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What's in a Name? Legal Fictions and Philosophical Fictionalism

Constantin Luft 

Abstract, This paper uses analytic philosophy to prevent merely verbal disputes about the concept of fiction within discussions on *fictiones iuris*. It provides a survey of potentially fruitful connections between legal fictions and fictionalism. More specifically, I will argue that by enriching current accounts of legal fictions in legal theory with insights from (1) the philosophy of language on fictional speech and from (2) contemporary metaphysics on philosophical fictionalism, it seems natural to explore the position that talk involving *fictiones iuris* is structurally an exemplification of elliptical speech. Such fictionalism about legal fictions illuminates why prominent condemnations of fictions in law – e.g. as blatant falsehoods, shady fraudulences, or legal defects – are theoretical myths, since they fail to distinguish between analytically distinct (ontological, epistemic, alethic, semantic, and evaluative) levels. Moreover, a fictionalist account might even sharpen our sense of which legal fictions are more “innocent” than others. I will begin by introducing philosophical fictionalism (II), before the *fictiones iuris* will be characterized as an operation in legal reasoning by consulting the Leibnizian reconstruction of Roman Law’s epistemology (III). Sections IV and V seek to provide further clarifications on the ‘fictional’ / ‘fictitious’ distinction as well as the heterogeneity of fictionalist research questions. Section VI then contains a little guided tour through the different analyses of the concept of fiction(s) within fictionalism. Subsequently, I will show how insights from those discussions contribute to demystify some of the most prominent allegations raised against legal fictions (VII). Fictionalism about legal fictions, Section VIII tentatively suggests, might not only harmonize with both classic and recent treatments of legal fictions, but help to also highlight their epistemic values. In slogan form: *fictiones iuris* are instruments to preserve legal truths worth having.

Keywords, legal fictions, concept of fiction, fictionalism, fictional speech, legal theory, analytic jurisprudence, legal reasoning, philosophy of law, philosophy of language, metaphysics

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I. INTRODUCTION

Legal fictions have not been much of a concern for analytic philosophers so far;¹ unlike the structure of fictional speech,² the status of entities within literary works of fiction,³ or the fictionalization of certain discourses.⁴ One contingent reason for this might be that philosophers prefer reading Tolstoy's *Anna Karenina* and Doyle's *Sherlock Holmes* in their spare time rather than leafing through legal documents.⁵ Regardless of such reading habits, this paper is intended as a first step towards combining the meanwhile sophisticated accounts of so-called "philosophical fictionalism"⁶ with theoretical treatments of the *fictio iuris* drawn from legal scholarship. Given this broad objective, I will content myself with an overview of various related issues in order to provide a new approach to legal fictions that requires further elaboration. This means that I will not attempt to offer a single knockdown argument for nor succinct details of fictionalism about legal fictions.

With respect to the interdisciplinary goal of comparing FICTION(S)⁷ in law, literature, and philosophy, the fictionalist perspective has two key benefits: first of all, the consideration of fictionalism is accompanied by a deepening of the philosophical use of 'fiction.' As analytic philosophers frequently draw on examples from literary works of fiction to motivate fictionalism, this focus could help scrutinizing some commonalities and differences between FICTIONS_{phil}, FICTIONS_{lit}, and FICTIONS_{law} along the way. Second, and this is my major concern, fictionalism about legal fictions offers an underexplored and potentially fruitful theoretical way to look at the fascinating phenomenon of *fictiones iuris*.

The take home message of my sketchy engagement with positions in contemporary philosophy of language and analytic metaphysics will be simple: legal fictions should no longer be primarily associated with non-existence, anti-realism, or counter-factualism (as is the case almost everywhere in legal theory). Instead, the term 'legal fiction' simply denotes a *special structure of speech* serving certain purposes. The point is to preserve juridical truths⁸ which are kind of quirky at first sight, but are at the same time worthy of being enshrined in the system of law: legal fictions are instruments to *preserve legal truths worth having*.

Here is my agenda to develop and sharpen this (perhaps rather bold) claim: after giving a first glimpse into philosophical fictionalism and the problem(s) it seeks to address (II), I will attempt an initial characterization of the *fictio iuris* as an operation in legal reasoning by consulting the Leibnizian reconstruction of Roman Law's legal epistemology (III). Returning to the philosophical issues, I will further introduce the clarifying distinction between the semiotic predicate 'fictional' and the ontological predicate 'fictitious' (IV) as well as point to the heterogeneity of the fictionalists' research questions which shouldn't be conflated (V). Section VI then contains a little guided tour through the different analyses of FICTION(S) within fictionalist accounts comparing them to their counterparts in law and literature (scholarship). I will show

how insights from those discussions contribute to demystifying some of the most prominent “allegations” legal theorists frequently raise against legal fictions (VII). Fictionalism about legal fictions, the final section (VIII) tentatively suggests, might not only harmonize well with classic treatments of and recent scholarship about legal fictions, but help to highlight their epistemic values, and to develop a framework for potential acceptance tests with respect to fictions as tools in legal reasoning.

