St. Thomas Law Review

Volume 23
Issue 1 *Fall 2010*

Article 2

2010

Legal Fictions and Juristic Truth

Nancy J. Knauer
James E. Beasley School of Law

LEGAL FICTIONS AND JURISTIC TRUTH

NANCY J. KNAUER*

I. INTRODUCTION

The legal fiction is a curious artifice of legal reasoning.[1] In a discipline primarily concerned with issues of fact and responsibility, the notion of a legal fiction should seem an anathema or, at the very least, an ill-suited means to promote a just result. However, the deployment of a patently false statement as a necessary component of a legal rule is a widely practiced and accepted mode of legal analysis.[2] *In rem* forfeiture proceedings rest on the fiction that the inanimate object was bad.[3] Attractive nuisance re-imagines the child trespasser as an invitee.[4] A host

* Professor of Law, James E. Beasley School of Law, Temple University. An earlier version of Part III.C. of this Essay was presented as a conference paper at the "Jurisprudential Perspectives of Taxation Law" colloquium held at the Universidad Computense de Madrid in September 2008. The colloquium was organized by John Prebble, Professor of Law, Victoria University of Wellington, and María Amparo Grau Ruiz, Associate Professor of Financial and Tax Law at the Universidad Computense de Madrid. My colloquium paper commented on Professor Prebble's general thesis of "Tax Ectopia" from the perspective of Critical Tax Theory. I am greatly indebted to all the participants for their thoughtful comments and challenging questions. I would also like to thank Alice Abreu, Andrew T. Fede, and Simon Stern for their insightful comments on earlier drafts.

1. *See* LON L. FULLER, LEGAL FICTIONS 1 (1967) (describing legal fictions as "conceits of the legal imagination. Sometimes . . . obvious and guileless . . . . [O]ther times . . . [a] more subtle character . . . .").

2. *See id.* ("There is scarcely a field of law in which one does not encounter [legal fictions]").

3. *See* The Palmyra, 25 U.S. 1, 15 (1827) (affirming civil forfeiture proceeding is *in rem* "wholly unaffected by any criminal proceeding *in personam*"); *see also* Todd Barnett, *Legal Fiction and Forfeiture: An Historical Analysis of The Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 86–92 (2001) (describing evolution of *in rem* personification fiction).

4. *See, e.g.*, United Zinc Co. v. Britt, 258 U.S. 268, 275 (1922) (establishing the notion that for children, an attractive nuisance has "the legal effect of an invitation"). Fuller referred to the

of doctrines bearing the term "constructive" in their titles adopt an "as if" rationalization that deems something to have occurred despite the fact that it did not.[5] These doctrines include constructive notice,[6] constructive eviction,[7] constructive ouster,[8] and constructive discharge,[9] to name but a few.

The legal fiction has a venerable pedigree that can be traced to Roman law where the *praetor* would endorse a false procedural statement, known as a *fictio*, in order to extend a right of action beyond its intended scope.[10] Some of the boldest legal fictions were adopted centuries ago by the English courts to mitigate the relentless formalism of the ancient writs[11] and the harsh results dictated by the command of *stare decisis et non quieta movere.*[12] Given this long and storied history, it is tempting to dismiss the

---

attractive nuisance doctrine as "the boldest fiction to be found in the modern law." FULLER, *supra* note 1, at 66.

5. *See* HANS VAIHINGER, THE PHILOSOPHY OF "AS IF:" A SYSTEM OF THE THEORETICAL, PRACTICAL, AND RELIGIOUS FICTIONS OF MANKIND (C.K. Ogden trans., Routledge 1965) (1924). The German philosopher Hans Vaihinger expounded on the nature and influence of so-called "as if" reasoning across the disciplines. *See id.* Fuller referred to this construction of analogical reasoning as the "assumptive form." FULLER, *supra* note 1, at 37.

6. *See* Jones v. Flowers, 547 U.S. 220, 226 (2006) (determining sufficiency of notice for Due Process); *see also* FULLER, *supra* note 1, at 89 (discussing "constructive service").

7. *See, e.g.*, Minjak v. Randolph, 528 N.Y.S.2d 554, 557 (N.Y. App. Div. 1988) (holding partial constructive eviction suspends tenant's obligation to pay rent).

8. *See, e.g.*, Olivas v. Olivas, 780 P.2d 640, 643 (N.M. Ct. App. 1989) (ruling co-tenant liable for constructive ouster).

9. *See, e.g.*, PA State Police v. Suders, 542 U.S. 129, 142–43 (2004) (establishing standard for constructive discharge applicable in Title VII employment discrimination cases).

10. *See* DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 855 (William Smith et al. eds., 3d ed., London, John Murray 1891) (defining *fictio* as "a technical term of procedure"). The praetor inserted a fiction in the formula that was then submitted to the judex for decision. *See id.* The effect was to extend a right of action to instances where it did not apply. *See id.*; *see also* OLGA EVELINE TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW 55 (Routledge 1993) (1990) (discussing role of praetor); VAIHINGER, *supra* note 5, at 34 (discussing Roman *fictones juris*).

11. *See infra* notes 52–56 and accompanying text (describing procedural fictions of Writ of Quominus and Bill of Middlesex).

12. *See* John Hasnas, *Legal Pluralism, Privatization of Law and Multiculturalism: The Depoliticization of Law*, 9 THEORETICAL INQ. L. 529, 536 (2008) ("Prior to the nineteenth century, the common law courts did not apply the doctrine of *stare decisis;* that is, they did not treat previous judicial decisions as binding legal authority for the decision of the cases before them."). Legal fictions relating to jurisdictional and pleading issues arose first because *stare decisis* did not take control until the nineteenth century. *See id.*; *see also* Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1584–87 (2003) (describing development of *stare* decisis). Zymicki explains:

> Although most modern lawyers and scholars conceive of the doctrine of stare decisis as a formative element of the common law, this is an a historical understanding of the development of the common law. The doctrine of stare decisis, the idea that the holding of a particular case is treated as binding upon courts deciding later similar

legal fiction as a "topic of antiquarian interest"[13] or a "blundering device[] of an unphilosophical age."[14] Indeed, some of the assumptions that underlie common law fictions, such as the rule of the fertile octogenarian, are quite literally antediluvian.[15]

It would be a mistake, however, to conflate the moribund common law fictions that punctuate the first-year Property course with the broader category of legal fictions.[16] Far from being a historical oddity, legal fictions are common features of not only our common law, but also our statutory and regulatory law.[17] These patently false statements and deeming principles empower lawyers and decision-makers to resolve novel legal questions through arguments of equivalence and creative analogical reasoning.[18]

In contemporary terms, our tax code provides an excellent example of statutorily imposed legal fictions.[19] Designed to untangle complicated financial relationships and transactions, tax fictions govern basic principles, such as the appropriate unit of taxation.[20] Tax fictions also mandate

---

cases, is a late nineteenth-century development and represents a clear doctrinal and conceptual break with the prior history of the common law.

Id. at 1566.

13. *See* FULLER, *supra* note 1, at 94. Writing in 1931, Lon Fuller cautioned that "it is easy to slip in the past tense" when discussing legal fictions. *Id.* at 93. Additionally, Fuller stated:

> The age of the legal fiction is not over. We are not dealing with a topic of antiquarian interest merely. We are in contact with a fundamental trait of human reason. To understand the function of the legal fiction we must undertake an examination of the processes of human thought generally.

Id. at 94.

14. *Id.* at 93 ("[These legal fictions] are now recognized as the blundering devices of the unphilosophic age, which had not yet learned from science to value truth for its own sake.").

15. *See, e.g.*, *Genesis* 17:15–19. For example, the legal fiction of the "fertile octogenarian" that is applied in the context of the Rule Against Perpetuities is often justified by reference to the Biblical story of Sarah who gave birth at the age of ninety. *See id.* For a longer description of the rule of the fertile octogenarian, its origin, and application. *See infra* notes 172–74 and accompanying text; *see also* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1876 (1986) (referring to rule as "one of the strangest aberrations of the legal mind").

16. *See* FULLER, *supra* note 1, at 55. Fuller specifically mentions that the legal fictions taught in the first year Property course pose challenges for students. *Id.* ("Every teacher of Property law knows how difficult it is to convince students that the only proper function of the 'relation back' of title is as a device of expression").

17. *See id.* at 90–92 (discussing statutory legal fictions).

18. *See id.* at 94 ("The fiction is generally the product of the law's struggles with *new* problems."); *see also id.* at 21–22 ("[F]ictions are, to a certain extent, simply the growing pains of the language of the law.").

19. *See infra* notes 268–338 and accompanying text (discussing statutory legal fictions in taxation).

20. *See, e.g.*, I.R.C. § 1(a)(b)&(c) (West 2009). Under section 1 of the federal income tax, the rate of tax depends on the filing status of the individual (e.g., unmarried, married, head of household). *See id.*

elaborate schemes, such as the deemed dual transfer of "foregone interest" in the case of a below-market rate loan.[21]

The apparent contradiction presented by the legal fiction has fascinated legal scholars, who have differed widely with respect to their views on the desirability of fictions.[22] William Blackstone offered tepid approval of fictions and acknowledged their potential usefulness,[23] whereas Jeremy Bentham raged against common law fictions, which he denounced as a usurpation of legislative prerogative.[24] Lon Fuller produced the definitive modern assessment of the legal fiction and carefully weighed both its promise and inherent risk.[25]

Written in the early 1930s, Fuller's three-part series gave us the now classic definition of a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[26] Fuller posited an inverse relationship between the danger presented by any given fiction, and the extent to which the fiction was openly acknowledged to be false.[27] According to Fuller, a fiction is only dangerous when it is believed.[28]

More recently, legal commentators writing in a number of diverse

21. *See id.* § 7872(e)(2)(A)–(B). Statutorily created "foregone interest" is deemed transferred from the lender to the borrower and then re-transferred from the borrower to the lender. *Id.*; *see also infra* notes 303–14 and accompanying text (discussing legal fiction inherent in section 7872).

22. *See* FULLER, *supra* note 1, at 1–5 (discussing Blackstone's and Bentham's views on legal fictions); *see also* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1455, 1466 (2007) ("The early commentators were divided on the virtue of the legal fiction."). Whereas Blackstone and Bentham opined on the device of the fiction generally, Vaihinger noted that the fiction could be used instrumentally either to great benefit or to further "the grossest forms of injustice." VAIHINGER, *supra* note 5, at 148 ("In legal practice the employment of fiction may lead both to benefits and also the grossest forms of injustice, as when all women were treated *as if* they were minors.").

23. *See* FULLER, *supra* note 1, at 3.

24. *See id.* at 57 (quoting Bentham that a legal fiction was "a willful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it, and but for the delusion thus produced could not exercise it."); *see also* Nomi Maya Stolzenberg, *Bentham's Theory of Fictions—A Curious "Double Language"*, 11 CARDOZO STUD. L. & LIT. 223, 232–36 (1999) (providing detailed analysis of Bentham's views on legal fictions).

25. *See* FULLER, *supra* note 1. Fuller's work on fictions was originally a series of three law review articles that appeared in the *Illinois Law Review* in 1930 and 1931. *See id.* at vii. The articles were republished in 1967 "in only [a] slightly altered form" with a new *Introduction* written by Fuller. *Id.*

26. *Id.* at 9.

27. *See id.* at 9–10 ("A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity.").

28. *See id.* at 9 ("[I]t is precisely those false statements that are realized as being false that have utility.").

fields have demonstrated a renewed interest in the legal fiction.[29] Not surprisingly, some of this work reflects the recent turn in legal scholarship toward empirical research and the re-evaluation of the role of social science data in the production of legal rules.[30] Armed with empirical research, scholars have noted that judges frequently rely on presumptions and rules that are demonstrably false, such as the reliability of eye witness testimony.[31] Far removed from empirical concerns, law and literature provides a natural platform for the study of legal fictions, and scholars writing from this perspective have used the insights of narrative and interpretation to recast the legal regime of slavery and the doctrine of discovery as deadly legal fictions.[32] Even scholars laboring within the statutory and regulatory morass of the tax laws have questioned the desirability of legal fictions, suggesting that the intractable problems of complexity and compliance are due to "ectopia" caused by over-reliance on tax fictions.[33] In each case, this new scholarship has sought to expand the category of legal fictions beyond Fuller's definition, in that the newly designated fictions are either not acknowledged to be false or are not themselves demonstrably false.

---

29. *See, e.g.*, Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 872 (1986). This interest in legal fictions is relatively new. *See id.* Writing in 1986, Soifer remarked on the "scholarly silence" since Fuller's work in the 1930s. *See id.* at 874–75 ("Hardly anybody in the United States talks much about legal fictions these days.").

30. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485–489 (1986); *see also* Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 10 (2002) ("[A] factual jurisprudence is our best hope for a fair and equitable legal system.").

31. *See* Smith, *supra* note 22, at 1452–55 (characterizing evidentiary rules governing eye witness testimony as a "new legal fiction").

32. *See, e.g.*, CHRISTINA ACCOMANDO, THE REGULATIONS OF ROBBERS: LEGAL FICTION OF SLAVERY AND RESISTANCE 4 (2001) ("[L]egal fictions of American slavery tell us that slaves and African Americans had no legal or political voice."); Jen Camden and Kathryn E. Fort, *"Channeling Thought"—The Legacy of Legal Fictions From 1823*, 33 AM. INDIAN L. REV. 77, 90 (2009) (referring to doctrine of discovery as a "legal fiction"). Aviam Soifer noted that legal fictions "pose special challenges for the best work on law and literature." Soifer, *supra* note 29 at 873. Vaihinger proposed the use of specific language to differentiate between scientific fictions on one hand and myth or aesthetic fictions on the other hand. *See* VAIHINGER, *supra* note 5, at 81 & n1. Vaihinger argued that scientific fictions should be called by the Latin *fictones*, whereas aesthetic fictions should be called figments. *See id.*

33. *See, e.g.*, John Prebble, *Income Taxation: A Structure Built on Sand*, 24 SYDNEY L. REV. 301, 305–06 (2002) [hereinafter Prebble, *Built on Sand*] ("[T]ax law's concept of income is not income itself but a simulacrum of income."); John Prebble, *Fictions of Income Tax*, Working Paper Series, Paper No. 7, 21–22, Centre for Accounting, Governance, and Taxation Research, *available at* http://www.victoria.ac.nz/sacl/cagtr/working-papers/WP07.pdf
(last visited Sept. 2, 2009) [hereinafter Prebble, *Fictions*] (asserting tax law inherently unstable due to prevalence of tax fictions).

Although I generally applaud efforts to revisit concepts that have fallen into commonplace, I believe it is important to resist the revisionist urge to dismiss discredited legal rules and burdensome statutory regimes as mere fictions. Such an expansive definition of legal fictions not only dilutes the utility of the category, it misapprehends the constitutive power of law and the nature of juristic truth. Does it make any sense to refer to slavery as a fiction when it was, in fact, a legal system that brutalized millions? Is the choice of a tax base "false" simply because it is statutorily prescribed? The assertion that something qualifies as a fiction necessarily invokes a concept of reality against which the fiction must be measured. Thus, before we can speak intelligibly of fictions, we must first be able to identify truth.

This Essay reviews the three categories of new fictions outlined above, which I refer to as (1) empirical legal errors; (2) discredited legal regimes; and (3) complex statutory schemes. With respect to each category, I conclude that the appellation of legal fiction is a misnomer and that the integrity of Fuller's classic definition should be retained for its analytic force.[34] The conundrum presented by the legal fiction is that it retains its utility *despite* its falsity, similar to false statements used in science and mathematics in order to advance a proof or hypothesis.[35] The new legal fictions, however, are different in kind from those described by Fuller because they are neither transparently false nor demonstrably false.[36] As a result, the new legal fiction scholarship does not add to the existing work on fictions, but rather changes the conversation entirely.

In addition, I note that the new fictions are often unveiled without an explicit discussion of the standard used to determine their falsity.[37] Certain legal rules, such as those governing eye witness testimony, explicitly incorporate statements of fact that are readily verifiable by reference to real world events.[38] This is not the case when dealing with legal regimes such

34. *See* FULLER, *supra* note 1, at 9 (providing classic definition of legal fictions).

