

1-1-2010

Is the Law Hopeful?

Annelise Riles

Cornell Law School, ar254@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/clsops_papers



Part of the [Jurisprudence Commons](#), and the [Legal History, Theory and Process Commons](#)

Recommended Citation

Riles, Annelise, "Is the Law Hopeful?" (2010). *Cornell Law Faculty Working Papers*. Paper 68.
http://scholarship.law.cornell.edu/clsops_papers/68

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Working Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Is the Law Hopeful?

Forthcoming in H. Miyazaki and R. Swedberg, *Hope in the Economy*

Annelise Riles

One of the central concerns of hope studies is the problem of living with, or under capitalism. Genda Yuji draws attention to the difficulties people of various ages face to find the motivation to continue to act as economically productive units within society (Genda 2005). Gassan Hage describes a moral crisis in ordinary people's lives surrounding how to respond to the triumph of capitalism (Hage 2003). Naoki Kasuga analyzes the "freeter problem," in which Japanese young people refuse to join the full-time labor force, as a new kind of resistance which is incomprehensible within both the framework of capitalism and its critiques (Kasuga, this volume). Hirokazu Miyazaki considers how such diverse subjects as Japanese traders, Fijian villagers and social theorists find the hope to continue in their respective roles in the global capitalist system (Miyazaki 2004; 2006).

One common way of describing this problem is to say that what is at stake is the instrumentalization of agency: human agency is rendered, within the capitalist system, as mere instrument. In the hope studies literature, the problem is more often described as an intellectual, moral, or political crisis in which something that once could be assumed or taken for granted, such as workers' faith that a life-long commitment to their employment will be justly rewarded, has now been lost. Hence people are disempowered not simply by outside forces but internally, by virtue of the fact that they have lost the energy or the motivation to go on.

As I understand it, one of the defining aspects of hope studies is that it addresses the current moment explicitly in two dimensions at once: on the one hand, it aims to describe the conditions of others' hope. On the other hand, it aims to produce the conditions for scholarly

hope, that is, to replicate others' hope on an academic terrain in which there is a parallel loss of confidence in the foundations and mission of social theory (Miyazaki 2004). By focusing on the linkages between the problems of people in the world and of scholars in the academy, the hope studies project also highlights the way the over-instrumentalization of the social sciences shuts down many of the most challenging questions before they can be answered. Hence hope studies scholars have shown interest in fiction as both a source of material about hope and as a model for hopeful scholarship. Both Genda and Miyazaki draw inspiration from the work of the novelist Ryû Murakami (1977; 1995; 2003; 2006; 2007), and in his larger project, Naoki Kasuga has written extensively about crime fiction (e.g. 2005).

It is comparatively interesting that law as a discipline has suffered no crisis on par with the crisis of social theory described by Hage and Miyazaki, and legal actors face no momentous problem of how to go on, on par with those faced by the social actors studied by Genda, Kasuga and others. This is despite generations of sophisticated efforts to create legal crisis through critiques of the way law, as an instrument of capitalism, embodies and perpetuates social inequality (Friedman 1973), for example, or, critiques of the indeterminacy of legal doctrine—the fact that it can be used to produce or justify any outcome and hence gives legal actors no guidance about how to decide at all (Unger 1986). Perhaps most directly relevant to the concerns of Professors Genda and Kasuga is the boredom that some critical legal scholars have expressed about legal argumentation. These scholars argue that they can no longer generate in themselves the enthusiasm to participate in the endless repetition of the same battery of arguments, the same playing out of old political and doctrinal positions (Kennedy 1997; Schlag 1995). One could say they are the freeters of the legal academy.¹ But despite these small pockets of freeterism, what is more surprising about law, given its close relationship to the social

sciences and humanities, and given its location at the heart of capitalist instrumentalism, is that there is not more exhaustion, more loss of hope.

Could we then talk about law as a hopeful discipline? It depends on the definition of hope we adopt. Law is certainly not hopeful in the sense described by Richard Swedberg, of a “wish for something to come true” (Swedberg, this volume). Indeed, law’s ability to deliver on specific promises of social change has been famously described as “hollow hope” (Rosenberg 1991). If lawyers hope, they do not hope *for* something so concretely and instrumentally defined. As I have argued elsewhere, their knowledge is not oriented toward an outside target in that way, even when it purports to have a specific aim such as social change or economic growth or the rationalization of government resources in mind (Riles 2004).² Law certainly is also not hopeful if we have in mind Jonathan Lear’s notion of “radical hope” (Lear 2006); there is nothing very radical about law at all. It is a much more mundane, ordinary technology than this. If we take Genda Yuji’s understanding of hope as an attribute or asset of persons, likewise, I doubt we can speak of law as hopeful since, as we will see, the “ability to go on” is understood as much as an attribute of the techniques of law itself as of the lawyers who deploy them. But if we adopt Miyazaki’s definition of hope as the “reorientation of knowledge” (2006: 149), described further below, I believe we gain a useful vocabulary for understanding the power of legal practice, as well as an agenda for replicating that power on other intellectual terrains.

