LEGAL FICTIONS REVISTED

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It is no compliment nowadays to accuse a judge, court, or theorist of employing a “legal fiction”. But it was not always so,¹ and the literature on legal fictions is replete with claims that legal fictions are often necessary to effectuate the goals of a legal system.² Such defenses of legal fictions are increasingly rare, however, and the accusation of using a “legal fiction has become a ubiquitous and ill-defined jurisprudential condemnations.³ But while the charge of relying on a legal fiction has become increasing pejorative, it is not clear what is being condemned, and why what is being condemned justifies the condemnation.

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The basic problem is that a fiction is, by definition, untrue. And although telling untruths is expected of novelists, playwrights, and poker players, in most domains intentionally saying something false is at least prima facie unacceptable. A legal fiction, an intentional untruth in the law, thus seems an odd thing for an institution allegedly committed to truth to tolerate. In analyzing the various uses of legal fictions, however, and the diverse deployment of the term “legal fiction”, we can see why not all legal fictions are to be condemned, and why legal fictions have had their defenders over the years. Understanding the occasional virtues of legal fictions, however, takes us into the realm of legal truth itself, and into the complex relationship between legal truth and truth simpliciter, a relationship that in turn exposes important complexities surrounding the connection between legal truth and legal language.

The structure of this paper (which brackets the technically fictional aspects of metaphor and other figurative uses of language) is in three parts, seeing legal fictions as presuppositions, as presumptions, and as prevarications. The first part is the least important and least original. But because the notion of a legal fiction plays such a major role in Kelsenian legal philosophy, it is necessary to say something about Kelsen and the Grundnorm as a fiction in order to distinguish this conception of a fiction from the ones to be examined more closely.

The heart of the paper begins in Section II, exploring legal presumptions such as the traditional presumption that the husband of a child’s mother is the child’s father. Obviously this is not literally (or biologically) true in some of the cases to which the presumption applies, and thus it is not surprising that such presumptions are often described as legal fictions, and almost as often criticized for their deceptiveness, even if not for their substantive import. As
we shall see, however, not only is this variety of legal fiction common, but it is also a fiction only in the sense that any rule is a fiction, precisely because it is a characteristic feature of any rule that it will treat what is ordinarily the case as if it were always the case. Presumptions that are sometimes false in particular cases may be an easy target of critics, but they are little more than the vivid embodiment of the way in which any enterprise that trades in generality – which law most certainly does – will wind up drawing conclusions that may not always be literally correct.

Yet the connection between legal fictions and rules is even closer than this, as discussed in Section III, examining legal fictions as common devices for effectuating the (contingent) defeasibility of legal rules. Because rules are both under- and over-inclusive with respect both to their background justifications and to broader notions of fairness, justice, efficiency, or utility, they frequently generate suboptimal or erroneous outcomes in particular cases. In such circumstances, and following Aristotle’s conception of equity as a remedy for the inevitable coarseness of rules, legal systems often permit their decision-makers to treat the system’s rules as defeasible, subject to being set aside in order to produce a good rule-independent outcome rather than a bad rule-generated one. But because judges, especially, are required to justify such departures from rules, they resort to various justificatory maneuvers in order to avoid saying that they are not following the rule. One of those maneuvers, albeit hardly the only one, is the most prominent kind of legal fiction, the re-description of facts in order to make them compatible with the rule while at the same time permitting what appears to be the right result.

In examining this last type of legal fiction -- the re-description of an X (or the class of X’s) as a Y in order to avoid an embarrassing outcome – we confront the largest issues of legal
language and legal truth. When we say that what appears to be an X is really a Y for purposes of the law, are we lying? Are we engaged in a fiction? Or are we recognizing, as some would have it, that legal language exists in an uncomfortable relationship with ordinary language. Part IV begins an exploration of this issue, inquiring into so-called terms of art and into the question whether legal language is ordinary language, technical language, or some combination of both.

I. FICTIONS AS PRESUPPOSITIONS

In a now unfortunately neglected work, the German philosopher Hans Vaihinger analyzed the concept of, in German, *als ob,* which, in its common English translation, means “as if.” Vaihinger’s philosophy of “as if” was for some years highly influential, and noteworthy for the influence it had on Hans Kelsen, and, at more or less the same time, Lon Fuller. Vaihinger’s basic idea is both logical and psychological. As to the former, the idea is straightforward: the premise of an argument can typically be presented in hypothetical form, as when we assume something for the sake of argument, or presuppose the truth of one proposition in order to

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7Fuller, note 2 above, pp. 94-137.
make sense of some other proposition. To take the standard example, the statement “The King of France is bald” presupposes that there is a king of France, and the statement makes sense on (and only on) the assumption that there is a king of France, even though there actually is no king of France. The presupposed factual proposition that there is a king of France is thus a fiction insofar as it allows the sentence in which it is contained to make sense even if and when the proposition is false. But it is a fiction only contingently, because the logically equivalent statement, “The Queen of England is not bald”, similarly presupposes a Queen of England. But because there really is a Queen of England, the presupposition in this case, contingently but not necessarily, is true and therefore not a fiction at all.

