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ARTICLE

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Fictions in Legal Reasoning

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Abstract
A legal fiction is a knowingly false assumption that is given effect in a legal proceeding and that participants are not permitted to disprove. I offer a semantic pretence theory that shows how fiction-involving legal reasoning works.

Résumé
Une fiction juridique est une hypothèse sciemment fausse qui est mise en œuvre dans une procédure judiciaire et que les participants n'ont pas la possibilité de réfuter. Je propose une théorie du faux-semblant sémantique qui explique comment fonctionne le raisonnement juridique qui implique les fictions.

Keywords: philosophy of law; legal reasoning; legal fictions; semantic pretence; interpretation

1. Introduction

This article proposes an account of the operation of fictions within legal reasoning. Let's start with two examples: one old and one recent.

It is 1598. B has been charged and convicted of pickpocketing. The automatic sentence is hanging. But it is B's first offence, and it is widely accepted that this sentence is far too harsh. There is an exception in the law: members of the clergy are spared execution for offences like these, as they are subject to the jurisdiction of the ecclesiastical courts. But B is not a clergyman. What to do? We will pretend that B is a clergyman (Baker, 2019, p. 555; Shmilovits, 2022, Chapter 1). More specifically, there is a background assumption that literacy is proof of clerical status. So, we will ask B to read Psalm 51 from the Latin Bible; knowing in advance that this will be the test, B will have memorized the Psalm and will have no difficulty reciting it. We will

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pretend to be convinced by this 'proof.' Given that B is a clergyman, his case will be transferred to the ecclesiastical courts, and he will not be hanged.

It is 2005. C is killed in a car accident. A few months later, C's daughter D is born. D is entitled to death benefits arising from her father's death only if, at the time of the death, she was her father's dependant. But D was not her father's dependant, as she did not exist at the time of his death. (X is Y's 'dependant' only if X is alive and is Y's infant child.) What to do? We will pretend that D was born at the time when her father died.[1] The approach is "to assume that the child is born, and then to draw deduction in the same way as we should in the case of an existing person."[2] Given that she was born, she was her father's dependant, and is entitled to death benefits arising from his death.

My aim is to propose an account of the logical structure of the reasoning that courts engage in in these and similar cases. I will not be attempting a comprehensive treatment of legal fictions. Rather, I want to get my account on the table and address some initial objections to it.

For purposes of this article, I'll use a definition of legal fictions drawn from the work of the medieval Glossators and Commentators (Olivier, 1975, p. 17).[3] A legal fiction is a knowingly false assumption that is given effect in a legal proceeding and that participants in the proceeding are not permitted to disprove.

Let us take these characteristics in turn. First, a legal fiction is a knowingly false assumption, in the sense that the court proceeds on the basis of a claim that is known to be false. In this, fictions differ from lies and mistakes (Fuller, 1930–1931a, pp. 367–368). Second, a fiction is given effect in a legal proceeding: it plays a role (as something taken to be true) in determining the outcome the court arrives at, typically as a premise in legal reasoning. Third, a fiction is such that proof to the contrary is not allowed. The other participants in the legal proceeding are not permitted to adduce evidence to rebut the fictional claim. In this, fictions differ from presumptions, which are claims a court is entitled to accept without evidence, but which can be disproven (or 'rebutted') by participants. I am not claiming that this is the only possible definition of legal fictions, but that it picks out the phenomenon I want to account for.[4]

Both the distinctiveness and the value of legal fictions are controversial. Hans Kelsen denied that there are distinctive fictions that operate within legal reasoning. In cases like that of death benefits, he argued, "[t]he law simply wants to attach the same legal consequences to one case as it does to another" (Kelsen, 2015, p. 10). It is a mistake to think that the law is claiming that D *really was* born at the time of C's death. The law is not claiming this, because "after all it does not claim anything": it is a structure of ought-statements, not is-statements (Kelsen, 2015, p. 12). Ultimately, the content of the law is that persons in D's situation can

[1] *Willard v Zurich Insurance Co.* (2004), 73 OR (3d) 309 (SC).

[2] *Willard* at para 17, citing *Schofield v Orrell Colliery*, [1909] 1 KB 177 at 182.

[3] The definition I set out here combines features that Pierre J. J. Olivier attributes to Azo of Bologna, Accursius, and Bartolus de Saxoferrato (Olivier, 1975, pp. 13–14, 17).

