§ I. Fictions and Fictitious Entities

For Lon Fuller, ‘A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility’ (Fuller, 1930-1, 369), while a fiction differs from a lie by its freedom from the intention to deceive. Fuller seeks not only to analyze legal fictions, but, informed by the philosophy of Hans Vaihinger, to rehabilitate fictions as necessary and useful elements in human thought. For Vaihinger, it is the fundamental contradiction between the physical world—the chaotic flux of reality as detected by sensation—and the conceptual world—the product of the active thought processes by which human intellect seeks grasp, understand and manipulate that world—which renders the use of concepts we know to be false essential to thought (Vaihinger, 1925, pp. xiii–xvii). In addition, Fuller seeks to provide some answer to the question ‘Are there good and bad fictions, and if so, how do we tell the difference?’ (1930-1, 365) and, again following Vaihinger, indicates that the legitimacy of a fiction depends not on its truth—an incoherent standard when interpreted as correspondence with reality—but on its usefulness, in simplifying and organizing data, and in converting new experiences into familiar terms (1930-1, 887–95; Vaihinger, 1925, pp. 3–4). On this fictionalist account, the central virtues of any theory are explanatory power, capacity to unify observational data, and predictive accuracy (Rosen, 2005, p. 14).

Bentham’s attitude to fictions is somewhat obscured by inconsistencies of expression, and, sometimes, of argument. Thus his references to fictions (especially legal fictions) are mostly harshly critical. However, he too believed that the employment of ‘names of fictitious entities’ is an inevitable feature of every remotely
complex language, and he too sought to elaborate rules for their proper use. Bentham contributed to the confusion by occasionally using the noun substantive ‘fiction’ to refer to other specific noun substantives, for instance ‘natural law’ or ‘natural right’ (Bentham, 1977, pp. 17, 20, 439–31; 1838-43, iii. 218–19), but more usually to refer to propositions, consisting at a minimum of a noun substantive, a copula and a predicate. Resolutions of this apparently contradictory attitude to fictions/fictitious entities have been offered by several commentators. For instance, it has been argued that Bentham anticipated the central elements of Vaihinger’s ’philosophy of the as if’ (Ogden, 1932, pp. xxxi-xxxii; Stolzenberg, 1999), and that his excoriation of legal fictions was not, therefore, a rejection of fictions per se, since his own logic consisted of a ‘theory of fictions’ which is as dismissive as Vaihinger of truth as the goal of theory. Conversely, Philip Schofield has recently sought to resolve the contradiction by arguing that Bentham’s standard usage of the term fiction applies not to noun substantives, which name entities—whether real, fictitious or fabulous—but to propositions (2006, p. 20). Applied to propositions, the term fiction is closely related in Bentham’s lexicon to the term ‘fallacy’, which he defines as: ‘any arguments that are considered as having been employed or considerations suggested, for the purpose, or with a probability of producing the effect of deception’ (UC ciii. 1 (1838-43, ii. 379)). Now Bentham certainly attacks legal fictions as deceptive, that is, as supplying the grounds for fallacious reasoning, but he is also clear that ‘fiction—the mode of representation by which the fictitious entities … are dressed up in the garb, and placed upon the level, of real ones’ (UC cii. 23 (1997, p. 84; 1838-43, viii. 198)), was inevitable in language, and did not necessarily involve the intention to deceive, while there were methods by which fictitious entities might be expounded in ways which eliminated the fiction, and allowed truth and meaning to be exchanged. It will
be argued that Bentham’s final position does appear to contain unresolved tensions between a realist and a fictionalist perspective, between, that is, the view that the use of propositions containing fictitious entities might only be legitimized insofar as they could be replaced with propositions containing only real entities, and the view that the sole criterion of legitimacy for the use of fictional constructs was a pragmatic one, namely the degree to which that use generated accurate predictions of reality.

Bentham explicates ‘fictitious entities’ as follows:

By this term is here meant to be designated one of those sorts of objects which, in every language, must for the purposes of discourse be spoken of as existing—be spoken of in the same manner as those objects which really have existence, and to which existence is seriously meant to be ascribed, are spoken of ... but without any such design as that of producing any such persuasion as that of their possessing each for itself any separate, or strictly speaking any real existence (UC cii. 24 (1997, p. 86; 1838–43, viii. 198) emphasis added).

Bentham contrasts fictitious entities with real entities, which, unsurprisingly, he defines as ‘an entity to which, on the occasion and for the purpose of discourse, existence is really meant to be ascribed’. (UC cii. 16 (1997, p. 164; 1838–43, viii. 196))

Bentham is also less than clear in his treatment of the category of real entities. Sometimes, he states that the only real entities are substances:

The only objects that really exist are substances. They are the only real entities. To convey any notion by words which are the names of any objects [other] than substances, we are obliged to attribute to such objects what in truth is attributable only to substances: in a word we are obliged to feign them to be substances. These others, in short, are only fictitious entities. (UC clix. 241)

Elsewhere, he states that the only entities whose reality we perceive directly are the mental phenomena to which our experience of the external world gives rise, that is sensations and impressions. Bentham never seems to have resolved the tensions between these two views, between an objectivist and a subjectivist perspective. Thus,

1 Alternatively: ‘Names of real entities are, if proper names, names of so many individual masses of matter: if common names, names respectively of all such individual masses of matter as are of such or such a particular description, which by these names are indicated or endeavoured to be indicated’ (UC ci. 341 (1838–43, viii. 262)).
on the one hand, he wastes no time in accepting the reality of the external world, on
the basis that no bad consequences could follow from such acceptance, in contrast to
the pain quickly imposed by the physical sanction if we act, for instance, on a
philosophical denial that the wall in front of us exists (UC cii. 15 (1997, p. 182; 1838-
43, viii. 197)). On the other hand, the subjectivist Bentham asserts that all knowledge
of the external universe comes to human beings through the mediation of their
sensory experience, while the only entities they perceive directly are the mental
events detected by sensation and perception, so that the existence of material objects
is properly speaking inferential (UC cii. 15 (1997, p. 180 (1838-43, viii. 196); see also
1983a, p. 271n): we conclude that the wall exists because we make highly plausible,
but by no means indefeasible inferences from the sensory data delivered by sight and
touch. On this view, given that no-one has direct access to any perceptions or
sensations which are not internal to their own mind, each of us lives in an irreducibly
private reality.

