midsummer nights' dreams of the law, in which the queen of rationality falls in love with a pair of asses' ears.

But at the end of the day this simply isn't good enough. From insensitivity to the complexity of the past we build a theory celebrating the perfection of our own rationality, and this perspective is perhaps a trifle shallow. Theory reflects what we think we are, and ignores what we have actually been. Yet if a realistic understanding of our past makes the effort of theorizing slightly more difficult, the rewards it offers are too substantial to ignore.