[4] Some have objected to various features of this traditional characterization — in particular, it has been argued that legal fictions are not false and that they are not assumptions (claims about what is the case) at all. I respond to these objections below.

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obtain death benefits. What appear on their surface to be fictions are really abbreviations for complex norms.

For Kelsen, the distinctive fictions are not within legal practice but within legal theory (Gustafsson, 2010; Kelsen, 2015, p. 5). For Kelsen, the concept of a legal person and the validity of the *Grundnorm* (the basic rule of the legal order) are theoretical fictions. The latter fiction is theoretically essential: on it hangs the validity of the rest of the legal order. Explaining these kinds of fictions is not my goal in this article; I leave open whether my account can be extended to include them. Rather, contra Kelsen, I will explain what is distinctive about fictions within legal reasoning. My claim is that fictions in legal reasoning use semantic pretence: games of make-believe about what certain sentences mean.[5]

Jeremy Bentham, unlike Kelsen, held that legal reasoning is rife with fictions. However, he argued that they are uniformly harmful and that we would be better off without them. First, they make the law impossible to understand for laypeople, such that nobody has a clear grasp of the rules they are subject to (Hart, 1982; Postema, 1986, pp. 271–272). Second, fictions allow judges to offer specious justifications for their decisions that don't correspond to the judges' own reasons. In this way, they undermine the publicity of law (Postema, 1986, p. 273).

These are serious challenges. In this article, I am not going to argue that legal fictions are, on the whole, a good thing. Rather, my account will bring out one valuable feature of legal fictions. Legal fictions allow us to modify the reach of the law in particular cases or kinds of case without reinterpreting legal terms.

I begin in Section 2 by sketching an example of legal reasoning. This shows that fictional reasoning is unsound by ordinary standards of legal reasoning. In Section 3, I respond to Kelsen's argument that fiction-involving reasoning is sound if correctly understood. In Section 4, I set out the general features of semantic pretence and work through an example. In Section 5, I give a pretence account of fictions in legal reasoning that makes sense of the examples we began with. In Section 6, I compare fictions with reinterpretations of legal terms, arguing that in some circumstances there are reasons to prefer fictions. In Section 7, I conclude with a comment on the broader significance of my account of legal fictions for our understanding of legal reasoning.

2. The Unsoundness of Fictional Reasoning

In this section, I sketch an example of legal reasoning and use it to show that fictional reasoning is unsound by ordinary standards of legal reasoning.

My sketch is not intended as a comprehensive one. It leaves out core features of legal reasoning, such as the apparent defeasibility or modifiability of legal rules, and the derivation of those rules from prior cases by exercises of interpretation.[6] It serves only to bring out a difference between fictional and ordinary legal reasoning.

[5] Olaf Tans (2016) offers a pretence account of what Kelsen would call fictions within legal theory, such as the fiction of the *Grundnorm*. My account is consistent, but does not overlap, with his.

[6] There is a large literature on these features of legal reasoning: see e.g., S. L. Hurley (1989) and John Horty (2015). I return to interpretation in Section 6.

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Let's return to the case of death benefits. First, we have a general rule.

> **Death Benefits Rule:** For any persons X, Y: if Y dies in a car accident, and X was Y's dependant at the moment before Y's death, then X is entitled to benefits arising from Y's death.[7]

In a case in which all parties are born at the time of death, the rule is easy to apply. But if we attempt to apply it in the case set out earlier, the result is unsound. (Deductive reasoning is *unsound* if either one of the premises is false or the premises do not entail the conclusion.) The reasoning is as follows:

1. C died in a car accident.
2. D was C's dependant at the moment before C's death.
3. Therefore, by the Death Benefits Rule, D is entitled to benefits arising from C's death.

Premise 2 is false: D was not C's dependant at the moment before C's death, because D was not yet alive at that point. So, the reasoning is unsound.

The natural thought is that this is why the reasoning in this case, and others like it, is fictional. Fiction is what allows us to get to the conclusion despite the falsity of certain premises. The account I will offer vindicates this natural thought, but before we get there, let me address an objection to this reconstruction of the reasoning.

3. Kelsen's Objection

Whether a set of premises entails some conclusion depends not only on the premises and conclusion but also on the rules of inference. Kelsen would suggest that the problem in the reasoning set out above is not with the premises, but with the rules.[8] Correctly understood, the law "simply wants to attach the same legal consequences to one case as it does to another" (Kelsen, 2015, p. 10). A Kelsenian might reconstruct the Death Benefits Rule as follows:

> **Death Benefits Rule*:** For any persons X, Y: if Y dies in a car accident, and X was Y's dependant at the moment before Y's death, *or if X was subsequently born and would have been Y's dependant had Y not died,* then X is entitled to benefits arising from Y's death.