Schofield argues that Bentham’s final position is that it is ‘more
straightforward’ to view corporeal substances as the only perceptible real entities
(2006, p. 16), but the passage he relies on explicitly limits itself to the category of
‘substances’, within which only corporeal substances are perceptible, while alleged
incorporeal substances, such as souls and God, are at best inferential (UC cii. 15
(1997, p. 180; 1838-43, viii. 196)). Indeed, if sensations like pleasure and pain were to
fail to qualify as real entities, the entire utilitarian project fails to get off the ground.
For her part, Stolzenberg argues that Bentham introduced the distinction between real
and fictitious entities only to subvert it immediately: ‘the category of the fictitious
effectively swallows up the domain of the real by the time Bentham finishes his
analysis’ (1999, 239). She dismisses Bentham’s statements that real entities exist, and
that we can exchange truth in relation to them, on the basis that such passages are ‘more than offset’ by the combination of his assertion that the reality of substances is, strictly speaking inferential, and her own assertion (which Bentham explicitly contradicts) that he regarded perceptions and ideas as ‘the paradigmatic fictions’ (1999, 241–2). Further discussion of the difficulties with this interpretation will be undertaken in due course, but, even given Bentham’s inconsistencies on this topic, it would surely be quite remarkable for a writer as pre-occupied with clarity as he to state his position in such an esoteric fashion, that is by insisting on the importance of ‘the comprehensive and instructive distinction—between real entities and fictitious entities: or rather between their respective names’ (UC ci. 341 (1838-43, viii. 262), which he actually regards as no distinction at all.

It is true that the division between real and fictitious entities occurs entirely within language, but the fundamental linguistic distinction between names which have referents in the world, and names which have no such referents, nevertheless reflects, for Bentham, an ontological distinction between things which exist, and things which do not. ‘What I assume then, is that of the objects, the things, we are in use to speak of, some do, others do not exist. Those which do exist may be said to have their archetypes in nature: those which do not exist may be said not to have their archetypes in nature’ (UC lxix. 52). Jackson is quite correct in asserting that for Bentham the reality attributed to real entities ‘is a discursive construction: a claim to reality made within discourse’ (1998, 498), but that simply reflects the fact that language is only the only instrument by which humans can communicate any assertions, and that that instrument very often misdescribes the world. Whilst the world really exists, the names ‘reality’ and ‘existence’ are, for Bentham, names of
fictitious entities (UC cii. 74 (1997, p. 150; 1838-43, viii. 210)), substantified linguistic labels, which do not refer to actually existing phenomena.

One solution to the paradox is to accept the reality of both substances and sensations, and to hope that, for the most part, there will be a correspondence between the reality of the external world and our perception of it, and this appears to be Bentham’s preferred solution: ‘Entities are either physical or psychical. Physical are either real or fictitious. Psychical again are either real or fictitious: real psychical are either present to perception, i.e. impressions, or present to memory, i.e. ideas’ (UC ci. 347 (1838-43, viii. 267)). If this is correct, Bentham is in fact anxious to retain both objective and subjective elements in his epistemology and ontology. The only resources available to us in discovering the objectively existing world are sense experience and reflection on it (UC ci. 183 (1838-43, viii. 238)). Substances (real entities) deposit impressions (real entities) on human sense organs (real entities), which impressions we can recall with a reasonable degree of accuracy. If our sense perceptions do indeed deliver reliable information about the world, we can know reality when it comes to real entities.

Bentham is, however, careful to add a caveat that the correspondence between reality and perception will not be entire, since it is possible for us to be mistaken in our interpretation of sensory data, while that possibility reveals once more the inferential nature of our knowledge of the external world, which depends not simply on passive perception, but active judgement:

When perception has place, the source or perceptible object from whence it is derived being an individual portion of matter—a real, corporeal entity ... impressions are at the time in question made on sense: on some one or more or all of the senses, to the cognizance of which the object stands exposed: of the perception thereupon obtained these impressions are the immediate object and subject: the body itself—i.e. the existence of it, is but, in a secondary and comparatively remote way, the object or subject of perception: of this supposed source of the perceptions that are experienced, the existence is,
strictly speaking, rather a subject of inference than of perception: of inference, judgment, ratiocination, which is liable to be erroneous, and in experience is very frequently found to be so.

Scarce does a perception take place, but it is accompanied ... with a corresponding judgment or act of the judicial faculty (UC ci. 118 (1838-43, viii. 224)).

The subjectivist nature of our engagement with the world, combined with the need to communicate with our fellows, explains the inevitable deployment of fictitious entities in language, the tool of both communication and thought itself. The subject of the earliest communications for Bentham were really existing objects, while in referring to such objects we were aided by the unambiguous link between the object, the name by which we designated it, and its idea, that is its mental image. If we were standing together and could both see, we could disambiguate our referents simply by pointing at them. If we no longer have sight of the referent, I must rely on the ability of its name to call forth its idea in your mind. ‘A proper substantive, the name of a real entity, is understood immediately and of itself, it offers a certain image to the conception. An improper substantive offers no such image. Of itself it has no meaning’ (UC lxix. 229). Such designation, the beginning of both language and logic, became embedded in the structure of language and thought, so that ‘a material image is the only instrument by which, the only medium through which, conceptions can be conveyed from mind to mind’ (UC cii. 463). Because of this connection, encountering a name gives rise to the expectation of a corresponding thing:

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 disposition and propensity to suppose the existence, the real existence, ... of a correspondent thing—of a thing to which it ministers in the character of a name (UC ci. 341 (1838-43, viii. 262)).

Such an expectation, however, is founded on a fundamental error, since in every language the majority of noun substantives do not name existing things (UC ci. 340
The symbol system that is language is a construction of the human mind, and the moment it evolves beyond the declaration of desire or aversion towards particular real objects, it necessarily ascribes existence to things which have none. It is indeed impossible for language strictly to mirror the world, while to demand that it should is to demand the reduction of human capacity to communicate verbally to the level of animals unable to form abstract concepts (UC cii. 23 (1997, p. 84; 1838-43, viii. 198)). In short, Bentham asserts that all language which deploys the names of anything other than real entities is figurative, or metaphorical (UC cii. 466 (1838-43, viii. 331)). As such, the propositions it contains are fictions (UC cii. 23 (1997, p. 84; 1838-43, viii. 198)), that is, they are strictly speaking falsehoods, which seem to assert the existence of things which do not exist. Thus far, Bentham appears to anticipate the insights of Vaihinger, and thence of Fuller: ‘All the language of abstract thought is metaphorical’ (Fuller, 1930–1, 374).

If we want to exchange meaning about fictitious entities, that is, broadly, about abstract terms, the easiest way is to speak as if they were physical objects, even though this is a misdescription. It is this metaphorical substantification of the immaterial, which gives rise to confusion, since it is seen everywhere in language, whether in the constructions ‘in motion’, ‘at rest’, or in the naming of properties or qualities: apples exist, many apples are ripe, but ripeness is a fictitious entity which we locate in ripe apples (Bentham, UC cii. 461–5 (1838-43, viii. 330–1)). The logical analysis by which ‘ripeness’ is first abstracted from the real apple, then designated as a noun substantive in its own right, and then attributed to other similarly coloured objects itself abounds in fictions, false propositions about the world, since ripeness relies on the existence of real objects in which it might inhere, and has no independent
existence. Bentham certainly anticipates Vaihinger in regarding many of the basic categories with which thought seeks to understand the world as fictitious entities (Bentham, UC cii. 35–56 (1997, pp. 88–120 (1838-43, viii. 199–206); Vaihinger, 1925, pp. 157–66). However, while they both regard qualities as fictitious, for Bentham, the particular bodies to which qualities are attributed are impeccably real (UC cii. 461 (1838-43, viii. 330); 1983a, p. 262). For Vaihinger and for Fuller, conversely, there is no thing apart from its qualities, while both are equally fictions: ‘By adding a Thing to which sensations are supposed to adhere as attributes, thought commits a very serious error’ (Vaihinger, 1925, p. 167; see also Fuller 1930–1, 883).