Although talk⁹ about *fictiones iuris* is generally messy, fictionalism about legal fictions is largely unaffected by the incoherent smorgasbord of examples for alleged exemplifications,¹⁰ their fuzzy boundaries,¹¹ or the various attempts to taxonomize¹² them. This is because fictionalism is a general, very abstract theorization of legal fictions – the view from 50 meters above the ground, so to speak.

II. ON TALK WORTH HAVING

Philosophical fictionalism is a strategy to preserve talk worth having. Some discourses are rather special. They seem to commit us to things we do not want to commit to.¹³ Math-talk involves a bunch of abstract entities (e.g. sets or numbers); possible-worlds-talk suggests cosmic extravagances; and morality-talk seems to postulate some “queer”¹⁴ properties (such as ‘objectively valuable,’ ‘good’ or ‘wrong’). Hence, the question might arise whether we should simply refrain from engaging in stuff like possible-worlds-, math- or morality-talk. Most of us are likely to reply in the negative. We would possibly react by responding something along the lines of “but such discourses are useful: we need numbers to do physics, possible worlds to imagine how things could be / could have been, and morality to get along in our society.” So how do we preserve those areas of discourse despite their undesirable (ontological¹⁵) implications?

There are two straightforward, although radical strategies. *Eliminativism* is the view that we should abandon all the peculiar entities and properties from the respective discourses.¹⁶ But how would it still be possible to engage in arithmetic-talk without any references to numbers and sets, for example? Wouldn't that boil down to dropping such talk altogether? *Errorism* (or error theory) is more elaborate in this regard. It states that all of the sentences involving peculiar entities and properties are false.¹⁷ Nonetheless, they can be preserved in ordinary discourse according to the maxim “think with the learned, and speak with the vulgar.”¹⁸ In the realm of arithmetic, one can continue to utter sentences such as ‘ $3 + 4 = 7$,’ yet with a guilty conscience.¹⁹ This makes error theorists vulnerable to the objection of a kind of “*mauvaise foi*”²⁰ by constantly expressing propositions despite being convinced of their literal falsity.²¹

The two more promising strategies understand ontologically²² puzzling talk (worth having) as containing elliptical speech. It must be completed to build apparently true sentences. *Figuralism* doubts that peculiar sentences like ‘the average Italian mother has 2,5 children’ are literally true, but they might be at

least metaphorically true.²³ Paraphrased as a sort of *figura dictionis* ('it is a metaphorical truth that the average Italian mother has 2,5 children') the once peculiar talk expresses full-fledged truths. Admittedly, one might wonder why the metaphorical character of sentences like ' $3 + 4 = 7$ ' is not completely obvious to us (unlike in the case of classic figurative utterances such as 'all the world's a stage' or 'chaos is a friend of mine').²⁴ Moreover, figuralism requires a solid understanding of the concepts of metaphor and metaphorical truth – topics with which analytic philosophers of language seem to have so far largely struggled.²⁵

Fictionalism is theoretically more parsimonious. In its most basic form, it simply states that a certain (region of) discourse "is not best seen as aiming at literal truth but [...] better regarded as a sort of 'fiction'."²⁶ Troubling sentences must not be taken at face value, since they are elliptical and can be paraphrased by prefixing them with context-shifting operators.²⁷ Hence, the proposition expressed by ' $3 + 4 = 7$ ' can be formulated more carefully by saying 'according to the fiction of Peano arithmetic, $3 + 4 = 7$.' This is of course a very rough characterization. What exactly 'in the fiction'-operators or FICTION mean is highly controversial and different camps under the ambiguous umbrella term 'fictionalism' have very nuanced and sometimes frankly incompatible opinions on this.²⁸ Generally speaking, a fictionalist position involves a redirection away from how things appear to be with regard to a certain discourse by claiming that (1) some aspect of / relation to fiction or pretense explains this redirection, (2) we do not (or should not) adopt a face-value reading of relevant sentences of the discourse, because – despite their denotational queerness – there is (3) some reason for retaining sentences of the relevant discourse, respectively some utility afforded by retaining (aspects of) the discourse.²⁹ In this sense, fictionalism preserves talk worth having.

What does all of this have to do with the *factio iuris*? Well, some prominent legal-fictions-talk seems to instantiate a rather similar structure. Consider the (in)famous doctrine of legal personhood. As a legal institute, it allows that corporations possess legal capacity without being actual (human) persons. Pope Innocent IV already and aptly used the phrase '*persona ficta*' to denote the fictitiousness of such 'corporation-persons' in canon law.³⁰ In this vein, *prima facie* troubling sentences like 'the Gulbenkian Foundation has legal capacity (as a person)' could also be regarded as elliptical speech and paraphrased accordingly. A rational reconstruction of the underlying legal doctrine might then go something along the following lines:³¹ it is indeed clear that the Gulbenkian Foundation is no person at all. Yet, the sentence 'according to a fiction, the Gulbenkian Foundation is a person' is true. Now, another juridical principle holds that anything that is (i) a genuine person or (ii) no person, but according to a fiction is a person, may claim the status of legal capacity. Therefore, it is not particularly peculiar to say that the Gulbenkian Foundation has legal capacity.