As it turns out, fiction is not something external to law, but a core device of law itself. Examples of legal fictions would be the treatment of the corporation as a person, or the common law doctrine of coverture, which held that at marriage a wife merged into the person of her husband. In the standard definition, a legal fiction is a factual statement a judge, a legal scholar or a lawyer tells, while simultaneously understanding full well –and also understanding that the

audience understands—that the statement is *not fact*. As Lon Fuller put it, a legal 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 1930a: 369). A legal fiction is not a lie because “it is not intended to deceive” —it is *known* by all who use it to be false (Fuller 1930a: 367). It differs from a hypothesis for Fuller because there is no question of proving its truth.³ This also distinguishes a legal fiction from a legal presumption which at least takes the form of a statement that can be rebutted.⁴

Some legal theorists now suggest that legal fictions, far from just helping to order social, political or economic phenomena, actually constitute those phenomena by providing the frames through which social actors apprehend social realities. For example, Yan Thomas’ research into the techniques of legal fictions for managing inheritance funds in Roman law shows how “facts” such as whether there was a death, or indeed whether there was a corpse, were matters produced internally by legal argumentation, even as that argumentation itself turned on a divide between matters of fact and matters of law: “Ce pouvoir--pouvoir de commander au réel en rompant ostensiblement avec lui--gouverne à mon sens la compréhension que nous devons avoir du *ius civile* antique” (Thomas 1995: 20). As Geoffrey Samuel (2004: 46) puts it, “What is ...interesting ... is the extent to which models of traditional legal concepts act as schemes for constructing the objects of legal science.” He gives the example of categories such as “person,” “damage,” “thing” and “fault” which the law treats as facts, and which social actors treat as social categories, but which are actually legal categories. Samuel terms these categories “virtual facts” because “they are factual modes which transcend actual factual reality. Some kinds of damage may not amount to ‘damage,’ while some types of things may not amount to a ‘thing.’” In sum,

The idea that legal science is a discourse that has its object in actual factual situations is to misunderstand, fundamentally, legal thought. ...[Law] functions as much within the world of fact as within the world of law and it is this dual role that endows it with its capacity to create virtual facts. Lawyers, like scientists, do not work directly on reality but construct rationalized models of this reality, and it is these models that become the 'objects' of legal discourse (Samuel 2004: 74).

The debate about legal fictions in legal studies then is not so much about how to go on once what has long been assumed is lost, as in hope studies, but rather, how does something come to be assumed in the first place, and what is the epistemological and political status of the assumption? What are the techniques and sources of authority that bring those assumptions into existence and allow them to carry on, as they pass from one lawyer's hands to another? In other words, what legal fictions help to bring to light is the technical source of law's agentive power. What this may contribute to the conversation about hope, in turn, is to rephrase concerns about conditions of powerlessness under capitalism as a challenge to replicate the power of hope itself.

Let me begin from a more straightforward place, however, with the question of the epistemological status of fiction in law and how it might speak to concerns about the over-instrumentalization of the capitalist world.

As If Instruments

The legal fiction has been the subject of a longstanding jurisprudential debate. Some ardently defend the legal fiction as the very engine of progress in the law. Sir Henry Maine, for example, celebrated the contributions of legal fictions to the evolution of law from Roman times to the present. For him, legal fictions were one of three key institutions, alongside courts of equity and legislatures, by which the law evolved in order to keep up with changes in society (Maine 1864).⁵ The legal fiction has had equally powerful adversaries. Jeremy Bentham, for example considered it the very opposite of ethical, transparent government. In this view, the

legal fiction is a device used by lawyers to pull the wool over everyone else's eyes, on the way to furthering their own class interests. If lawyers wished to change the law, in his view, they should do so through their legislature, where the public has at least some degree of access, instead of with a lawyerly wink and a nod:

It has never been employed to any purpose but the affording a justification for something which otherwise would be unjustifiable. ...It affords presumptive and conclusive evidence of the mischievousness of the act of power in support of which it is employed. ...In every case, and throughout the whole field of government, these instruments of mis-rule have had, as they could not but have had, for their fabricators, the fraternity of lawyers" (Bentham and Bowring 1843 Vol IX, pp. 77-8)

Bentham's position has many contemporary advocates. The constitutional theorist Cass Sunstein, for example, has plainly argued that we need "principles, not fictions"—that legal fictions are "unhelpful and in fact harmful to legal reasoning and results. Fictions are not indispensable. The law would be better off without any of them" (Sunstein 1990:1256). But for others, the fiction captures something paradigmatic about the nature of law itself. As the legal realist Jerome Frank put it, on his way to a critique of what he viewed as the dogmatism of legal formalism,

What, with unfortunately few exceptions, judges have failed to see is that, *in a sense, all legal rules, principles, precepts, concepts, standards--all generalized statements of law--are fictions*. In their application to any precise state of facts they must be taken with a lively sense of their unexpressed qualifications, of their purely "operational" character. Used without awareness of their artificial character they become harmful dogmas (Frank 1970 (1930): 179).

What is at stake in this debate over creativity versus obfuscation is a certain epistemological subtlety about the legal fiction. One early attempt to theorize the epistemological foundations of legal fictions, Hans Vaihinger's *The Philosophy of "As If"* (2001 (1924)), has inspired generations of legal theory.⁶ Vaihinger's larger argument concerns the use of what he terms "As ifs," in all aspects of knowledge, from mathematics to economics to religion. An "As if" in Vaihinger's terms is knowledge that is consciously false, and hence for

this very reason is *irrefutable*. Vaihinger draws attention to the delicate epistemological stance of the “As if”—to its subtle, ambivalent, “tension.” The “As if” is *neither* true nor not true, he insists, but rather is itself the tension between what is true and not true. It is this tension, for Vaihinger, that it is the fountain of all growth in knowledge:

The ‘As if’ world, which is formed in this manner, the world of the “unreal” is just as important as the world of the so-called real or actual (in the ordinary sense of the word); indeed it is far more important for ethics and aesthetics (Vaihinger 2001 (1924): xlvii).⁷

Vaihinger calls for remaining open to what he terms the “As if” quality of knowledge rather than critiquing its distance from reality: “We can only say that objective phenomena can be regarded *as if* they behaved in such and such a way, and there is absolutely no justification for assuming any dogmatic attitude and changing the ‘as if’ into a ‘that’” (2001: 81).

