Fiction and Metaphor

What do fiction and metaphor have to do with the law? Do they not belong rather to the realm of literature? A fiction is an account known not to be true. Yet when reading a novel or a short story, we are asked to suspend our disbelief and to pretend that the characters are real and that the events indeed take place. A metaphor too is fictional. It is a rhetorical device that depicts one thing as though it were another. Thus, both fiction and metaphor share a similar pretense of asking the reader to envision something that is not literally true as though it were so. The law, on the other hand, is not supposed to deal with pretense but with ‘real’ facts. However, it may come as a surprise to learn that the law has its fictions too, which require one to assume as true principles and doctrines known to be false. Moreover, many of these fictions are grounded in metaphor – that is, jurists and lawyers think about them and talk about them using vocabulary drawn from the domains to which they are compared. 

Why the Law Needs Fictions and Metaphors

What is the purpose of a legal fiction? As Lon Fuller aptly noted: ‘[It] is frequently a metaphorical way of expressing a truth.’ Pierre Olivier, in his treatise on legal fictions, supports this theme:

The basic reason for the employment of fictions, not only in law but in almost all sciences, is that they facilitate the thought process…The fiction is based on an analogy or similarity between two objects or situations, and
enables us to equate the two so that they can be treated alike….and yet at
the same time warns us that the analogy…is not true in all respects…. iii

A legal fiction literally is a false statement. As an illustration of how a false statement
may have an air of truth, Fuller provides a whimsical scenario of the dilemma facing the
judge who first came up with the ‘attractive nuisance’ doctrine. iv Recall the facts. A
child from an industrial area of town has been seriously injured while playing on a
turntable in an open railroad yard. The plaintiff child brings suit against the defendant
railroad. Issue: Is the railroad responsible for the injury? In attempting to find an answer
to this inquiry, Fuller imagines various solutions that might have gone through the
judge’s head. He knows that the current law asserts that a landowner owes a duty of care
to ‘invitees’, but not to ‘trespassers’. However, deep down inside, the judge feels that this
unfortunate child should be treated more like an invitee and less as a common trespasser.
The judge is reluctant to base a decision on his personal feelings; after all, the child really
was trespassing. Perhaps the judge could state that the rule of trespass does not apply to
children. Such a ruling would raise further problems: the types of children to be
exempted, their ages, and whether children entering the property were aware of the
danger there. Or perhaps the landowner should be held responsible for injuries sustained
by anyone who enters upon his land. But the judge realizes that such a proposal would be
much too broad (and brash); it would essentially do away entirely with the law of
trespass. Finally, he could decide in favor of the plaintiff child without giving any
particular reason, but the judge is very uncomfortable with that prospect, as it would not
sit well with those seeking a rationale for the decision.
Our judge, faced with this dilemma and finding no real viable solution, feels compelled to go back to his original hunch – to treat the child as an invitee rather than as an ordinary trespasser. He announces before the court that the defendant railroad must be ‘deemed to have invited’ the child onto the land. This bold assertion by our hypothetical judge ‘brings the case within the cover of existing doctrine and puts an end to these troublesome attempts to state a new principle.’ The law has adopted a fictional statement because of its utility. Although the statement is false, nonetheless it has expressed a truth – namely, that the child’s status is more like that of an invitee’s than of a trespasser’s, and the only way to express this ‘truth’ is metaphorically – by claiming that the landowner (or his agent, the attractive nuisance) must be ‘deemed to have invited’ the child onto the premises. Once so ‘invited’, the landowner then owes the child the same duty of care that would be extended to any other guest. This scenario gives some idea, albeit fanciful, of the genesis of the ‘attractive nuisance’ doctrine, which, according to Fuller, is ‘probably the boldest fiction to be found in modern law.’

The Corporation as a Person

The law allows corporations to do some of the things that people do. They may enter into contracts, buy and sell land, commit torts, sue and be sued. Other rights and liabilities are denied. Corporations cannot hold public office, vote in elections, or spend the night in jail. In spite of evident differences between a corporation and a flesh-and-blood human, there are sufficient similarities for the law to treat the corporation as a person. The word ‘person’ as used in a statute will usually be construed to include corporations, so long as such an interpretation fits within the general design and intent of the act. The edification
of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.

The personification of the corporation is by no means a recent innovation. As early as 1444, it was asserted in the Rolls of Parliament that ‘they [the Master and Brethren of the Hospital] by that same name mowe be persones able to purchase Londez and Tenementz of all manere persones.’ vii Three centuries later, Sir William Blackstone, the well-known English jurist, gave the following definition of legal persons: ‘Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.’ viii In the nineteenth century, particularly in France and in Germany, there was a flourish of interest in the nature of corporate personality – what the French call la personnalité morale.