For all three thinkers, fictitious entities are useful, they permit the exchange of complex and subtle information relating to the exterior world, even though they do not, in themselves, designate actually existing objects. No project which sought to cleanse language of fictitious entities could succeed, since fictitious entities are essential not only to all except the most basic communication, but also, since language is the medium for thought, and constrains thought, to all except the most basic thought. Thus no discussion of qualities can occur without the false assertion of the existence of the quality, no discussion of mental acts can occur without the substantification of the mind and its faculties, that is the pretence that motive, disposition and a host of other fictitious entities are really existing objects.

To say that, in discourse, fictitious language ought never, on any occasion, to be employed, would be as much as to say that no discourse in the subject of which operations, or affections, or other phenomena of the mind are included, ought over to be held: for no ideas being ever to be found in it which have not their origin in sense, matter is the only direct subject of any portion of verbal discourse; on the occasion and for the purpose of the discourse, the mind is all along considered and spoken of as if it were a mass of matter: and it is only in the way of fiction that when applied to any operation, or affection of the mind, anything that is said is either true or false (1983a, pp. 371–2)

\footnote{Rosen notes Bentham’s assertion of the ubiquity of this spatial metaphor, but questions whether it represents Bentham’s considered position, since it is ‘obviously a mad, mad view’ (2005, p. 53).}
Language may indeed be ‘an instrument for the communication of thought from one mind to another’ (UC cii. 456 (1838-43, viii. 329)), but language, because of the unavoidable employment of names of fictitious entities as if they were real entities, is necessarily littered with falsehoods: ‘Pure from all moral turpitude, deception, though so frequently ... not being, unless by accident, the object of it, this falsehood ... notwithstanding all of those inconveniences of which in respect of clearness of conception it is so apt to be productive, is interwoven with the very essence of language’ (UC cii. 463). Again, Vaihinger and Fuller would agree, but here emerges the crucial difference between Bentham’s view and theirs, which concerns the degree to which, and the manner in which, such falsehood can be removed from language.

Because fictitious entities are not associated with images which correspond to substances, they possess no obvious shared meaning. Insofar as propositions including such entities can have any meaning, it is only a connection with real entities which can bestow it. Fortunately, such connections are available for the set of words (right, obligation, power, title) which constitute the currency of law, and Bentham’s method for explicating those entities, the combination of the processes of phraseoplerosis and paraphrasis, consists precisely in making those connections explicit. Taken singly, the name obligation has no referents in the external world, and means nothing. It is true that, as for all fictitious entities, any images associated with propositions employing its name derive from images of real entities in the external world, whilst those images are sometimes discoverable through a third process of archetypation, which in this case reveals the original referent of obligation in the image of a man tied up (Bentham, 1983, p. 272n). However, in order to make sense of the term, it is necessary first to

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3 In fact, Bentham offers more than one archetype for obligation (UC ci. 223 (1838-43, viii. 247)). Jackson criticizes modern commentators for overlooking archetypation as ‘an etymological fifth wheel
include it in a proposition (phraseoplerosis), and then to substitute for that proposition another which replaces the fictitious entity with a real one (paraphrasis) (UC cii. 217 (1838-43, viii. 246); UC lxix. 221; 1983a, p. 272n.). In the paraphrasis of normative abstractions, the real entities which do the heavy lifting are the sensations of pleasure and pain. Harrison notes that the difficulty involved here concerns the criteria according to which we are to conclude that the substituted proposition possesses the same meaning as the original (1983, p. 68), and concludes, quite correctly, that for Bentham it is simply impossible to compare the import of the two, since the first proposition, like the term itself, has no cognoscible meaning, but is simply nonsense. ‘The options are either nonsense or taking it to mean what the analysis says: there is no separate way of understanding it’ (Harrison, 1983, p. 72). Or, with Bentham:

Nothing has no properties. A fictitious entity, being as this its name imports—being, by the very supposition, a mere nothing, can not of itself have any properties: no proposition by which any property is ascribed to it can therefore be in itself and of itself a true one, nor therefore an instructive one: whatsoever of truth is capable of belonging to it can not belong to it in any other character than that of the representative of—the intended and supposed equivalent and adequate succedaneum of—some proposition having for its subject some real entity (UC cii. 217 (1838-43, viii. 246)).

Paraphrasis provides Bentham’s standard answer to Fuller’s question concerning the difference between good and bad fictions. All propositions concerning fictitious entities are, in Bentham’s terms, fictions—they appear to assert the existence of something which has no existence. However, paraphrasis offers the means to rehabilitate fictitious entities, by their exposition in terms of real entities. As will be discussed in § III, there are occasions on which Bentham allows for the utility on the coach’ (1998, 507–9). Bentham’s treatment of this subsidiary process is, once again, not entirely consistent. For an attempt to reconcile some of the inconsistencies, see Quinn, Michael (2012).

Similarly, ‘A proposition having for its subject the name of a fictitious entity is not clearly understood any further than as it can be translated into a correspondent proposition having for its subject the name of some real entity. Falsehood, then, or nonsense, is the only import, of which, abstractedly from all relations to any proposition having for its subject the name of some real entity, a proposition having for its subject the name of a fictitious entity is susceptible’ (1983b, p. 75).
of fictitious entities, and the fictions asserted in propositions containing them, which are not resolvable by paraphrasis, but on most occasions he insists that paraphrasis is the only route to making sense of fictitious entities (UC lxix. 221; UC ci. 217 (1838-43, viii. 246); 1977, p. 495n; 1983b, pp. 74–5; 1838–43, iii. 286, 594n), so that a good or useful fictitious entity is either one which can be explicated by paraphrasis, or a species of a generic fictitious entity which is itself capable of such exposition.

Fuller once more follows Vaihinger in recommending the deployment of fictions in the form of metaphorical representations, in full awareness that ‘the fiction must drop out of the final reckoning’ (Fuller, 1930–1, 895; see also Vaihinger, 1925, pp. 68, 69, 98, 104, 109, 177). This recommendation bears comparison with Bentham’s solution to the semantic problems arising from the fact that fictitious entities have no physical existence. For Bentham, if the fictitious entity has been successfully subjected to paraphrasis, there is in fact no need to eliminate it, as long as the speaker can supply on demand an exposition in terms of real entities (Bentham 1983a, p. 373). Paraphrasis rehabilitates fictitious entities precisely by eliminating the fiction—the assertion that the fictitious entity has real, independent existence—involving in propositions which contain them. One of Bentham’s early projects was to develop a lexicon of legal and political terms (Bentham, UC lxix. 134), the availability of which would save legislators from the requirement to replace all fictitious terms with their paraphrastic exposition every time they were used in law.