Such fictionalism *about (some) legal fictions* has to be carefully distinguished from fictionalism *about law as such*. The latter claim is much more demanding

since it implies a non-literal reading of any legal proposition. Their proponents use ‘in the fiction’-operators in order to ground the all-encompassing claim that “law is a fiction.”³² However, this would certainly have to count as a claim in *general jurisprudence*, whereas this paper is at most concerned with claims in *special jurisprudence*, namely about the concrete phenomenon of legal fictions.

Besides the sketched similarities with excerpts of law-talk, though, two clear differences between FICTIONALISM and FICTION in literature should also have become apparent from the foregoing remarks. Firstly, fictionalist approaches aim at the preservation of a certain pre-existing discourse; literary fictions, on the other hand, usually indicate the invention / initiating of a completely new one. And secondly, fictions in literature (*vulgo* literary fictions) actively narrate a story, while fictionalist approaches passively describe one.³³

In order to pursue the potential application of the kind of fictionalism we are interested in, namely fictionalism about legal fictions, we cannot proceed without a more accurate characterization of its object.

III. ON LAW: CONJECTURES, PRESUMPTIONS, FICTIONS

A particularly lucid approximation of what legal fictions are (and especially what they are not) is offered by G.W. Leibniz’s early classification of Roman Law’s legal epistemology concerning different degrees of evidence. He basically distinguishes between three categories: conjectures (*coniectio/indicium*), presumptions (*praesumptio*), and fictions (*factio*).³⁴ Subsequently, I will call this the Leibnizian trichotomy.

Conjectures are *probable* judgements. Note that this signals an epistemic location beneath the level of (demonstrative) knowledge; we are rather confronted with a probabilistic setting. For illustration purposes, let us consider the following:

(1) A witness testifies that the murderer is (always) the gardener.

Scenario (1) gives judges a (*pro tanto*) reason to assume that ‘the murderer is always the gardener’ is probably true. In other, respectively older words, the court has reached a *probatio semiplena* (= a half-proof).³⁵

Presumptions are different, since they are *provisionally true* judgements.³⁶ What is presumed lies somehow in between the levels of demonstrative knowledge and merely probable assumption. Take the most prominent *praesumptio iuris*³⁷ as an example:

(2) A defendant in a criminal trial is presumed to be innocent (until proven guilty).

The legal principle in (2) gives judges a tentative reason to believe that the innocence of the suspect is a full-fledged truth. If the gardener is accused of

murder, Article 11 of the Universal Declaration of Human Rights does not indicate that judges should assume with a certain initial (and high) probability that the gardener is not the murderer.³⁸ Rather, courts have to do significantly more than this from an epistemological standpoint – they must consider ‘the gardener is not the murderer’ to contain a true proposition; at least for the time being. Hence, presumptions enable courts to reach a provisional *probatio plena* (= a full proof).³⁹

Fictions are in a sense yet another step closer to the level of demonstrative knowledge. This is most clear in cases of so-called irrefutable presumptions (*praesumptio iuris et de iure*):⁴⁰ the respective (legal) facts cannot be contested at all. Nevertheless, such epistemological resistance to doubts (about their truth-values) can also be found in more orthodox manifestations of the *fictio iuris*, namely deeming provisions. Let us examine a particular devious instance of legal fictions of this kind:

(3) The extramarital child is deemed to be unrelated to its father.⁴¹

Judges following a rule like (3) have conclusive reasons to be convinced that there are full-fledged truths about (certain) children who are not related to their fathers. And such propositions are not tentative, but permanent. However, while statements concerning the “non producer-relatedness” of extramarital children might be wholly true within a legal system, they are not the whole truth about the matter, so to speak. The aforementioned biological impossibility can only count as true because of the characteristic ‘as if’-operations within legal fictions.⁴² This constraint paves the way for realizing the limits of comparing the *fictio (iuris)* to other epistemological instruments within evidence law (*indicium, praesumptio*): when one thinks the Leibnizian Trichotomy through, fictions would have to be considered as providing *probationes plenas*. But for imaginative inventions deviating from the boundaries of the “real world” (compare the Latin term ‘ *fingere*’) it seems quite odd to talk about a *probatio* in the literal sense.

In summary, a first approximation to the phenomenon of legal fictions⁴³ locates them in ancient juridical doctrines of evidence. They are tools for weaving all sorts of truths – from the catchy, to the peculiar, to the seemingly impossible – into a legal system without the need to prove them in a strict sense. It seems quite obvious how well this characterization fits with fictionalism’s general purpose of retaining statements, or truths, in a certain discourse. At this stage, though, it is sufficient to broadly categorize legal fictions as “operation[s] in legal reasoning.”⁴⁴ To work toward the more specific claim that legal fictions are instruments to *preserve legal truths worth having* we must first elucidate how fictionalism manages to “preserve truths” at all. The following two sections provide some clarifying distinctions.