Sometimes, however, we assume a fact for the sake of argument under circumstances in which it does not matter whether the assumed fact is true or false. The fact of the matter may be irrelevant, but we nevertheless assume the truth of the fact because the assumption makes some other point understandable. So consider the following: “Assume that 70% of some population favors a particular policy. Then, in a democracy, that is the policy that should be adopted”. Here it does not matter whether the 70% assumption is true or false. Rather, the 70% majority is an assumption that enables us to understand the idea of democracy, an understanding which is independent of the actual truth of the factual assumption. In discussing “fictions” as important elements of thought, therefore, Vaihinger was less concerned with the facticity of the “as if” than with the way in which “as if” thinking often facilitated human understanding. That Vaihinger was an important Kant scholar and the founder of the journal

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Kant-Studien underscores the similarities between Vaihinger’s philosophy of “as if” and the Kantian transcendental understandings which are related to but not quite the same as the factual presuppositions in Russell’s example and in subsequent philosophical usage.  

Vaihinger’s perspective links closely with Kelsen’s Grundnorm. The Grundnorm under Kelsen’s system is a transcendental understanding, but a transcendental understanding, or at least the factual components of it, might still turn out to be either factually true or factually false. If factually true – if making sense of a legal system requires that we adopt an understanding that turns out, contingently, to mirror reality, then it would be odd to describe that understanding as a fiction. But if the understanding is not true, or if, more precisely, it simply does not matter whether it is true or not, then we can understand why Kelsen would describe the understanding that is the Grundnorm as a fiction. It is thus the contingent falsity and, even more, the irrelevance of the factual truth or falsity of the Grundnorm that explains why

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it is commonly thought of as a legal fiction in Kelsenian legal theory. But although the assumed existence of something that may not exist perhaps justifies (but only barely) the term “fiction”, and although it is the very assumption rather than the factual existence of the truth of the Grundnorm that distinguishes it from Hart’s ultimate rule of recognition, the use of the term “fiction” in this context seems substantially metaphorical. If we understand a fiction not so much as an assumption (whether a transcendental understanding or not) whose factual truth is not relevant but as a statement that is both literally false and known by the maker of the statement to be literally false -- were it otherwise we would call it a “mistake” and not a “fiction” – then the common usage of “legal fiction” to refer to Kelsen’s idea of the Grundnorm is itself at least slightly fictional with reference to the term “fiction” itself.

Both Kelsen and Vaihinger recognized that it is sometimes important to act and speak as if something were true, and that we do so not necessarily only when what we assume to be true is false, but also when we do not want the truth or falsity of the assumption to matter. Vaihinger’s and Kelsen’s ideas were thus not primarily about counterfactual assumptions, but

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instead about “afactual” assumptions in which the factual truth or falsity of the assumption is largely irrelevant. The connection between Vaihinger and Kelsen thus seems apparent, but what appears as well is the conclusion that to describe the ideas of “as if” or the Grundnorm itself as “fictions” is a usage that, while not plainly wrong, is at least somewhat non-standard. Normally we understand a fiction as being closer to a lie – the intentional statement of a falsity – but lacking the deceptive component of actual lying. Unlike lies, fictions are known by their recipients to be false, and that is why we do not normally think of novelists and screenwriters as liars, even though they are saying things that are literally untrue and known by the novelists and screenwriters to be untrue. Despite the intentional falsity, however, we do not understand playwrights and novelists as liars because the audience is aware of the untruth and thus the element of deception necessary for a proposition to count as a lie is missing. The audience or the readers may be expected to suspend their disbelief in the truth of the fictional narrative while they are reading or listening, and this may be a variant on the kind of transcendental understanding that is the key to the idea of the Grundnorm, but the fictional aspect of the Grundnorm is no more problematic than is fiction in general. The Grundnorm may be a legal fiction, but only in the sense that any assumption or presupposition is potentially fictional, and fictions of this variety are such a large part of our conceptual machinery as scarcely to deserve notice at all, let alone even the mildest of condemnation. More importantly, the use of “fiction” to describe the Grundnorm is sufficiently distant from the traditional way in which “fiction” has been used in “legal fiction” in common law discourse as to suggest that discussions of the fictional aspect of the Grundnorm, while important in themselves, are largely peripheral to the topic of legal fictions itself.
II. PRESUMPTIONS AS FICTIONS

Once we turn from presuppositions to presumptions, the odor surrounding legal fictions is upon us. Bentham and others since have condemned legal presumptions as undesirable legal fictions because they require judges or juries to accept as true things that are or may be false,\(^{14}\) but seeing presumptions as fictions turns out to be more misleading than helpful.