In other words, the law simply covers two cases. One is the case of a dependant who is already born at the time of the insured's death. The other is the case of someone who

[7] A couple of notes on this formulation. First, the Death Benefits Rule clearly holds in some legal orders and not others. I am leaving implicit the relativization to a particular legal order. Second, in my reconstruction of the legal reasoning from 1 and 2 to 3, I am treating the Death Benefits Rule as a local rule of inference, validating the transition from premises to conclusions. But we could equivalently treat it as a universally quantified truth, such that one instance of it serves as an additional premise in the reasoning from 1 and 2 to 3.

[8] For a different reading of Kelsen's argument, see Liron Shmilovits (2022, Chapter 2). Shmilovits attributes the argument I attribute to Kelsen to Sir John Baker.

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subsequently comes into being. The law provides for persons in either situation to get death benefits.[9] On a correct understanding of the rule, there is no need to pretend that anything is the case in order to arrive at the desired conclusion.

This disjunctivizing treatment can be extended to any other case of fiction-involving legal reasoning. For any situation in which courts are permitted to proceed on the basis of a premise that is known to be false, we simply add a description of that situation as an additional disjunct to the antecedent of the relevant legal rule. Then we can arrive at the conclusion without the need for a false premise.

Kelsen's argument poses a challenge. On the one hand, there is a sense in which he is clearly right. The Death Benefits Rule* appears to capture the operation of the legal order. It is true that the law provides for someone who is born after the death of the accident victim to receive death benefits, just as a dependant does. On the other hand, there is a sense in which he is clearly wrong. His rule is not part of the law. The Death Benefits Rule* would not be found in, say, an abridgement or a treatise on statutory accident benefits. An attempt to rely on this rule in court would fall flat. (The point may be easier to see with the earlier example of clergy and the death penalty. A disjunctivized version of the relevant legal rule — say, that pickpocketing is punishable by hanging, except for members of the clergy *or non-members of the clergy who can pretend to read Psalm 51* — would not have been recognized as part of the law.[10])

In thinking through Kelsen's challenge, it is useful to distinguish between *immanent* and *transcendent* ways of stating legal rules.[11] An immanent way of stating a legal rule in a particular legal order aims to capture the rule as it occurs in the reasoning of participants in that legal order. Roughly speaking, an immanent statement of a legal rule is the kind of thing that might be recognized as correct not only by a legal theorist but also by a judge, a lawyer, or a litigant. A transcendent way of stating a legal rule aims to capture the patterns of conduct that that rule serves to coordinate. The rule need not be anything recognizable by participants in the legal order; it is sufficient that the participants act in ways that a theorist can see as conforming to the rule.

This distinction is not unproblematic. On the one hand, if reasoning is a kind of conduct, then a complete transcendent statement of a rule would also have to describe the way participants in the legal order reason with the rule, and so would have to include an immanent statement of the rule. So, any statement of the rule that is entirely non-immanent would have to be incomplete. On the other hand, it may be that some participants in a legal order grasp its rules only under a transcendent statement. For example, Oliver Wendell Holmes' 'bad man' is concerned only with knowing the consequences the law attaches to various actions (Holmes, 1897). A 'bad man' in 1598 might really have understood the law about pickpocketing in

[9] In fact, the law is more limited: it only provides these benefits for a person who was *en ventre de sa mère* at the time of death. I ignore this detail in what follows.

[10] It is true that, in 1351, the benefit of clergy was extended by statute to 'all manner of clerks, as well secular as religious,' but the statute still nominally limited the benefit to 'clerks.'

[11] This distinction is loosely inspired by Gareth Evans' (1976) use of the same terms to characterize two kinds of semantic definition.

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the disjunctivized way set out above. If this is right, then a transcendent statement can also be an immanent statement for some participants in the legal order.