35. *See generally* VAIHINGER, *supra* note 5, at 50–53 (comparing fictional concepts in mathematics with those used in jurisprudence). Vaihinger identified a number of "historically important fictions," including the "Linnaean system" of classification, "Adam Smith's theory," the "atomic theory," and "differential calculus." *Id.* at 80.

36. *See* FULLER, *supra* note 1, at 9 (providing classic definition of legal fictions). To Fuller, even a false statement that is recognized as having utility must be acknowledged to be false because "it is precisely those false statements that are realized to be false that have utility." *Id.*

37. *See infra* notes 172–87 and accompanying text (discussing importance of measure of falsity). This failure is most evident in the case of the discredited legal regimes. *See infra* notes 188–267 and accompanying text.

38. *See* Smith, *supra* note 22, at 1441–42. In the case of eye witness testimony, Smith notes: "social science research has exhaustively demonstrated that eyewitness identifications often are

as slavery or the doctrine of discovery because these legal rules do not reflect or mimic life events; rather they help shape and define complex social relationships and hierarchies.[39] Instead of demonstrable statements of facts, these regimes encompass abstract concepts, such as liberty, autonomy, and sovereignty that are not provable in any conventional sense of the term.[40] Thus, the reliability of eye witness testimony is subject to external verification, whereas the legal regime of slavery and the doctrine of discovery stand as juristic truths quite independent from questions of empirical proof.

Finally, I contend that the term legal fiction carries a dismissive connotation that not only denies the inherently constitutive power of the law, but ignores the reality of the system of sanctions established under various regulatory schemes. It also acts as a disservice to those who have labored under the discredited legal regimes that have been recently labeled as legal fictions. The notion of a legal fiction requires a present agreement to temporarily suspend belief and to proceed notwithstanding the acknowledged falsity of the statement.[41] With the clarity of hindsight, there can be no doubt that slavery, and later Jim Crow, were deadly conceits of a different age that exacted untold pain and suffering on persons of color who were conveniently viewed as Other.[42]

The fact that these regimes are now discredited, however, does not mean that they can be dismissed as mere legal fictions.[43] They were

---

unreliable, that most people grossly overestimate their and other people's ability to make accurate eyewitness identifications, and that jurors are disproportionately influenced by eyewitness testimony." *Id.*

39. *See, e.g.*, VAIHINGER, *supra* note 5, at 43 ("[T]here is nothing in the real world corresponding to the ideas of liberty, though in practice it is an exceedingly necessary fiction.").

40. *See* Michael V. Hernandez, *A Flawed Foundation: Christianity's Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 681–83 (2004) (describing modern philosophies regarding racial classifications and hierarchies). Although an appeal to natural law will refute slavery, it should be remembered that it was natural law that justified slavery in the first instance. *See id.* at 674–81; *see also* John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905 (2004) (discussing slavery in Justinian's Institutes and the Aristotelian approval of slavery).

41. *See* FULLER, *supra* note 1, at 9.

42. *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 1 (1980); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS IN THE AMERICAN LEGAL PROCESS 2 (1996); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2002).

43. *See* GEORGE ORWELL, 1984, at 214 (Signet Classic 1961). The suppositions underlying these discredited regimes seem to have functioned more like an Orwellian "big lie" than a classic legal fiction. *See id.* In *1984*, an Orwellian "big lie" is described as follows: "[t]o tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then when it becomes necessary again, to draw it back from oblivion for just so long as it is needed. . .

violent legal regimes that spanned centuries. Fuller cautioned that a legal fiction becomes dangerous when it is believed for then the fiction can approximate a lie.[44] I would add that a fiction can also become dangerous when the force of its constitutive power is ignored. When this occurs, the label of fiction works a denial and removes from memory important lessons regarding the law and the fragility of the human experience.

In Part II, I provide a brief overview of legal fictions and discuss the prevalence of both common law and statutory legal fictions, with a particular emphasis on the law school curriculum.[45] Part III then establishes that the three categories of "new legal fictions" (i.e., empirical legal errors, discredited legal regimes, and complex statutory schemes) are different in kind from the classic fictions and, therefore, warrant separate treatment.[46] In each case, the newly labeled "fictions" are either not transparently false or not demonstrably false. With respect to empirical errors, I argue that legal rules valued for their veracity, such as the reliability of eyewitness testimony, are not appropriately termed legal fictions despite the fact that they might rest on false premises.[47] A classic legal fiction maintains its utility despite its falsity, but an empirically based rule that rests on a factual error should be modified or discarded.

I then turn to the disturbing trend in scholarship to dismiss discredited legal regimes, such as slavery and the doctrine of discovery, as legal fictions.[48] I distinguish these examples from the empirical errors discussed in the preceding section. Specifically, I address the argument that some of the racist assertions made in judicial opinions were known to be false.[49] I maintain that, even if they were understood to be false, they were propounded with the intent to deceive and, therefore, do not qualify as legal fictions.

In the last section, I consider the constitutive power of law in the less emotionally charged atmosphere of a complex statutory scheme.[50] I maintain that even though statutory schemes may be artificial

." *Id.*

44. *See* FULLER, *supra* note 1, at 9–10.

45. *See infra* notes 52–124 and accompanying text (examining traditional legal fictions).

46. *See infra* text accompanying notes 125–348 (examining categories of new legal fictions).

47. *See* Smith, *supra* note 22, at 1441–42 (discussing empirical evidence regarding reliability of eye witness testimony).

48. *See, e.g.*, ACCOMANDO, *supra* note 32 (referring to slavery as a legal fiction); Camden and Fort, *supra* note 32, at 90 (discussing the doctrine of discovery as a legal fiction).

49. *See infra* notes 217–67 and accompanying text (analyzing Justice Marshall's opinion in Johnson v. M'Intosh, 21 U.S. 543 (1823)).

50. *See infra* notes 268–346 and accompanying text (analyzing claims that tax codes necessarily rest on legal fictions).

constructions, they cannot be said to be false in any meaningful way. A brief conclusion restates my rationale for advocating a relatively narrow definition of legal fictions and offers some final observations regarding the nature of juristic truth.[51]

II. THE LEGAL FICTION

The traditional legal fiction is an enabler. It is a device used to facilitate the application of the law to novel legal questions and circumstances.[52] Some legal fictions consist of bald untruths. This was the case with many of the earliest jurisdictional fictions, such as the Writ of Quominus[53] or the Bill of Middlesex,[54] where a plaintiff seeking redress in a particular court would have to claim a nonexistent debt owed to the Crown[55] or an invented trespass in the county of Middlesex.[56] The majority of legal fictions, however, operate more in the realm of metaphor.[57] A corporation is treated *as if* it were a person for certain legal purposes.[58] An adopted child is treated *as if* he were reborn as a member of his adopted family for purposes of inheritance.[59]

---

51. *See* Part IV.

52. *See* FULLER, *supra* note 1, at 21–22. Fuller argues that to "reject all of our fictions would be to put legal terminology in a straightjacket—fictions are, to a certain extent, simply the growing pains of the language of the law." *Id.*

53. *See* EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 173 (1912). A Writ of Quominus was a procedural fiction used to secure jurisdiction in the Court of the Exchequer. *See id.* It required the averment that the plaintiff owed a debt to the Crown. *See id.*; *see also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009) (providing a contemporary reworking of the legal fictions implicated in jurisdictional cases).

54. *See* JENKS, *supra* note 53, at 170–71. A Bill of Middlesex was a procedural fiction used to secure jurisdiction before the King's bench. *See id.* It required the averment by the plaintiff that a trespass had taken place in the County of Middlesex. *See id.* at 171.

55. *See id.* at 172.

56. *See id.*

57. *See, e.g.*, Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004) (discussing the importance of metaphor in legal reasoning and decision making). In addition, the *Mercer Law Review* devoted an entire issue to the use of metaphor in legal analysis. *See* Symposium, *Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. 835 (2007).

58. *See* FULLER, *supra* note 1, at 13. On the topic of corporate personality, Fuller wrote:

> No one can deny that the group of persons forming a corporation is treated, legally and extra- legally, as a 'unit.' 'Unity' is always a matter of subjective convenience . . . . [T]his treatment of the corporation bears a striking (though not complete) resemblance to that accorded 'natural persons.' It then follows that natural persons and corporations are to some extent treated in the same way in the law . . . .

Id. See generally Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129 (2009) (providing a recent critique of the legal fiction of corporate personhood).

59. *See* FULLER, *supra* note 1, at 39 ("It is convenient to describe the institution by saying that the adopted child is treated *as if* he were a natural child."); *see also* Frances H. Foster, *The*

These types of fictions are a lawyer's stock in trade.[60] Even though the defendant was not in fact physically evicted, a lawyer can argue that the conditions were so deplorable that it was *as if* the defendant had been forcibly removed.[61] In this way, analogical reasoning empowers lawyers and judges to extend the law to address unforeseen, and perhaps unintended, situations.[62] Exercising this same sort of *as if* reasoning, some recent scholarship has endeavored to extend the definition of a legal fiction well beyond Fuller's intended scope.[63] This section outlines the classic view of the legal fiction, discusses the equitable remedy of a constructive trust, and addresses the use of legal fictions in statutory drafting.

A. COMMON LAW LEGAL FICTIONS

Fictions may be ubiquitous across the law,[64] but, as Fuller noted, fictions are also found in other disciplines.[65] Much of modern political philosophy rests on basis of a presumed social compact.[66] Economics

Family Paradigm of Inheritance Law, 80 N.C. L. REV. 199, 248 (2001) (describing "elaborate fictions" created by judges in inheritance cases); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 538 (2000) (discussing adoption).

60. *See* Soifer, *supra* note 29, at 876 ("Post-realist lawyers, scholars, and judges concede that legal fictions are the tools of our legal trade.").

61. *See, e.g.*, Minjak v. Randolph, 528 N.Y.S.2d 554, 557 (N.Y. App. Div. 1988) (holding condition of premises supports finding of partial constructive eviction). Constructive eviction is often raised as an affirmative defense for non-payment of rent. *See id.*

62. *See* Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 443–46 (2004) (discussing role of legal fictions in development of jurisdictional doctrines). *See generally* Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001) (analyzing the cognitive science model of human thinking and its relationship to legal reasoning).

63. *See* Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 2–3 (1990). Harmon notes that, prior to Fuller, there was no consensus regarding what qualified as a legal fiction. *See id.* ("None of the participants in the historical debate could agree."). In addition to Blackstone and Bentham, Harmon discusses the views of Henry Maine, John Chipman Gray, John Austin, and Roscoe Pound. *Id.* at 2–16.

64. *See* FULLER, *supra* note 1, at 1 ("There is scarcely a field of law in which one does not encounter one after another of these conceits of the legal imagination."); *see also* Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. Rev. 1271, 1323 (2008) ("The ubiquity of legal fictions in statutory interpretation generally . . . .").

65. *See* FULLER, *supra* note 1, at ix (mentioning, specifically, political science and economics); *see also* VAIHINGER, *supra* note 5. Vaihinger describes the many and varied disciplines that utilize fictions, including mathematics, physics, ethics, law, and the natural sciences. *See id.*

66. *See* FULLER, *supra* note 1, at 98 ("In theories of the state there appears the constantly recurring notion of the Social Compact, a notion which perhaps was never given full credence as a historical fact by anyone, but which has nevertheless had the most profound, and perhaps, beneficial, influence on the history of human thought."). Alexis de Tocqueville specifically

posits man as a rational actor,[67] and scientific inquiry often proceeds on principles acknowledged to be false.[68] Greatly influenced by the German philosopher Hans Vaihinger's *The Philosophy of As If*,[69] Fuller went so far as to suggest that the construct of the fiction was "an indispensable instrument of human thinking."[70]

Adopting a pragmatic approach to legal fictions, Fuller wrote approvingly of the persuasive force of legal fictions, stating that to "[e]liminate metaphor from the law [would] . . . reduce[] its power to convince and convert."[71] However, he also warned of the dangers inherent in the deployment of false statements and argued, "[a] fiction becomes wholly safe only when it is used with a complete consciousness of its falsity."[72] For Fuller, a fiction that was believed not only dangerous, it was no longer a fiction.[73] Fuller also reasoned that once fictions had outlived their utility, they would fall into disuse.[74] Quoting a metaphor coined by John Chipman Gray, Fuller likened legal fictions to scaffolding that although "useful and necessary" could also be "removed with ease" once the job was completed.[75]

The use of fictions may be second nature to lawyers and judges, but

---

commented on the importance of legal fictions with respect to the founding of the United States. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 193 (J. Mayer ed., Henry Reeve trans., Penguin Books 2003) (1904) ("The government of the Union rests almost entirely on legal fictions.").

67. *See* VAIHINGER, *supra* note 5, at 20 (discussing Adam Smith and *as if* thinking in economics); *see also* FULLER, *supra* note 1, at 106–07 ("The assumption . . . that man is an 'economic animal' constantly seeking his own advantage is an illustration of . . . a fiction.").

68. *See* FULLER, *supra* note 1, at 124–27 (comparing legal fictions with scientific fictions).

69. FULLER, *supra* note 1, at viii ("[A]t the time when I began to study the literature of fictions, the subject was surrounded by the romantic aura of Hans Vaihinger's *Philosophy of As If*, with its mysterious title promising obscurely some mind-expanding reorientation of human perspectives."). *See generally* VAIHINGER, *supra* note 5 (exploring the philosophy of *as if* thinking).

70. FULLER, *supra* note 1, at 93.

71. *Id.* at 24.

72. *Id.* at 10.

73. *See id.* at 9–10 ("A fiction taken seriously, i.e., believed becomes dangerous and loses its utility."). Once a fiction loses utility, "[i]t ceases to be a fiction under either alternative of [Fuller's classic] definition . . . ." *Id.* at 10.

74. *See id.* at 14. Fuller makes the distinction between "live and dead fictions." *Id.* He argues: "A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality." *Id.*

75. *Id.* John Chipman Gray used analogical reasoning to compare legal fictions to scaffolding. *Id.* Fuller quoted Gray: "fictions are scaffolding – useful almost necessary, in construction – but after the building is erected, serving only to obscure it." *Id.* Fuller also added, that like scaffolding, fictions could be "removed with ease." *Id.*

the duality of the legal fiction never ceases to confound first-year law students.[76] As any law professor can attest, an essential part of legal education involves the mastery of *as if* reasoning,[77] but the type of sophisticated analogical reasoning extolled by Fuller and theorized by Vaihinger does not always come naturally to lawyers-in-training.[78] Along with pleading in the alternative, legal fictions directly contradict the intense emphasis we place in the first-year curriculum on correctly discerning the salient *facts* of a given case.[79] If fact finding is an ultimate goal of adjudication, then our students are correct to wonder how the entire doctrine of civil forfeiture can be based on the preposterous fiction that an inanimate object was bad?[80]

As a Property professor, I have innumerable opportunities to introduce my students to legal fictions, ranging from the inscrutable livery of seisin pantomime[81] to the mysteries of instantaneous privity.[82] Without fail, however, the constructive trust proves to be one of the most difficult

76. *See* FULLER, *supra* note 1, at 55. Fuller singled out Property professors for having to teach students legal fictions. *Id.* ("Every teacher of property law knows how difficult it is to convince students that the only proper function of the 'relation back' of title is as a device of expression."). For a discussion of legal fictions that arise in other law school courses, see Julie A. Seaman, *Cognitive Dissonance in the Classroom: Rationale and Rationalization in the Law of Evidence*, 50 ST. LOUIS L.J. 1097 (2006) (discussing legal fictions in the basic Evidence course); *see also* Jerry J. Phillips, *Teaching Torts: Law School Teaching*, 45 ST. LOUIS U. L.J. 725, 726 (2001) (discussing legal fictions in the first-year Torts class).

77. *See* H. David Rosenbloom, *Banes of an Income Tax: Legal Fictions, Elections, Hypothetical Determinations, Related Party Debt*, 26 SYDNEY L. REV. 17, 20 (2004) ("Indeed, a basic aspect of legal training, absorbed by law students throughout the world, is that the 'law' operates with unshakable acceptance of such fictions."); *see also* Soifer, *supra* note 29, at 872 ("[L]egal fictions is an issue that those of us who teach law bump into constantly.").