A significant disagreement between Fuller and Bentham appears when the former approvingly cites Holmes reference to the ‘metaphor’ by which “‘legal duty’ becomes simply “a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court’” (Fuller, 1930–1, 894–5). For Bentham, this is precisely not metaphor, but a less than perfect example of
paraphrasis, that is, the explication of the term legal duty by the provision of a phrase which refers—albeit only implicitly—to the real entity pain. Insofar as the notion of legal duty can possess any meaning at all, Holmes ‘metaphor’ has expressed it well enough. What Fuller takes to be a neglective fiction, a simplifying theoretical operation serving to focus investigation by ignoring all but one aspect of a phenomenon, Bentham views as delivering the truth—the observable, empirically testable truth—via the substitution of discussion of real entities for that of fictitious ones. For the most part, then, Bentham asserts that paraphrasis alone permits access to both meaning and truth in relation to fictitious entities, whereas for Fuller and Vaihinger, to believe that truth can be spoken in relation to fictions is to be committed to a fool’s errand.

It is a similar failure to take the slightest cognizance of paraphrasis (the complete failure, that is, to address Bentham’s apparatus for speaking truly or comprehensibly about fictitious entities) which undermines Stolzenberg’s interpretation (1999). As noted above, Stolenberg wastes no time in dismissing Bentham’s statements that real entities do exist, that truth can be spoken about them, on the basis that such statements are contained in passages which do not fit with Bentham’s core understanding. However, these statements by Bentham, and his assertion that the key to the legitimate use of fictitious entities lies in their explication in terms of real entities, are emphatically not contained in one or two passages, but constitute the bulk of the textual evidence. If Bentham thinks that there is no possibility of exchanging truth, why does he insist repeatedly that there is, straightforwardly in relation to real entities (1983b, p. 74; UC ci. 217 (1838-43, viii. 246); UC cii. 302 (1838-43, viii. 300); UC lxix. 241; 1838-43, iii. 189; 1838-43, vii. 81), and, in relation to fictitious entities, via their analysis in terms of real ones?
What is it that he thinks is gained by the process? Most tellingly, perhaps, if Bentham were to accept that there were no ontological distinction between real and fictitious entities, he would be denying to utilitarianism its most effective weapon in the struggle with competing moral theories. Thus the superiority of the principle of utility over its major competitor, the principle of sympathy and antipathy, or ipse-dixitism, consisted precisely in the reliance of its conclusions on matters of fact, that is, on the real entities constituted by pleasure and pain. To abolish the distinction between real and fictitious entities is to reduce Bentham, in his own terms, to just one more ipse-dixitist.

If fictitious entities are capable of rehabilitation through their connection with really existing entities, why does Bentham become so exercised about the use of fictions in law and politics? Fuller poses the question of how a lie, which even its purveyors admitted to be a lie, could deceive anyone, and thereby lead to the consequences which Bentham asserts to issue from its use (Fuller, 1930–1, 519). Isn’t Bentham simply being carried away by his animus against the legal profession, and investing fiction with a magical power which in fact it lacks?

In attempting to clarify the object and origin of his hostility, three different types of fiction will be distinguished, all of which Bentham would recognize, though for the most part he would avoid referring to the first type as ‘fictions’. First come the legal/moral fictitious entities, such as obligation and power, which Bentham and Fuller both believe to be utterly essential to discourse about law or morals. For Bentham, the meaningful use of this type of fictitious names is conditional on their capacity to be successfully paraphrased. For Fuller, they are useful neglective fictions,

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5 Of course, Bentham also recognizes the principle of Asceticism as a competitor, and one that also
the result of simplifying mental operations which actually make no claim to describe the totality of a particular phenomenon. Second come the procedural or linguistic expedients used by courts, for instance to bring particular cases within their remit. The rule of Roman Law which treated foreigners ‘as if’ they were Roman citizens, or the decision of a London court that Minorca was in London (Fuller, 1930–1, 376, 390), are classic examples of this type of sleight of hand. Finally, come what we might call theoretical fictions, and what Bentham would call fallacies, for instance the assertion that Common Law judges do not make law. Bentham’s critique of legal fictions leaves every ‘fiction’ of the first type which is capable of successful paraphrasis wholly unimpugned; but finds no more than, at best, a very temporary justification for the second type. Indeed, his chief interest in these fictions relates to the way in which they arise from, and in turn help to buttress, intellectual and linguistic practices which facilitate the deployment of the third type. It is against this third type, the theoretical fallacies, that he directs his most bitter criticism, and he does so because he believes them to be a serious danger to general well-being.

Thus, Bentham might point out that many legal fictions of the second type were in fact wholly unnecessary: what is the point of deliberately misdescribing reality when an accurate description is easily available? Such a critique might prove effective against many of the procedural fictions found in the common law practice of Eighteenth century England: why not simply change the law, where the law needed changing, without resort to the linguistic gymnastics which underlay ‘ejectment’ or ‘latitat’? Such a strategem might conceivably be justified on utilitarian grounds once, in an urgent case which required speedy adjudication, but its repetition simply encourages lawyers and judges to lie with a straight face. For Fuller too, ‘it seems allows the exchange of sense. However, in Bentham’s view, a proper understanding of the principle
exceedingly questionable whether it is ever truly convenient to employ a fiction where the judge introducing the reform can state the new rule in non-fictitious terms’ (1930–1, 524). As Bentham would argue, if the reasons for the decision are given, we can all make an assessment as to their quality, and therefore come to a judgment as to whether we are witnessing a justified extension of judicial competence or merely a power grab.

Fuller argues that many legal fictions arise from intellectual conservatism, from the judge’s attempt to fit new realities into a limited existing set of conceptual resources: ‘we find ourselves compelled to force new situations, which bob up out of the eternal flux of reality, into the confining framework of an existing intellectual apparatus’ (1930–1, 525). Bentham would agree that analogy was absolutely central to the development of human thought, and that our existing frame of reference determines the manner in which we assimilate new facts. Indeed, Bentham and Fuller use the same illustration, that of a first encounter with a horse by persons whose previous knowledge of large quadrupeds extended only as far as dogs, who initially assimilate the unfamiliar phenomenon to the existing category ‘dog’ (Bentham, UCCci. 335 (1838-43, viii. 266); Fuller, 1930–1, 892). However, while Bentham would also agree with Fuller on the need to attend to the motives operative upon the instigators and perpetrators of legal fictions, he would differ markedly in assigning the salient motives in the development of legal fictions of the second and third types detailed above.

For Bentham, the problem with fictions of these types arose from their use as a tool of misrule. The most plausible explanation for their prevalence lay in the commitment of common lawyers to the overarching fiction that the common law had can only result in its rejection (Bentham, 1996, p. 21).
existed unchanging since time immemorial, and that judges did not make law, but merely applied existing law. As Postema notes, Bentham’s core objection to common law was that it was a fictitious entity masquerading as law: a set of customary rules alterable at the will of judges, which did not satisfy the essential criteria for law, that is clarity, determinacy, authority and content (1986, pp. 295–9). Similarly, propositions about natural law were meaningless assertions about a non-entity, but the consequence of their deployment was to stifle investigation and debate. ‘The great mischief of the expression is that, by furnishing men with the semblance of a reason ready made, it prevents them from looking after a real one.’ (Bentham, UC lxix. 126) Fuller notes that a ‘fiction taken seriously, i.e. “believed”, becomes dangerous and loses its utility’ (Fuller, 1930–1, 370), while Bentham would argue that the overarching fictions about the status of common law, natural law, and original contract are often swallowed whole by the mass of the people, since lawyers and politicians use them as if they were true.