These points show that some statements may count as both immanent and transcendent. But this overlap doesn't matter for our purposes, as long as the core cases of these two kinds of statement come apart. They do, because immanent and transcendent statements have their proper roles in two different points of view on a legal order. From the point of view of a typical participant (a subject or official), the legal order is a structure of normatively binding rules to be obeyed and applied.[12] The rules make sense in part because of the normatively freighted concepts they use. In our own legal order, we use concepts like *private*, *public*, *owner*, *duty of care*, *thief,* and *murderer*. A different legal order might use other concepts. An immanent statement uses the concepts that make the rule intelligible to participants in the relevant legal order. By contrast, consider a theorist who is comparing a range of different legal orders as ways of shaping human conduct. For this purpose, the theorist requires statements of the rules in different legal orders in a common set of concepts. Transcendent statements would suit this purpose.[13]

Kelsen's Pure Theory of Law is a transcendent project. It aims to provide a framework in which any possible legal order can be characterized. It eschews many of the concepts that make particular legal orders intelligible to their participants, such as the distinction between public and private law (Kelsen, 1997, pp. 92–96). Similarly, one can imagine Pure-Theoretical descriptions of communist legal orders, religious legal orders, and Indigenous legal orders, using only the austere resources of the Pure Theory, correct by their own standards and yet unrecognizable to the participants in those legal orders.

Returning to Kelsen's challenge, the Death Benefits Rule* I attributed to him is correct as a transcendent statement but incorrect as an immanent statement.[14] It is correct if it aims only to capture the patterns of conduct on which participants in the legal order coordinate. However, it fails to capture the rule as it occurs in the reasoning of participants in the legal order. Kelsen's challenge succeeds only if it can be shown that immanent statements are in some way defective wherever they come apart from transcendent ones. But it is not clear why this would be so. The features of immanent statements that allow them to come apart from transcendent ones — their use of normatively freighted concepts that are local to a particular legal order — also play an important role in making the rules intelligible to those who have to follow them.

Given that immanent statements like the original Death Benefits Rule play this role, I return now to the question of how fiction-involving legal reasoning works.

[12] There are also atypical participants, such as the 'bad man,' to whom the rules only make sense as descriptions of the way power is likely to be exercised.

[13] If there is a substantive set of normative concepts that any possible legal order must use, then the theorist would be able to draw on these concepts. Some Kantians and natural law theorists might suppose that this is the case. I am assuming that this is not the case.

[14] In fact, the rules I set out are not quite correct as transcendent statements, as they invoke resources beyond the Pure Theory; the point is that their failure to capture the fictional nature of the reasoning involved is no objection to them as transcendent statements.

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4. Semantic Pretence

In this section, I introduce semantic pretence (Armour-Garb & Woodbridge, 2015; Walton, 1990).[15] In this context, *pretence* refers to games of make-believe — that is, games where we pretend that something is the case. We all seem to have the capacity to participate in these games, or, as I will say, to *enter* or *engage in* a pretence. The surprising idea that drives pretence theory is that this capacity is at work not only in play and storytelling but also in some activities that appear more 'serious,' such as art and art criticism, scientific inquiry, and (I will argue) legal reasoning. In particular, the capacity plays a role in these activities by way of *semantic* pretence: pretence about the meaning or truth-value of certain words or sentences.

Pretences have a common structure, including certain general rules. When we engage in a pretence, we tend to follow these rules, although we may not be aware of doing so. A pretence *account* attempts to codify this common structure, including its general rules.

What is the common structure? First, a pretence will typically include some items (call them *props*) about which something is pretended to be the case (call these *initial stipulations*). For example, if the child X is pretending that she is a builder and the shoeboxes are bricks, then the props are X and the shoeboxes, and the initial stipulations are that X is a builder and the shoeboxes are bricks. Second, however, these stipulations do not exhaust the content of the pretence (Crimmins, 1998, p. 5). Real-world facts, including facts about the props, can be incorporated into the pretence, and inferences can be drawn within the pretence just as in the real world. When X stacks up the shoeboxes, in the pretence, the builder is building a wall. These moves are made possible by the general rules of the pretence.

In a semantic pretence, the props are not physical objects but words and sentences, and the initial stipulations assign them meanings or truth-values other than their ordinary ones. Let's work through the Construction Site Pretence as an example. I'll say that a sentence is *make-believedly true* when an assertion of it would be correct within the pretence (Crimmins, 1998, p. 15; Evans, 1982, p. 354).[16] The basic rules of the pretence, then, are as follows:[17]

Construction Site Pretence[18]

Props: The props are the terms 'The builder,' 'bricks' and sentences containing those terms.