Consider a typical generalization in a non-legal context. “Swiss cheese has holes”, for example. Or “Volvos are reliable”. Such statements are not true of all members of the described class. There is Swiss cheese without holes that is still Swiss cheese, and there are unreliable Volvos. But if that is so, then what is it to make a statement about a class? And what makes a statement about a class true? Or false? Consider the class of Yugos, a notoriously unreliable automobile manufactured in the former Yugoslavia in the 1970s and 1980s. Assuming (possibly counterfactually) that there were at least two reliable Yugos, it would be true to say that “some Yugos are reliable”, yet the statement “Yugos are reliable” seems false. But if there are some unreliable Volvos and some reliable Yugos, then why is the statement “Volvos are reliable” true and the statement “Yugos are reliable” false? And the answer is that

\(^{14}\) Indeed, much of Bentham’s famous excoriation of the fictions of the law had this flavor. Among Bentham’s stronger statements, although entirely representative, were “the pestilential breath of Fiction poisons the sense of every instrument it comes near” (J. Bentham, The Works of Jeremy Bentham, J. Bowring ed. (London, 1962), vol. 1, p. 235) and “[I]n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.” (Ibid., vol. 5, p. 92). Bentham and fictions generally are the subject of C.K. Ogden, Bentham’s Theory of Fictions (London, 1932), and N.M. Stolzenberg, “Bentham’s Theory of Fictions – A ‘Curious Double Language’” (1999) 11 Cardozo Studies in Law and Literature 223, but Bentham’s views about fictions as abstractions in language bear only an indirect relation to Bentham’s contempt of legal fictions.
according to the standard pragmatics of standard English, a statement about a class attributing a property to the class is true if and only if the property is present within the class to a greater extent than the property is present within another class — a reference class -- with which the class under discussion is explicitly or implicitly compared. Note that there is thus no requirement that the property appear within a majority of the members of a class for the statement about that property within the class to be true. It would be accurate to say that “Yugos are unreliable” even if only 45% of Yugos were unreliable, because 45% is a rate of unreliability far higher than the rate for cars in general or other models of car. Similarly, it is correct to say that “pit bull dogs are aggressive” even though only a minority of them are, because the rate of aggression for the class of pit bulls is higher than the rate of aggression for most other breeds and higher than the rate for all dogs. Statements attributing a property to a class may thus be true if the property appears in all members of the class, if the property appears in a majority of members of the class, or if the property appears within the class to a greater degree than the property appears within some implicit reference or comparison class.

Thus, probabilistic statements about a class may be true (or false) without being universally true (or false) for all members of the class. And this applies not only to descriptive

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16 For discussion of this point with reference to this example, see F. Schauer, Profiles, Probabilities, and Stereotypes (Cambridge, Massachusetts, 2003), pp. 55-78.
generalizations, but also to the prescriptive generalizations we call rules. Prescriptive rules serve background justifications, such as a “no driving in excess of 60 miles per hour” rule designed to foster the background justification of highway safety. As in this example, rules are also probabilistic generalizations, being generalizations about the forms of conduct that will serve the background justifications. So prohibiting vehicles in the park in order to secure peace and quiet is premised on the assessment that prohibiting vehicles, in general, will advance peace and quiet, again in general and not necessarily in every case. The prohibition is embodied in a rule with full knowledge that the rule can be the right rule even though some vehicles may not be detrimental to peace and quiet (over-inclusion) and even though some non-vehicles maybe detrimental in the same way that vehicles ordinarily are (under-inclusion).

Legal presumptions typically operate in just this manner. Consider the common law presumption of paternity – the presumption that the husband of the mother is the father of any child born to the mother during the marriage. Assuming for the moment – but only for

17See F. Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford, 1991). It is true that some rules may not be prescriptive generalizations – think of non-instrumental Kantian rules, for example – but I leave such complications aside here. The basic point is only that many (even if not all) criticisms of presumptions as fictional are criticisms that would be as apt with respect to instrumental rules.


the moment, as we shall see in Section IV below – that fatherhood is a physiological state requiring some biological connection between the father and the child and requiring that the father have had sexual relations (or a modern scientific or technological equivalent) with the mother in order to produce the child, then some number of people presumed by the law to be fathers will not in fact be fathers. It is, after all, quite possible to be the biological father of a married woman’s child without being the person to whom the mother was married at the time of conception or the time of birth. But the law, partly because it reflected a traditional social aversion to illegitimacy, and partly to create and enforce obligations of support, presumed that all men married to women at the time the women gave birth were the fathers of the child so born, even though, in fact, only most of them were.\footnote{Many of the common law’s presumptions, including this one, were rebuttable. See W. Swadling, “Explaining Resulting Trusts” (2008) 124 L.Q.R. 72, 74-77. But because even a rebuttable presumption shifts the burden of proof, a rebuttable presumption can be expected to produce some outcomes in which the presumed fact is not actually a fact at all. And thus we should not be surprised that Bentham, Fuller, and most of the writers on legal fictions have spent some time on the fictions produced by even rebuttable presumptions.}