If the problem hope studies responds to, then, is a condition in which the longstanding presumed bases of life and work to which social actors are committed—intellectual and otherwise—no longer hold, then the legal fiction represents a different kind of commitment in the first place, neither belief nor disbelief. After all, it is not a presumption but a fiction. And indeed, Vaihinger’s tarrying toward the subjunctive of knowledge makes him an ideal talismanic figure for humanistic attempts to dislodge certain kinds of empiricist claims in the social sciences. In this view, the world of the unreal is just as important, just as true, as the world of the real. For example, Edmund Leach, drawing on Vaihinger, indexed his own commitment to theoretical models that he were admittedly “unreal” and “static” with the provocative phrase, “as if” (Comaroff 1992: 23; Leach 1982; 1954), and the anthropologist Roy Wagner picked up on the phrase As If, and on Vaihinger’s work on the nature of analogy, as fiction, to refer to ethnography as a wider analogical task of seeing one thing as if it were another (Wagner 1986: 9).⁸

For social theorists, the “As if,” like the turn to hope, has been seen as a position that affords a certain pause from the instrumentalism of social analysis. Although I join those who embrace Vaihinger’s text for its hopeful reorientation of social scientific knowledge, there is a curious omission from these anti-instrumental readings of Vaihinger: For Vaihinger, the As if, or the fiction, is at its core always and only a *means to an end*: “Thought, then, must be regarded as a mechanism, as a machine, as an instrument in the service of life” (Vaihinger 2001 (1924): 5).⁹ It is on precisely this point, moreover, that lawyers have embraced Vaihinger. Vaihinger’s insight about the instrumental nature of subjunctive truths crystallizes a kind of commonsense among lawyers: the particular character of the legal fiction as an assertion of what is understood always already to be false is that it is an *explicit instrument*, a device with a clearly defined purpose, *a means to an end*. For Maine, for example, legal fictions, as tools of particular judges working out individual cases, serve the larger social and historical purpose of legal reform. For Bentham, in a converse way, although legal fictions may advance the interests of individual litigants, the problem with legal fictions is not their epistemological status but rather the fact that they serve no larger social purpose: “[The fiction] has never been employed but to a bad purpose. It has never been employed to any purpose but the affording a justification for something which otherwise would be unjustifiable” (Bentham and Bowring 1843: Vol. IX p.77). The two agree in other words on the purposeful quality of the fiction; they disagree only on whether the ends justify the means.

The fiction’s status as a relation of means to ends is central to lawyers’ own complicated and delicate epistemological and ethical commitments, therefore. Lon Fuller focuses on the legal fiction’s tool-like quality when he argues that at least one purpose of the legal fiction is as technical abbreviation, a “convenient shorthand” (Fuller 1930b: 517), a marker or place-holder

for the points at which legal thought reaches the limits of its own capacities. When a judge adjudicating a dispute between divorcing spouses over how to treat frozen human embryos resolves to treat the embryos as “quasi-property,” for example, is not as much to imagine them as actually part human and part property as to create a placeholder for the fact that *we do not yet know* how to imagine embryos in relationship to existing legal categories of person and property and to solve a practical dispute. The legal fiction is an instrument for getting over these kinds of humps—a tool for leap-frogging over our own conceptual limitations, he argues. Nomi Stolzenberg, drawing on psychoanalytic theory, updates Fuller by presenting the legal fiction as a tool for dealing with anxiety surrounding the inherent uncertainty in the world (her example is uncertainty about paternity) by foreclosing factual inquiry (2007: 343).

So the first contribution of a study of legal fictions to hope studies might be to redirect our attention away from efforts to escape capitalist instrumentalism and towards the hopeful quality of instrumentalism itself. And indeed, if the *As if* is something akin to hope, there is evidence that it pervades the very capitalist institutions that some take as the source of global hopelessness. As one of the grandfathers of international economic law long ago insisted, the international economic order is an “as if” economic order (Röpke 1954: 227). Legal actors who participate in the global financial markets must also be their proponents, for private governance is understood by its proponents to be a fragile project. The ultimate concern of international economic law is how to *build* an “economic order”—it does not “exist” at the outset. As Hannoun (1995: 84) points out, the proliferation of fictions of all kinds in economic law is particularly interesting because this is a field in which, according to its own ideology, the law should mirror reality. In fact, Hannoun argues, the legal fictions of economic law show less concern with the adequation of law and reality than with intervening technically in economic

realities, to achieve certain objectives.¹⁰ In other words, economic law is less concerned with mirroring reality than it seems. What the legal fictions of international economic law foreground in Hannoun's terms are not economic "realities," but the effects of legal practice ("effets de la pratique") (1995: 93). The As If quality of global capitalism, moreover, depends on the As If quality of legal knowledge.

Reorienting Legal Knowledge

But the motivation for this essay is the implications of Miyazaki's idiosyncratic definition of hope for an understanding of legal knowledge. In his argument, every kind of knowledge has what he terms, a "directionality." Social actors' implicit or explicit appreciation of the directionality of their knowledge leads them in turn to seek to "reorient" it, and this ability to see the potential for reorientation in one's knowledge is what Miyazaki terms "hope" (whether it is hopeful or not in the commonsense understanding of the term) (Miyazaki 2004:11).

For example, the shared directionality of financial analysis for the traders he studied was the directionality of economic time, in which actions in the present dictate the future. Actors are constantly oriented toward predicting the future, but the future cannot ultimately be known until it is too late, that is, it has become the present.¹¹ Miyazaki describes how the trading team leader's constant contemplation of the temporal directionality of market analysis led him to entertain a somewhat bizarre fantasy of creating a trading machine that could accurately predict market movements into the future and hence replace human analysis altogether. In Miyazaki's definition, this surreal dream is "hopeful" (even if in a commonsense notion it is perhaps only bizarre) because, having become aware of the directionality of time in trading analysis, in which the future is constantly speculated upon from the point of view of the present, it entertains the possibility of reversing that direction and reimagines the present from the point of view of the

future endpoint of speculative trading altogether (2006:167). Of course this machine never came to be: Miyazaki argues that hope in the end is always disappointed (2004: 22), but this very disappointment is in turn the engine of further hope, as it leads to further reversals. Hence any act of hope is in fact always a replication of some other prior act of hope, elsewhere, on another analytical terrain (2004: 25).