Initial Stipulations: For a sentence *P* that contains one or more of 'The builder' and 'bricks,' *P* is make-believedly true if and only if *P* ['The builder'/'X'; 'bricks'/'shoeboxes'] is true.

[15] My discussion in this section borrows from my discussion in Manish Oza (forthcoming).

[16] Why define make-believe truth in terms of what is correct to assert within the pretence, rather than the other way around? Because make-believe truth is not truth. I am happy to take *truth* as a primitive concept, but not *make-believe truth*. By contrast, the concept of a correct move in a game is a familiar one, and we can use it to characterize what it is correct to assert in a game that involves asserting.

[17] This way of setting out the pretence comes from Bradley Armour-Garb and James A. Woodbridge (2015).

[18] I use *P*, *Q*, and *R* as variables running over sentences and *P* ['a'/'b'; 'c'/'d'; …] for the result of replacing 'a' with 'b,' 'c,' with 'd,' and so on in *P*.

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We also have two more general rules (Evans, 1982, Chapter 12).[19] The Principle of Generation says that if something is really true, then it is make-believedly true as well, provided that it doesn't conflict with the existing content of the pretence.

> **Principle of Generation:** If P is true, and if there is no set of make-believedly true sentences $Q_1 \ldots Q_n$ such that if $Q_1 \ldots Q_n$ were true then P would not be true, then P is make-believedly true.

The Recursive Principle allows us to extend the content of the pretence by drawing inferences that are really valid, provided that their conclusions don't conflict with the existing content of the pretence.

> **Recursive Principle:** If $P_1 \ldots P_n$ are make-believedly true and if $P_1 \ldots P_n$ were true, then R would be true and there is no set of make-believe truths $Q_1 \ldots Q_n$ such that if $Q_1 \ldots Q_n$ were true then R would not be true, then R is make-believedly true.

These rules specify the set of make-believedly true claims. Some claims are expressly made-believe, while others are determined by a function from real-world truths to make-believedly true claims.

Now consider an assertion of 'The builder knocked over a pile of bricks.' Given the rules of the pretence, we know what has to be the case for the assertion to be make-believedly true: the assertion is correct, within the pretence, if and only if X knocked over a pile of shoeboxes.

5. A Semantic Pretence Account of Legal Fictions

The pretence account of legal fictions holds that, when participants in a legal order engage in fictional reasoning, they enter a semantic pretence (Fuller, 1930–1931a, pp. 363, 377). The initial stipulations are to the effect that certain sentences are true. Given these stipulations, the participants in the pretence can use the general rules to incorporate non-fictional legal content and then draw inferences within the pretence.

Let's consider an example. I propose that when courts engage in the fictional reasoning in the death benefits case, they enter a pretence defined by the following rules:

> **Death Benefits Pretence**
>
> **Props:** The props are the terms 'C,' 'D,' 'alive,' and sentences containing these terms.
>
> **Initial Stipulations:** The sentence 'D was alive at the moment of C's death' is make-believedly true.
>
> **Principle of Generation:** If P is true, and if there is no set of make-believedly true sentences $Q_1 \ldots Q_n$ such that if $Q_1 \ldots Q_n$ were true then P would not be true, then P is make-believedly true.
>
> **Recursive Principle:** If $P_1 \ldots P_n$ are make-believedly true and if $P_1 \ldots P_n$ were true, then R would be true and there is no set of make-believe truths $Q_1 \ldots Q_n$

[19] Given that make-believe truth is not truth, these two general rules should be treated as proof-theoretic rules of inference rather than as semantic entailments.

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such that if $Q_1 \ldots Q_n$ were true then R would not be true, then R is make-believedly true.

Now let us walk through the reasoning. First, by the Principle of Generation, it is make-believedly true that

1. C died in a car accident.

By the same principle, it is make-believedly true that

2. D is C's infant child.

Next, by the Initial Stipulation, it is make-believedly true that

3. D was alive at the moment of C's death.

Then, by the Recursive Principle, from 2 and 3, it follows that

4. D is C's dependant.

Finally, recall that under the Recursive Principle, if an inference is really valid, then it is make-believedly valid, unless its conclusion contradicts existing make-believe content. Thus, by the Recursive Principle and the (really valid) Death Benefits Rule, from 1 and 4, it follows that

5. D is entitled to benefits arising from C's death.

And this is the desired conclusion.