The connection between rules and presumptions is now clear. Legal rules treat the typical as universal, as when they treat ordinarily peace-and-quiet-hampering vehicles as if they necessarily hampered peace and quiet. So too with the ordinary speed limit, which is based on an assessment of the maximum safe speed for average drivers in average vehicles under average road, weather, and traffic conditions, but which is nevertheless the speed limit for all drivers in all vehicles under all conditions. Legal rules presume that all vehicles will detract from peace and quiet even if only most of them will, and presume that all drivers can drive safely only up to a certain speed, even if in fact some drivers can drive safely at a higher speed. The
similarity between the typical rule and the typical presumption is thus not merely the parallel in treating what is typically the case as if it were always the case. Rather, rules necessarily incorporate presumptions, and in some way just are presumptions, although this feature of rules is sometimes obscured by the way in which presumptions are normally expressed. But the presumption that the husband of the mother of a child born during wedlock could also be expressed in terms of a rule requiring the husband of the mother of a child born during wedlock to support the child, treat the child as legitimate, etc. In that case, the same consequences flowing from the presumption would be articulated in the form of a rule rather than a presumption, but the legal import of the two would be identical.\footnote{On the essential identity between a rule and an irrebuttable presumption, see the decision of the Supreme Court of the United States in Weinberger v. Salfi, 422 U.S. 749 (1975).}

We can now see why talk of presumptions as fictions is misguided. Asking legal decision-makers to assume for the purpose of decision that that which is false is true resembles a fiction, but no more so than asking legal decision-makers to apply rules in the area of their under- and over-inclusion.\footnote{At least in Bentham’s case, however, there may be some compatibility between his skepticism about the exclusionary rules of evidence and his skepticism about presumptions. See G.J. Postema, “Facts, Fictions, and Law: Bentham on the Foundations of Evidence” (1983) 16 ArchivfürRechts- und Sozialphilosophie 37.} When a police officer stops an experienced and safe driver for exceeding the speed limit under ideally safe traffic and weather conditions, the officer is assuming that the driver and the conditions are average even though they are not.\footnote{See F. Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge, Massachusetts, 2009), ch. 1.} When the park official keeps out a non-peace-and-quiet-hampering vehicle he is assuming (or effectuating}
the rule-maker’s assumption) that the vehicle will hamper peace and quiet even though it will not. On countless occasions, applying a rule in the area of its under- and over-inclusion can be seen to be a fiction in just the same way that the typical factual presumption is a fiction in the area of its factual falsity. Perhaps rigid rule-following is itself a problem, as will be discussed in the next section. But if rigid (even non-conclusive) rule-following itself has its uses, there is no reason to believe that anything is amiss in achieving the same end through the use of a presumption, which does much the same thing in much the same way.

III. IS A LEGAL FICTION A LIE?

In the previous section it was assumed that rigid rule-following might in some contexts be desirable, but that assumption is by no means universally held. We thus return to Aristotle, who in discussing equity recognized that rigid rules might generate precisely the “false” results just noted. Aristotle described rules as “law,” and proceeded to say that:

. . . all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, although not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behavior is essentially of this kind. So when the law states a general rule, and a case arises under this that is exceptional,

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then it is right, where the legislator owing to the generality of his language has erred in not covering the case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances . . .

This is why equity, although just, and better than a kind of justice, is not better than absolute justice – only than the error due to generalization.  

Aristotle’s basic idea, expressed even earlier by Plato in *Statesman,* was subsequently developed by Cicero, other Romans philosophers and jurists, and the creators of the formal institutions of equity in English law. But what is important here is not the history of the idea, but the idea itself. And that idea is that any rule, and thus any legal rule, might produce a wrong answer in a particular case by virtue of the generality rules. Equity, broadly understood, is the contingent mechanism by which such errors are corrected. But the mechanism is contingent because a rule-governed domain might deny the equitable power, taking the position that the errors of rule-produced under- and over-inclusion are better tolerated than


26In particular, the dialogue with the Eleatic Stranger. Plato, *Statesman,* J.B. Skemp. Trans. (Bristol, UK, 1952), ¶¶ 294a-b.

27Cicero, *De Oratore* 1.57.


empowering a group of judges or other officials to determine when such an error has occurred.\textsuperscript{31} Rule-governed domains such as law are formal insofar as such powers are withheld, and are equitable to the extent that somewhere in the system there exists a remedy for the mistakes generated by the under- and over-inclusion of written-down rules.