This technical definition of hope I think provides a useful vocabulary for explicating the internal workings of the legal fiction, as it passes from the hands of one practitioner to the next. Consider for example what happens when a friendly critic of the As If, the eminent American legal realist Morris Cohen, manages to reverse its logic. Morris Cohen's article, "On the Logic of Fiction" (Cohen 1923),¹² marks the emergence in the early twentieth century of a modernist approach to the legal fiction. Cohen begins by attacking the "positivistic bias" in Aristotelian logic that values 'facts' (1923: 477) and treats relations between facts as artifice. He contrasts this view with what he terms the "modern relational view" in which "a complex of things-in-relation is the subject-matter of science" (1923: 483). From this point of view, Cohen raises an objection to Vaihinger's definition of a fiction as a statement that is false but nevertheless useful. The objection is that such a statement assumes that there are facts in the world—true facts and false facts—rather than analytical relations. The ultimate problem with Vaihinger's understanding of legal fictions, from Cohen's point of view, is that the fiction—the analytical relation that is also a judgment or legal resolution—is treated as the opposite of fact. A fiction such as $\sqrt{-1}$ for example is not simply 'false but useful'; *it does* exist in the world, if one accepts that "besides things and their qualities," the world includes also "relations and processes between them" Cohen argues (1923: 486).

In my view, the contribution of Cohen's article to our understanding of legal fictions—and more generally to a modernist conception of law—inheres in the kinds of reversals that Miyazaki wishes to capture with the term “hope.” Like the trader studied by Miyazaki, Cohen has a feel for the directionality of the centuries-long debate about legal fictions in the law: he is aware, implicitly or explicitly, that the question of the epistemological status of the legal fiction—is a statement such as “a corporation is a person” true or false?—turns on another question, the question of political agency in law—is the answer to a legal question found or made? In Cohen's time, this latter question would have been highly charged, as the legal realist movement in which he was a core figure worked hard to demonstrate that the law was not simply a system of discovered logic but an artifact of judging, and hence judicial decisions invalidating workers' rights legislation, for example, were the matters of political choice.

From this realist perspective, whatever one might think of them, legal fictions were artifacts of judicial power. In an article published in the *Harvard Law Review* in 1893, for example, Oliver Mitchell argued that “Judicial fictions are, in truth, but the hand-maidens of the only true judicial power—that of decision” (Mitchell 1893: 252) and as such were “but a species of a much larger class of legal devices, which have been rendered necessary by the *unacknowledged* character of the power of legislation exercised by the judges, which, as a necessary consequence, entailed a resort to this principle of fiction” (1893: 261). To summarize, “A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges” (Mitchell 1893: 262). Mitchell himself was a proponent of legal fictions and, unlike Bentham, intended these observations as complement, rather than criticism.

Cohen himself subscribed firmly to this understanding of the legal fiction, and indeed all of legal reasoning, as political artifact. Some fictions could be characterized rather as euphemisms, he argues—ways of avoiding explicitly stating the “disagreeable truth” that “judges are not merely umpires but also make the law” (1923: 482). But where others saw in Vaihinger’s claim that legal fictions are neither true nor untrue an opportunity to champion the claim that the law is therefore nothing but a political artifact, it is precisely here that Cohen finds Vaihinger’s approach inadequate. For Cohen, Vaihinger’s excessively positivistic distinction between reality and fiction makes it impossible fully to appreciate the legal fiction as a political act, an act of decision and not just an act of description. As Cohen puts it, “it would be absurd to regard these fictions as false propositions. They are rather resolutions to extend certain legal rights” (Cohen 1923: 482). Abstractions (metaphors, or fictions—those things that are opposed to fact) then are “methodologic resolutions, or determinations to look at objects in certain ways” (Cohen 1923: 483). Take, for example, the fiction of the Hobbesian social contract as a justification for initial allocations of rights and duties in society. “It is... a great error to think that you can refute any of the older natural-law theories by denying that the social contract with which they began ever took place. The social contract is really not a hypothesis as to what actually happened, but a concept of social transformation” (Cohen 1923: 487-88).

For Cohen, then, two strands in modernist legal debate are intertwined—the question of the epistemological status of law leans on a question of the political status of law and vice versa. He grasps the directionality of the argument, in Miyazaki’s terms—the way that each strand can serve as a kind of foundation or support for the other. For example, Vaihinger’s seductive epistemological flexibility of *As If* (as laudable as it is) is propped up by a fairly rigid notion of political agency: the problematization of the distinction between what is real and what is artifice,

what is truth and what is fiction is achieved at the expense of simplifying the difference between what is found and what is made and treating the law simply as a man-made tool, an artifact of human agency, an instrument.

But what is interesting is what happens next. Following Cohen's awareness of the directionality of this debate—of the way a claim about epistemology leans on a claim about the agency of the judge—he suddenly reverses his own analysis, to make a surprising claim about the agency of law: Vaihinger claims that fictions are *made*; they are the artifacts of creative intellectual work, he says. But Cohen asks,

Did the Romans find or invent their legal system? We always speak of finding the solution to all sorts of problems and even great mechanical inventors testify that they find their inventions, that the sought-for-device sometimes 'flashes upon them,' and most often they 'stumble upon it' while looking for something else (Cohen 1923: 484-485).