In this way, the pretence account can explain the correctness of the reasoning engaged in by courts applying legal fictions. Importantly, this account does not require us to make any modification to the core legal rules (like the Death Benefits Rule) being applied. So, it stands a chance of explaining how fiction-involving reasoning works in the minds of participants in the legal order. I would note, though, that this is all the account purports to explain. It does not explain when participants can or should engage in such reasoning. In particular, it does not explain what it takes to introduce a new pretence, how such a pretence gets uptake so as to become part of the law, and when participants in the legal order should or should not enter the pretence (see Fuller, 1930–1931b).

As an explanation of how fiction-involving reasoning works, the account has some merits. First, it vindicates the natural thought that the sense in which these are fictions is that the reasoning involves premises that are literally false.[20] The pretence involves statements that are make-believedly true but in conflict with the actual facts.

[20] Douglas Lind (2015) argues against this thought on the basis that it leads to contradiction — we end up treating fictions as both true and false. My account avoids the contradiction by drawing a distinction. The premises are not true and false in the same sense. They are make-believedly true but literally false.

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Second, it captures the sense that fictions are, as it were, encapsulated or isolated from legal reasoning more broadly (Lind, 2015, p. 93). The distinctive feature of semantic pretence is that it creates a 'sandbox' in which we can draw inferences without having to confront all of the broader claims to which we are committed. The fact that something is make-believedly true within the scope of a particular pretence does not entail that it is literally true, and so available for general inferential use.[21]

Third, the pretence account sheds light on one valuable feature of fictions in legal reasoning in particular. I'll elaborate on this point in the next section.

6. Fiction, Meaning, and Interpretation

I said earlier that legal fictions allow us to modify the reach of the law in particular cases or kinds of case without reinterpreting legal terms. This is one valuable feature of legal fictions brought out by my account. In this section, I'll elaborate on this point by contrasting legal fictions with an alternative.

The basic problem addressed by legal fictions is this. There is a legal rule that attaches consequences to falling under a certain word, like 'clergyman' or 'dependant.' In some kinds of case, there are reasons why the consequences should apply even though the word's requirements are not satisfied, or the consequences should not apply even though the word's requirements are satisfied. Legal fictions allow us to arrive at the right result without revising the legal rule. Of course, wherever there is a reason to use a legal fiction, there is also a reason to revise the legal rule. So, the technique of legal fictions is particularly useful where there are constraints on our ability to revise the legal rule.[22]

However, it might seem that there is another, simpler way to get to the right results without revising the legal rule. To see this, consider what Ronald Dworkin might say about the death benefits case. For Dworkin, legal interpretation is assessed on the axes of *fit* and *justification*: the best interpretation of the law will be the one that best fits with the legal materials and justifies them, or shows them in their best light (Dworkin, 1986, p. 230). Legal interpretation is subject to distinct normative pressures, pressures that can pull the legal meaning of a term apart from its ordinary meaning. Given the moral value of providing for children, it might be argued that, on its best interpretation, the word 'dependant' has to include subsequently born children. If this is right, then there is no need for a legal fiction: a court can engage in an interpretive exercise and determine that the child D counts as a dependant.

Someone who takes this interpretive approach doesn't have to say that 'dependant' always includes subsequently born children. Rather, they can argue that the meaning of many terms varies between ordinary and legal contexts, given the distinct

Lind's way out, by contrast, is to abandon the assumption that there is "a realm of objectively knowable reality" and such a thing as "absolute truth" (Lind, 2015, p. 88), holding instead that truth is what works. This is not the place for a lengthy discussion of pragmatist theories of truth. In my view, legal fictions can be explained more straightforwardly.

[21] That said, given that the conclusion of the reasoning in Death Benefits is only shown to be make-believedly true, arriving at a make-believedly true conclusion must be sufficient for a court to be entitled to make an order.

[22] This, I suggest, is why fictions were so pervasive in older common law, which was bound by rigid forms of action that courts did not have the power to change (Shmilovits, 2022, Chapters 2, 3).

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normative pressures that apply in legal contexts. Meanings may even vary between different legal contexts. In an ordinary context, 'dependant' does not include subsequently born children; in some legal contexts, it does, such that there is no need for a legal fiction to get to the right result. This may be seen as an instance of the more general phenomenon of meaning varying with context. For example, the meaning of 'today' varies with the day when the word is used, and the meaning of 'loud' might be different in a library and a concert venue.