But what might those remedies be? One would be a separate system for correcting the errors wrought by under- and over-inclusive rules, and indeed this was the remedy embodied in the first appearance of equity in English law. Judges of law, in the narrow sense of “law”, had no authority to ameliorate the mistakes generated by general rules, but someone aggrieved by such mistakes could still go the Chancellor, and later to the courts of equity, in order to gain equitable relief from the rigidity of law.\textsuperscript{32} More recently, many common law countries, and at its most extreme in the United States, often authorize ordinary judges to exercise such powers. When those powers exist, a judge may legitimately conclude that the application of the rule would be unjust or inconsistent with the purposes behind the rule, and proceed to treat the rule as inapplicable to the case at hand, in much the way that Aristotle envisaged.\textsuperscript{33}


\textsuperscript{32}See J.A. Guy, Christopher St. German on Chancery and Statute (London, 1985).

Although resorting to equity in order to produce an all-things-considered just result is now increasingly acceptable, doing so in direct contravention of explicit legal rules appears to retain much of the bad odor of earlier eras. For reasons that go to the legitimacy of judicial law-making in a democratic society, it is difficult for judges to be seen to rewrite what seem to be the clear words of a clear statute. And so it has long been considered more acceptable in the pursuit of justice in the individual case to re-describe the facts in order to achieve the right result than to rewrite a law in order to do the same thing, even though, in reality, re-describing (and thus mis-describing) the facts to make them fit the law is little different from re-describing the law in order to make it fit the actual facts.

But if rewriting the law to fit the facts and rewriting the facts to fit the law have the same effect, then why have legal fictions emerged? Why has re-describing facts to produce a just result seemed preferable to the more overt re-writing of a legal rule? If the rule says that $X$’s should be treated in manner $\phi$, and if $\phi$’ing this particular $X$ – call it $X_1$ – in this particular case will be unjust, then a court that concludes that $X_1$ is not an $X$ has done nothing logically

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Theory and Legal Institutions (Oxford, 1987). Often this power is exercised by a judge creating (but claiming to be discovering) a previously unrecognized exception, but creating an exception at the moment of application is no different from changing the rule, or refusing to apply it. See F. Schauer, “Exceptions” (1991) 58 University of Chicago Law Review 871.

34“[Legal ] authorities . . . admit that fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration in the hands of judges.” J. Smith, “Surviving Fictions” (1917) 27 Yale Law Journal 147, at 150.

35The consequences in the particular case may be virtually identical, but, depending on issues of precedent and judicial power within a given jurisdiction, it may be that modifying the law to produce the right result in the case at hand will have greater effects on future cases than will mis-describing the facts to accomplish the same result. If and when this is so, we can understand the preference for judicial mis-description over judicial re-writing.
different from a court that says that the rule is not to φ all X’s, but rather to φ all X’s except X₁. As Hart correctly observed, a “rule that ends with the word ‘unless . . .’ is still a rule”.

Once we see the logical equivalence in the particular case between the two approaches, the puzzle becomes clearer, as does the fact that the solution to the puzzle appears to lie much more in the realm of psychology and politics than in technical legal analysis. And as a matter of the psychology and politics of appearances, there seems to emerge a preference for judicial prevarication over judicial activism, even though the prevarication is simply judicial activism in different clothing. But if judges believe the two to be different, or if judges believe their audiences to believe that the two are different, we can understand why re-describing the facts has seemed preferable to rewriting the law. Thus there emerges the most prominent version of the legal fiction, the re-description or mis-description of facts in order to achieve a sound or just end. Consider the classic example of Mostyn v. Fabrigas, decided by the King’s Bench in 1774. Fabrigas, a resident of the Mediterranean island of Minorca then occupied and controlled by England, was imprisoned by Mostyn, at the time the governor of the island. Because no suit could be brought against Mostyn in Minorca without the approval of the governor, and because the governor was the defendant in the very lawsuit Fabrigas wished to pursue, Fabrigas sued instead in the Court of Common Pleas in London for trespass and false imprisonment, proceeding to win a jury verdict of 3000 pounds. On appeal, Mostyn claimed,  

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36 Hart, note 13 above, at 139.


38 It is likely that Fabrigas’s imprisonment was part of a political vendetta, and thus Fabrigas’s underlying substantive claim was likely a legally sound one.
correctly, that the trial court had been granted jurisdiction only in cases brought by residents of London, but Lord Mansfield, recognizing that denying jurisdiction would leave someone who was plainly wronged without a legal remedy, concluded that Minorca was part of London for purposes of this action. That conclusion was plainly false and equally plainly produced a just result, making *Mostyn v. Fabrigast* the paradigmatic example of a fiction used to achieve what might in earlier days have been done through the vehicle of equity.\(^{39}\)

*Mostyn* is an extreme example, but it is representative in the sense that this kind of legal fiction – the obvious re-description or mis-description of a fact – has historically been used most commonly for jurisdictional purposes.\(^{40}\) Indeed, legal fictions were the typical method by which the King’s Bench and Exchequer courts expanded their own jurisdictions beyond the constraints of statutory geographic limitations or the constraints of the write system. The well-known “Bill of Middlesex”, for example, involved the common allegation that a trespass had occurred in Middlesex, even if it had not, in order to gain access to the King’s Bench courts.\(^{41}\)