‘By fiction, in the sense in which it is used by lawyers, understand a false assertion of the privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true’ (1838-43, ix. 77). How can I expect compliance in acting on an assertion which I admit to be false? Bentham’s answer lies in the manner in which the faculty of judgment is subject to the influence of will: ‘Judgment, opinion, persuasion, is in a very considerable degree under the dominion of the will; discourse, declared opinion, altogether’ (1838-43, vii. 107). The powerful know that to determine the terms of discussion is to rule. The point of legal fictions, especially the grand substantive personifications of natural law and common

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6 Whereas Fuller imagines his hypothetical pattern-matcher as a small boy, Bentham relies on a reported classification by the inhabitants of Tahiti.
7 Note the considerable overlap between Bentham’s criteria for law and Fuller’s account of the inner morality of law (Fuller, 1964, pp. 33–94).
law, is to divert attention and sow confusion, and thereby to stifle investigation. Fuller compares fictions to temporary scaffolding supporting new developments in thought, and notes both that scaffolding gets removed once building work is complete, and that legal fictions, precisely because of their transparent falsity, are easily removable, so that their persistence can only be justified by ‘considerations of social and economic policy’ (1930–1, 529), that is, in Bentham’s terms, by their utility. For Bentham, the need for such scaffolding is at an end once the option between following a Benthamic path, and deploying fictitious entities only where they can be connected to real entities, so that sense can be effectively exchanged, is available. Further, there can be no lasting utilitarian justification for the fictions deployed by natural or common lawyers, since, in policy terms, they served only the sinister interest of the political and legal establishment. Instead, paraphrasis sets limits to the legitimate exercise of analogy:

At the age at which the world is now arrived, the mine of extraordinary cases ought to have been worked out: whatsoever cases have not yet happened to present themselves to the Judge, analogy, if diligently consulted, is ready to point out to the Legislator. Jurisprudence, the science of the blind, ought long ago to have been consigned to oblivion: it is a disgrace to the architect that rubbish and scaffolding should continue in any part to deform the building (UC xx. 91).

Thus judges and politicians can choose clarity over obfuscation should they be so inclined. They are not so inclined because constraining discussion within the realm of fiction buttresses existing structures of power, and prevents the application of attention to the reality of the situation (1838-43, vii. 107). Perhaps the most significant power wielded by judges and politicians is an epistemological power, a power precisely to supply the analogies by which the rest of us make sense of legal and political events. The immutable common law and the law of nature are pernicious fictions because neither is capable of paraphrastic exposition, while both serve to divert attention away from facts: ‘he who is completely master of men’s discourses, is
little less than completely master of men’s opinions’ (1838-43, vii. 108). Dominant discourses make everything which contradicts them unthinkable, while the fictional underpinnings of law and political theory render rational exchange concerning reality much more difficult: ‘Of moral science, the only true and useful foundations are propositions enunciative ... of facts; viz. of the existence of human feelings, pains or pleasures, as the effects of this or that disposition of law’ (1838-43, vii. 81n).

All our judgments are liable to be influenced by our perceived interest, while the ambiguity of language offers a means not only to conceal this influence from others (as in the case of sinister interest), or indeed from ourselves (as in the case of interest begotten prejudice), but to mislead others concerning the nature of their interests (as in the case of adoptive prejudice). Note that the evils of reliance on fictions are not limited to the deliberate deception of one set of people by another, but extend to self-deception on the part both of those who benefit from the fiction, and on the part of those who suffer from it, so that Bentham’s argument is more subtle than is usually allowed (See, for example, Jackson, 1998, 528). Since accuracy in judgment varies directly with attention (1838-43, vi. 226), it is the failure to examine the fiction, the failure to attend to the fallacious assumptions on which it is grounded, which explains these phenomena. Fictions which become embedded in our mental furniture prevent salient questions from occurring to us, so that we think under the direction of an unconscious self-denying ordinance. Malcolm Quinn argues that the central distinction for Bentham was not that between the real and the fictitious, but that between fact and fallacy (Quinn, Malcolm, 2011). There is abundant evidence, however, that for Bentham the latter distinction is derived from the former, since the appeal to ‘facts’ directs attention to evidence, and evidence consists in empirically verifiable propositions about the condition of real entities. The reason facts are facts is
that they are in principle verifiable, and that observation provides evidence of their existence. If I wanted to make assertions capable of truth as well as falsehood, I needed to refer to facts: ‘Truth can operate only by supporting evidence’ (Bentham, 1838–43, x. 146).

§ II. Facts and Opinions: Objectivity and Subjectivity in Bentham

It has been argued so far that Bentham appears committed to an ontological distinction between real and fictitious entities, which in turn commits him broadly to some kind of philosophical realism. His justification for seeking to purge legal and political discourse of those fictitious entities which were incapable of explication with reference to real entities, depended on the possibility of such explication with reference to many fictitious entities. It is time to note Bentham’s awareness of the difficulties involved in exchanging meaning through discussion of facts.

Bentham confidently identified the tools for the progressive unveiling of the world around us: ‘Experience—Observation—Experiment—Reflection on the results of each and of all together: these are the means, these are the instruments, by which knowledge, such as is within the power of man, is collected’ (UC ci. 183 (1838–43, viii. 238)). Bacon’s inductive method offered a means through which assertions and hypotheses could be tested, and thus offered the prospect of objectivity in the physical sciences: their empirical methods of verification generated knowledge. For Bentham, the same methods are capable of rendering morality equally a science. He viewed the binary opposition between pleasure and pain as the route to objective knowledge about human beings and the interactions between them. It was only by relating moral and political discourse to these real entities that it was possible to exchange meaning instead of nonsense, and it is by this route that morality is reduced to a matter of fact,
which is to say, becomes a science. For Bentham, all knowledge (of law and morality just as much as of physics) is ‘matter of fact’, while a facts is: ‘The existence of any expressible state of things, or of persons, or of both, whether it be quiescent or motional or both, at any given point or portion of time’ (UC cii. 301 (1838–43 viii. 300)).