This statement would have sounded like a scandal to Cohen's realist colleagues bent on demonstrating that it is the judge, and not the law, that has agency in legal decisions, and it probably would have surprised even Cohen himself. Cohen's attention to the dichotomy between what is found and what is made in the law then suggests a different point of engagement between legal studies and hope studies, around the question of the conditions for the abeyance of legal agency. Just as, in Miyazaki's analysis, hope can inhere in the way it is possible momentarily to grasp how someone else's agency can be the cause of one's actions (Miyazaki 2004), Cohen asks us to query whether even within the context of an argument for the political quality of law, we might also acknowledge the way that at particular moments legal knowledge runs away from the knower, and becomes more than a tool in human hands.

A Double As If

But note where Cohen's surprising claim comes from: it is achieved simply by working the standard, longstanding connection between the reality/artificiality of law and the given/artifactual quality of law in reverse. That is, Cohen reverses Vaihinger's logic of a subjunctive epistemology propped against a standard understanding of legal agency, by giving us a more subjunctive approach to legal agency propped against what was by that time the standard modernist epistemology (the notion that relations are as real as the "things" they relate). The ability to see one's own agency in abeyance then is here the effect of a very specific kind of move, the ability to turn the analysis around, or inside out (Riles 2000), in order to grasp another possibility that is not external but internal to the legal form itself. Note that this feat is achieved in Cohen's article largely as a matter of intuitive lawyerly skill—it is just what good lawyers do, just as turning financial knowledge around to see in it other possibilities is what good traders do, for the traders Miyazaki studied.

In fact I want to take this a step further to suggest that this kind of reversal is best understood as a routinized aspect of the usage of the legal fiction, what a legal fiction, as practice, is. We can see this most clearly if we specify the standard definition of a legal fiction quoted at the outset in the following way: a legal fiction is not just any false statement understood by all to be false; it must take a particular form. When a judge asserts that at marriage the wife merges into the person of her husband, for example, or that the corporation is a person, the judge makes a legal conclusion, as Cohen points out—the conclusion that the woman loses control over her property or that the corporation can enter into contracts or be held liable for torts. But this conclusion is presented *as if* it were a factual claim: the wife is part of her husband; the corporation is a person. A legal fiction is a legal conclusion—an act of judgment—

that takes the *form* of a *factual statement*: It is a theory presented *as if* it were a fact. What we have then is a double “As if”: the As if of fact (the subjunctive assertion of a factual claim that is known to be false—the woman merges into her husband) turns on the As if *relationship of judgment to fact itself*—the legal conclusion that takes the form of a fact. And here we have the trick of the device: for if the legal conclusion takes the form of a fact, the fact that is known by all to be false, also becomes, in a sense, by operation of law, true: what else does it mean to say that a corporation is a person than that a judge has drawn an analogy between the qualities of the legal rights and obligations of the particular corporate entities in the dispute before him or her and those of archetypal rights and obligations bearers—natural persons?

The remarkable agentic power of the legal fiction commented upon by contemporary legal theorists then is not simply an artifact of the device’s epistemological complexity. Rather, the power of the device inheres in the way it reorients a question of agency, by pairing it with a question of epistemology. It redirects attention from the question of “who shall decide, and how shall she decide?” to a question of “is the legal statement true or false?” From this point of view we might more accurately describe the legal fiction as a technique of reorientation, that is, of hope, in Miyazaki’s terms.

Replicating the Power of the Legal Fiction

Now it would be possible to rephrase the observations above in a modality of critique. Indeed, the propensity to make the political nature of law disappear into a forest of complex technical and epistemological arguments is precisely what critical legal theorists mean when they refer to the “enchantment” of legal reasoning (Schlag 1998). In this view, legal reasoning obfuscates a simple truth, that power lies outside, and not within, legal form. And it is on this academic terrain that we find the most interesting parallel between legal studies and hope

studies, because these critiques of law's enchantment participate in the same social theory debates described as in crisis by Hage (2003), Miyazaki (2004) and others. The legal critiques, for not wholly unrelated reasons, have suffered similar exhaustion. As in hope studies, critical legal scholars now are asking, what should be the attitude of the sophisticated observer of law after the failure of critique? The question here is essentially, can the (conservative) "hope" of law be replicated on a (progressive) critical terrain?

To date, the resounding answer to this question has been "no." For example, the legal theorist Pierre Schlag has critiqued what he terms "'as if' jurisprudence" (1998: 109)—what he describes as a sophisticated modern view of law, cognizant of all the epistemological and political critiques, in which "when doctrines are said to bind or rights to trump, this means only that the doctrines are to be understood *as if* they were binding and that rights are to be understood as if they trumped other claims" (Schlag 1998: 110). Schlag explains,

The ambition of the sophisticated legal thinkers [who deploy as if legal reasoning] (and it is not a small one) is to avoid the naïve metaphysics of objectivism and subjectivism while nonetheless retaining the frame and force of these metaphysics (1998: 112).

Schlag concludes that legal analysis, so understood, suffers "a certain authority deficit" (1998: 112):

If, as a result of contemporary antimetaphysical scruples, entities such as principles, doctrines, values, rights are stripped of their subjective powers, then their prior subjective power must be relocated elsewhere for law to retain its authority. The question is where" (1998: 111)?

He offers an analogy to explain why this approach is ultimately doomed to fail: what if the Pope were to state explicitly that angels do not exist, but that this is just an "as if" discourse, he asks. This would leave the faithful unsatisfied. "Once the metaphysical illusion is gone, the pope's authority dissipates as well. The same thing goes for law" (Schlag 1998: 112).

Schlag's point is that As If jurisprudence is *either* jurisprudence without power, without authority, *or* it is a continuation of the same old politics of mystification, that is, submission to legal form. If the As If jurisprudence is powerful, for Schlag, it is simply because it is a clever way of reinstating a belief in what is no longer believable; simply "the continuation of the same old metaphysics by other means" (1998: 114). For example, the repetition of statements such as 'the corporation is a person,' even in a semi-ironic tone, perhaps makes other moves to extend the powers of corporations such as giving them free speech rights to corporations seem more politically palatable and logically defensible than it would be otherwise.