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\(^{39}\)There is a story, probably apocryphal, that, in 1939 the renowned and beloved deer that graze on the grounds of Magdalen College, Oxford, were at risk of being requisitioned during the wartime food shortage by the Ministry of Food. In order to prevent such an occurrence, it is said, influential Magdalen graduates in the government arranged to have the deer reclassified as vegetables and thus be spared from the slaughterhouse. Closer to the truth, according to Dr. Ralph Walker, Magdalen’s historian and archivist, are the examples of a Fellow’s dog being classified as a cat in order to be allowed into college even in the face of a rule prohibiting dogs, and the loudly banging back door of the Waynflete Building at Magdalen being designated as a musical instrument so as to come within the rule specifying the times when musical instruments could (and could not) be used.


\(^{41}\)Ibid.
Jurisdictional expansion was the common historical use of the legal fiction, but over time the use of fictions to do substantive justice rather than merely to ground jurisdiction became more common. Thus we see the 2007 case of *R(Robinson) v. Torridge District Council*. Robinson’s land had been flooded and damaged as a result of a bridge whose pilings had constricted the flow of water, producing the flooding. Robinson’s action against the relevant authorities would have been sound had their actions involved failing to remedy a watercourse “so choked or silted up as to obstruct or impede the proper flow of water,” and in order to allow Robinson relief the court concluded that the blockage caused by the bridge was to be treated as having “choked” the watercourse, even though it plainly had not done so according to any definition of what it is to choke a watercourse or fall within the statute’s reference to “choked or silted up.” But the false re-description of the problem enabled Robinson to recover.

American courts have done much the same thing with the laws of inheritance. As is often the case, two people may own property jointly, and sometimes one joint-owner kills the other so as to secure full ownership. Under such circumstances, the killer, although obviously subject to criminal liability, would under the traditional rules of joint ownership obtain full ownership of the previously jointly-held property. To avoid such an unjust outcome, however, several courts have deemed the killer to have died before the victim, even though such an eventuality was somewhere between highly unlikely and plainly false. Yet although

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the conclusion is factually false, it serves to achieve a just result without the necessity of modifying the general terms of the laws regarding jointly upheld property. Again the fiction as a false statement of fact is used to achieve a just or equitable result, explaining the maxim in *fictionejuris semper aequitasexistit* – in a fiction of law, equity always exists.\(^{44}\)

These examples all involve particular (and more or less unique) facts in particular cases, but even more common is for fictions of this type to be employed with reference to *categories* of events a court may perceive to be mis-treated or non-treated by the relevant legal rule. It is a fiction to treat a corporation as a person, for example, by virtue of the simple fact that corporations are not people according to any standard understanding of what a person is. But because there were perceived numerous reasons to treat corporations as if they were people, the fiction that corporations were people developed and was allowed to flourish,\(^{45}\) in much the same way that there long existed the fiction in admiralty law that a ship was a person.\(^{46}\)

Such categorial, rather than particularized, legal fictions abound, in much the same form as the fictions of corporate and vessel personality, and thus we see implied contracts, which

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\(^{46}\)The traditional fiction is described and criticized in *The Carlotta*, 48 F.2d 110 (2d Cir. 1931).
treat non-contracts as contracts,\textsuperscript{47} the rise of the doctrine of ejectment, which allowed English courts to try the title to land even though no one had been ejected from anything by anyone,\textsuperscript{48} the rule declaring illiterate males to be members of the clergy in order to fall within the law granting the benefit of clergy only to literate males,\textsuperscript{49} the legal rule declaring children who are trespassers to be invitees even under circumstances in which they have decidedly not been invited,\textsuperscript{50} court decisions concluding that someone will be deemed to have notice of some event even when they did not,\textsuperscript{51} and the American constitutional doctrine that provides that a citizen of his own state is a citizen of “another” state, thereby extending the jurisdictional bar in the Eleventh Amendment beyond its literal meaning in order to produce an internally consistent doctrine about when citizens could use federal courts to sue state entities.\textsuperscript{52}

In none of these instances is there the kind of deception normally associated with lying, and indeed the characteristic way of differentiating the fiction from the lie is with the observation that fiction is typically known to be untrue, while the lie is an attempt to pass off falsity as truth to those who are unaware that some statement is untrue. But if legal fictions


\textsuperscript{49}\textit{Ibid.}, pp. 621-622.