Three Theories of Corporate Personality

The word ‘corporation,’ derived from the Latin corporatus, ‘made into a body’, designates a body of individuals joined together for a common purpose. Does this body have rights distinct from those of the individuals composing it? The philosophical implications of this question that occupied German and French jurists throughout the nineteenth century led to three different theories of corporate personality: the creature theory, the group theory, and the person theory.

The Creature Theory

Savigny, in Germany, was the principal proponent of the creature theory. ix His ideas stem from a belief in the individualistic nature of the person. According to Savigny, a human being, as a conscious and willing entity, by his or her very existence, possesses
certain inalienable rights. The law must confirm this unique status of the individual.

Legal relations, at the most fundamental level, take place between one person and another. Now, individuals may enter into an association, but the resulting group has no independent existence on its own, and unlike a natural person, it has no preexisting rights. Only in contemplation of the law does it become a legal entity – a persona ficta, an artificial, moral, or juristic person. John Marshall, Chief Justice of the United States Supreme Court from 1801 to 1835, described the corporation as an ‘artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.’

Marshall's characterization has become one of the classic definitions of the corporation as a ‘creature’.

The assumption that the corporation as a legal person is an artificial entity – a creature that emanates uniquely from the state – conflicts with two other notions: first, man as an independent being has the natural right to join freely with other persons and to form associations; and second, these associations take on a cohesion and an existence of their own. The first objection constitutes the main argument behind the group theory. The second forms the foundation for the person theory.

The Group Theory

The group theory had as its chief advocates, Ihering in Germany and Vareilles-Sommières in France. Like the creature theory, it recognizes human beings as the original bearers of rights. Among them is the right to join together and to do business under an assumed name. But the ensuing business enterprise thereby does not become a separate entity to be treated as a legal person. The group theory holds that although it
may be convenient to speak of the rights of a corporation and therefore to think of it as a legal unit, corporate rights, in actuality, are nothing other than those of the component members. Persons conducting business under a corporate name are entitled to the same protection of the law that is guaranteed to them as individuals. Consequently, a corporate name can never be the name of any artificial being; it is simply a useful label for identifying the members of the group, in much the same way that a family name serves as a cover term for the members of a family.

**The Person Theory**

Gierke, in Germany, was the main spokesman for the person theory. He advocated that groups are as ‘real’ as the persons who form them. He pointed out that it is an undeniable aspect of human nature for persons to join together to form groups. Families, clans, guilds, unions, corporations, nations – these are just a few of the kinds of associations that occur. Both individuals and groups are natural entities within all societies, and in societal interactions there must be a trade-off between the wishes of individuals and the endeavors of groups. Furthermore, the group is more than just an expression of the sum of its members. It acquires a common will and pursues its own goals, and its life continues regardless of changes in membership. The law may or may not recognize the group, but that endorsement in no way affects its reality, for it exists in its own right. Within the framework of the person theory, one may still refer to corporations as artificial persons, particularly whenever one needs to distinguish them explicitly from natural persons. Such reference, however, should not be confused with the similar terminology of the creature theory. Under the creature theory, the corporation is a legal person created by
law. Under the person theory, the corporation is a legal person naturally, as much as any human being.

Corporate Personality and Corporate Interests

At the beginning of the nineteenth century in America, it was the creature theory that dominated thinking on corporate personality. This perspective was to change with the spectacular rise of private corporations in the latter half of the nineteenth century and the first part of the twentieth. The new economic needs clashed with the premises of the creature theory. There developed an increasing mistrust in the efficacy of special charters granted by the state. They restricted the creation of new companies and interfered with corporate growth. Worse yet, they led to corruption, political favoritism, and monopolies. Consequently, there arose a movement for free incorporation – for making the corporate form available universally as a regular and normal feature of business activity. Although free incorporation turned out to be incompatible with the creature theory, for a while it appeared that the group theory could accommodate the new economic structure. The group theory treated corporations in terms familiar to partnership law. After all, the corporate members had freely decided to come together to enter into agreement. Yet there were basic conceptual problems in attempting to adjust the partnership model to corporations. Whereas the composition of a true partnership tends to remain stable, a corporation has no such rigidity, and its membership may fluctuate constantly. Furthermore, unlike a partnership, where the members are individually and severally responsible for the debts of the company, a corporation brings limited liability to its members. Finally, in a partnership the members share in decision making; however, with the growth of large corporations and with the advent of stock exchanges for trading
shares, shareholders have become mere investors and decision making has shifted to an elite corps of officers and directors. The group theory, by treating the corporation as a partnership, did not effectively accommodate the special features of corporate immortality, limited liability, and distribution of power. The person theory ultimately emerged as the most amenable to the evolving needs of American corporations. This theory conceived of the corporation as a real entity that existed independently of its members. Hence, the precise make-up of the membership became immaterial. A corporation could have its own property and incur its own debts. It was understandable, then, that the liabilities of the members were not coextensive with those of the company. Finally, as a person, a corporation had the power to delegate responsibilities to its agents – the officers and directors. The person theory, in its treatment of the corporation as a bearer of rights and duties, freed corporations from those restrictive notions that were built into the creature and group theories.