78. *See* VAIHINGER, *supra* note 5, at 29 ("All knowledge, if it goes beyond simple actual succession and co-existence, can only be *analogical*.").

79. *See, e.g.*, Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (discussing the classic distinction between questions of law and questions of fact). With respect to layman, Fuller asserted that they were not typically concerned about fictions:

> Laymen frequently complain of the law; they very seldom complain that it is founded upon fictions. They are more apt to express discontent when the law has refused to adopt what they regard as an expedient and desirable fiction. Perhaps, too, the fiction has played its part in making the law 'uncognoscible' to the layman. They very strangeness and boldness of the legal fiction has tended to stifle his criticisms.

FULLER, *supra* note 1, at 2.

80. *See* Barnett, *supra* note 3 (describing evolution of *in rem* personification fiction).

81. *See, e.g.*, JENKS, *supra* note 53, at 259 (describing the "medieval principle that freehold estates in possession could only be created or transferred by livery of corporal seisin").

82. *See* Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 934 n.24, 25 (1988) (explaining the distinction between "instantaneous" and "simultaneous" privity).

concepts for students to grasp.[83] I teach the constructive trust concept in a number of places throughout the first-year Property course, and it never ceases to encounter staunch resistance from my students who bristle at the realization that no trust is actually created. I suspect this is partly due to the fact that the constructive trust continues to have contemporary application and, therefore, is not easily explained away as simply the legal detritus of formalism.[84]

To some extent, part of becoming a lawyer is learning how to argue that both sides are up without descending into cynicism. In a case on easements implied by estoppel, my Property students chuckle when they realize that the plaintiff alleged *both* an easement by estoppel and an easement by prescription.[85] The inside joke for the properly schooled Property aficionado is that a finding of one would preclude a finding of the other.[86] If the plaintiff has an easement by estoppel, then the plaintiff was on the property with permission.[87] That permission, in turn, would invalidate any claim of prescription.[88] It is like the child, who standing amongst the shards of a broken vase, says to his or her parent, "I absolutely did not break the vase, but if I did break the vase, it was an accident."

The elaborate pretense of the constructive trust baffles students, but they also seem offended by what Bentham terms the "delusion" inherent in legal fictions.[89] Used as an equitable remedy to prevent unjust enrichment,

83. *See infra* notes 84–101 and accompanying text. With respect to the constructive trust, Fuller writes: "The 'constructive trust' originally involved a pretense that the facts which create an actual trust were present. Today it is simply a way of stating that the case is a proper one for equitable relief." FULLER, *supra* note 1, at 32; *see also* Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 523 (2007) ("[A] constructive trust is a legal fiction, a common-law remedy in equity that may only exist by the grace of judicial action.").

84. *See, e.g.*, Rase v. Castle Mountain Ranch, Inc., 631 P.2d 680, 686 (Mont. 1981) (imposing a constructive trust on a purchaser of property with pre-existing long-term licensees).

85. *See, e.g.*, Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976) (finding easement by estoppel where there was reasonable reliance).

86. *See, e.g.*, Community Feed Store, Inc. v. Ne. Culvert Corp., 559 A.2d 1068, 1070 (Vt. 1989) (discussing the requirements of acquiescence and non-permission for easement by prescription).

87. *See, e.g.*, *Holbrook*, 532 S.W.2d at 765–66 (finding easement by estoppel where there was reasonable reliance).

88. *See, e.g.*, *Community Feed*, 559 A.2d at 1070 (discussing the requirements of acquiescence and non-permission for easement by prescription).

89. *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 509 (J.H. Burns & H.L.A. Hart eds., 1977). Bentham's charge of "delusion" was part of his overall objection to legal fictions based on principles of institutional competency. *See id.* at 510. With respect to a legal fiction, Bentham argued that "its object [is] the stealing legislative power, by and for hands, which could not, or durst not, openly claim it, —and, but for the delusion thus produced, could not exercise it." *Id.* at 509.

my students are not persuaded by my patient explanation that a constructive trust is appropriate when there is no remedy at law. Clearly, the once stark demarcation between law and equity has been lost to the generations.[90] To them, equity is *law*, and they are not particularly comforted by the adage that "equity considers done that which ought to be done."[91] To them, it sounds like an open invitation for activist judges to overstep their institutional role.

For my students who are deeply committed to judicial restraint, I offer the quandary presented by a slayer/beneficiary as a compelling example of potentially *unjust* enrichment. The justifications I offer for the imposition of the device echo the mild endorsements of Blackstone and Sir Henry Maine, both of whom wrote approvingly of the expediency of legal fictions.[92] For example, Blackstone noted that we should "applaud the end" of most legal fictions, but should not "admire their means."[93] According to Blackstone, judges and lawyers were "obliged" to resort to fictions because otherwise the law was static.[94]

In the case of the slayer/beneficiary, the device of a constructive trust permits the court to do indirectly that which it is powerless to do directly.[95] Until the 1960s and the widespread adoption of so-called slayer statutes, state courts in the United States commonly used the constructive trust remedy rather than allow a slayer to take as mandated under a will or the rules of intestate succession.[96] To quote Maine, the constructive trust thus provides an "invaluable expedient[] for overcoming the rigidity of the

90. *See* JENKS, *supra* note 53, at 165–66 (explaining the distinction between English courts of law and equity).

91. HON. MR. JUSTICE STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 45 (1st ed. 1884) (expressing equitable maxim as "equity looks upon that as done, which ought to have been done").

92. *See* HENRY MAINE, ANCIENT LAW 16 (J.M. Dent & Sons Ltd. 1977). Sir Henry Maine expressly disagreed with Bentham regarding the beneficial nature of legal fictions and urged others not "to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them." *Id.* Maine thought legal fictions were beneficial in terms of "the historical development of law." *Id.*

93. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 360 (A. Strahan 14th ed. 1803). Speaking of legal fictions, Blackstone wrote "to such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse . . . while we applaud the end, we cannot admire the means." *Id.*

94. *Id.*

95. *See* Tara Pehush, *Maryland is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271, 272, 291 (2005) (noting that as of publication, forty-two states had slayer statutes).

96. *See, e.g.*, *In re* Estate of Mahoney, 220 A.2d 475, 479 (Vt. 1966) (exercising equitable powers to impose constructive trust on an estate that would otherwise pass to the surviving spouse who had been convicted on manslaughter in connection with the decedent's death).

law."[97] When a beneficiary under a will kills the testator, few would argue that the beneficiary should nonetheless take because the terms of the will failed to foresee the unpleasant circumstances of the testator's demise.[98]

Bequests are routinely subject to requirements of survivorship, but it would be highly unusual, and arguably paranoid, for a will to include a contingent gift in the event a named beneficiary killed the testator. Rather than allow the beneficiary to take under the clear and unambiguous terms of the will, the constructive trust doctrine empowers the court to declare that the slayer/beneficiary holds the property as trustee, in trust, for the benefit of the next of kin.[99] The court then orders the constructive trustee to distribute all trust assets to the constructive beneficiaries (i.e., next of kin or contingent beneficiaries) and make good on any trust funds that may have been expended for the personal use of the trustee.[100]

Although I present the constructive trust in Blackstone's terms as a "highly beneficial and useful" legal fiction,[101] my students, as members of the Scalian generation, often counter that legal fictions are nothing more than a bare attempt at a judicial power grab. This puts them in good company because Bentham voiced similar objections. Bentham likened the legal fiction to "swindling"[102] and denounced it as "a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness,"[103] but his primary objections centered on the institutional

97. MAINE, *supra* note 92, at 16.

98. *See* Jeffrey Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 805 (1993). One exception to this general sentiment might be in the case of assisted suicide or "mercy killing." *Id.* at 808. Where the slayer acted at the decedent's behest, it would seem the decedent would want the slayer to inherit. *Id.* at 809–10.

99. *See* Dutill v. Dana, 113 A.2d 499, 501–02 (Me. 1952). Jeffrey Sherman explains: "[L]egal title to the property was decreed initially to those entitled under the intestacy statute or the testator's will, and only then was a constructive trust impressed upon the property in the slayer's hands for the benefit of the worthy candidates." Sherman, *supra* note 98 at 846 n.206; *see also Dutill*, 113 A.2d at 501–02 (explaining that a slayer's inheritance is treated as a constructive trust).

100. *See Dutill*, 113 A.2d at 502.

> [L]egal title passes to the murderer but equity will treat him or those claiming under him or for him as a constructive trustee because of the unconscionable mode of its acquisition and compel him or those to convey it to the heirs or next of kin of the deceased exclusive of the murderer.

Id.

101. *See* BLACKSTONE, *supra* note 93, at 43.

102. C.K. OGDEN, BENTHAM'S THEORY OF FICTIONS 141 (Harcourt, Brace & Co. 1932) (quoting Bentham, "Fiction of use to justice? Exactly as swindling is to trade.")

103. JEREMY BENTHAM, *Elements of the Art of Packing as Applied to Special Juries, Particularly in Cases of Libel Law*, *in* THE WORKS OF JEREMY BENTHAM 92 (John Bowring ed., Simpkin, Marshall, & Co. 1843) (emphasis omitted).

constraints of the judiciary.[104] Bentham wrote that the legal fiction had "for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it—and, but for the delusion thus produced, could not exercise it."[105] In this regard, Bentham underscores what many of the earlier commentators had implicitly acknowledged—fictions allowed judges to introduce flexibility and movement into the common law.[106]

Today, the adoption of so-called "slayer statutes" in all but a few states has obviated the need for courts to resort to the constructive trust as a common law device.[107] Consistent with Fuller's prediction, this guise of the constructive trust died off once the inconsistency in the law was addressed directly,[108] but the constructive trust remains a popular equitable remedy in other contexts when there is no remedy available at law.[109] Interestingly, the statute that eliminated the need for the constructive trust rests on its own legal fiction. Instead of acting *as if* a trust were created, the slayer statutes provide for the distribution of an estate *as if* the slayer had predeceased the decedent.[110]

---

104. *See id.*

105. Smith, *supra* note 22, at 1466 (quoting Bentham). Fuller wrote:

> There was no doubt in Bentham's mind about the purpose of the historical fiction. It was "a willful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it, but for the delusion thus produced could not exercise it."

FULLER, *supra* note 1, at 57 (quoting Bentham).

106. *See, e.g.*, BLACKSTONE, *supra* note 93, at 268 (arguing judicial creation of legal fictions "wisely avoided soliciting any great legislative revolution in the old established forms"); Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth?*, 7 HARV. L. REV. 249, 262 (1893) (defining "legal fiction" as "a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law").

107. *See* Sherman, *supra* note 98, at 846 n.206 ("Under modern slayer statutes, the constructive trust approach is not used; the statutes bar the slayer from acquiring legal title."). Bradley Myers reports that forty-three states have passed legislative slayer statutes, and only three states continue to rely on the common law rule. *See* Bradley Myers, *The New North Dakota Slayer Statute: Does it Cause a Criminal Forfeiture?*, 83 N.D. L. REV. 997, 1002 n.37 (2007). According to Myers, "[t]wo states, Massachusetts and New Hampshire, have neither a judicial nor a legislative slayer statute." *Id.*; *see also* Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. Rev. 143, 169 n.202 (2004) (reaffirming that two states have never faced slayer statute questions).

108. *See* Sherman, *supra* note 98, at 876.

109. *See, e.g.*, Rase v. Castle Mountain Ranch, Inc. 631 P.2d 680 (Mont. 1981) (imposing constructive trust on purchaser of property with pre-existing long-term licensees).

110. *See* Sherman, *supra* note 98, at 851. "It is generally agreed that the simplest and perhaps most often-applied solution is to distribute the property as if the slayer had predeceased the victim." *Id.*

B. STATUTORY LEGAL FICTIONS

This statutory fiction inherent in contemporary slayer's statutes illustrates that legal fictions are not solely the province of judges.[111] Although most closely associated with the common law, legal fictions are regularly used in statutes and regulations.[112] In fact, some of the earliest Roman legal fictions, such as the *fictio legis Corneliae* were statutory.[113] Their use in statutory drafting reflects the ever-present nature of analogical thinking in legal reasoning. Unlike common law fictions, they are not susceptible to criticisms based on institutional constraints, and they have the benefit of increasing certainty because they reduce judicial discretion.[114]

The fact that legal fictions are an integral element of statutory law means that students are not able to bid farewell to legal fictions when they complete the common law-heavy first year of law school. The very subject of corporations proceeds from the legal fiction of the corporate personality.[115] Family law brims with legal fictions related to adoption and abandonment and capacity.[116] Taxation involves elaborate fictions that completely disregard the legal structure of a transaction in order to reach its economic substance.[117]

In my Taxation class, I patiently explain the virtues of legal fictions to still skeptical students. By far my favorite example is Section 7872 of the Internal Revenue Code, which stands out for its complex and multi-layered deeming principles.[118] It establishes a statutory definition of "foregone

111. *See, e.g.*, VAIHINGER, *supra* note 5, at 34–35 (discussing an example of statutory legal fiction in German Commercial Code).

112. *See* FULLER, *supra* note 1, at 90–92 (discussing statutory legal fictions).

113. *See id.* at 61; *see also* DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, *supra* note 10, at 855 (describing *fictio legis Corneliae*). Fuller also provides an interesting example of a Veteran's benefit bill that was vetoed by President Hoover. *See* FULLER, *supra* note 1, at 92.

114. *See id.* at 90–92.

115. *See* Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886). *See generally* Lee, *supra* note 58 (providing a contemporary account of corporate personality).

116. *See* Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family"*, 4 THEORETICAL INQ. L. 797, 802–03 (2003) (discussing how the legal fiction of coverture limited the rights of women to contract and own property). Vaihinger said this particular legal fiction created the "grossest forms of injustice." VAIHINGER, *supra* note 5, at 148.

117. *See, e.g.*, I.R.C. § 7872 (West 2006).

118. *See* John A. Lynch, Jr., *Taxation of Below Market Rates Loans Under § 7872: This Could Be a Lot Simpler!*, 21 AKRON TAX J. 33, 43–55 (2006) (explaining reasons for enactment of section 7872).

interest"[119] as the amount of interest that would have been charged on a loan had the loan borne interest in accordance with the prevailing applicable federal rate.[120] Of course, this is a mere fiction and no interest is actually charged.[121] Under section 7872, this statutorily created "foregone interest" is deemed transferred from the lender to the borrower and then retransferred from the borrower to the lender as interest.[122]

Again, given that this is a fiction, no money actually changes hands.[123] Magically, however, this fictive interest can produce a hefty tax bill. Depending upon the context of the underlying transaction, this "foregone interest" can be subject to income tax twice—once in the hands of the lender and then again in the hands of the borrower.[124] And, so is the power of the fiction.

III. NEW LEGAL FICTIONS?

As evidenced by the example of section 7872 and the tax treatment of below-market rate loans, there is no dearth of new legal fictions. Although the predominance of positive law may have greatly reduced the need for common law legal fictions, *as if* reasoning remains a prime staple of legal analysis.[125] It will continue to inform the development of judge-made rules, and it will also feature prominently in legislative and regulatory initiatives. Recent scholarship has sought to identify new types of legal fictions and, in so doing, has strained Fuller's now classic definition of a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[126] In this Part, I discuss the classification error raised in this scholarship and conclude that the so-called new legal fictions can be more accurately described as empirical legal errors, discredited legal

119. I.R.C. § 7872(e)(2) (West 2006) (defining "foregone interest").

120. *See id.* § 7872(f)(2) (defining "Applicable Federal rate").

121. *See id.* § 7872(a)(1)(A)–(B) (providing rule for "demand" or "gift" loans).

122. *See id.*

123. *See id.*

124. *See* I.R.C. § 61(a)(1) (West 1984); *see also id.* § 61(a)(4). In the case of an employer–employee relationship, the foregone interest that is deemed transferred to the borrower would be characterized as compensation income under section 61(a)(1). *See id.* § 61(a)(1). The foregone interest that is deemed re-transferred to the lender "as interest" would be characterized as interest income under section 61(a)(4). *See id.* § 61(a)(4).