\textsuperscript{50}See Fuller, note 3 above, at 66.


are known to be fictional, then why are they used? One answer to this question lies in the word “deem,” which is sometimes used in this context and sometimes assumed even when it is not explicit. To say that a bird is deemed to be a “beast,” even though it is not, or that the husband of the mother of a child is deemed to be the father even when he is not, is simply to say that something that is not an X will be deemed to be an X – will be treated as if it were an X – because the reasons for treating X in manner m apply as well to some non-X’s, which will consequently be treated in the same way. So too with the word “constructive,” and thus we see constructive trusts that are not actually trusts, constructive delivery that involves no actual delivery, constructive ejectment, which lacks any ejection, and constructive fraud, in which the elements typically associated with fraud are lacking.

There is nothing mysterious about such a process, and in important ways it relates to the use of presumptions discussed above, but it remains slightly of a mystery, especially in common-law decision-making where judicial law-making is (more or less) accepted, why the fiction of the not-X being taken to be an X is preferred over the straightforward declaration that this non-X, albeit a non-X, will be treated in the same way as an X because the reasons for treating X in such-and-such a way apply to some non-X’s as well.

There seem to be two justifications for such a circuitous, albeit not deceptive, approach. One is that in the case of interpreting a statute, as opposed to modifying or extending a common law rule, the circuitous approach of the legal fiction appears to avoid a direct judicial

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Rewriting of a legislatively enacted statute and thus may seem more legitimate or politically palatable, even though the consequences are the same in the particular case, and often substantially the same even for future cases. And the other justification is captured by the familiar adage that the law is a “seamless web.” Legal rules typically exist as part of an interlocking network of other rules, and so there may well be times when changing one rule will have indirect effects on other rules in ways that simply misapplying rules will not.

IV. LEGAL FICTIONS AND THE NATURE OF LEGAL LANGUAGE

But now things become more complex. The occasion of a legal fiction is a legal rule that produces a legally poor outcome when applied to the facts at hand. But in order for such a circumstance to arise, the language of the relevant rule must be understood as, at least in part, something other than legal technical language. Were it otherwise – if the language of the rule was legal language, then that language could be understood to allow the desirable legal result without the need for a legal fiction. What makes the fiction in Mostyn v. Fabrigas a fiction is the simple fact that Minorca is not in London, where “London” is conventionally and not technically understood. And the description of the problem in Robinson becomes a fiction, again, just because there is a standard understanding of what it is for a watercourse to be “choked,” an understanding that does not itself derive from the law and its goals.

The foregoing is a bit obscure, but can be made clearer by examining the process of extending an intrinsically legal term. Consider, for example, the process by which a court could

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conclude that a “trust” was created even absent an intention on the part of some agent to do so. It is true that the law may previously have treated trusts as requiring a certain kind of intent, but it is also true that a trust is itself a creature of the law. Putting aside for the moment questions about which legal actors have the power to change the law, it seems no affront to truth for the legal system to find a trust to have existed even absent intent, and that is because the truth of whether some instrument is or is not a trust is itself entirely a legal matter. “Trust” is defined by the law, and the truth or falsity of something being subsumed by that term is consequently similarly and necessarily a legal matter.

The point is obvious with respect to trusts and the word “trust,” and even more so for terms that simply do not have any non-legal meanings at all. The law is well-stocked with law-exclusive technical language, some but not all of it in Latin -- “replevin”, “bailment”, “curtesy”, “per stirpes”, “interpleader”, “champerty”, “distraint”, “and “jus poenitendi”, for example. It would be hard to imagine such terms occasioning a legal fiction, for there would be no gap between what a rule using such terms says and what would be a good legal result. The terms could simply be defined and redefined to be compatible with good legal results, and at no point could we say that applying such a term within law and to produce a legal result was fictional, precisely because there could be no gap between what the terms meant outside of law and what they meant within law, as there would be when terms like “London” and “person” are applied in law to things that are not London or not persons outside of law.
This is straightforward. But the question then is whether the same form of analysis holds true for all language that is used within and by the law.\textsuperscript{55} That is, is \textit{all} language used in the law technical in just the same way that “trust” is just because it is used within the law? Is all of the language of law technical, and does all legal language have a legal meaning? Does the legal use of any language transform that language into legal language. Consider Lon Fuller’s (not entirely clear) suggestion with reference to Hart’s “no vehicles in the park” example that perhaps Fuller’s hypothetical military truck used as a war memorial was not a vehicle at all, at least for purposes of the law and when the word “vehicle” was used in as legal rule.\textsuperscript{56} The man on the Clapham omnibus may think of the truck as a vehicle, but when the word “vehicle” is incorporated within a legal rule and subject to interpretation by legal officials, then it may be that \textit{vehicle} becomes \textit{vehicle’}, where \textit{vehicle’}, superficial appearances to the contrary, is a legal term of art in just the way that “trust” is a legal term of art with a characteristically legal meaning. And if this is so, then saying that the military truck is not a vehicle, assuming it would be absurd to apply the “no vehicles in the park” regulation to it, is no longer false. Or at least so Fuller seemed to suggest. Similarly, the conclusion that Minorca is part of London would no