IV. FICTIONAL AND FICTITIOUS

The elaboration of fictionalism about something requires an important terminological subtlety. Works of fiction have a distinct status from particular “fictions” described in those works: the stories of Sir Arthur Conan Doyle are somewhat different from the character Sherlock Holmes. And the writings of Georg Ernst Stahl are not to be confused with the enigmatic entity phlogiston. Taking the perspective from philosophers of language theorizing “fictional speech,” these findings correspond to the important – though often overlooked – distinction between the *semiotic predicate* ‘fictional’ and the *ontological predicate* ‘fictitious.’⁴⁵ The entities *that represent* are fictional, whereas the entities *being represented* are fictitious.⁴⁶ Hence, an application of this clarifying terminology classifies the novels in the Sherlock Holmes series and Stahl’s book “Zymotechnica fundamentalis” as *fictional*, while the drug-dependent detective Sherlock Holmes and the chemical element phlogiston are seen as *fictitious*.

So far, this idiom has not really caught on outside literary studies, especially in the English-speaking world.⁴⁷ Nevertheless, it is very helpful for fictionalist purposes. Most people probably think of fictitious entities as being non-existent (or at least ontologically whimsical). At the same time, most people probably think of fictional entities as being quite unproblematic – things like books surely belong to the “inventory of the world.” And this is exactly where the basic idea of fictionalism kicks in: we can use several uncontroversial properties of fictional entities (‘according to Doyle’s work, Sherlock Holmes is such and such’) to preserve controversial talk about fictitious entities (‘Sherlock Holmes really is such and such’). In a nutshell, this is fictionalism’s basic mechanism for the preservation of truths.

On the other hand, the fictional / fictitious-distinction also gives us a first impression of how complex philosophical questions concerning fictionalism can become due to the different levels being permanently addressed along the way. This problem with regard to the (concealed) heterogeneity of respective research questions is fleshed out in the next section.

V. ON QUESTIONS WORTH ASKING

One reason why fictionalism is particularly apt for sparking merely verbal disputes⁴⁸ is the overwhelming variety of philosophical research questions connected to its realm. Just by applying classical categories of analytic philosophy to the field, we can already produce a non-exhaustive list of seven distinct questions:

- *Conceptual*. How can FICTION be defined/explicated?⁴⁹
- *Metaphysical*. What would fictitious objects be, if there were any?⁵⁰
- *Ontological*. Do fictitious objects exist?⁵¹

- *Semantic*. What do sentences with fictitious elements mean?⁵²
- *Epistemic*. What can we know about / through fictions?⁵³
- *Alethic*. Is it possible to utter a truth by means of fictional speech?⁵⁴
- *Evaluative*. To what extent are fictions more or less valuable?⁵⁵

Admittedly, some of these are closely related. Answering the conceptual question by identifying a promising meaning for FICTION might, for example, solve (parts of) the semantic question's puzzle as well. But especially the discourse on *fictiones iuris* in legal scholarship shows that there is a tendency to conflate analytically distinct questions without such mutual implications which results in argumentative fallacies: as characteristic as ubiquitous is the allegation of legal fictions being deceptive or mendacious falsehoods because of their "counterfactual element."⁵⁶ On closer examination, this claim stems in large part from legal theorists confusing the ontological question with the alethic question (more on this below).⁵⁷ However, before turning to concrete stereotypes about the *fictio iuris* that could be avoided by embracing the heterogeneity of philosophical research questions (VII), I will take the conceptual one to careful scrutiny (VI). The latter is arguably fictionalisms' most important question with regard to the interdisciplinary goal of comparing fiction(s) in law, literature, and philosophy. This is because a map of the currently available answers to the conceptual question makes the philosophical conceptions of FICTIONS_{phil} explicit. These might then be tested against the pertinent conceptions from literary studies (FICTIONS_{lit}) and legal scholarship (FICTIONS_{law}).⁵⁸

The next section goes through no less than six different meanings of FICTION(S) and touches on five corresponding views on the structure of fictional speech. These can be read as five options for a fictionalist about legal fictions insofar as they mark five possible (not necessarily persuasive) ways to preserve truths by making use of a "fiction." As a corollary, there are at least five routes for constructing legal fictions as preservers of legal truths worth having.

VI. LEGAL FICTIONS AND FICTION(S)

Looking at the most elaborate versions of philosophical fictionalism, there are roughly six prominent accounts of FICTION(S).⁵⁹

Unqualified antirealism simply states that something is a fiction iff⁶⁰ it does not exist.⁶¹ While this might do as a "derived sense of 'fiction'"⁶² in cases such as astrology, phlogiston, or Vulcan, it is certainly over-inclusive. Historical figures like Caesar, Franz Kafka, Mother Teresa, Tolstoy, or Virginia Woolf do not exist. Nonetheless, few people would be inclined to say that they are fictions (or fictitious entities).