125. *See* Smith, *supra* note 22, at 1470 & n.187. Smith points to the rise of positive law as corresponding with a decrease in legal fictions. *See id.* "The postivization of law, and a revolution against common law formalism, has erased many of the most egregious fictions of the common law." *Id.* at 1470 & n.187.

126. FULLER, *supra* note 1, at 9.

regimes, and complex statutory schemes.[127]

In each case, I believe that these newly identified legal fictions represent a fundamentally different phenomenon from that described by Fuller. Many of the new fictions are not fictions in the classic sense defined by Fuller because either they are not acknowledged to be false or, in some cases, they are not in fact demonstrably false.[128] As such, they present a distinct set of concerns that could be more profitably studied as a separate category.

In addition to this definitional objection, the new categories deny the basic constitutive power of the law.[129] Before we can speak of fictions, we must be able to identify the truth. With the exception of the empirical legal errors discussed in the next section, the new legal fictions do not have a clear measure of truth or falsity. Even with respect to the empirical errors, there remain questions of the subjectivity and sufficiency of proof.[130] Both the discredited legal regimes and the complex statutory schemes illustrate the self-referential nature of law. To dismiss them as mere legal fictions ignores the nature of juristic truth.

A. EMPIRICAL LEGAL ERRORS

An increased emphasis within legal scholarship on empiricism has enlivened an important debate regarding the role social science data should play in the fashioning of normative legal rules.[131] It has also caused legal scholars to re-examine certain long-standing legal rules and presumptions in light of existing social science research.[132] The results have been

127. *See infra* notes 131–346 and accompanying text.

128. *See* Robert A. Yale, *Bentham's Fictions: Canon and Idolatry in the Genealogy of Law*, 17 YALE J.L. & HUMAN. 151, 159–60 (2005) (quoting Maine: "But now I employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified"). It is arguable that both Maine and Bentham applied a broader definition of fictions. *See id.*

129. *See id.* at 160–61.

130. *See* Smith, *supra* note 22, at 1446–49.

131. *See generally* Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977) (arguing against social science data); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 543 (1991) ("The Constitution's many broad prescriptions must be interpreted in accordance with various external guides."); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2–3, 12 (1998) (arguing in favor of an increasing use of social science data); Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 157, 159–66 (1990) (discussing "fundamentally incompatible normative systems").

132. *See* Todd Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 420–22 (2009) (discussing "new legal fictions" and factual

sobering.[133] For example, empirical evidence roundly contradicts a number of our stalwart evidentiary rules, including the reliability of eyewitness testimony,[134] the ability of jurors to disregard testimony,[135] and predictions of future dangerousness.[136] Such observations raise weighty questions regarding the relevance of this empirical data, the nature of legal rules, and the scope of judicial discretion.

Peter J. Smith has produced a comprehensive survey of this phenomenon, which he refers to as the problem of "new legal fictions."[137] For clarity, and to differentiate this group from the other "new" legal fictions discussed in this Essay, I refer to Smith's category as "empirical legal errors." Although Smith recognizes that these empirical legal errors are different in kind from the legal fictions described by Fuller, he persuasively uses Fuller's assessment of the dangers inherent in legal fictions to condemn the continued use of these empirical legal errors and argue for greater judicial candor.[138] Specifically, Smith notes that the utility of a legal fiction "must wane—and its danger correspondingly wax—as recognition that it is in fact false diminishes."[139]

As identified by Smith, empirical legal errors fall into three general categories: cognitive processes (e.g., reliability of eyewitness testimony),[140] individual beliefs (e.g., presumption that individuals know the law),[141] and institutional relationships (e.g., canons of construction relating to presumed legislative intent).[142] In each instance, Smith marshals considerable social

---

premises in agency review cases); *see also* Criddle, *supra* note 64, at 1315 (analyzing legal fictions in Chevron agency jurisprudence).

133. *See* Smith, *supra* note 22, at 1447–49.

134. *See, e.g.*, *id.* at 1452–55 (citing "virtually unequivocal data").

135. *See, e.g.*, Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1254–75 (2005) (discussing psychological research).

136. *See, e.g.*, Smith, *supra* note 22, at 1455 (noting "numerous studies" show such predictions "unreliable"); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1442–44 (2001).

137. *See* Smith, *supra* note 22, at 1480–94; *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1121–23 (2008) (proposing that "false" plea bargains for innocent defendants should be reconceived as legal fictions).

138. Smith, *supra* note 22, at 1480–94 (discussing connection between "new legal fictions" and judicial candor).

139. *Id.* at 1467.

140. *Id.* at 1450–57 (providing examples involving cognitive processes include: limiting instructions for jurors, the reliability of eyewitness testimony, predictions of future dangerousness, fraud on the market and the rational economic actor).

141. *Id.* at 1458–59 (listing examples involving individual beliefs which include: custodial interrogation and freedom to leave and ignorance of the law).

142. *Id.* at 1460–64 (providing examples of "new legal fictions" related to institutional

science data that contradicts the factual suppositions contained in the rules and presumptions.[143] Although Smith confines his work to judge-created empirical legal errors, similar observations also could be made with respect to empirical errors in statutory law.[144]

Smith's empirical legal errors differ from classic legal fictions in two significant ways.[145] First, even though the empirical legal errors are based on inaccurate factual premises, they are not generally acknowledged to be false.[146] Thus, strictly speaking, empirical legal errors would not qualify as legal fictions according to Fuller[147] because they are not transparently false.[148] Under Fuller's construction, a legal fiction that is believed is not only dangerous, but it ceases to be a legal fiction.[149]

Secondly, the empirical legal errors present a different calculus of utility. As described by Smith, empirical legal errors are generally valued for their presumed veracity.[150] Thus, when an empirical legal error is

---

relationships including canons of statutory construction, theories of legislative intent, and constitutional originalism).

143. *See id.* at 1472–78 (identifying a number of explanations for why courts employ these new fictions despite the existence of empirical evidence that refutes the premise of the fiction). These explanations include: ignorance, institutional constraints on the consideration of empirical evidence, and attempts to conceal normative choices. *Id.*

144. *See* Smith, *supra* note 22, at 1469 (providing support for the illustration in the preceding section, however, common law and statutory legal fictions raise different institutional concerns). Speaking of judge-made legal functions, Smith notes: "Like the classic legal fictions that Bentham so despised, new legal fictions are sometimes a device that judges deploy to mask the fact that they are arrogating to themselves the power to make normative choices, and thus to make law itself." *See id.*

145. *See generally* Fuller, *supra* note 1, at 9 (providing classic definition of legal fictions).

146. Smith, *supra* note 22, at 1470. Smith acknowledges that "new legal fictions" are different in kind from classic legal fictions. Smith writes:

> For new legal fictions . . . there generally is no recognition of the fact that the premise is false, although the assertions need not consciously be intended to deceive. Indeed, what characterizes most new legal fictions is that the learned reader of the law would *not* have explicit or implicit indication that the court is simply deeming to be true that about which we know otherwise. In addition, new legal fictions are not simply a device for softening (or, depending on one's perspective, obscuring) the effects of legal *change*—that is, departure from a regime already established—but rather are instrumental in *justifying* doctrine, whether received or newly established.

Id.

147. *See* Fuller, *supra* note 1, at 9 (providing classic definition of legal fictions).

148. *See* Smith, *supra* note 22, at 1470 (noting there generally is no recognition that the premise of the statement is empirically false).

149. *See* Fuller, *supra* note 1, at 9–10. According to Fuller, "[a] fiction taken seriously, i.e., 'believed,' becomes dangerous and loses its utility." *Id.* Once a fiction loses utility, "[i]t ceases to be a fiction under either alternative of [Fuller's classic] definition." *Id.*

150. Smith, *supra* note 22, at 1441. Smith provides the following definition:

> A court deploys a new legal fiction when (1) the court offers an ostensibly factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule; and (2) the factual supposition is descriptively inaccurate. In

revealed, it ceases to have any primary utility.[151] For example, a conviction based on the unquestioned strength of eyewitness testimony is not premised on the agreed upon fiction that eyewitness testimony is reliable.[152] It rests on the belief that the witness reliably identified the defendant.[153] If that belief turns out to be mistaken, then the rules governing the admissibility of eyewitness testimony have no direct utility and should be abandoned or modified. This differs from classic legal fictions, which are considered to have utility *despite* their falsity.[154]

Indeed, this disjunction between truth and utility is the defining feature of a legal fiction.[155] It is at the heart of the conundrum that has occupied legal scholars for centuries, namely: how can a legal fiction retain its utility despite its acknowledged falsity?[156] The empirical legal errors fail on both counts of transparency and utility, and, therefore raise a separate and distinct set of concerns.[157] Even without reference to Fuller's warning about the danger of fictions, it would seem that one could make a strong case in favor of exposing the factual inaccuracies that underlie Smith's empirical legal errors.[158] As defined by Smith, a legal rule that is mistakenly based on a demonstrably false factual supposition is a legal fiction.[159]

I would suggest that a legal rule that rests on an empirical mistake demands correction regardless of its label, and there is arguably little

---

> most cases, the premise is false because empirical research has demonstrated that it is false, although occasionally the factual supposition so conflicts with general knowledge and conventional wisdom that it can be characterized as a new legal fiction even without reference to empirical research. To be a new legal fiction, the court must offer the factual supposition as a (or the) basis supporting the court's normative choice among competing possible legal rules.

Id.

151. *See id.* at 1485–94 (identifying a number of secondary considerations that may produce utility).

152. *See id.* at 1452–55, 1476.

153. *See id.* at 1453–54.

154. *See* Fuller, *supra* note 1, at 9.

155. *See id.*

156. *See* Vaihinger, *supra* note 5, at 33–35.

157. *See, e.g.*, Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 654 (2008) (referring to two of Smith's "new legal fictions" as "legal fictions"). Empirical legal errors may be like classic legal fictions, but they are not actually classic legal fictions. *See id.* It is a fiction to say otherwise. *See id.* Smith is clear on this point. However, other scholars have used Smith's definition "new fictions" more broadly. *See id.*

158. *See* Smith, *supra* note 22, at 1467 ("If a legal fiction is a false statement not intended to deceive, then its utility must wane - and its danger correspondingly wax - as recognition that it is in fact false diminishes."). Essentially, Smith revises Fuller's identification of the inverse relationship between the acknowledged falsity of a legal fiction and its danger. *See id.*

159. *See id.* at 1471–72.

benefit to insisting that it is a legal fiction as understood by Fuller. The category of empirical legal error envisioned by Smith, however, does have direct relevance to classic legal fictions insofar as it underscores important questions regarding the subjectivity and sufficiency of proof of truth or falsity.[160] Given that any discussion of fictions necessarily implies an understanding of truth, it is essential to identify the appropriate measure of truth.

For empirical legal errors (i.e., false factual suppositions that underlie legal rules and presumptions), the relevant measure of truth is "descriptive reality" as distilled through social science data.[161] However, even when the appropriate measure is identified, it is not clear under what circumstances a factual supposition can be definitively declared to be false. As Fuller explained:

> The truth of any given statement is only a question of its adequacy. No statement is an entirely adequate expression of reality, but we reserve the label "false" for those statements involving an inadequacy that is outstanding or unusual. The truth of the statement is, then, a question of degree.[162]

Take for example, two empirical legal errors identified by Smith: the reliability of eyewitness testimony and the determination of when an interrogation is custodial.[163] In the case of eyewitness testimony, Smith reports that "virtually unequivocal data . . . challenges the presumption that jurors are competent to assess the reliability of eyewitness testimony."[164] By any measure, this sounds like compelling evidence sufficient to contradict the long-standing factual supposition that expert testimony is not necessary to explain the (un)reliability of eye witness testimony.[165] Smith presents a very different case with respect to the question of when *Miranda* warnings are necessary and notes that "informal surveys of students and common sense tend to suggest that most people, including most lawyers, do not feel free to leave when the police seek to ask them questions."[166]

It is not at all clear that this quantum of proof should be sufficient to warrant a determination that the factual supposition underlying the rules

160. *See id.* at 1445 ("[I]t is often difficult to claim that a factual supposition on which a legal rule is based is false without reference to some other measure of descriptive reality.").

161. *See id.* ("To identify a new legal fiction, it is usually necessary to refer to empirical research; after all, it is often difficult to claim that a factual supposition on which a legal rule is based is false without reference to some other measure of descriptive reality.").

162. FULLER, *supra* note 1, at 10.

163. *See* Smith, *supra* note 22, at 1452–55, 1458–59.

164. *Id.* at 1453.

165. *See id.* at 1454.

166. *Id.* at 1458.

governing custodial interrogations is demonstrably false. Moreover, when dealing with a reasonable person standard, it is not clear what level of consensus should be required in order to constitute a reasonable person or when the construction of the reasonable person is, by design, aspirational.[167]

Classical legal fictions, on the other hand, more often consist of a false statement relating to the individual facts of the case, rather than the applicable law.[168] Therefore, the distinction between classical legal fictions and empirical legal errors, at least to some extent, can be expressed in terms of the traditional split between fact and law.[169] For many classic legal fictions, the appropriate measure of the truth is simply the facts of the case. With respect to the customary false jurisdictional statements, there was no trespass in the county of Middlesex nor any debt owed the Crown.[170] In the case of *in rem* civil forfeiture proceedings, no one involved believes for one moment that the inanimate object named as the defendant sprang to life, like the teapot in Disney's *Beauty and the Beast*, and cooked up a pound of methamphetamine.[171]

In other instances, it might not be clear whether the legal fiction is a factual statement accepted to be false or actually an empirical error of fact that mistakenly justifies a rule of law.[172] In the latter case, the error should

167. *See id.* at 1478. Also, there are no doubt instances where the reasonable person is admittedly aspirational, as would be the case with ignorance of the law. *Id.* ("The conventional policy justification for the rule is that it creates an incentive for citizens to learn their legal obligations.").

168. *See id.* at 1468–69 (explaining that classic legal fictions pertain to adjudicative facts rather than legislative facts). Where the statement goes to an ultimate fact of the case, such as the defendant's guilt or innocence, it may not be possible to determine whether the statement is indeed false. *Id.* at 1468 ("A court deploying a classic legal fiction generally would deem some fact particular to the controversy . . . to have occurred, even though in reality it had not."). This would be the case with plea bargains. *See* Bowers, *supra* note 137, at 1121 (arguing false plea bargains should be viewed as legal fictions).

169. *See* Smith, *supra* note 22, at 1468 ("Classic legal fictions generally pertained to adjudicative facts."); Stolzenberg, *supra* note 24, at 231–36 (discussing Bentham's view of the distinction between fact and fiction). *But see* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769, 1771 (2003) (rejecting fact/law distinction).

170. *See supra* notes 53–56 and accompanying text (describing these jurisdictional legal fictions).

171. *See, e.g.*, One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 233 (1972); Various Items of Pers. Prop. v. United States, 282 U.S. 577, 581 (1931); United States v. One 1983 Homemade Vessel Named "Barracuda," 858 F.2d 643, 644–45 (11th Cir. 1988); United States v. $38,000.00 in U.S. Currency, 816 F.2d 1538, 1540 (11th Cir. 1987); United States v. U.S. Treasury Bills Totaling $160,916.25, 750 F.2d 900, 901 (11th Cir. 1985); United States v. One 1976 Porsche 911S, 670 F.2d 810, 811–12 (9th Cir. 1979); United States v. One 1963 Cadillac Coupe de Ville Two Door, 250 F. Supp. 183, 186 (W.D. Mo. 1966).

172. Some classic legal fictions are very upfront about their nature and signal their falsity in

be revealed and the rule modified. In the former case, the fiction will be maintained to the extent it has continued utility. One example of this ambiguity would be the doctrine of the *fertile octogenarian* applied in the context of the dreaded Rule Against Perpetuities.[173] The relevancy of the rule has declined in recent years as states have either replaced, or have significantly reduced, the opportunity for the arbitrary application of the Rule Against Perpetuities.[174] Despite my admitted fondness for the fertile octogenarian, I no longer teach it in my Property course.