Bentham early on detailed the morally relevant facts: ‘Now this matter of fact is no other than this: viz. the state of sensations, upon the commission of an act, of the persons within the circle of its influence: viz. of sensations, partly present, partly future in certainty, partly future in contingency, estimated all together at their present value’ (UC lxx. 22). Rules require reasons, while ‘a maxim, to be intelligible, must openly refer to, and ... be … justifiable by, a balance of utilities’ (UC lxx. 22). Without such comparison, morality and law are neither defensible nor comprehensible. When established on the basis of sensation, however, morality ‘is as strictly and properly a science founded upon experiment, as any branch of Natural Philosophy’ (UC lxx. 22).^8

The conclusions of any science are only as valid as the data, or with Bentham the facts, from which they are derived. Does moral reasoning permit certainty? ‘[T]he answer is plain, the same that those facts are in each case susceptible of, and none other’ (UC lxx. 23). Now the facts in question in moral reasoning are sensations, while ‘sensation is the highest evidence’ (UC lxx. 23). This looks like a promising start, but the disjunction between external reality and our perception of it gives rise to a series of potential pitfalls. First, as previously noted, perception itself often depends on judgment. ‘A judgment-involving perception is the perception of a relation: i.e. of

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^8 A scientific morality depends upon the discovery of a common metric for the quantification of pleasures and pains, and Bentham discovers his metric in the measurement of sensation, the value of which is either negative (pain) or positive (pleasure), and is the product of its intensity and its duration, discounted by its uncertainty and temporal distance, multiplied by its extent (1996, pp. 38–41).
the existence of a relation between some two objects’ (UC ci. 407 (1838-43, viii. 279)). The moment we do more than simply report the existence of a sensation, the moment, for instance, we endeavour to assert a relation of cause and effect between the sensation and some other object, the probability of error increases, because causation, like all relations, is a fictitious entity (UC cii. 460 (1838-43, viii. 330; and see ibid., vii. 83 n.)). The attribution of cause and effect is ‘a soil in which the greatest understandings have toiled with great labour and no fruit’ (1838-43, vi. 237). I have direct access to my own sensations, but in explaining them I make choices from a limitless range of potential candidates for my list of influencing circumstances.

Every body, it is plain, is a circumjacent body with respect to every other body; every event is a circumstance to every other event. The thread that links them together may, for aught we know, be the same for all. Every one may influence every other. If the fly that two minutes ago was perched upon the left hand page of the paper I am writing on had perched upon the right hand page, the Turkish empire might have been to have a different sovereign this day 500 years from him it will have (UC lxix. 174).

Second, if the inferences I draw from my own sensations can only be provisional, the caveat applies much more to the inferences I draw from what I assume to be the sensations of others (UC cii. 460 (1838-43, viii. 330)). In moral reasoning, the relevant sensations are not discoverable by straightforward introspection on the part of the reasoner, for the simple reason that they are not his sensations, but those of other people (UC lxx. 23). Since all legal and moral reasoning beyond the purely prudential concerns the sensations of others, to which I have no introspective access, I should be cautious in attributing sensations, and doubly so in attributing their causes (Bentham, UC cii. 71 (1997, p 146; 1838-43, viii. 210)).

Third, in any project of rule-making, the sensations in question do not simply exist outside the direct introspective experience of the rule-maker, but do not exist at all: they are ‘no more than a presumption of what would be the sensations, in a case
which is not present, of other men’ (UC lxx. 23. Emphasis added). Rule making operates in the subjunctive rather than the indicative mood. The pains and pleasures which form the basis of calculation are putative, constituted by predictions of sensations which do not yet exist, and are not present to me, but are the product of my beliefs about the probable future, and thus literally figments of imagination. On what does the decision-maker base his predictions of sensation? ‘upon recollection, observation and analogy—recollection of one’s own sensations upon past occasions—observation of the conduct of others—analogy according to which such conduct … is presumed to originate from like sensations as those which give birth to the same conduct in ourselves’ (UC lxx. 23). To aid him in his efforts, he has first his lived experience, mediated by memory; second, the observed behaviour of others; and third, the pattern-matching faculty of analogy.

Although recollection, observation and analogy ‘are the very grounds (and the only ones we have) of conduct which are universally received as sufficient for the most … important concerns of common life’ (UC lxx. 23), when we undertake the process of estimating the value of ‘sensations, partly present, partly future in certainty, partly future in contingency’, we are all too likely to get it wrong:

These observations of experience may be erroneous, [they] may be incomplete, though just: the analogy binding together the experiences and observations, according to which the sensations of others are presumed to be what we remember our own to have been in cases similar, though true as to the kind of those sensations, may be erroneous as to their degree (UC lxx. 23).

Thus we rely on our memories and on second hand data, both of which may be inaccurate; we are prone to leave out of the account some sensations without which our calculation is incomplete; we become confused in making analogies and attributing causes, so that we mistake irrelevant circumstances, and even obstacles, for causes (Bentham, UC cii. 71 (1997, p. 146; 1838-43, viii. 209)); finally, we choose
appropriate analogies, but we err in estimating ‘degree’, that is, we assess the intensity of the relevant sensations incorrectly.

Concern about the accuracy of such judgments is strengthened by Bentham’s recognition that moral and legal reasoning has a serious disadvantage as against natural philosophy, which is that in this field fundamental and conflicting interests are at stake, so that ‘the judgment is in a peculiar degree liable to be disturbed and led astray by the several sources of illusion:—by original intellectual weakness—by sinister interest—by interest-begotten prejudice—by adoptive prejudice’ (Bentham, UC cii. 71 (1997, p. 146; 1838-43, viii. 210)). Human beings develop their ideas within a network of power relations which limit choices and ground thought. They are historically and concretely situated in particular positions within overlapping networks of influence and power. They are empiricists—experiencing sensations, developing hypotheses of cause and effect, and modifying them once falsified—but they interpret the world with the tools made available to them by their particular language, and by the habitual ways in which they put that language together, in an arena where the accurate construction of meaning through the assertion of significant relations between real entities is vitiated by the weight of prevailing conceptual presumptions and prescriptions, themselves fictitious and fallacious constructs, which often falsely assert the reality or salience of non-entities, and deny the reality or salience of real sensations, and of the connections between them.

In exchanging meaning through discourse, what we actually exchange is information about the state of our or opinions, our judgments, and, centrally, the degree of confidence with which we assert those opinions and judgments: ‘when information is professed to be given, judgment, vis. the judgment existing or declared to exist concerning the matter in question in the mind of the alleged informant, is the
utmost that in truth is communicated’ (UC cii. 203). As Schofield puts it: ‘A statement about what existed in the physical world could not be separated from a statement about what was believed to exist’ (2006, p. 18; see also Postema, 1983, p. 53). While human beings could believe things about the world and communicate that belief to others, absolute knowledge was incompatible with human experience.

‘Certainty, absolute certainty, is a satisfaction which on every ground of enquiry we are continually grasping at, but which the inexorable nature of things has placed for ever out of our reach’ (1838-43, vii. 105). The statement ‘I am certain that ...’, communicated the highest degree of subjective conviction, but the predicate, being derived from the doubly fictitious entity ‘certainty’, \(^9\) asserted a falsehood, which was corrected by reframing the statement in terms of belief: ‘I believe as strongly as it is possible for me to believe that ...’. Similarly, the assertion that something was impossible could only be sensibly interpreted as an assertion that the speaker considered that thing to be unlikely in the highest degree (1838-43, vi. 46).