Qualified antirealism using story operators claims that something is a fiction iff it, i.e. the representandum [i] does not exist and [ii] its representans is part of

a sentence which can be true only in the scope of a context-shifting story operator ('in the story...' / 'in the fiction...').⁶³ For matters of clarification: this means that fictions are objects (the things being represented) and not just entities or bits of language (the things that represent).⁶⁴ Fictional speech has a structure resembling the following paraphrases:

- (4) According to Tolstoy's story, Anna Karenina committed suicide.
- (5) According to Savigny's *opus magnum*, the juridic person has legal capacity.⁶⁵

Qualified Antirealism using possible worlds ("possibilism") is similar, but the second conjunct of the definition takes a slightly different shape. Something is a fiction iff it, i.e. the representandum [i] does not exist and [ii] its representans is part of a sentence which can be true only in the scope of a context-shifting modal operator ('in a possible world...').⁶⁶ Accordingly, fictional speech has a structure resembling the following paraphrases:⁶⁷

- (6) There is a possible world where Gregor Samsa is a beetle.
- (7) There is a possible world where Whanganui river is a person.⁶⁸

As a refinement for inconsistent fictions⁶⁹ qualified antirealism using hyperintensionality ("impossibilism") comes to the rescue.⁷⁰ Sometimes, fictional speech has the fancier (hyperintensional)⁷¹ structure of the following paraphrases:

- (8) In an impossible world designed by Conan Doyle, Doctor Watson has exactly one war wound – sometimes in his shoulder and sometimes in his knee.⁷²
- (9) In an impossible world of inheritance rules, a fetus (*nasciturus*) is at the same time yet to be born and already born.⁷³

This complication is due to the "Principle of Poetic Licence"⁷⁴ which is well-established in the context of research on $\text{FICTIONS}_{\text{lit}}$: for any x , one can write a story in which x is true.⁷⁵ In discussions about $\text{FICTIONS}_{\text{phil}}$, Graham Priest's short story "Sylvan's Box" could serve as a further example: what, someone might ask, is actually true in the fiction of "Sylvan's Box," if it essentially concerns a box being empty and non-empty at the same time?⁷⁶

Moving on to the third account, creationism, one immediately recognizes an obvious deviation from the previous accounts just by looking at the ontological level. Creationism says that something is a fiction iff it, i.e. the representandum [i] is an artifact and [ii] it exists as an abstract object and [iii] its representans is part of a true sentence.⁷⁷ Now, fictional speech is thought to have a kind of invention precondition resembling the following statements:

- (10) "Twain, by writing *Huckleberry Finn*, brought both a novel and a fictional character into being."⁷⁸

- (11) Savigny, by writing *System des heutigen römischen Rechts*, brought both a canonical work of legal dogmatics and a fictitious entity (the juridic person) into being.

After such initial acts of creation, the structure of fictional speech is indistinguishable from ordinary utterances of literal truths. One is thus in a position to express “perfectly normal” statements about the things brought into being by Twain and Savigny:

- (10*) Huckleberry Finn has \$6000.
 (11*) The juridic person has legal capacity.

Ontologically even more tricky and difficult to understand is the fourth approach, meinongianism. It defends the intricate thesis that something is a fiction iff its representans [i] is part of a true sentence while [ii] the representandum does not exist (non-“Sein”) and [iii] that the non-existing something is nevertheless there by the description of its properties (“Sosein”).⁷⁹ Hence, according to meinongianism, the structure of fictional speech is pretty straightforward:

- (12) (Given a certain story about existential quantification) Holmes *really* is a detective.
 (13) (Given a certain story about existential quantification) ideal drivers are *really* impeccable.⁸⁰

However, there are at least two striking problems with meinongianism. First, nobody knows whether Alexius Meinong himself would subscribe to the claims of the self-appointed “Meinongians” (*the exegetical problem*).⁸¹ Second, meinongianism might violate the principle that we should not excessively rewrite ordinary language, if this is not strictly necessary (*the revisionist problem*): consider the utterance ‘I believe that there are things that do not exist’ and compare it to ‘I believe in the existence of things that aren’t there.’ As ordinary language speakers use ‘exist’ and ‘there is,’ the truth-values of the two sentences certainly cannot differ. But the “Meinongians” have to tell us that while the first one clearly expresses a true belief, the second contains a blatantly contradictory belief.⁸²

Last but not least, pretense theory holds that something is a fiction iff it, i.e. the representandum [i] has a representans which is part of a true sentence⁸³ and [ii] the author of that sentence does not express an assertion about the representandum / does not refer to the representandum, but [iii] the author pretends to assert / to refer to the representandum and [iv] a set of conventions (so-called “separate language game” or “game of make-believe”) serves as truth-maker for [iii] (breaking the established connections between world and word).⁸⁴ Hence, fictional speech has in fact a structure resembling the following paraphrases:

- (14) Since Thomas Mann and his audience enter(ed) a semantic pretense, it is make-believable that Hans Castorp is an engineer.
- (15) Since the *praetores* in Roman Law and their audiences enter(ed) a semantic pretense, it is make-believable true (*formula ficticia*) that a non-roman *peregrinus* is part of the roman *civitas*.⁸⁵

Now, what are the lessons from this little *tour de force* through FICTION(S) in fictionalism? First of all, it serves as a forceful reminder that “truth in fiction” and “existence in fiction” can fall apart: according to the respective accounts, all of the sentences (4)-(15) are *true*. But only (10)-(11) involve *existing* fictitious entities⁸⁶ In other words, the variety of FICTIONS_{phil} vividly illustrates the separation between the *alethic* and the *ontological* question.