Simply put, in its strictest terms, the Rule Against Perpetuities voids, *ab initio*, certain executory or contingent interests where the interest could fail to vest within a life in being plus twenty-one (21) years.[175] The madcap judicial interpretations surrounding this old common law rule have been the Property student's bane of existence for several generations.[176] Over the years, it has provided favorites such as the slothful executor,[177] the magic gravel pit,[178] and the unborn widow.[179] The application of the Rule Against Perpetuities was considered so complicated that the California

---

their very structure. This is the case with the *as if* fictions that are often preceded by the term "constructive" or "implied." *See* FULLER, *supra* note 1, at 22–23. Fuller colorfully referred to these signals as "the badge of [the fiction's] shame. *Id.* at 23 ("It is not significant that each carries still the badge of its shame – the apologetic 'constructive' or 'implied.'"). Fuller noted that a similar semantic tic was common among the Roman *fictiones*, which often "carried a grammatical acknowledgement of [their] falsity." *Id.* at 36. Fuller called these fictions "apologetic fictions." *Id.* at 23.

173. *See* Jee v. Audley, 29 E.R. 1186 (Ch. 1787) (referring to a classic example of the application of the fertile octogenarian doctrine); *see also* Dukeminier, *supra* note 15, at 1876 (referring to the fertile octogenarian rule as "one of the strangest aberrations of the legal mind"). Dukeminier expresses the rule of the fertile octogenarian as follows: to *A* for her life, and then to the first of *A*'s children to reach 25 years of age. *Id.* at 1876–78. In other words, if *A* is eighty-five years old at the time the interest is created, then, under the rule, *A* could bear a child the following year at age eighty-six and then die the next year. Under these facts, the child, who was not a life in being at the creation of the interest, would reach twenty–five years of age beyond the perpetuities period. *See id.* at 1876. Accordingly, the interest would be void because it could conceivably not vest within the mandated "lives in being plus twenty-one years." *Id.* at 1868.

174. *See* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097 (2003).

175. *See* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (Roland Gray ed., 4th ed. 1942). John Chipman Gray offered the classic statement of the modern Rule Against Perpetuities: "no interest is good unless it vests or fails within a life in being plus 21 years." *Id.*

176. *See* Maureen E. Markey, *Ariadne's Thread: Leading Students Into and Out of the Labyrinth of the Rule Against Perpetuities*, 54 CLEV. ST. L. REV. 337, 340 (2006).

177. *See, e.g.*, Richards v. Tolbert, 232 Ga. 678, 678 (1974) (approving admission of will to probate over fifty years after testator's death); *In re* Estate of Campbell, 28 Cal. App. 2d 102, 103 (1938) (voiding gift to be made upon distribution of estate).

178. *See In re* Wood, 3 Ch. 381, 382–83 (1894).

179. Several states have abolished the *unborn widow* rule by statutes that presume any gift to a spouse to be to a person in being. *See, e.g.*, FLA. STAT. § 689.22 (5)(b) (repealed 1988) (emphasis added).

Supreme Court famously held that it was not malpractice for a lawyer to misinterpret the rule.[180]

Without dwelling on the mechanics of a near obsolete rule of law, the doctrine of the fertile octogenarian conclusively presumes that an individual is capable of bearing children regardless of age or physical infirmity.[181] In support of this proposition, the commentators referenced the Biblical story of Sarah who conceived a child at ninety years of age.[182] That said, is this dubious rule, which was first propounded in the Eighteenth Century, appropriately understood as a fiction, or is it an empirical legal error?[183] The rule would only be an empirical legal error if the Master of the Rolls had mistakenly thought the presumption of unlimited procreative ability was true.[184] If not, then the presumption is understood as false and would function as a bright line rule enabling jurists to avoid individual determinations regarding fertility.[185]

In the seminal case of *Jee v. Audley*, Sir Lloyd Kenyon rejected such individual determinations of fertility calling them "a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture."[186] Today, the rule of the fertile octogenarian is understood as a bright line rule that is applied despite its obvious falsity.[187] As such, it is a legal fiction in the classic sense of the term.

B. DISCREDITED LEGAL REGIMES

The preceding section concentrated on the specifics of the law–those verifiable factual suppositions that sometimes support and justify legal

180. *See* Lucas v. Hamm, 56 Cal. 2d 583, 592–93 (Cal. 1961). *But see* Wright v. Williams, 47 Cal. App. 3d 802, 809 n.2 (1975) (questioning holding of *Lucas v. Hamm* "in today's state of the art").

181. *See* Walton v. Lee, 634 S.W.2d 159, 160–61 (Ky. 1982) (applying conclusive presumption of fertility).

182. *See Genesis* 17:15–19.

183. *See* Jee v. Audley, 29 E.R. 1186, 1186 (Ch. 1787). *Jee v. Audley* was decided by Sir Lloyd Kenyon, Master of the Rolls of the Court of Chancery in 1787. *See id.* "The Master of the Rolls, originally keeper of the chancery records, [later] became the chief deputy of the Lord Chancellor." *Jee v. Audley*, UCHASTINGS.EDU, at n.1, http://www.uchastings.edu/site_files/facultywebs/massey/JeevAudley.pdf (last visited Aug. 1, 2010) (providing a copy of the *Jee v. Audley* decision with supplemental notes and questions).

184. *See supra* notes 158–61 and accompanying text (discussing what constitutes an empirical legal error).

185. *See infra* note 187 and accompanying text.

186. *Jee*, 29 E.R. at 1188.

187. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §1.4 cmt. h (1983).

rules. This section shifts our attention from accuracy of individual details, to the legitimacy regarding comprehensive legal regimes such as slavery and the doctrine of discovery. Over the last twenty years, legal scholarship has greatly benefited from a number of multi-disciplinary interventions; specifically, the law and literature movement has particular relevance to our discussion of legal fictions. [188] The emphasis on law *as* literature has introduced legal audiences to the important concepts of narrative, interpretation, and critique. Within this area of expertise, the legal fiction would seem to have obvious appeal because it knowingly incorporates a work of imagination (i.e., temporally counterfactual events) into the law.

That being said, the concept of the legal fiction is relatively under-theorized within the field of law and literature.[189] It has, however, become relatively common to apply the term "legal fiction" to discredited legal regimes, specifically slavery and the doctrine of discovery.[190] In many instances, this naming occurs without an express discussion of the definition of a legal fiction.[191] Aviam Soifer presaged this trend when, in 1986, he wrote that "[i]n our post-realist world, however, our sense is that legal fictions are not some small, awkward patch but rather the whole seamless cloth of the law."[192]

On one hand, it is quite satisfying to dismiss these past legal regimes as mere fictions. In the case of slavery, and later Jim Crow, we can confidently say that they lacked the staying power of moral truth.[193] But, is it appropriate, or even accurate, to label as a mere legal fiction a comprehensive system of oppression and subordination that persisted for hundreds of years? Does hindsight really lead us to regard slavery as equivalent to the fertile octogenarian? If one applies Fuller's definition of a legal fiction, it is difficult to see how these discredited legal regimes

188. *See, e.g.*, James Boyd White, Acts of Hope: Creating Authority in Literature, Law and Politics (1994); Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983); Robin West, Narrative, Authority, and Law (1993). In addition, our discussion of both slavery and the doctrine of discovery necessarily involves the discipline of history. *See* Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 Colum. L. Rev. 640, 640 (2001) (discussing legal history and cultural history).

189. *See* Camden and Fort, *supra* note 32, at 85 ("A subset of law and literature not often addressed is that of legal fictions.").

190. *See* ACCOMANDO, *supra* note 32 (referring to slavery as a legal fiction); *see also* Camden and Fort, *supra* note 32 (referring to doctrine of discovery as a legal fiction). From a more contemporary standpoint, one could argue that the gender binary represents a "legal fiction."

191. *See, e.g.*, Ruth Wedgewood, *The South Condemning Itself: Humanity and Property in American Slavery: A Review of Andrew Fede, PEOPLE WITHOUT RIGHTS,* 68 CHI.-KENT L. REV. 1391, 1392 (1993) (referring to "slaves as property" as a "legal fiction").

192. Soifer, *supra* note 29, at 876.

193. *See* FULLER, *supra* note 1, at 9.

qualify. They were neither acknowledged to be false at their time of adoption, nor are they demonstrably false without resort to abstract principles of natural law.

Despite the fact that the classic definition of legal fiction does not seem to apply,[194] legal scholars casually refer to slavery as a "legal fiction."[195] Indeed, race itself is sometimes expressed as a "fiction."[196] This trend is also evident in other fields such as history and literary criticism.[197] For example, when the noted historian Eugene Genovese referred to the "preposterous legal fictions" that supported slavery, he was talking about the central tenet of the slave system, namely "the treatment of slaves as chattel."[198] Christina Accomando, professor of English and Ethnic Studies, addresses the legal and political fictions of slavery in her book, *The Regulations of Robbers: Legal Fictions of Slavery and Resistance*,[199] and has classified as a "legal fiction" the entire body of slave "[l]aws governing legal testimony, racial identity, literacy, miscegenation, rape, and reproduction."[200]

---

194. *See id.* (providing a classic definition of legal fictions).

195. *See, e.g.*, Judge James A. Wynn, Jr., *Thomas Ruffin and the Perils of Public Homage, State v. Mann: Judicial Choice or Judicial Duty*, 87 N.C. L. REV. 991, 992 (2009) (referring to "the legal fiction of slaves as insensible property, unworthy of any sort of protection from their owners regardless of the form of cruelty or barbarity employed"); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 129 (1998) (noting the judge "knew only too well, those 'pretty little mulattoes' were most likely 'one of the family', but it was a legal fiction to be preserved at all costs that black people were slaves and white people were free."); Roger J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 871 n.26 (1986) ("[A]lthough slaves possessed few legal rights, treatment of slaves as chattel was largely legal fiction; they were, in practice, granted certain rights"); Wedgewood, *supra* note 191, at 1392 ("Tucker worried that white Southerners would mistake legal fiction for moral fact, thinking of slaves as property, excluding them from any claim of human right").

196. *See* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 102 (1996) ("[R]ace is not a measured fact, but a preserved fiction . . . race is a matter not of physical difference, but of what people believe about physical difference."); *see also* Soifer, *supra* note 29, at 892. Soifer provides a discussion of the "fictions" contained in the *Slaughter-House Cases* and the *Civil Rights Cases*. *See id.* ("Taken case by well-known case, decisions such as those in the *Slaughter-House Cases* and the *Civil Rights Cases* seem illogical. Yet for all their peculiarities, their fictions have become crucial links in mainstream constitutional law.").

197. *See, e.g.*, EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 30 (1974).

198. *Id.* ("The South had discovered, as had every previous slave society, that it could not deny the slave's humanity, however many preposterous legal fictions it invented.").

199. ACCOMANDO, *supra* note 32, at 4 ("[L]egal fictions of American slavery tell us that slaves and African Americans had no legal or political voice.").

200. Christina Accomando, *The Laws Were Laid Down to me Anew: Harriet Jacobs and the Reframing of Legal Fiction*, AFR. AM. REV. (1998), http://findarticles.com/p/articles/mi_m2838/is_n2_32/ai_21059953/. Accomando writes that the

Certainly, the inherent tension in slave law between conceptions of liberty and property led to the creation of some convoluted legal fictions; however, these fictions and inconsistencies largely existed on the edges of slave law.[201] They did not go to the ultimate hegemonic practice of enslavement and subordination on the basis of legally constructed racial difference.[202] An example of a classic legal fiction existing within slave law was the procedural posture assumed in the so-called "freedom suits."[203] In order for the case to proceed, the plaintiff was presumed to be free, even though the determination of freedom was the ultimate question of the case.[204] If we are going to credibly maintain that slavery, or the doctrine of discovery, is a legal fiction, then there must be an available measure of truth or falsity. The empirical legal errors discussed in the preceding section explicitly incorporated statements of fact that were readily verifiable by reference to real world events, such as the evidentiary rules governing the reliability of eye witness testimony.[205] However, the legal systems of slavery, and the doctrine of discovery necessarily encompass abstract concepts such as liberty and sovereignty that are not provable in any conventional sense of the term.[206]

---

law:

> [D]efined slaves and African Americans in specific yet contradictory ways – as nonhuman, with dangerous sexuality and nonexistent subjectivity. These legal and political fictions were just that – constructed fictions – but they have had tremendous power. Analyzing legal, political, and literary discourses of slavery can help deconstruct these fictions and their power (which did not vanish with emancipation).

Id.

201. *See* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 311–12 (1996). With respect to the inherent inconsistencies of slave law, Cheryl Harris writes: "Slavery has long been acknowledged as a highly unstable legal regime which managed the central contradiction of human property—thinking, breathing property—through the concept of race and the ideology of white supremacy." *Id.* at 311–12; *see also* Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 422 (1997).

202. *See* Harris, *supra* note 201, at 312.

203. Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 332 (1994) (explaining that suits for freedom "always proceeded through the legal fiction that the plaintiff (slave) was already free . . . usually in the form of a claim for civil damages for assault, battery, or false imprisonment").

204. *See* Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1228 (2008). Finkelman explains:

> Southern state courts regularly accepted a legal fiction that the plaintiff was 'free' and therefore had standing to sue. If the court ultimately ruled against the slave plaintiff, the jurisdictional issues disappeared because the defendant continued to own the slave. This is in fact what had happened in Dred Scott's cases in Missouri.

Id. at 1228.

205. *See* Smith, *supra* note 22, at 1441–42.

206. *See* FULLER, *supra* note 1, at 9.

An appeal to natural law principles would reveal that slavery is morally wrong and, indeed, contrary to the first principles of any just society.[207] However, is the determination that slavery is morally wrong equivalent to a finding of falsity? [208] Whereas the reliability of eyewitness testimony is subject to external verification, the legal regime of slavery is not provable or disprovable by reference to empirical evidence.[209] It stands simply as a juristic truth. Slavery was a fact, not a fiction.[210]

As with slavery, some scholars refer to the entire doctrine of discovery and its resulting Native American land policy as a "legal fiction."[211] The doctrine of discovery, as announced in *Johnson v. M'Intosh*, justified title to all land in the United States by reference to the "principle . . . that discovery gave title to the government by whose subjects, or by whose authority, it was made."[212] The first of the so-called Marshall trilogy,[213] the consequences of *Johnson* were far-reaching. The legal doctrine of discovery and conquest established a clear chain of title to all land in the United States.[214] *Johnson* also had the effect of permanently

207. *See* Hernandez, *supra* note 40, at 698.

208. *See* Francis Jennings, *Conquest and Legal Fictions*, 23 OKLA. CITY U. L. REV. 141, 142 (1998) (stating discovery "remains a legal fiction to the present day despite its long-exposed falseness to well-documented facts").

209. *See* Smith, *supra* note 22, at 1438–39.

210. *See* Jennings, *supra* note 208, at 142.

211. *See, e.g.*, William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 9 n.39 (2005) ("The international legal fiction of 'discovery' bestowed occupancy and exclusive negotiating rights to impair the title of a 'discovered' Indian nation upon a so-called discovering European nation."); Julie Ann Fishel, *United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level*, 31 AM. INDIAN L. REV. 619, n.41 (2007) (referring to doctrine of discovery as "the legal fiction expressed by Chief Justice Marshall in the *Johnson* ruling"); Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 19 (1998). Nader and Ou observed that:

> Nowhere is the legal fiction and ambiguity more prevalent than in Supreme Court cases concerning Indian sovereignty . . . . [I]n *Johnson v. M'Intosh*, Marshall held that the United States had preeminent sovereignty over its claimed territory by virtue of the doctrine of 'Discovery' and the rights of 'Conquest.'

Id.

212. 21 U.S. 543, 573 (1823).

213. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 n.2 (2006) (citing CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987)). The other two cases in the trilogy are Cherokee Nation v. United States, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

214. *See* Camden and Fort, *supra* note 32, at 79 ("*Johnson*, creates the legal fiction of discovery and conquest to ensure a smooth chain of title—and permanently dispossess tribes of full title to their land in Anglo-American courts.").

dispossessing Native Americans from their land.[215]

In many first-year Property courses, including my own, *Johnson v. M'Intosh* is the first assigned case.[216] The facts of the case are exceedingly difficult to master and require some familiarity with colonial history.[217] The chain of events starts during the reign of James I in 1609 and gets increasingly complicated with the passage of time as sovereigns come and go and parties die.[218] My students are often confused by the procedural posture of the case, the length of time that had elapsed from the date of first purchase, and the sheer expanse of land involved.[219]

Lindsay Robertson's comprehensive study of the *Johnson* decision, *Conquest by Law*, does an excellent job of unraveling the facts leading up to the case and indentifying the competing interests involved.[220] Robertson also points out that the entire case was actually based on a procedural legal fiction.[221] The plaintiff brought a suit in ejectment that required the averment of a complex legal fiction involving a tenant who was driven from the land by force at the hands of a "casual ejector."[222] This procedural fiction, however, is not what commentators mean when they refer to the legal fictions imbedded in the *Johnson* decision.[223]

Johnson is a challenging case to read on the first day of Property class. Although students are generally aware of charges that the European

215. *See id.*

216. *See id.* at 86 ("The case is still taught in first-year property classes, often as the first case."). Camden and Fort note that three Property casebooks include *Johnson* as the first case. *See id.* at 86 n.59. These casebooks are: JON W. BRUCE & JAMES W. ELY JR., MODERN PROPERTY LAW 2 (6th ed. 2007); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 3 (6th ed. 2006); JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 3 (4th ed. 2006). A number of other Property casebooks include *Johnson* in the first chapter. *See* Camden and Fort, *supra* note 32, at 86. Camden and Fort single out the Singer casebook for its thoughtful treatment of the case and Native American law generally. *See id.* at 94–95.

217. *See Johnson*, 21 U.S. at 543. There were twenty-four points of agreed upon facts. *See id.* Lindsay Robertson explains that the parties agreed upon the facts prior to the case to simplify the proceedings. *See* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 54 (2005) (discussing how pleadings in *Johnson* were based on a legal fiction).

218. *See* ROBERTSON, *supra* note 217, at 159–61.

219. *See Johnson*, 21 U.S. at 543; *see also* ROBERTSON, *supra* note 217, at 159–61. Robertson describes the land in question as "43,000 square miles of lush, rolling farmland commanding the junctures of four major river systems in Indiana and Illinois." *Id.* at 4.

220. ROBERTSON, *supra* note 217, *passim*.

221. *See id.* at 54 (discussing how pleadings in *Johnson* were based on a legal fiction).

222. *See id.*

223. Camden and Fort, *supra* note 32, at 88 ("However, when scholars refer to the legal fiction of *Johnson v. M'Intosh*, they usually are not referring to the type of case brought.").

powers "stole" the land from the Native Americans, they are surprised to see the common law producing legal precedent to justify the Europeans' claims of ownership.[224] For some students, the language used in the decision to describe Native Americans is also difficult to read. Later in the course, we compare Justice Marshall's construction of "fierce savages"[225] who were unable to be "blended with the conquerors or safely governed as a separate people"[226] with Justice Taney's description in *Dred Scott v. Sandford* of "beings of an inferior order"[227] who are unable "to become a member of the political community."[228]

Although I understand the urge to dismiss these judicial constructions of the racial *other* as legal fictions, I am concerned that the term is used too freely and without regard to its traditional definition. A legal fiction, according to Fuller, is wholly safe and has utility only when its falsity is openly acknowledged and understood by all.[229] We can certainly disprove Justice Taney's statement regarding "beings of an inferior order," but the appropriate question is whether Justice Taney understood that statement to be untrue when *Dred Scott* was decided?

Far from offering a fictional account of race, Justice Taney went to great lengths to establish that the views expressed in his majority opinion

---

224. *See* ROBERTSON, *supra* note 217, at 4 ("In *Johnson v. M'Intosh*, the Supreme Court announced the so-called discovery doctrine, which provided that, upon discovery of the continent, European sovereigns acquired title to all 'discovered' lands, while indigenous people retained only an 'occupancy' right that could be transferred only to the discovering sovereigns.").

225. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.").

226. *Id.* at 589–90. The *Johnson* Court noted that in the normal course of events, the conquered would be "blended" into society:

> When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

Id. at 590.

227. Scott v. Sandford, 60 U.S. 393, 407 (1856) ("[A]ltogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.").

228. *Id.* at 403. The majority framed the question presented as:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?

Id.

229. *See* FULLER, *supra* note 1, at 9 (discussing the classic definition of a legal fiction).

represented the conventional wisdom at the time of the Founders.[230] This exercise was necessary to establish the original intent behind the term "citizen."[231] Rather than deliberately deploying a legal fiction, Justice Taney claimed that he was describing the historical understanding of the social, political, and legal standing of individuals of African descent.[232] The full passage reads:

> [Individuals of African descent] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic if a profit could be made by it.[233]

Certainly, my students are right to dismiss this passage as "racist ramblings"[234] that reflect a shameful period in United States history, and it is important to be conscious of our legacy of racial slavery and the legitimizing role played by Anglo-American property law.[235] However, it is dangerous to dismiss these hateful sentiments as a mere fiction. These "ramblings" carried the force of law. They set forth the rationale for the enslavement and subordination of an entire class of people. Even if we believe that Justice Taney's decision is filled with detestable racist lies, his lies are not necessarily legal fictions because when one employs a legal fiction, there is no intent to deceive.[236]

---

230. *See Scott*, 60 U.S. at 409 ("We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted.").

231. *Id.* at 411 (discussing the term "citizen"). Justice Marshall points to the Fugitive Slave clause and the clause limiting the slave trade to support his conclusion: "But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed." *Id.*

232. *See id.* at 407. Justice Taney asserted that this view was "universal." *Id.* Justice Taney further stated:

> This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id.

233. *Id.*

234. Camden & Fort, *supra* note 32, at 107 (suggesting that today Justice Marshall's opinion can be seen "as racist ramblings about the role of Indians and their land.")

235. *See* Harris, *supra* note 201, at 343–53 (discussing institution of Property law and its role in subordination of both slaves and white women).

236. *See* FULLER, *supra* note 1, at 6; *see also* Scott v. Sandford, 60 U.S. 393, 407 (1856). For

Returning for a moment to the *Johnson* case,[237] we can see another set of "racist ramblings"[238] concerning the "character and habits" of Native Americans.[239] In *Johnson*, Justice Marshall provided the following description of Native Americans as:

> [F]ierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[240]

Instead of dismissing the entire doctrine of discovery as a legal fiction, some commentators have taken issue with the individual errors that Justice Marshall repeated in the *Johnson* opinion about Native Americans.[241] Specifically, Justice Marshall incorporates Lockean views of investment and labor to suggest that that Native Americans could not own the land because they did not cultivate it and merely "wandered" over it.[242] As my students never fail to point out, this description inaccurately portrays all Native Americans as "hunter gatherers," whereas many Native American tribes had highly complex agricultural systems.[243]

---

example, Justice Taney may have committed an empirical error when he states, "[t]his opinion was at that time fixed and universal in the civilized portion of the white race." *Id.*

237. Johnson v. M'Intosh, 21 U.S. 543, 543 (1823).

238. Camden and Fort, *supra* note 32, at 107.

239. *Johnson*, 21 U.S. at 589. ("Although we do not mean to engage in the defence [sic] of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.").

240. *Id.* at 590.

241. *See, e.g.*, Camden and Fort, *supra* note 32, at 89. Camden and Fort observe:

> There is a serious question as to whether Marshall intended to write a legal fiction or took his holding at face value. It is difficult to determine whether he was 'bamboozled' by the myth of the 'vanishing Indian hunter' and used it to justify the more clearly mythical narrative of conquest or if he understood both the reasoning and the holding as a legal fiction.

Id.

242. *Johnson*, 21 U.S. at 569–70 ("North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it.").

243. *See* Fletcher, *supra* note 213 at 675. Fletcher points to popular accounts of the agricultural achievements of Native Americans that were contemporaneous with the *Johnson* decision. *See id.* Fletcher concludes: "The entire Marshall Court, it appears, was bamboozled by one of the greatest lies ever perpetrated about Indian people - that Indians were hunters and were not (and could not) be farmers." *Id.*; *see also* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 152 (2005) (providing illustrations of contemporary accounts of Native American agriculture).

Commentators have also seized on this misstatement and have labeled it as a "legal fiction."[244] This characterization leads to the obvious argument that the doctrine of discovery is inherently flawed because it rests on a legal fiction.[245]

Jen Camden and Kathryn Fort have produced a thoughtful examination of *Johnson* from the perspectives of both law and literature,[246] and they suggest that Justice Marshall's characterizations echo the "myth of the Vanishing [Native] American."[247] Camden and Fort also discuss whether Justice Marshall knew that his descriptions of Native American land use patterns were inaccurate. They further note that:

> [T]here is a serious question as to whether Marshall intended to write a legal fiction or took his holding at face value. It is difficult to determine whether he was "bamboozled" by the myth of the "vanishing Indian hunter" and used it to justify the more clearly mythical narrative of conquest or if he understood both the reasoning and the holding as a legal fiction.[248]

Although they equivocate as to whether Justice Marshall's views were sincere, Camden and Fort repeatedly refer to the doctrine of discovery as a legal fiction.[249] Other scholars who have asked the same question have concluded that the apologetic dicta with which Justice Marshall peppered his opinion confirms that he was knowingly deploying a legal fiction.[250] In

244. *See, e.g.*, Camden and Fort, *supra* note 32, at 89–90 (discussing arguments on both sides of the debate).

245. This type of argument is very similar to that leveled against the complex statutory schemes discussed in the next section. *See infra* notes 268–302 and accompanying text.

246. Camden and Fort, *supra* note 32, at 95. One of the primary concerns raised by Camden and Fort is the effect of time on legal fictions. *See id.* Camden and Fort ask: "Has the legal fiction of conquest become historical fact in the minds of lawyers whose first-year property law course provides their only exposure to *Johnson v. M'Intosh*?" *Id.*

247. *See id.* at 102–04 (discussing literary trope of "vanishing Indian").

248. *See id.* at 90–91. Recognizing the definitional issue regarding what qualifies as a legal fiction, Camden and Fort explain, "[t]his is an interesting question because the term 'legal fiction' has clear requirements, not the least of which is that the judge using the fiction understands it as such." *Id.* at 89.

249. *See id.* at 92. Camden and Fort conclude that discovery qualifies as what Fuller called either a persuasive or apologetic fiction. *Id.* ("Marshall's dicta and reasoning, at the time, also fits Fuller's definitions of emotive or persuasive and apologetic legal fictions.").

250. *See id.* at 91. According to Camden and Fort, "[t]his 'extravagant' claim against 'natural law' seems to demonstrate at least an ambiguous stance on the part of Marshall." *Id.* They nonetheless equivocate by concluding "whether it was understood to be a 'fiction' by other judges and lawyers at the time is questionable." *Id.* at 90; *see also* William D. Wallace, *M'Intosh to Mabo: Sovereignty, Challenges to Sovereignty and Reassertion of Sovereign Interests*, 5 CHI.-KENT J. INT'L & COMP. L. REV. article 5, at 4 (2005), *available at* http://www.kentlaw.edu/jicl/articles/spring2005/s2005williamwallace.pdf (observing that the language used in the *Johnson* opinion illustrates that "Chief Justice Marshall recognized the legal

particular, these scholars point to Justice Marshall's use of the term "extravagant"[251] to describe the concept that the "discovery of an inhabited country" was equivalent to "conquest."[252] Still other commentators have concluded that Justice Marshall was merely repeating the conventional racist wisdom of the time, and he genuinely believed "one of the greatest lies ever perpetrated about the Indian people."[253]

At the end of the day, it is not clear what is gained by determining whether Justice Marshall actively believed his statements about Native American land use patterns. If Justice Marshall believed his claim that Native Americans were not agriculturists, then his decision includes a factual misstatement. This is an empirical legal error. As we saw in the last section, when a legal rule is based on an inaccurate factual supposition, the rule should be changed or modified provided the rule is valued for its veracity.[254] An empirical error does not qualify as a legal fiction under Fuller's definition because it lacks the required transparent falsity of a legal fiction.[255]

In the alternative, even if Justice Marshall understood that the land use patterns he described were not in fact true, it still does not qualify as a legal fiction.[256] The hallmark of a legal fiction, according to Fuller, is that it is not intended to deceive.[257] An intentional misstatement designed to justify a racially oppressive legal system seems to be calculated to both deceive and subordinate. It differs markedly from the fictional ejectment that was fabricated in order to bring the *Johnson* case before the court.[258]

Just like the fertile octogenarian,[259] everyone involved in the *Johnson* case knew that the ejectment did not in fact occur and no one beyond the

---

fiction involved in his decision but nevertheless acknowledged the political and legal necessity to establish such a theory").

251. Johnson v. M'Intosh, 21 U.S. 543, 591 (1823) (admitting "extravagant . . . pretension" of European land claims); *see also* Camden and Fort, *supra* note 32, at 91 (referring to use of the term "extravagant"); Wallace, *supra* note 250, at 4 (referring to the use of "extravagant").

252. Camden and Fort, *supra* note 32, at 91.

253. Fletcher, *supra* note 213, at 675 ("The entire Marshall Court, it appears, was bamboozled by one of the greatest lies ever perpetrated about Indian people—that Indians were hunters and were not (and could not) be farmers."). Banner also agrees that Marshall "mistook the fiction for the reality." BANNER, *supra* note 243, at 184 (referring to colonial land acquisition).

254. *See supra* Part III.A.

255. *See* FULLER, *supra* note 1, at 9 (providing classic definition of legal fictions).

256. *See* Camden and Fort, *supra* note 32, at 102–04.

257. *See* FULLER, *supra* note 1, at 6 ("For a fiction is distinguished from a lie by the fact that it is not intended to deceive.").

258. ROBERTSON, *supra* note 217, at 54 (describing how pleadings were based on procedural legal fictions).

259. *See supra* notes 173–87 and accompanying text.

case was expected to believe that it had.[260] The same cannot be said of intentional lies told about minority groups in order to justify repressive laws.[261] As Camden and Fort observed, such "legal fictions" can easily "become 'truth' to the majority . . . and trickery to the minority group."[262]

Regardless of whether Justice Marshall knew that the land use patterns he described were false, it is not plainly apparent that Justice Marshall based his holding on the distinction between cultivators and hunters. Although Justice Marshall mentions this distinction as a possible justification for the doctrine of discovery, he clearly states that the Court "will not enter into the controversy" over such "abstract principles" and their effect on ownership rights.[263] Indeed, it is in the next sentence that Justice Marshall declares: "[c]onquest gives a title which the Courts of the conqueror cannot deny."[264]

It is here, in the constitutive power of the law, that Justice Marshall rests his decision. The doctrine of discovery exists because of the actions of the sovereign—not because of real or imagined land use patterns. Justice Marshall's infamous pronouncement illustrates a point that is often raised by commentators regarding the inherent difference between legal fictions and literary fictions.[265] Although theories of narrative and interpretation can enhance our understanding of the law and judicial opinions, it is imperative not to lose sight of what makes the law unique "because the production and reception of texts within the law takes place within a context of the systemic application of state-sanctioned force."[266]

---

260. *See* ROBERTSON, *supra* note 217, at 54.

261. *Cf.* Sofier, *supra* note 29, at 892 ("Pragmatic fictions eliminate the past and shroud the tragedy of present reality.").

262. Camden and Fort, *supra* note 32, at 86 (asserting existence of such legal fictions "delegitimizes the law in the eyes of outsiders").

263. Johnson v. M'Intosh, 21 U.S. 543, 588 (1823) (expressing a question as to "whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits").

264. *Id.*

265. *See* Sofier, *supra* note 29, at 882–83 (discussing the differences between legal fictions and literary fictions). Sofier explains:

> Legal fictions are quite different from real, literary fictions. For one thing, as Bob Cover pointed out, potential violence lurks beneath the fictions created by judges, while the nexus between even the most powerful literary fiction and actual force is quite attenuated. Additionally, the author of real fiction enjoys more freedom than the creator of legal fiction.

Id.; *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death."); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1986) (noting that adjudication is not an interpretive act rather it "is an imperative act").