I want to query Schlag's skepticism about As If jurisprudence, or what I would term the *replication* of the very hope critiqued as mystification or enchantment, on one's own critical terrain, from one particular vantage point. My interest is in the picture he presents of legal knowledge as a product, produced by some and consumed by others, and in which power inheres in the production. As the discussion of debates in legal theory summarized above suggests, legal scholars routinely direct their attention, positive and negative, to the inventors of legal fictions. Perhaps commentators, who also fancy themselves to be original creators of new ideas, identify most readily with this image of the creative judge, commentator or legislator. But is this a satisfactory account of the workings of legal knowledge?

Consider for example one of the pinnacles of modern American property law, a doctrine known as the Implied Warranty of Habitability. This doctrine in fact only dates to the 1970s. Prior to this point, if tenants did not explicitly contract for rental property to be maintained up to a minimum level of safety they had no recourse against their landlord and remained liable for rent even if they fled the uninhabitable property. The traditional account of the doctrine is as follows. Faced with a question of how to hold the landlord responsible for maintaining a level of

safety he or she did not covenant to maintain in the lease, progressive judges responded by inventing a legal fiction of an “implied warranty” under which it was deemed to be As If the landlord and tenant had inserted a promise to maintain the apartment in safe condition into the lease. In the law of property, this invention is imagined alternatively as the heroic or maniacal action (depending on one’s political persuasion) of a handful of judges who, in a singular set of politically charged decisions, forever changed the law. But although the invention of new legal doctrines is one exciting location of legal fictions, it is not by any means the most common. This focus on the judge as producer of legal fictions misrepresents legal practice and, in my view, both overstates the political agency of judges and fails to give us a full account of the agentive power of law.

Let me make this more concrete with an example of how this fiction passes from the hands of teacher to student. When I teach a doctrine like the Implied Warranty for the first time to new law students, they fight hard against the concept of “constructive intent”—how can it be, they argue, that a judge can simply, by the stroke of a pen, state that the landlord intended something which all parties know the landlord did not intend? It is an important part of my job, as a trainer of novices, to fight the students to an “expert” understanding of the legal fiction as a subjunctive modality of expression. But the next time the class encounters a doctrine of this kind—say, when the students learn the doctrine of adverse possession under which one person’s occupation of another person’s land for a given period of time without sufficient resistance from the true owner will cause title to shift to the occupier—I need only say, “constructive intent” and the students have “got it”: they type the phrase into their notes and move on. The creativity, the second time around, is neither mine nor the students. In fact, there is no creativity at all. What there is, instead, is the agentive power of the act of replication, as the device becomes the

students' as much as the teacher's, and the students, thinking now "like a lawyer" also come to belong to the device: the legal fiction "works" in a thin, shorthand, technical, way, to obviate (in Wagner's terms) or leapfrog over (in Fuller's terms) the need for political conflict between novice and expert or between proponent and critic of housing law reform.

What is ignored in the standard account of the development of American housing law, in which one act of judging forever changes the law, is the afterlife of the fiction. In the decades after the landmark case that brought the Implied Warranty of Habitability into existence, it is passed from legal hand to legal hand, dissected in law review articles, invoked in the briefs of countless housing lawyers, debated by generations of law students. This practice cannot adequately be captured by a view of legal knowledge as produced by some and consumed by others. We should rather say that legal knowledge comes into agentive being in the process of its handing from one legal actor to another, and in that process it comes to constitute the very actors that deploy it.

One of Schlag's concerns is that As If jurisprudence unwittingly reinforces a naïve view of legal truth. But note that in this example what matters is really not what the teacher and the students believe to be the truth about the terms of the contract. What matters rather is the practice, the move, the *replication*. Schlag errs, in other words, when he critiques the instability of As If jurisprudence as if it were a truth claim, a theory. As Yan Thomas points out, a legal fiction is *not* theory ("la pensée juridique") but legal technique ("la technique du droit"), its own way of doing things ("sa manière de faire") (Thomas 1995: 18). The truth value of the legal fiction is not simply ambiguous or subjunctive; it is actually quite irrelevant.

So where lies the authority of the legal fiction? Is it simply a tool of other external interests, such as housing reform, or the academic stature of the legal theorist, or the authority of

the teacher? In fact, the purposes for the creation of the legal fiction recede from view as students replicate the practice. Vaihinger terms this phenomenon “the law of the preponderance of the means over the ends.” He argues that in all aspects of human thought, in the course of the use of As If devices as means to particular conceptual ends, the ends begin to recede from view as those who use the tool come to focus rather on the means. In the example of the classroom discussion described above, for example, the first and difficult discussion of constructive intent focused on the social, political, and economic goals for having such a doctrine; the second, third and fourth discussions focused only on the applicability of the doctrine of “constructive intent” itself. If by power we mean, among other things, the ability to go on, then the power of law inheres in the reception and replications it calls forth, as it passes from one set of legal hands to another. There is no authority deficit here because power¹³ is not a zero sum game. The replication, as experienced by the students, is both empowered and empowering. I would like to claim this power as a definition of hope, a reason for which we might say that the technical legal fiction is hopeful. If the legal fiction is hopeful, then hope is power. From this perspective, the objective might become not simply to document the hopelessness of the powerless, but to replicate the power of hope.

The question then becomes, can legal authority be apprehended in any other modality than either blind submission or critique? Miyazaki argues that hope cannot be analyzed. It can only be “replicated on another terrain” of scholarship (2004: 25). Hence for him there is no critical study of hope; there is only hopeful scholarship, that is, hope that replicates its subjects hope through its own reversals of the directionality of academic knowledge. In this essay, I have sought to engage in such an act of replication by reversing the directionality of critiques of la

· Jack G. Clarke Professor of Far East Legal Studies and Professor of Anthropology, Cornell University. I thank Hirokazu Miyazaki for his assistance with this paper and for his hope, dimly replicated here. I also thank Ralf Michaels, Richard Swedberg, Iwao Sato, and audiences at the International Hope Studies Conference convened by the Institute of Social Science, University of Tokyo, December 2007, and the Annual Meeting of the Law and Society Association, May, 2008, for comments that substantially shaped the direction of the paper. For their research assistance I thank Guillaume Ratel and Saiba Varma.