Second, not every context-shifting operator in philosophical fictionalism would be classified as a *work of fiction* by the standards of literary theory. While (4) contains a genuine work of fiction one would presumably find in the pertinent library section under the eponymous tag, (5) does not. This point might be most obvious in the earlier case of numbers: the ‘fiction of Peano arithmetic’ is perfectly fine as part of an operator in “fictionalist” paraphrases of maths-talk. At the same time, the axioms of Giuseppe Peano and Richard Dedekind are certainly not discussed as “fictional” in the literary scholars’ seminar room. Hence, neither FICTIONS_{phil} nor FICTIONS_{law} necessarily involve works of fiction in the sense of FICTIONS_{lit}.

This insight already leads us to the third lesson which has to do with the well-known problem⁸⁷ of law’s normativity.⁸⁸ Authors of literary fictions do not assert, but quasi-assert; they pretend to assert, expecting their audiences to see-through their game of make-believe.⁸⁹ In contrast, the legislator establishes norms, i.e. deontic “should”-sentences. And it seems odd to say that the legislator (or the judge) merely acts *as if* we should obey. Rather, what the legislator (or the judge) establishes as a norm is what we should *actually* do or omit. This is one of the most striking difference between literary fictions and legal fictions. The latter do not fiddle with “reality” at all: the *fictio iuris*,

- (16) A person who is not yet alive at the time of the devolution of an inheritance, but has already been conceived, is deemed to have been born before the devolution of an inheritance

is a normative requirement and cannot be paraphrased with the indubitably truth-apt, descriptive statement such as

- (17) The *nasciturus* was born before the devolution of an inheritance.

The content of (16) is rather met by a prescriptive utterance like the following:

- (18) The *nasciturus* shall be treated as if he or she were born before the devolution of an inheritance.

This might pave the way for identifying another purpose of fictions in legislation. Hans Kelsen famously argued that a deviation from reality (“counterfactuality”) cannot take place in fictions such as (18) right from the outset, since the legislator does not intend to make a statement about reality at all.⁹⁰ By means of the “pseudo-fictions”⁹¹ of legal practice, reality is not to be comprehended, but regulated or created.⁹² Now, if such fictions always create a certain (juridical) reality, they cannot be opposed to it at the same time.⁹³ In Kelsen’s words, the legislative *fictio iuris* is therefore rather something which is “established in the ‘actuality’ of law”⁹⁴ than something which “cannot in actual reality be established.”⁹⁵

Besides these differences, we can nonetheless draw a fourth lessons about clear family resemblances between $\text{FICTIONS}_{\text{phil}}$, $\text{FICTIONS}_{\text{law}}$, and $\text{FICTIONS}_{\text{lit}}$. All of them structurally rely on *elliptical speech* in need of careful completion. Fictionalism unites those three concepts by its core characteristic: sentences within fictionalist discourses are not literally true, but *true with qualification* – “make-believedly true,”⁹⁶ true in a possible world, true according to a relevant fictional work, or true given meinongianist stories about existential quantification.

VII. REVISITING STEREOTYPES ABOUT LEGAL FICTIONS

Now equipped with increased conceptual clarity, this section brings into perspective some of the most prominent prejudices against the operation of using legal fictions.⁹⁷ Fictionalism shows us to what extent these are misguided.

Legal Fictions are False

The falsehood allegation states that fictions are (or involve) false statements⁹⁸ However, this is severely misleading. Even if fictitious entities do not exist (ontological question), sentences containing such entities can be used to express truths (alethic question).⁹⁹ This is, as we have seen, because fictional speech is elliptical and cannot be taken at face value. If I stood in front of René Magritte’s famous painting *La trahison des images* and declared ‘That’s a pipe,’ my statement would of course be literally false – but nobody would care. Everyone understands what is meant. We can cope with elliptical speech and are used to it. Otherwise, the inscription of Magritte’s artwork could not puzzle us at all.¹⁰⁰ Thus, from the perspective of fictionalism, the unspecified falsehood allegation misses the very point of fictional speech.¹⁰¹ Legal fictions are at most literally false.