\textsuperscript{55}The most careful discussion in the literature of the relationship between ordinary language and legal language is M.J. Morrison, “Excursions into the Nature of Legal Language” (1989) 37 Cleveland State Law Review 271.

longer be false, because the London of a statute regulating the jurisdiction of the courts would not necessarily be the London of the cartographers.\(^{57}\)

Propositions are creatures of language, and thus for a proposition to be false there must be a way in which reality diverges from the meaning of the proposition. But if all legal propositions incorporate the full set of goals of a legal system, and if among those goals is the power of the interpreter – typically the judge – to achieve a just result, then the meaning of vehicle’ incorporates that power, and when a judge concludes that a military truck in the park is not a vehicle’ she is not saying anything false at all, and thus not employing a fiction. This seems to be what Fuller was claiming, and it is not entirely implausible.\(^{58}\) Indeed, when Fuller maintained that law progresses to the extent that more of its terms become technical terms and are understood as technical terms,\(^{59}\) and when the contracts scholar and legal theorist Edwin Patterson noted that much confusion could be eliminated were all legal concepts to have “pure” legal labels,\(^{60}\) they recognized the way in which language in legal context might solely by virtue of the legal context take on a meaning different from the meaning that the same words would have in non-legal contexts. And if that is so, then perhaps every word in the law

\(^{57}\)Of some related interest are People v. Kohl, 847 N.E.2d 150 (Ill. 2006), and Harris v. State, 3 S.W. 477 (Tex. App. 1887), both holding that “brass knuckles,” the possession of which was unlawful, need not be made of brass.

\(^{58}\)And even more plausible in Moore’s version. \textit{Ibid.}

\(^{59}\)Fuller, note 3 above, at pp. 23-27.

\(^{60}\)Edwin W. Patterson, Manuscript of Chapter 3 of The Law of Contracts (unpublished, available in the archives of the Columbia Law School Library). Patterson of course recognized that such a proposal was totally unrealistic, and would in addition bring disadvantages in terms of some of the other goals of the law.
necessarily has a legal and not ordinary meaning, and then perhaps as well every legal meaning incorporates the norms and goals of the legal system. If, with Fuller for example, one believes that law necessarily must avoid absurd constructions of rules inconsistent with the purposes lying behind those rules, then it is only a short step to the conclusion that vehicle’, the legal term, incorporates the goal of avoiding the non-absurd result, and thus a truck used as a war memorial, even though clearly a vehicle, is simply not a vehicle’ at all.

Yet although Fuller’s view is not entirely implausible, it is inconsistent with the idea that there is something that we call a legal fiction. That is, the idea of a legal fiction presupposes that not all legal language is technical language. Legal fictions exist by virtue of legal terms having non-legal meanings, such that a non-standard application of that meaning is false, regardless of the justifications for the falsity. And of course if law is to serve its function of guiding ordinary folk, the meaning of some or most of its terms must be in the language that such folk use and understand. Fuller’s offhand suggestion that the military truck was not a vehicle at all was offhand for a reason, for he at other times and in other places fully recognized that without some connection between legal language and ordinary language, and thus between legal truth and truth simpliciter, law could not achieve its primary purposes at all.61

V. CONCLUSION

The examination of legal fictions, therefore, is not simply an examination of an epiphenomenal and quaint feature of legal reasoning. Rather, it is an entry into the difficult

problem of legal truth. Fictions are, by definition, false, and thus a legal fiction is a legal falsehood. But for there to be legal falsehoods there must be actual or potential divergence between what the law says and what the law or some legal actor should do. Accordingly, the very idea of a legal fiction presupposes a view of legal truth that makes legal truth not entirely discontinuous with truth simpliciter, and such a view about the relationship between legal truth and truth in turn presupposes a view of legal language such that legal language is not, and cannot be, entirely sui generis in all of its words, all of its sentences, and all of its meanings.

That legal language cannot be understood as entirely technical is consistent with the view that legal language cannot be understood in such a way that the all-things-considered best outcome can be collapsed into the meaning of legal language. Legal fictions are thus parasitic on a gap between legal language and all-things-considered sound results. Without this gap, we would be unable to understand the idea of a legal rule, and unable to understand the way in which law, however technical it may at times get, must remain tethered to the language in which it is written, and thus tethered to the language of the linguistic community in which the legal system exists. Were it otherwise, law would be unable to guide ordinary people, and perhaps unable to perform some number of its other core functions. Legal fictions may be minor curiosities of the law, but the fact that they exist and are understood as fictional suggests that law does not consist entirely of terms of art. Perhaps it does, and thus perhaps it is the talk of legal fictions that is mistaken. But that we think otherwise, and that we think there are legal fictions, entails that we do not think that all legal terms are terms of art. Some of them, and probably most of them, are the terms of the ordinary language of which the technical language of the law is, to a substantial degree, derivative.