Notes

¹ For a discussion of freeters and freeterism, see the chapters by Genda and Kasuga in this volume.

² Drawing on my analysis of legal knowledge, Miyazaki has argued (against Swedberg in my view) that in any case such “hope in a predetermined end occludes home in the means” (2005: 289-90).

³ In this respect, a legal fiction also differs from the ideal typic models of Weberian social science, in which the very point of the convention is to open up further inventive possibilities—further challenges, modifications, critiques, or empirical tests. A legal fiction differs from what social theorists term ideology also, since ideology is effective only if it is taken as a true statement by at least some political actors.

⁴ As Yan Thomas puts it,

La présomption intègre l'imperfection de la connaissance humaine, le droit revêtant alors d'une apparence de certitude un probable qui ne peut être éternellement débattu. La fiction procède d'une démarche résolument contraire, même si les résultats auxquels elle conduit sont parfois empiriquement comparables. Elle ne se contente pas de mettre un terme à la recherche due vrai: c'est cette recherche même que, d'emblée, elle répudie. La fiction est une négation du vrai manifeste; elle transgresse, pour le fonder autrement, l'ordre même de la nature des choses....Avec la fiction, nous sommes en présence du mystère le plus radicalement étranger à la pensée commune qu'offre, non pas la pensée juridique, mais plus précisément la technique du droit, sa manière de faire, *l'ars iuris* (Thomas 1995: 18).

For a contrasting view of the legal fiction as essentially identical to the legal presumption, see Stolzenberg (2007).

⁵ For example, the legal fiction of adoption allowed Roman citizens to incorporate foreigners into their communities while preserving the premise that kinship defined political allegiances. Fictions “satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change that is always present,” he argued. Without legal fictions, in other words, the law would stagnate—and hence would hold society back by refusing to recognize in law changes long since recognized in society (1931: 22).

⁶ Lon Fuller enthusiastically embraced Vaihinger as the greatest of all thinkers about the nature of legal fictions, and devoted the better part of his canonical work on legal fictions to a straightforward summary and explication of Vaihinger’s text: “I am firmly convinced that a study of Vaihinger will make one a *better* legal thinker” (Fuller 1930c 880 n. 177). Hans Kelsen, likewise, drew heavily on Vaihinger in his own work on legal fictions, and Jerome Frank reads Vaihinger (in a highly enthusiastic but fairly flat-footed way) to support his own view that the law was full of “conceptual distortion” (Frank 1970 (1930): 342; see also Lichtman 1930-31).

⁷ This subtle epistemological and aesthetic orientation has had many anthropological admirers. Edmund Leach, drawing on Hans Vaihinger, many years ago indexed his own commitment to admittedly “unreal” and “static” models in anthropological thought with the provocative phrase, “as if” (Comaroff & Comaroff 1992: 23; Leach 1954: 5f). Roy Wagner later picked up on the phrase, and on Vaihinger’s work on the nature of analogy, as fiction, to refer to the wider analogical task of seeing one thing as if it were another. This could include not simply the as if models of anthropological theory, but the “as if” nature of the ethnographic project itself:

A relative perspective *within* the province of cultural construction, taking the referentialism of the symbol, the “is” of convention, as a kind of subjunctive, is to enter a tentative suspension—Vaihinger’s world of “as if” (Wagner 1986: 9).

⁸ This could include not simply the as if models of anthropological theory, but the “as if” nature of the ethnographic project itself in which ethnography becomes:

A relative perspective *within* the province of cultural construction, taking the referentialism of the symbol, the “is” of convention, as a kind of subjunctive, is to enter a tentative suspension—Vaihinger’s world of “as if” (Wagner 1986: 9).

⁹ The fiction is, in effect, only an elaboration or perfection of the larger instrumental quality of all knowledge:

Thought is bent on continually perfecting itself and thus becomes a more and more serviceable tool. For this purpose it expanded its province by inventing instruments, like other natural activities....The natural function of thought, which we spoke of above as a tool, also expands its instrumentality by the invention of tools, means of thought, instruments of thought, one of which is [the fiction] (Wagner 2001: 6).

It is this emphasis on the instrumental, purposive quality of the As If that distinguishes Vaihinger’s work from the Kantian tradition and has led some to view him as a kind of pragmatist: “It must be remembered that the object of the world of ideas as a whole is not the portrayal of reality—that would be an utterly impossible task—but rather to provide us with an *instrument for finding our way about more easily in this world* (Vaihinger 2001 (1924): 15).

¹⁰ “Les fictions intellectuelles ne sont donc pas absentes du droit économique ; outre la diversité de leurs sources, leur usage donne toutefois un contenu particulier au réalisme économique qui, au-delà de la recherche affirmée de l’adéquation du droit au fait, se révèle également soucieux d’efficacité technique pour la réalisation des buts poursuivis...l’effet d’un interventionnisme juridique créatif destiné à informer la réalité, voire à la heurter, en fonction de ses objectifs ...” (Hannoun 1995: 90).

¹¹ For example, he describes a debate between the financial traders he studied over whether traders would be best rewarded or punished as a group for the successes or failures of the team as a whole. This debate turned on yet another debate about whether the gains or losses associated with trading should be reckoned on a short or long-term time horizon--if one took a short-term view one supported individualized incentives while if one took a long-term view one supported collective incentives.