To be clear, this alternative proposal involves a less predictable kind of meaning-variation than cases like 'today' and 'loud.' In those cases, the rule governing the use of the word stays the same between contexts, while the semantic contribution of the word varies in a constrained way (Kaplan, 1989). This is why you can learn it in one context and be able to use it in another. The way legal meaning comes apart from ordinary meaning need not be this constrained: knowing what 'dependant' means in ordinary contexts need not allow you to determine what it means in legal contexts. Still, I agree that there are words whose meanings vary between ordinary and legal contexts. For example, 'consideration' means different things in ordinary and legal contexts; knowing what it ordinarily means does not allow you to determine what it means in law. So too for 'person.'

But while this kind of variation is a real phenomenon in legal language, I don't think it offers a complete alternative to legal fictions (Fuller, 1930–1931a, p. 379). The two techniques — meaning-variation and fictions — suit different problems. Meaning-variation is most apt where there are reasons — general to the legal order, or at least a large part of it — why the legal meaning of a word should diverge from its ordinary meaning. The legal meanings of 'consideration' and 'person' play a role across the legal order. By contrast, fictions are most apt where there are reasons local to one kind of legal situation to (mis)apply a term. The fictional application of 'dependant' to subsequently born children is specific to death benefits cases.[23]

The difference between these two techniques matters because multiplying meanings comes with a cost. Whenever the legal meaning of a term diverges in an unpredictable way from its ordinary meaning, participants in the legal order have to learn a new meaning in order to understand and engage with that legal rule. This cost is more likely to be worth it where the legal meaning plays a role across the legal order. If the legal meaning is specific to one kind of case — for example, if participants will have to track the difference between what 'dependant' means in most legal cases and what it means in death benefits cases — then fictions offer a more epistemically accessible way to get to the right result.[24] Instead of learning a new meaning, participants only have to exercise their capacity for make-believe. This is a capacity that we have independent reason to attribute to subjects like us.[25]

[23] The difference between meaning-variation and fictions is also reflected in the fact that a distinctive legal meaning of a term can be applied fictionally. For example, we might pretend that an organization which is not a legal person is a legal person for certain purposes, such as naming it in a lawsuit. Of course, fictions about legal facts are harder to see than fictions about non-legal facts.

[24] On the epistemic accessibility of law, see Barbara Levenbook (2022). A distinct legal meaning can also sound artificial. See the discussion of the deeming provision in *R v Verrette*, [1978] 2 SCR 838 at pp. 845–846.

[25] Precisely what is involved in this capacity and how it relates to other cognitive capacities is beyond my scope here. Helpful discussions can be found in Amalia Amaya and Maksymilian Del Mar (2020) and in the broader literature on imagination (see Balcerak Jackson, 2016, 2018; Van Leeuwen, 2013, 2014).

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Indeed, I would suggest that, even by Dworkin's own standards, an interpretation of the law that includes legal fictions might be superior to one that assigns variant meanings to legal terms wherever necessary to get to the right results. Of course, if all we had to work with was the word 'dependant,' then an interpretation of 'dependant' that included subsequently born children would be better than one that did not. But that is not all we have to work with. We don't interpret terms one at a time; rather, we interpret the law as a whole. So, we should be comparing two interpretations of the law as a whole: one that interprets 'dependant' to include subsequently born children, and another that does not, but in which courts can fictionally apply 'dependant' to those children in the death benefits context. The fiction-involving interpretation certainly fares better on the axis of fit. As to justification, both interpretations provide benefits to the children who need them, but the fiction-involving interpretation may also be more epistemically accessible.

Put differently, the normative considerations that, in Dworkin's view, bear on the assignment of meanings to legal words also bear more broadly on the whole range of devices courts use in interpreting and applying the law. In some situations, these considerations may favour recourse to legal fictions or other devices.

7. Conclusion

To sum up, I've argued that legal fictions play a role in legal reasoning as understood by participants in the legal order, and that they do so by way of semantic pretence: when we reason with a legal fiction, we are reasoning within the scope of a pretence. I haven't shown that this account of legal fictions fares better than all the alternatives, nor that, on the whole, legal fictions are a good thing. However, I have argued that, in some situations, legal fictions have an advantage over reinterpretations of words in legal rules: fictions allow us to modify the reach of the law without requiring participants to learn new meanings.

If my account of legal fictions is correct, it suggests that fiction-involving legal reasoning has a rational structure which is not captured by a model of legal reasoning as deductive reasoning. Beyond our capacity for deductive reasoning, legal reasoning also draws on our capacity for make-believe.

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