Legal Fictions are Deceptive

The deception allegation says that fictions are deceptive or mendacious.¹⁰² Yet in claiming so, one makes a sweeping negative value judgment (evaluative question) without appreciating the particular meaning of fictional speech (semantic question). Anyone who has understood the underlying elliptical structure will not be deceived.¹⁰³ No reasonable man or woman – to use another notorious fictitious entity – would take my utterance from the previous example (‘That’s a pipe’) as evidence for thinking that Magritte’s artwork can be smoked or goes well with a bourbon whiskey. Occasionally, though, legal fictions are strategic instruments contributing to concealing legal change and hiding the fact that the cherished myth of a stable, substantively unchanging system of legal doctrines (lasting for eternity) just got another crack. However, this is no necessary conceptual feature of the *fictio iuris*, but one of its multifarious and contingent functions especially in the Common Law.¹⁰⁴ From the perspective of fictionalism, there is simply nothing inherently deceptive about fictional speech. Legal fictions might at most be classified as non-literal attempts to mislead.¹⁰⁵

Legal Fictions are Unjust

The damaging allegation implies that fictions are symptoms of crisis signaling morally rotten legal systems.¹⁰⁶ Insofar as this stereotype solely relies on a negative answer to the evaluative question – i.e. does not appear as a mere consequence of the falsehood or the deception allegation – it is still way too simple. Legal fictions fulfill a whole archipelago of different functions such as combatting difficulties of proof, mitigating the harshness of or preserving pre-existent rules, playing Ockham’s razor regarding the creation of new norms, enabling the development or making sense of the law, flagging the technicality of legal language, or contributing to a convenient and practicable set of legal doctrines.¹⁰⁷ Those functions, as functions of the operation of using fictions in legal reasoning, seem to be at most morally neutral or even *pro tanto* praiseworthy. What can be severely unjust or sometimes morally abhorrent is the wrongful content of individual exemplifications of the *fictio iuris*. Some legal fictions are, for example, clearly racist (the “one drop”-rule),¹⁰⁸ patriarchal (the “non-producer-related” child),¹⁰⁹ colonialist (the *terra nullius* doctrine),¹¹⁰ or sexist (the doctrine of “coverture”).¹¹¹ From the perspective of fictionalism, this is not due to their structure as fictions, but to their misuse as instrument in legal reasoning animated by societies where racism, patriarchy, colonialism, sexism etc. are (still) present and spill over into the legal system. Legal fictions are not innately unjust.

Legal Fictions are Obligation-Inapt

The (probably least well-known) obligation-inaptness allegation says that nobody can be placed under a moral duty to accept a fiction.¹¹² While this characterization poses a theoretically intricate problem for legal fictions on the level of the evaluative question, it also exaggerates a bit. Sure, the argument of its proponents seems *prima facie* elegant and easy: since there simply cannot be things like fictions in the state of nature (first premise) and since *ad impossibilia nemo tenetur*¹¹³ (second premise), it follows that there is no moral obligation to comply.¹¹⁴ Yet, this passes over the fact that the moral duty to obey the law might be backed up by a general *pro tanto* reason to comply with every valid norm in a legal system which must be balanced against the individual reason(s) to obey a particular legal norm.¹¹⁵ This would leave some space for obligations toward legal fictions. Further-more, the broad perspective of fictionalism might cast some doubts on the blanket obligation-inaptness claim itself: if there is something like an epistemic (moral) “right to know,”¹¹⁶ say about fully accepted scientific theories, we get correlative moral duties to provide such information as a corollary. Now, some of our best scientific theories unambiguously quantify over something – numbers – being regarded as plainly fictitious according to the standard view of metamathematical fictionalism.¹¹⁷ And would not that be tantamount to an obligation to accept a fiction? In any case, it is arguably too sweeping and questionable to say that individuals can *never* be placed under a moral obligation to accept a legal fiction.

In this section, I have outlined why lessons from our little guided tour through philosophical fictionalism might allow us to be a bit more relaxed about the polemic allegations frequently leveled against legal fictions. Thus, we were able to generate some further evidence to support a very accurate observation by legal theorist Frederick Schauer:

[T]he accusation of using a “legal fiction” may have overtaken “formalist” as the most ubiquitous and ill-defined of jurisprudential condemnations. But while it is clear that a charge of relying on a legal fiction is overwhelmingly pejorative these days, it is less clear just what is being condemned, and why what is being condemned justifies the condemnation.¹¹⁸

VIII. PROSPECTS: A FICTIONALIST ACCOUNT OF LEGAL FICTIONS?

This article has demonstrated some of the merits of taking an analytical view of FICTION in general and LEGAL FICTIONS in particular by combining insights from (1) the philosophy of language on fictional speech and from (2) the methodological¹¹⁹

program of philosophical fictionalism with the discourse in legal theory. Pivotal to the whole discussion was the claim that talk involving legal fictions is an exemplification of *elliptical speech*. By realizing this structural feature of the *fictio iuris*, one is enabled to grasp how the seemingly dialectical situation that legal fictions are blatantly false and trivially true at the same time comes about. They are literally false, yet true in fiction. Embracing this distinction results in subscribing to fictionalism about legal fictions: legal fictions-talk is odd on the surface, but cannot be taken at face value, since it should be redirected as merely aiming at truth in fiction, because of some utility afforded by retaining (aspects of) the juridical truths within this discourse. In short, legal fictions are instruments of legal reasoning to *preserve legal truths worth having*.