¹² Cohen writes here for a philosophy audience about the nature of ‘fiction’. He refers only in passing to legal fictions, although it is clear that the argument is animated by his work on property, contract and legal philosophy.

References

Bentham, Jeremy, and John Bowring

1843 The Works of Jeremy Bentham. Edinburgh, London: W. Tait; Simpkin, Marshall, & co.

Cohen, Morris R.

1923 On the Logic of Fiction. *The Journal of Philosophy* 20(18):477-488.

Comaroff, John L. and Jean Comaroff

1992 *Ethnography and the Historical Imagination*. Boulder: Westview Press.

Frank, Jerome

1970 (1930) *Law and the Modern Mind*. Gloucester, Mass.: Peter Smith.

Friedman, Lawrence

1973 *A History of American Law*. New York: Simon & Schuster.

Fuller, Lon L.

1930a *Legal Fictions*. *Illinois Law Review* 25(4):363-99.

1930b *Legal Fictions Part II*. *Illinois Law Review* 25(4):513-46.

Genda, Yuji

2005 *A Nagging Sense of Job Insecurity: the new reality facing Japanese youth*. J. Hoff, transl., Japan: International House of Japan.

Hage, Ghassan

2003 *Against Paranoid Nationalism: searching for hope in a shrinking society*. Annandale, NSW.: Pluto Press.

Hannoun, Charley

1995 *Les Fictions en droit Économique*. *Droits* 21:83-93.

Kasuga, Naoki

Forthcoming *Hope between 'Inside' and 'Outside': Freeters in Japan*. *In Hope in the Economy*. H. Miyazaki and R. Swedber, eds.

2005 *Law Creators or Law Discoverers? Japanese Crime Novels Today*, paper delivered to Clarke Program in East Asian Law and Culture, Cornell University, April 4, 2005.

Kelsen, Hans

1991 *General Theory of Norms*, M. Hartney, trans., Oxford: Clarendon Press.

Kennedy, Duncan

1997 *A Critique of Adjudication [Fin de Siècle]*. Cambridge, Mass.: Harvard University Press.

Leach, Edmund R.

1982 *Social Anthropology*. New York: Oxford University Press.

1954 *Political Systems of Highland Burma: a study of Kachin Social Structure*, London: Bell.

Lear, Jonathan

2006 *Radical Hope: ethics in the face of cultural devastation*. Cambridge, Mass.: Harvard University Press.

Lichtman, Mark M.

1930-31 *Four Modern Philosophies and Their Application to Law*. *Temple Law Quarterly* 5 (2) pp. 215-234.

Maine, Henry Sumner

1864 *Ancient Law*. New York: Charles Scribner

Mitchell, Oliver R.

1893 *The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth?* *Harvard Law Review* 7(5):249-265.

Miyazaki, Hirokazu

2003 *The Temporalities of the Market*. *American Anthropologist* 105 (2), pp. 255-265.

2004 *The Method of Hope: Anthropology, Philosophy, and Fijian Knowledge*. Stanford, Calif.: Stanford University Press.

2005 *From Sugar Cane to 'Swords': Hope and the Extensibility of the Gift in Fiji*, *Journal of the Royal Anthropological Institute (N.S.)* 11 (2), pp. 277-295.

2006 *Economy of Dreams: Hope in Global Capitalism and Its Critiques*. *Cultural Anthropology* 21(2):147-172.

Murakami, Ryû

- 1977 *Almost Transparent Blue*, Nancy Andrew transl., Tokyo; New York: Kodansha International.
- 1995 *Coin Lockers Babies*, Stephen Snyder transl., Tokyo; New York: Kodansha International.
- 2003 *In the Miso Soup*, Ralph F. McCarthy transl., Tokyo; New York: Kodansha International.
- 2006 *Sixty-Nine*, Ralph F. McCarthy transl., Tokyo; New York: Kodansha International.
- 2007 *Piercing*, Ralph F. McCarthy transl., New York, NY: Penguin Books.

Riles, Annelise

- 2000 *The Network Inside Out*, Ann Arbor: University of Michigan Press.
- 2004 Property as Legal Knowledge: Means and Ends. *Journal of the Royal Anthropological Institute (N.S.)* 10 (4):775-95.

Röpke, William K.

- 1954 Economic Order and International Law. *Receuil Des Cours* 86: 202-71.

Rosenberg, Gerald

- 1991 *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

Samuel, Geoffrey

- 2004 Epistemology and Comparative Law: contributions from the sciences and social sciences. *In Epistemology and methodology of comparative law*. M.v. Hoecke, ed. Pp. 35-77. Oxford : Hart Pub.

Schlag, Pierre

- 1995 *Laying Down the Law: Mysticism, Fetshism, and the American Legal Mind*. New York : New York University Press.
- 1998 *The Enchantment of Reason*. Durham & London: Duke University Press.

Stolzenberg, Nomi M.

- 2007 Anti-anxiety Law: Winnicott and the Legal Fiction of Paternity. *American Imago* 64(3): 339-379.

Sunstein, Cass

- 1990 Principles, Not Fictions. *University of Chicago Law Review* 57 (4) :1247-58.
- Thomas, Yan
- 1995 *Fictio Legis: L'empire de la fiction Romaine et ses limites Medievales.*
Droits 21:17-63.
- Unger, Roberto
- 1986 *The Critical Legal Studies Movement.* Cambridge: Harvard University Press.
- Vaihinger, Hans
- 2001 (1924) *The Philosophy of "As If": a system of the theoretical, practical and religious fictions of mankind.* C.K. Ogden, transl. London: Routledge.
- Wagner, Roy
- 1986 *Symbols that Stand for Themselves.* Chicago: University of Chicago Press.
- 2001 *An Anthropology of the Subject: Holographic worldview in New Guinea and its Meaning and Significance for the World of Anthropology,* Berkeley: University of California Press.