Instead of the reductionist Gradgrind insisting on nothing but facts, lacerated by Dickens in *Hard Times* (1995), we seem close to a subjectivist and constructivist Bentham for whom facts, whilst existing, are never completely knowable, and for whom belief seems the irreducible and inaccessible product of esoteric psychological processes. However, whilst it is true that Bentham relied on a subjectivist epistemological model, he also asserted that opinions, and the judgments which underlay them, were capable of rational assessment. For instance, individual assessments of the probability of an event’s having occurred are, for Bentham, simply statements of the individual’s persuasion or belief that the event did occur. As reports

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\(^9\) Whilst all qualities are fictitious entities, that is, have no existence outside the particular entities in which we speak of them as being ‘lodged’, the concepts of, for instance, certainty, impossibility, probability and necessity are doubly fictitious in that they are not properly ascribed to any really existing entities (Bentham, UC cii. 75–6 (1997, pp. 152–4; 1838-43, viii. 210–11)).
of the internal state of the individual mind, they are infallible, at least so long as the individual is being honest, and his faculty of introspection is functional. However, this emphatically does not imply that every individual’s assessment of probability is equally valid, because assessments of probability depend upon evidence, and evidence is ‘any matter of fact, the effect tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact’ (1838-43, vi. 208). Once more, the introduction of facts—‘the existence of any expressible state of things, or of persons ... at any given point or portion of time’—provides an escape route from terminal relativism. We cannot simply choose to believe whatever we like, since, given full attention, the faculty of understanding is governed by evidence.

Now, what is in man’s power to do, in order to believe a proposition, and all that is so, is to keep back and stifle the evidences that are opposed to it. For, when all the evidences are equally present to his observation, and equally attended to, to believe or disbelieve is no longer in his power. It is the necessary result of the preponderance of the evidence on one side over that on the other (1838-43, x. 146 (emphasis added); see also ibid., vi. 18 n.).

For Bentham, ‘A Belief is an act of the Judgment’ (Bentham, UC lxix. 133), while judgments about facts do admit of meaningful and rational assessment. Whilst absolute certainty is incompatible with human existence, what Bentham calls ‘Practical certainty, a degree of assurance sufficient for practice’, is not (1838-43, vii. 105). How can humanity approach toward practical certainty? We fall back on the basis of all knowledge: experience, observation, experiment and reflection. Essentially, we undertake an ongoing process of mutual checking, and we learn from our mistakes. We can be fairly confident, for instance, in regarding as improbable the existence of reported ‘facts’ which appear ‘contrary to the order of nature’ (1838-43, vii. 83). ‘The better acquainted we are with the course, the ordinary course, of nature, the better qualified we are, of course, for judging whether a given fact be conformable
or unconformable to it’ (1838-43, vii. 94). We may not all be skilled natural
philosophers, but we can all purchase publications dealing in the subject and adopt
their opinions, subject to our persuasion of the validity of that opinion. Centrally,
human wisdom grows with experience. As far as the natural world is concerned,
Bentham’s close to absolute persuasion of the correctness of Newtonian physics looks
a little optimistic to twenty-first century eyes—no quantum uncertainties for him—but
his general point, that human knowledge increases as human experience—and access
to reports of, and reflections on, that experience—increases (1838-43, vii. 92), is
surely more that just an enlightenment prejudice.

Since, given adequate attention and a desire to uncover the actual state of
things, judgment depends on evidence, Bentham is also committed to the view that
the presentation of identical evidence to a plurality of persons with broadly similar
levels of knowledge and probity should issue in a tendency to agreement between
those persons. As Postema puts it, Bentham’s account of probability is not radically
relativist because ‘given the same store of background beliefs regarding the ordinary
course of nature, people would make the same assignments of probability’ (1983, p.
60). Postema argues, quite correctly, that nothing in Bentham’s subjectivist
epistemology supports such a conclusion, which requires a separate premise akin to
what Cohen calls ‘universal cognitive competence’ (1983, pp. 1–21). There is ample
evidence in Bentham’s writings that he, in company with many Enlightenment
thinkers, did subscribe to such a premise (Bentham, 1977, p. 441). Indeed, without
such an egalitarian premise, Bentham’s entire rationale for representative democracy
collapses.\(^{10}\)

\(^{10}\)Note that Bentham’s qualification for the franchise was in large part a cognitive one: literacy. Access
to written language is access to both statements of government and the opinions of others. For Bentham
the premise represents a valid empirical generalization, to which there will be exceptions. Thus general
cognitive competence underpins Bentham’s political economy, which is driven by individual
§ III. The useful or the true?

Fuller echoes Vaihinger in noting the way in which human minds, and human languages, cannot simply mirror the external world, since such a mirroring would be simply chaotic: ‘If we dealt with reality as it is, in its crude, unorganized form, we should be helpless’ (1930–1, 886). If truth is equivalent to exact correspondence with reality, then the expectation that human beings can deal in truth is simply a false one, since in the very act of describing reality we alter it (1930–1, 885). As noted above, Bentham too is acutely aware that in its efforts to describe the physical world, human thought, and its instrument language, actively construct a purely mental model of the world. He recognizes that basic categories of human thought (matter, form, quality, quantity) are indeed fictitious entities. He gives an extended parable of the way in which thought deconstructs (analyses) external reality in creating logical, but fictitious qualities, and then reconstructs (synthesises) it, in accordance with concepts and the organization thereof, which are its own, fictitious, invention (1983, pp. 261–73), thus recognizing that, even in the description of real entities, thought alters reality by imposing classificatory schemes and concepts which are the product of human artifice. The question, however, remains, do these constructivist elements render Bentham a fictionalist?

Fuller applies a thoroughly pragmatic criterion in assessing the worth of scientific fictions. He adopts Vaihinger’s description of the two tasks of science: ‘1. to determine the actual sequences and co-existences; 2. to give the ideas with which we

perception of individual interest: I can only know my interest if I can make reasonably accurate assessments of the probable consequences of the options before me. As he notes in comparing the indigent man with his more affluent fellows: ‘He knows what is his interest as well as they do, and is as well disposed and able to pursue it as they are’ (1787, p. 33 (1838–43, iii. 7)). In his poor law writings, Bentham asserts that a minority of the indigent have an erroneous conception of their interests, but this
Invest reality a more concise, more adequate, more useful and more harmless form’ (Vaihinger, 1925, p. 67; Fuller, 1930–1, 886). The first task is impeccably realist, since Vaihinger, like Bentham, asserted the reality of the external world: ‘The only thing that is real and will remain real is the observable unchangeability of phenomena’ (Vaihinger, 1925, p. 124). However, the second task is wholly pragmatic, and human creativity is central to its successful completion, by developing theoretical concepts which link observed phenomena together in fruitful ways. Postema notes that Bentham’s logic too is entirely pragmatic in origin (1983, p. 50), and without doubt Bentham was committed to evaluating everything according to its consequences. For him, the confusion in language arising from the necessary use of names of fictitious entities in law has had appalling consequences, while his method for the ascription of meaning is capable of preventing such consequences in future. The pragmatic necessity to impose order on the potential chaos of reality demands the invention of a host of fictitious entities which are essential to interpret reality in all areas of life. Logic provides a method for ‘giving, to the best advantage, direction to the human mind, in its pursuit of any object or purpose’ (UC ci. 92 (1838–43, viii. 219)), while the end of logic, as of all rational action, is well-being. Bentham then, explicitly subjects all knowledge to utilitarian evaluation (UC ci. 153 (1838–43, viii. 233)), but clearly differentiates between truth and utility, and identifies truth with ‘the knowledge of what facts really did exist’ (1983b, p. 354).