The three theories of corporate personality recognize different interests of society. The creature theory emphasizes the ultimate power of the sovereign; the group theory the contractual rights of individual persons; and the person theory the economic freedom of enterprises and organizations. These philosophical and historical developments provide the necessary background for approaching and appreciating a series of judicial events that occurred in America beginning in the nineteenth century. Although British and American jurists showed little enthusiasm for the metaphysical discussions that were taking place on the Continent, American law did not entirely escape the effects of the philosophical issues. On more than one occasion, the Supreme Court had to determine whether, within the meaning of the U.S. Constitution, the terms ‘person’ and ‘citizen’ apply to
corporations, and in order to resolve this issue the Court could not totally ignore the
nature of corporate personality.

**Supreme Court Views on Corporate Personality**

The highest court of the land was compelled to take an interest in the nature of corporate
personality and in the language for discussing it. One set of cases concerns federal
jurisdiction. The issue is whether national courts, empowered by article III of the U.S.
Constitution to handle controversies between citizens of different states, can entertain
suits by or against corporations. We shall see that in treating the jurisdictional question,
the Supreme Court, from the outset, rejected the creature theory of corporate personality.
At first, it would adopt the group theory. When this conception of the corporation proved
impractical, the court would shift to the person theory. However, this move turned out to
be prematurely radical, and the Court would recant by adopting an interesting
compromise position, one that embraces elements of both theories.

To state, in the analysis of a case, that the Supreme Court was operating within a
particular theory is not to imply that the justices explicitly and knowingly reached
decisions by applying well-defined sets of principles. In fact, at the time of most of the
cases, the theories had not yet been articulated in the forms that we know them today.
Nor did the discussions that were taking place in Europe seem to find their way into the
opinions written by the Court. The different theories must be understood as explanatory
models useful for interpreting the Court’s decisions. They bring coherence and structure
to what otherwise might be disparate events, and they provide a conceptual background
against which to trace the evolution of American corporate personality. Here is the story
of the jurisdictional issue.
Article III: Diversity of Citizenship

The United States has a dual judiciary structure. There are both federal and state courts. The Constitution envisages that the state courts will handle most disputes. A federal court may become the forum of adjudication either because of subject matter – such as, cases arising under the Constitution or from federal laws – or because of the character of the litigants. Article III recognizes seven classes of parties that may bring suit within a federal court. It is the fifth class that will be our focus of interest.

(1) Cases affecting Ambassadors, other public Ministers and Consuls;
(2) Controversies to which the United States shall be a Party;
(3) Controversies between two or more States;
(4) [Controversies] between a State and Citizens of another State;

(5) **[Controversies] between Citizens of different States.** (emphasis added).

(6) [Controversies] between Citizens of the same State claiming Lands under Grants of different States;

(7) [Controversies] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

When two persons are citizens of the same state and they have a dispute that concerns a matter of state law, they must appear in a court of that state. However, if they are citizens of different states, then a federal court may hear their case, even though the subject matter deals uniquely with state law. The rationale behind diversity of citizenship is to enable an out-of-state litigant, who feels that he might not receive equal treatment in
a state court located in the territory of his adversary, to bring the suit into the more
neutral domain of a federal court. Chief Justice Marshall aptly stated the rationale for
federal jurisdiction:

However true the fact may be, that the tribunals of the states will
administer justice as impartially as those of the nation, to parties of every
description, it is not less true that the constitution itself either entertains
apprehensions on this subject, or views with such indulgence the possible
fears and apprehensions of suitors, that it has established national tribunals
for the decision of controversies . . . between citizens of different states. \textsuperscript{xiv}

In allowing federal jurisdiction where there is diversity of citizenship, the
Constitution expressly speaks of ‘Controversies . . . between Citizens of different States.’
\textsuperscript{xv} It does not mention corporations. The drafters of the Constitution were not unaware of
corporate entities. Although not so common or extensive as they are today, nonetheless
they were fairly numerous. At that time there were trading companies, banks, railroads,
and canal and toll bridge companies. \textsuperscript{xvi} Because article III does not expressly single out
corporations, is litigation involving them to be restricted entirely to state courts? If an
individual of one state suing a citizen of another state can turn to the impartial umbrella
of the federal courts, might this same individual not be equally desirous of this protection
where he, as an outsider, sues a corporation in its home state? The Supreme Court
definitely thought that the litigants in such cases were entitled to its beneficence. Under
the guise of ‘Controversies between Citizens of different states’, the Court has managed
to bring corporations through the doors of federal courtrooms.

Fuller, 10.


Fuller, 66-68.

Fuller, 68.

Fuller, 66.


The discussion of the evolution of American corporations within the context of the three theories of corporate personality is a summary of the views of Morton Horwitz,