266. KIERAN DOLIN, FICTION AND THE LAW: LEGAL DISCOURSE IN VICTORIAN AND

C. STATUTORY SCHEMES

We now move our discussion to complex statutory schemes that, like the discredited regimes discussed in the immediately prior section, are neither transparently false nor demonstrably false. As noted in Part II, statutory legal fictions exist across a broad range of complex regulatory systems, including the tax code, food and drug law, environmental protection law, inheritance law, anti-discrimination laws, and securities regulation.[267] The tax system represents one of the most familiar and comprehensive of these regulatory regimes.[268]

As anyone who has labored through the intricacies of the Child and Dependent Care Tax Credit,[269] or the three percent phase-out of itemized deductions for high-income taxpayers can attest,[270] the tax law is confusing, complicated, and frustratingly self-referential. Students who enroll in my introductory tax course initially approach the topic with a degree of fear and loathing that seems unrivaled among the recommended large lectures classes in the upper level curriculum.[271]

Although the United States can boast one of the highest levels of voluntary tax compliance in the world, there remains an annual "tax gap" of approximately $345 billion in unpaid taxes.[272] This gap is partly

---

MODERNIST LITERATURE 10 (1999). The full quote provides:

> In the midst of this interdisciplinary endeavour, one irreducible difference between law and literature has often been reasserted: that legal interpretation cannot be assimilated to literary interpretation, because the production and reception of texts within the law takes place within a context of the systemic application of state sanctioned force.

Id.; *see also* Cover, *Violence and the Word*, *supra* note 265, at 1629 ("Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.").

267. *See* discussion *supra* Part II.B.

268. *See* Carolyn C. Jones, *Taxes and Peace: A Case Study of Taxing Women*, 6 S. CAL. REV. L. & WOMEN'S STUD. 361, 364 (1997) ("Taxation is an encounter between the state and citizen that is ordinary and regular.").

269. *See* I.R.C. § 21 (West 2007). Taxpayers are first directed to a twenty-three page publication to explain the credit and determine if they are eligible. *See* Child and Dependent Care Expenses, I.R.S. Publication 503, (Dec. 10, 2009), *available at* http://www.irs.gov/pub/irs-pdf/p503.pdf (last visited Sept. 2, 2009).

270. *See* I.R.C. § 68(a)(1) (West 2001). The three-percent phase out is subject to its own phase out, such that the three percent phase out became a two percent phase out in 2007 and went down to one percent in 2008 and 2009. *See id.* § 68(f)(1)–(2). The phase out is repealed as of December 31, 2009. *See id.* § 68(g).

271. See Ajay K. Mehrotra, *Teaching Tax Stories*, 55 J. LEGAL EDUC. 116 (2005), for a general discussion of the teaching challenges facing tax professors. According to Professor Mehrotra, "[l]aw professors who teach tax have long recognized the challenges of their subject matter." *Id.* at 116.

272. *See* Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing It*, 27 QUINNIPIAC L. REV. 375, 377 (2009) (reporting estimated tax gap of $345 billion for 2001, the

attributable to the complexity of the tax system and the general alienation many taxpayers feel when confronted with this regulatory behemoth.[273] Persistent calls for simplification highlight the fact that the tax code is a creation of the legislature, a regime spun out of whole cloth as a fair and equitable method to apportion the burdens of citizenship.[274]

In the face of such complexity, taxpayers are quick to catalogue the indignities imposed by the tax code, and it is appealing to dismiss the entire project as a mere fiction. We saw a similar impulse in the earlier section with respect to the discredited regimes of slavery and the doctrine of discovery.[275] John Prebble has written widely on the subject of tax fictions and takes the position that the "dislocation" or "ectopia"[276] intrinsic to tax law is a result of the flawed fictions on which the tax code is based.[277] Building on the work of Fuller, Prebble argues that tax is entirely "different from other law" because it rests on a tax base that the law cannot describe accurately and has no counterpart in reality.[278] Prebble uses this observation to draw a number of conclusions regarding the complexity of tax law, its general incoherence, and the necessity for open-ended anti-avoidance rules.[279]

---

most recent year available).

273. A major cause of the "tax gap" is the perceived unfairness of the tax code. JOINT COMMITTEE ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES, JCS REP. NO. 02-05, at 1 (Jan. 27, 2005), *available at* www.house.gov/jct/s-2-05.pdfwww.house.gov/jct/s-2-05.pdf (noting efforts to address non-compliance include "simplifying the [tax] or making it more fair"). The tax gap is caused in part by the complexity and confusion of the tax code. *See* Rifkin, *supra* note 272, at 418–19.

274. *See* Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1267 (1990) (discussing movement for simplification of tax code).

275. *See* discussion *supra* Part II.B.

276. Prebble, *Built on Sand*, *supra* note 33, at 306.

277. *See* Prebble, *Fictions*, *supra* note 33, at 23–24 ("[I]ncome tax law is constitutionally incapable of attaining the desideratum of fictionless transparency."). Professor Prebble notes that the fictions of tax law diverge from the fictions of the common law because the latter achieved an end that could have been accomplished directly. *See id.* at 11. Specifically, Prebble observes that "[t]he fictions of income tax law are very different. The classic legal fiction entails pretence, but taxation fictions entail duplicity." *Id.* Calling both classic and tax fictions "pure legal fictions," Prebble distinguishes them from series of "quasi-fictions" which he refers to as "apologetic, deeming, and expository." *Id.* at 19. As opposed to classic legal fictions, which rest on a false statement, "quasi-fictions contain within themselves their own explanations, so they only appear to be false until one examines them closely." *Id.* Prebble further divides the fictions used in tax law into two distinct camps: inherent fictions as to questions of fact and analeptic fictions as to questions of law. *See id.* at 16–17.

278. *See id.* at 18. Prebble concludes that "society has chosen a tax base that is inherently flawed by fictions, a base that the law cannot describe accurately." *Id.* at 24

279. *See* Prebble, *Built on Sand*, *supra* note 33, at 318 ("[T]he ectopia of income tax law offers an explanation for a number of the more puzzling aspects of this branch of the law, including its complexity and its incoherence.").

To be sure, the tax code employs numerous individual fictions, such as the dual transfer of foregone interest under section 7872 that was discussed in Part II.[280] Many of these tax fictions are imposed in order to untangle tax-motivated transactions that are not without their own hint of fantasy. Although tax scholars have from time to time quibbled with these individual fictions,[281] Prebble's objection to the flaws inherent in tax fictions extends to the entire tax system.[282] Central to our discussion, Prebble contends that tax fictions are "truly false"[283] because they cannot accurately capture economic reality. Thus, the appropriate measure for the truth or falsity of a tax system, according to Prebble, is the extent to which the system serves as a replica of economic activity.[284]

Although I have serious reservations as to whether economic reality is a suitable benchmark, my larger concern relates to whether the tax system or the choice of a tax base is demonstrably false in any meaningful way. As with the discussion of discredited regimes,[285] the notion that a legislatively imposed tax base is "false" denies the constitutive power of law.[286] It also involves an unspoken appeal to a set of "facts" dubbed "economic reality,"[287] just as the falsity of the discredited regimes required an unspoken appeal to principles of natural law.[288] As the law defines the tax base, it also serves to reify the concept it names. In this way, society would not be said to *choose* a tax base. Society *constitutes* a tax base through the process of legislation, regulation, compliance, judicial

280. *See* Lynch, *supra* note 118, at 35 and accompanying text.

281. *See, e.g.*, H. David Rosenbloom, *Banes of an Income Tax: Legal Fictions, Elections, Hypothetical Determinations, Related Party Debt*, 26 SYDNEY L. REV. 17, 22 (2004) ("Elections, like legal fictions, are probably inevitable in an income tax system.").

282. *See* Prebble, *Fictions, supra* note 33, at 6.

283. *See id.* at 19. Prebble argues that tax fictions are not simply the "scaffolding," but "entail duplicity" because they are integral to the tax system itself. *Id.* at 11, 15. Quoting Fuller, Prebble notes that "[w]e cannot drop [the tax fiction] from the 'reckoning' once it has fulfilled its function because it is the means of fulfillment." *Id.* at 16.

284. Prebble states that "inherent in any income tax is a concept of income that cannot avoid being flawed [because] unlike most law, tax law cannot avoid being separated from its factual subject." Prebble, *Built on Sand*, *supra* note 33, at 318. Although Prebble quotes Vaihinger's views on reality, such quotations seem to raise questions about Prebble's reliance on economic reality as an accurate (or even discernable) measure of truth or falsity. For example, Prebble quotes the following observation by Vaihinger: "[T]he greatest and most important human errors originate through thought-processes being taken for copies of reality itself." Prebble, *Fictions, supra* note 33, at 16.

285. *See* discussion *supra* Part II. B.

286. *See* VAIHINGER, *supra* note 5, at 147. As Vaihinger noted "jurisprudence is not really a science of objective reality but a science of arbitrary human regulations." *Id.*

287. *See* Prebble *Fictions*, *supra* note 33, at 14, 16.

288. *See supra* notes 89–93 and accompanying text.

interpretation, and enforcement. Our tax code may be an artificial creation of law, but it is no less "real" than the economic transactions it imperfectly measures.[289]

At the outset, it bears noting that many of my tax students would doubtless applaud Prebble's assertion that the "income tax law may be law as tax specialists know law, but it is not law as other people know it."[290] Each Fall, I face 100 second and third year law students who show up for the first day of tax class with a preconceived view that tax law is equal parts penalty, sport, and torture. As a penalty to be avoided at all costs, students are eager to find the promised "loopholes" and often play fast and loose with the facts in a way that I do not encounter in my other courses.[291] My first challenge is to convince them that representing a client in a tax controversy is no different from any other professional undertaking. Or is it?

Perhaps the disregard my tax students show towards the *facts* of a transaction is a product of what Prebble calls the "simulacrum" effect of tax law?[292] Why should I expect my students to respect the facts of a case when the tax code rests on such obvious and uneasy fictions?[293] Ultimately, I believe that Prebble's ectopia thesis may yield helpful insights with respect to tax and other highly regulated fields where the artificiality

289. Prebble asserts, "unlike . . . other forms of law, the separation between tax law and its subject matter is real, inherent, and unavoidable." Prebble, *Built on Sand*, *supra* note 33, at 308. With respect to business profits, Prebble argues:

> In its most general sense, the policy of income tax law in respect of businesses must be to tax real business profits. Profits from economic activity exist in the natural world, but profits defined by law are a construction of human thought. Economic profits constitute the only reality that a government can tax.

Id. at 310. Again, Vaihinger's work would seem to question Prebble's strong reliance on "reality." *See* VAIHINGER, *supra* note 5, at 15 ("[T]he object of the world of ideas as a whole is not the portrayal of reality – this would be utterly impossible – but rather to provide us with an *instrument for feeling our way around more easily in this world.*").

290. Prebble, *Built on Sand*, *supra* note 33, at 311. Professor Prebble notes:

> Other people reasonably expect law to have a close and almost symbiotic relationship with its subject matter. Tax specialists know that income tax law's relationship with its subject matter can be so haphazard that at times it appears to be almost a matter of random serendipity when fact, law, and tax consequence coincide.

Id.

291. For a general discussion of taxpayer ethics, see Michael Wenzel, *The Multiplicity of Taxpayer Identities and Their Implications for Tax Ethics*, 29 LAW & POL'Y 31 (2007) (discussing role of identity in determining "tax ethics" of taxpayers).

292. *See* Prebble, *Built on Sand*, *supra* note 33, at 305 ("[T]ax law's concept of income is not income itself but a simulacrum of income."); *see also* Prebble, *Fictions*, *supra* note 33, at 3 ("Tax law's concept of income is not the fact of income itself but a legal simulacrum of income.").

293. *See* Prebble, *Fictions*, *supra* note 33. Arguably, the widespread disdain and disregard for tax compliance is the inevitable result of the ectopia Professor Prebble has so carefully described.

of regulation looms large in the minds of the regulated. However, I suspect that the dislocation so persuasively described by Prebble is due to something other than inherently flawed tax fictions.

The unspoken assumption that economic reality is the appropriate measure for the truth or veracity of the taxing statute potentially opens all regulatory schemes to a charge of falseness because regulation, by its nature, does not simply replicate economic activity. Although taxation is a product of transactions and what takes place in markets, the taxation of those markets is necessarily something more than, or other than, the object of the tax itself. The tax base represents a political compromise that incorporates a host of social and economic policy considerations. Many factors of economic and social policy go into the ultimate determination of how best to measure "ability to pay."[294] For this reason, the tax base is necessarily much more complex that a simple replica of economic activity. A multitude of deductions and credits are designed to further a wide range of social and economic policies, such as the charitable deduction,[295] the Earned Income Tax Credit,[296] and special expensing rules applicable to small businesses.[297] The fact that the tax code is not intended to reflect economic reality might make it artificial, but it does not make it false.[298]

The business world has largely adjusted to the notion that tax is a necessary transaction cost, although taxpayers routinely chase tax-motivated investment vehicles, pejoratively known as "tax shelters."[299]

---

294. Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 872 (2005) (discussing "ability to pay" as a "norm of an ideal income tax").

295. *See* I.R.C. § 170 (2008). The charitable contribution deduction encourages contributions to a carefully defined universe of organizations. *See id.* § 170(c).

296. *See* I.R.C. § 32 (2009). The Earned Income Tax Credit functions as a transfer payment to the working poor. *See, e.g.*, Center on Budget and Policy Priorities, *Policy Basics: The Earned Income Tax Credit* (2009), *available at* http://www.cbpp.org/files/policybasics-eitc.pdf (last visited Jun. 10, 2010) (The Center on Budget and Policy Priorities is a non-partisan research organization analyzing programs affecting low- and moderate-income families and individuals at the federal and state levels).

297. *See* I.R.C. § 179 (2010). The provision allowing immediate expensing is designed as a targeted way to promote investment in new machinery and other capital goods. *See* RAQUEL MEYER ALEXANDER, *Expensing*, in NTA ENCYCLOPEDIA OF TAXATION AND TAX POLICY, (2d ed. 2005), *available at* http://www.taxpolicycenter.org/taxtopics/encyclopedia/Expensing.cfm.

298. *See* Prebble, *Fictions*, *supra* note 33, at 21 (explaining that fictions of tax law are essential to tax law and are different from other fictions). Although it is appealing to conflate the artificiality of a statutory scheme with falsity, it is important to remember the distinction between *fiction* and legal fictions. If an author makes up a story about a parallel universe where concepts are identified by three-digit numbers and familiar things are called by different names, that author has engaged in a bona fide bout of fiction writing. Something very different happens, however, when the author of this alternate reality is the legislature.

299. *See* Karen C. Burke & Grayson M.P. McCouch, *COBRA Strikes Back: Anatomy of a Tax*

Indeed, a good measure of ectopia arguably occurs when the tax code struggles to look past the formal law of the transaction and capture its economic impact. Section 7872, discussed in Part II, provides an example of tax legislation that was designed to unravel tax-motivated transactions.[300] Congress enacted section 7872 after years of unsuccessful litigation on the part of the Internal Revenue Service, which had urged courts to recognized the value of "foregone interest"[301] in a variety of transactions that included employee/shareholder below-market loans[302] and intra-family no interest loans.[303]

In the first instance, the foregone interest provided additional tax-free income or distributions to the employee/shareholder and, in the latter case, the loan format avoided an otherwise substantial gift tax.[304] Without a statutory mandate, courts had refused to impute the amount of foregone interest to the borrower, much less impute it a second time to the lender.[305] Congress enacted Section 7872 because the legal structure of the underlying transaction did not reflect its intended economic impact.[306] In the case of below-market rate loans, the "displacement" or "dislocation"[307] between the tax law and the law of the transaction exists because the transaction was structured in an artificial way as to defeat the taxing authorities.[308] As a result, tax law cannot rely on the law of the transaction

---

Shelter, 62 TAX LAW. 59, 59, 64–65 (2008) (discussing "contingent-liability tax shelters").

300. *See* discussion *supra* Part II.B.; *see also* I.R.C. § 7872 (West 2006); George Cooper, *The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance*, 85 COLUM. L. REV. 657, 659–660 (1985) (identifying section 7872 as a means to stop tax avoidance measures).

301. *See* Phillip J. Closius & Douglas K. Chapman, *Below Market Loans: From Abuse to Misuse—A Sports Illustration*, 37 CASE W. RES. L. REV. 484, 496-98 (1987) (describing section 7872 as a legislative response to judicial inaction and defining the foregone interest).