Fuller comments that the ‘lack of a physical counterpart for our intellectual processes is the thing which has led us to call our ideas “false”. But whence comes this notion that our ideas must have physical counterparts in nature?’ (1930–1, 885). The first part of this quotation in fact summarises a main premise of Bentham’s logic,

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assertion is always accompanied by the attribution of the error to a lack of education (2001, pp. 85,
while he would be puzzled by the question, since the lack of counterpart in nature constitutes precisely the characteristic which differentiates fictitious entities from real ones: things ‘which do exist may be said to have their archetypes in nature: those which do not exist may be said not to have their archetypes in nature.’ He would however, agree that the non-existence of fictitious entities by no means implied the necessity to remove them from language. The central fruit of his own logic was precisely a method for eliminating the falsity, indeed the incomprehensibility, involved in the use of central legal concepts which do not correspond to things. For this reason, Bentham could not endorse Fuller’s dismissal of the distinction between ‘fact’ and ‘theory’ as superficial: “‘Facts’ are only those thought constructs which are useful for so many purposes and are so commonly accepted that no one doubts their “existence” or “reality”” (1930–1, 908). This definition of facts, or in effect, the wholly constructivist denial of their existence, might seem to Bentham either vacuous or vicious, exactly, in fact, like a fiction.

For Lee, Bentham’s inductivist commitment to the reliability of sense experience as a guide to reality constitutes the central difference between his thought and that of Vaihinger. On this account, Bentham simply refuses to abandon the search for facts: ‘What is true has its basis in reality or may be said in some way to be a reflection of it’ (Lee, 1990, p. 108). Vaihinger and Fuller, then, err in jettisoning the idea of truth understood as correspondence to external reality. For Vaihinger, as for Bentham, we find ourselves surrounded by a world that is real, and to which our access is mediated by sensory data which provide which both starting point and terminus for all logical activity (1925, pp. 4–5), while even Vaihinger accepts the reality of empirically verifiable experimental and observational data (1925, p. 68).
Good theoretical models produce accurate predictions of such data, so that the
criterion of a good model is entirely pragmatic: good models are good guides to action
(Vaihinger, 1925, p. viii; Fuller, 1967, p. xi). If such fictionalism does deliver such
useful predictions, it is legitimate to ask on what basis Bentham could possibly reject
it, especially given his recognition of the inescapably figurative nature of much
language. Nevertheless, as the bulk of the above discussion bears witness, he seems to
do just that, in his insistence that only through paraphrasis is the route opened to truth
and meaning in relation to fictitious entities. Rosen recognizes the tensions in
Bentham’s views, and declines to endorse either a fictionalist or a realist reading,
noting however, that insofar as he believes paraphrasis uniquely capable of delivering
truth in relation to fictitious entities, Bentham sounds very like a reductionist realist

In essence, it all depends on what Bentham means by translating ‘figurative
language into language without figure’, or by the fictitious having its ‘necessary root’
in the real (1838-43, iii. 181; 1983a, p. 75). If it means simply that the employment of
the fictitious entity in a theoretical model gives rise to predictions about the condition
of real entities, which can be corroborated by observational data, Bentham might
plausibly be read as a proto-fictionalist. However, if Bentham’s repeated claims for
paraphrasis are taken at face value, and fictitious entities incapable of successful
paraphrasis are thereby illegitimate, he is no fictionalist, but cleaves to truth
understood as the accurate description of reality. Considerable textual evidence for the
realist interpretation has been adduced above, but there is some textual support for the
alternative, since there are occasions on which Bentham does seem directly to
anticipate key elements of Vaihinger’s account of fictions. Thus, he consistently
recognizes that the concepts used in geometry (line, point, circle) are fictitious, that is,
lacking referents in the world (1983a, pp. 346–8), and that mathematics while thus not
‘true’, remains extraordinarily useful, thanks simply to resemblance of those concepts
to real phenomena. More tellingly, in discussion of Newtonian fluxions, he explicitly
recognizes that the self-conscious employment of a fiction can lead to the acquisition
of new knowledge (1983a, pp. 370–1; and compare Vaihinger, 1925, pp. 60–1). His
insistence in such cases is ‘not that no such fictions ought to be employed, but that to
the purpose and on the occasion of instruction, whenever they are employed, the
necessity or use of them should be made known.’ (1983a, p. 371). Finally, in his
universal grammar, Bentham defines non-figurative language not as language without
figure, since almost all language is figurative, but as language ‘in which, for the
conveyance of the immaterial part of the stock of ideas conveyed, no other fictions—
no other figures—are employed than what are absolutely necessary to, and which
consequently are universally employed in, the conveyance of the import intended to
be conveyed’ (UC cii. 466 (1838-43, viii. 331)). These examples do appear to open
methods other than paraphrasis for the rehabilitation of fictitious entities: they can be
justified by necessity (we simply cannot speak without them), and by utility (they
allow us to calculate right answers to problems which were previously insoluble).

There is no obvious reconciliation between these two views, both of which
Bentham expresses. It is possible, however, that Bentham believed different attitudes
to fictions to be appropriate in different contexts. Thus, paradoxically, but on
impeccable utilitarian grounds, he might well endorse Vaihinger’s fictionalism in
natural, but not in legal science. If fictional theoretical constructs like gravity, atoms,
and the rest generate models, and thereby predictions, which are testable by the
observational data, and which are flexible enough to be revised when the
observational data contradict them, what does it matter that the concepts which make
up the model do not actually exist as real entities? However, in the area of Bentham’s primary interest, morality and law, he believes that the investigation-stymieing consequences of deference to unparaphrasable fictions has been a disaster, and that, therefore, a thorough revision of language is urgently necessary. That revision takes the form of interpreting the fictitious entities in which legal discourse abounds in terms of real entities, and specifically the entities of pleasure and pain. Such a revision would at once produce significant progress toward truth (understood as accurate reference to that which exists), and an equally significant gain in utility, since, in this sphere at least, truth and utility stand or fall together. Ultimately, it is the rooting of utility in the real entities of pleasure and pain, that is to say the exposition of the fictitious entity utility in terms of alleged facts which are themselves capable of empirical verification or falsification, which bestows all the utility on the term ‘utility’. In morals at least, then, he would endorse Lee’s reading that there can be no conflict between truth and utility, because only the true can in fact be useful: ‘Any construct, which itself does not refer to a real entity and is not reducible to others which do, is bound to lead to disutility’ (Lee, 1990, p. 204).

\[\text{11 ‘By utility is meant that property in any object, whereby it tends to produce … pleasure … or … to prevent the happening of … pain … to the party whose interest is considered’ (Bentham, 1996, p. 12).}\]
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