302. *See, e.g.*, Hardee v. United States, 82-2 USTC P9459 (Ct. Cl. 1982), *rev'd*, 708 F.2d 661, 662 (Fed. Cir.1983) (holding that majority shareholder and president who received an interest-free loan from a closely-held corporation did not realize taxable income from the loan).

303. *See, e.g.*, Johnson v. United States, 254 F. Supp. 73, 73, 77 (N.D. Tex. 1966) (intrafamily demand loan); Crown v. Comm'r, 67 T.C. 1060, 1065 (1977), *aff'd*, 585 F.2d 234, 234–235 (7th Cir. 1978) (intrafamily demand loan).

304. *See Hardee*, 708 F.2d at 662; *Crown*, 585 F.2d at 234–235. The provisions controlling gift tax can be found at I.R.C. § 2501 et seq. (West 2004) (gift tax provisions).

305. In 1984, the U.S. Supreme Court held that an interest-free loan can result in a taxable gift to the extent of the foregone interest, thereby imputing interest to the borrower, but not to the lender. *See* Dickman v. Comm'r, 465 U.S. 330 (1984).

306. *See, e.g.*, Adam Chodorow, *Economic Substance and the Laws of Interest: A Comparison of Jewish and U.S. Federal Tax Law*, HANDBOOK OF JEWISH LAW AND ECONOMICS 13 (Aug. 6, 2009) (unpublished paper, on file with Oxford University Press), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1440294.

307. *See* Prebble, *Built on Sand*, *supra* note 33, at 305–06 ("'Ectopia' means 'displacement' or 'dislocation'").

308. *See* Chodorow, *supra* note 306, at 13; *see also* David P. Hariton, *The Frame Game: How*

because the structure of the transaction is a tax-motivated fiction.[309] Thus, Prebble's observation that "[e]conomic reality for tax law is not necessarily the same as legal reality for leasing law"[310] should not be surprising. Indeed, I would suggest that the any given transaction involves more than just these two layers of complexity identified by Prebble (i.e., tax law and the law of the underlying transaction).[311] It involves the law of the transaction, the economic impact of the transaction, the tax consequences, and accounting conventions.[312]

Even if economic reality were the appropriate measure, it is not clear by what standard Prebble's tax fictions are demonstrably false. In asserting that tax fictions are "truly false,"[313] he notes that "[p]rofits from economic activity exist in the natural world, but profits defined by law are a construction of human thought."[314] This approach to verity differs from the definition of an empirical legal error employed by Smith—a statement that rests on an empirically false premise, such as the already discussed rules governing eye witness testimony.[315] For example, Prebble identifies the generally held twelve-month convention for measuring income as a fiction.[316] I would argue that the choice of twelve months as the relevant period during which to measure income is neither objectively true nor false. It reflects a legislative decision to measure income in twelve-month snapshots. This convention may be artificial, but does the fact that it is legislatively imposed, or in Prebble's words "a construction of human

---

Defining the "Transaction" Decides the Case, 63 TAX LAW. 1, 1 (2009), *available at* http://www.abanet.org/tax/pubs/ttl/631fa09/1-Hariton.html.

309. *See, e.g.*, James M. Delaney, *Where Ethics Merge With Substantive Law—An Analysis of Tax Motivated Transactions*, 38 IND. L. REV. 295, 295–96, 300–01 (2005) (discussing "shams," or legal fictions, created by taxpayers where actions align with the letter of the law but do not meet what the IRS considers to be the "spirit of the law").

310. Prebble, *Fictions*, *supra* note 33, at 17. As Prebble explains:

> Economic reality for tax law is not necessarily the same as legal reality for leasing law. It is a characteristic of tax law that this kind of problem is always potentially present. That is, there are always two different laws potentially applicable to any one transaction, namely the law of the transaction itself and tax law.

Id.

311. *See id.*

312. This observation includes accounting conventions to the extent they also do not reflect economic reality. *See generally* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003).

313. Prebble, *Fictions*, *supra* note 33, at 19.

314. Prebble, *Built on Sand*, *supra* note 33, at 310.

315. *See* Smith, *supra* note 22, at 1452–55. Similarly, empirical studies indicate that individuals who are being questioned by the police do not *in fact* believe that they "are free to go" and, therefore, they should be entitled to a *Miranda* warning. *See id.* at 1458–59.

316. *See* Prebble, *Built on Sand*, *supra* note 33, at 307.

thought," make the convention "truly false"?[317]

There are certainly tax fictions that would qualify as classic legal fictions under Fuller's reckoning,[318] and there are some tax fictions that would qualify as empirical legal errors according to Smith's model.[319] For example, the deeming fiction of section 7872 seems to qualify as a classic legal fiction and would be easily recognizable as such by Fuller.[320] It is uncontroverted that no interest actually changed hands, despite the dual deemed transfer.[321] Accordingly, the imposed transfers are patently false. Section 7872 has utility notwithstanding its false transfers because it allows the tax code to reach transactions that have been structured to avoid income and gift taxation.[322]

In addition, tax rules could be classified as empirical legal errors under Smith's definition, if they were based on a factual error subject to empirical proof.[323] The determination of whether a tax law qualifies as an empirical legal error, therefore, depends on the justification underlying the adoption of the law. Take for example the choice of the appropriate unit of taxation.[324] For many purposes, U.S. tax law treats a husband and wife as a single unit of taxation.[325] If the legislative choice of the marital unit was based on the factual supposition that husbands and wives engage in extensive income-pooling,[326] then the policy choice regarding spousal unity is subject to a test of empirical proof.[327] If, however, the choice of the

317. *See* Prebble, *Fictions*, *supra* note 33, at 13, 19.

318. *See* FULLER, *supra* note 1, at 9 (providing classic definition of legal fictions).

319. *See* Smith, *supra* note 22, at 1439–40 (discussing "new legal fictions" and the six most important reasons why judges rely on these fictions).

320. *See* Lynch, *supra* note 118, at 35. It is acknowledged to be false in that no interest actually changes hands. *See id.* In addition, the legal fiction of section 7872 has utility because it reaches the economic substance of a tax-motivated transaction. *See* Brien D. Ward, *The Taxation of Interest Free Loans*, 61 TUL. L. REV. 849, 850–51 (1987) (describing section 7872 as creating artificial transfers between lenders and borrowers "to ensure that income [is] recognized by each party.").

321. *Id.*

322. *See* Cooper, *supra* note 300, at 725.

323. *See* Smith, *supra* note 22, at 1441.

324. The federal individual income tax is imposed at different rates depending on an individual's filing status. *See* I.R.C. §§ 1(a)–(d) (West 2008). There are additional issues with respect to the appropriate unit of taxation in the context of entity taxation. *See* I.R.C. § 11 (West 1993).

325. *See* I.R.C. § 1(a) (West 2008) (rates for married individuals filing jointly and surviving spouses).

326. See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 73–79 (1993), for a critique of the income pooling rationale.

327. *See id.* For example, based on empirical research, Kornhauser concludes: "even among couples who nominally pool assets . . . true sharing frequently does not occur because power

marital unit was the result of a policy decision to privilege and benefit (opposite-sex) married couples, then it is difficult to theorize the truth or falsity of that choice.[328]

Critical tax theory has produced volumes of scholarly commentary on the unit of taxation and the marital provisions.[329] It has criticized the exclusion of same-sex couples on the basis of equity and uniformity.[330] It has discussed the hidden disincentives to family formation that the joint filing provisions produce when they intersect with the Earned Income Tax Credit.[331] It has documented the "stacking effect" that penalizes two-wage earner families.[332] It has marshaled empirical research regarding the extent to which income pooling is practiced by opposite-sex couples.[333] It has not to my knowledge, however, asserted that the joint filing provisions are false.[334] One might disagree with the choice based on competing policy

---

arising from both cultural sources and earning power is distributed unequally." *Id.* at 88.

328. *See generally* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 144–47 (1998).

329. Critical tax scholarship emerged as a distinct field of scholarship in the United States in the late 1990s. *See* CAMBRIDGE UNIV. PRESS, CRITICAL TAX THEORY: AN INTRODUCTION xxi (Anthony C. Infanti and Bridget J. Crawford, eds.) (2009). Critical tax scholarship encompasses a relatively diverse range of perspectives, including critical race theory, feminist legal theory, and queer theory. *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002 (1996) (feminism); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. Rev. 751, 751 (critical race theory); Knauer, *supra* note 328, at 130 (queer theory). Although it is difficult to categorize the divergent voices of the critical tax scholars, they all share a common understanding that "legal doctrine and legal institutions are contingent products in an evolutionary process of social change." RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE 3 (Westview Press 1996). In this way, the critical tax scholars can trace their roots directly to the larger and earlier field of critical legal studies which rejects law's neutrality and the existence of determinative rules that produce objective and predictable adjudications. *See id.* at 4.

330. *See* Knauer, *supra* note 328, at 217.

331. *See, e.g.*, Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 789 (1997).

332. *See, e.g.*, Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavorial Gender Biases in the Code*, 40 UCLA L. REV. 983, 991 (1993).

333. *See* Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 301, 303 (1997).

334. Critical scholars have re-examined seemingly neutral tax provisions such as the Earned Income Tax Credit paid to the working poor. *See, e.g.*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 790 (2007). They have also considered the marital deduction Qualified Terminable Interest Provisions under the federal estate and gift tax. *See* Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L. J. 301, 301–02 (1996). Another wider set of provisions that also came under scrutiny is those related to employer-provided pension plans. *See* Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 385 (2007). They have also critiqued the so-called "Nanny Tax". *See* Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the*

considerations, but something is not false just because it is ill advised or poorly drawn or discriminatory or even, as we saw in the last section, immoral.[335] Indeed, for those who bear the weight and press of discriminatory laws, such laws feel very real indeed. Discriminatory laws and regulations limit life opportunities, constrain choices, reify inequality, and legitimize violence. To dismiss such laws as false, devalues the pain they cause.

The concept of capital gains provides another, and less emotionally charged, example.[336] Prebble is primarily concerned with tax fictions when they fail to reflect economic reality.[337] The determination of whether an item of receipt is ordinary income or capital gain is exceedingly important due to the favorable tax rates applicable to capital gains,[338] but there is no comparable concept in accounting or economics.[339] The distinction between capital gain and ordinary income is purely a creation of the income tax law.[340]

Is it appropriate to say that the distinction between ordinary income and capital gain is a fiction simply because it does not have an analog in economic reality or in accounting or the law governing sales? How can we declare this distinction is false when numerous sections of the Internal Revenue Code and Treasury Regulations delineate its terms and parameters and millions of taxpayers struggle with it annually?[341] By way of comparison to the empirical legal errors identified by Smith, the distinction between capital gain and ordinary income does not rest on a factual

---

Nanny Tax Debate, 3 J. GENDER RACE & JUST. 1, 2–3 (1999). In each instance, the authors looked at the tax provisions with fresh and, admittedly, critical eyes. Not one, however, declared the underlying tax provision to be "truly false."

335. *See* discussion *supra* Part II.

336. *See* I.R.C. § 1(h) (West 2008).

337. *See* Prebble, *Fictions*, *supra* note 33, at 14.

338. *See* I.R.C. § 1(h) (West 2008).

339. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 549 (Foundation Press 1940) (6th ed. 2009) (explaining that the "concept is an artificial creation of the tax law that has no firm theoretical grounding in accounting or economics").

340. *See id.*

341. Prebble devotes considerable attention to discussing the tricky area of business profits and the distinction between capital and revenue. *See* Prebble, *Built on Sand*, *supra* note 33, at 312. Specifically, Prebble states that "income tax law cannot abandon the fiction of a logical and factual boundary between capital and revenue." *Id.* at 311. Strictly speaking, the income tax could impose a tax on gross receipts that would eliminate the need to differentiate between capital and revenue and the resulting ectopia existing between economic profits and taxable income. Of course, a tax on gross receipts would be wildly unpopular. It would also contradict the overriding goal of taxation, namely to apportion fairly the burdens of citizenship and accurately measure one's ability to pay.

supposition regarding the nature of the underlying economic activity.[342] The distinction is imposed by the tax code in order to measure ability to pay.[343] It is not designed to capture or reflect economic reality.[344] We can argue with its parameters and call them illogical, overly complex, and inefficient. However, this critique does not render the distinction false in the conventional sense of the term. The distinction might be a fiction to the extent that it is made up out of whole cloth by the Internal Revenue Code, but the failure to adhere to the rules and correctly characterize an item of receipt carries with it a host of penalties that could include, in certain instances, criminal sanctions.[345] Although the distinction may be artificially created, its consequences are quite real.

Attempting to limit law's reach to only what it can observe and describe in real time greatly underestimates the constitutive power of law. When Prebble argues that tax law is "separated from its subject matter in a way that other law is not,"[346] he implies that the subject matter of tax law exists *a priori* and in some way precedes what we call the "law." I would argue that law can in fact create its very subject matter and in so doing generate and regulate reality. The tax base is defined by the tax laws and the tax laws define the tax base. Thus, when the tax law defines the tax base, it also constitutes the base. The resulting construction is no less real than the economic profits it intentionally mismeasures.

IV. CONCLUSION

Fuller referred to legal fictions as "the growing pains of legal language."[347] Using "as if" reasoning, legal fictions facilitate the application of legal rules to new and novel circumstances through analogy, arguments of equivalence, and what only can be described as leaps of faith.[348] The leap of faith imbedded in a traditional legal fiction does not

342. For example, in the course of interpreting legislative or regulatory authority, courts consider "legislative history" based on the belief that there is a discernable "legislative intent" that guided the enactment of the law. *See* Smith *supra* note 22, at 1461–62. Smith notes that recent research and many judicial opinions have cast serious doubt on the existence of any autonomous body of collective intent. *See id.* at 1464–65.

343. *See* I.R.C. § 1(h) (West 2008).

344. *See id.*

345. *See* Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 114 (2009) (exploring the link between sanctions and compliance).

346. Prebble, *Fictions*, *supra* note 33, at 21.

347. Fuller, *supra* note 1, at 21–22 ("[F]ictions are, to a certain extent, simply the growing pains of the language of the law.").

348. *See id.* at viii ("At the time I began to study the literature of fictions, the subject was surrounded by the romantic aura of Hans Vaihinger's *Philosophy of As If*, with its mysterious title promising obscurely some mind-expanding reorientation of human perspectives."). Fuller

require unwavering belief, but rather a suspension of belief because a legal fiction is not meant to deceive.[349] Both its power and its utility comes from the fact that a legal fiction is acknowledged to be false.

Empirical legal errors, discredited regimes, and complex statutory schemes are not classic legal fictions. Wrongly valued for their veracity, empirical legal errors are mistakes—not fictions.[350] The discredited legal regimes of slavery and discovery were imposed with the intent to subordinate millions, and they were not acknowledged to be false, despite being morally wrong.[351] The complex statutory schemes are artificial legal frameworks replete with legal fictions, but the schemes themselves are neither demonstrably false nor commonly held to be false.[352]

Although these "new legal fictions" fall short of Fuller's classic definition, the commentators who have examined these categories within the larger context of legal fictions are correct to see a certain similarity, and they are correct to raise concern. As Fuller explained, a fiction becomes dangerous when it is believed.[353] The new legal fictions are not legal fictions in the conventional sense. Instead, they occupy the space on the margins surrounding any broader discussion of legal fictions. They are examples of the inherent risk involved whenever we mix fiction with justice—at some point the fiction can become a lie.

---

discussed what he described as the "romantic aura" surrounding the potential of "as if" thinking. *See id.*; *see also* Vaihinger, *supra* note 5.

349. In this regard, a legal fiction is not a benign "white lie" because even a white lie is deployed with the intent to deceive, albeit for a good purpose.

350. *See supra* notes 131–87 and accompanying text (discussing empirical legal errors).

351. *See supra* notes 188–266 and accompanying text (analyzing discredited legal regimes).

352. *See supra* notes 268–346 and accompanying text (scrutinizing complex statutory schemes).

353. *See* Fuller, *supra* note 1, at 9. According to Fuller, "A fiction taken seriously, i.e., believed becomes dangerous and loses its utility." *Id.* Once a fiction loses utility, Fuller states that "[i]t ceases to be a fiction . . . ." *Id.*