This account is, of course, in need of further elaboration. If the potential value of using the *fictio iuris* lies in its core job of preserving “talk worth having,” as the slogan goes, it seems important to know which juridical talk is (why exactly?) worth having and which legal truths are (why exactly?) worth conserving. How should we demarcate fictions preserving important and useful legal doctrine, like the juridical person, from fictions stabilizing racist stereotypes, like the “one drop”-rule? To carve out respective criteria is beyond the scope of this article, but an essential research desideratum for another day. However, even in this preliminary form, it shows us a promising direction for future theorizing about legal fictions: perhaps we should shift our attention away from the heated, so far unfruitful, ontological and alethic disputes to the epistemic as well as the evaluative question mentioned earlier. This will certainly require, among other things, a great deal of new and meticulous case studies on the epistemic merits of specific legal fictions in different legal systems. The value of having the *fictio iuris* of legal personhood, for example, is historically quite well studied.¹²⁰ With the rise of monasteries, certain persons (monks and nuns after taking the cloth) died the “monastic death” and could neither own property nor enter into legally binding contracts anymore.¹²¹ But the legal talk ‘persons in monasteries have the power to own property or design contracts’ was simply *worth preserving* to circumvent practical problems in private law.¹²² Therefore it was useful to implement the fiction of juridical or corporate personality to allow monasteries owning property in their own name. Another famous example from legal history is the clergyman fiction (or benefit of clergy):¹²³ During the Renaissance, English law even punished trifles like pickpocketing by hanging. Many judges thought of this as far too harsh.¹²⁴ But the law contained the exception that members of the clergy are spared the gallows.¹²⁵ Since the legal truth ‘certain people can be freed from the death penalty’ was *worth having* in a significant number of cases, judges introduced a fiction into their legal reasoning process: anybody who was able to recite the first verse of Psalm 51 from the Latin Bible, was deemed to be a clergyman.¹²⁶

From this point of view, the epistemic merit of the clergyman fiction is fairly obvious. On the other hand, the vices of historical *terra nullius* fictions are not far either. As the Crown began settling Australia, indigenous people were the inhabitants of the continent. Because Britain claimed full ownership of all their colonial territories, they invented the legal fiction that “New South Wales” was to be treated as land belonging to no one – unoccupied, uninhabited and open for British appropriation.¹²⁷ However, the legal truth ‘as of 1788 “New South Wales” is uninhabited’ was certainly not worth having, since it was only introduced to block, respectively cut off, legitimate claims of the indigenous people inhabiting the territory. While these examples are just a tentative glimpse at juridical truths (not) worth having, fictionalism about legal fictions as a thesis about the structure of special talk in legal reasoning might sharpen our sense for what an appropriate “acceptance test”¹²⁸ for *fictiones iuris* would have to ask.

At the very least, a fictionalist account harmonizes quite well with classic treatments of legal fictions by “major players”¹²⁹ in this field: as an exemplification of elliptical speech they are “abbreviating expression[s]”¹³⁰ of technical legal language – this is where Kelsen got it right – and as an exemplification of benign true-in-fiction-talk they are useful epistemic instruments¹³¹ – this is where Vaihinger got it right. Moreover, it fits nicely with more recent scholarship describing them as artificial enablers,¹³² communicative devices,¹³³ or markers for legal truths.¹³⁴

Even if one does not endorse all the claims, diagnoses and arguments given in this article it might still serve to encourage or induce a further engagement with or even a fully developed fictionalist account of *fictiones iuris* and thus render it a really promising option for legal theory. It could contribute to demystify their structure, to highlight their epistemic values, and to gain new knowledge about theoretically solid conditions of adequacy for accepting them as tools in legal reasoning. Perhaps future scholarship on legal fictions is ready for an *analytic turn*.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

1. A notable exception is Manish Oza, “Fictions in Legal Reasoning,” *Dialogue* 61, no. 3 (2022): 451–63.
2. E.g., John R. Searle, “The Logical Status of Fictional Discourse,” *New Literary History* 6, no. 2 (1975): 319–32; John Philipps, “Two Theories of Fictional Discourse,” *American Philosophical Quarterly* 37, no. 2 (2000): 107–19; Wolfgang Künne, “Perception, Fiction, and Elliptical Speech,” in *Thinking and the Structure of the World*, ed. Klaus Jacobi and Helmut Pape (Berlin/New York: De Gruyter, 1990), 259–67.
3. E.g., Stuart Brock and Anthony Everett, eds., *Fictional Objects* (Oxford: University Press, 2015); Fred Kroon and Alberto Voltolini, “Fictional Entities,” in *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/win2022/entries/fictional-entities/>; Maria Reicher, “Nonexistent

- Objects," in *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/win2022/entries/nonexistent-objects/>.
4. E.g., Fred Kroon and Alberto Voltolini, "Fiction," in *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), ed. Edward N. Zalta, <https://plato.stanford.edu/archives/win2019/entries/fiction/>; Matti Eklund, "Fictionalism," in *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), ed. Edward N. Zalta, <https://plato.stanford.edu/archives/win2019/entries/fictionalism/>; Bradley Amour-Garb and Frederick Kroon, eds., *Fictionalism in Philosophy* (Oxford: University Press, 2020).
 5. This is how Wolfgang Kühne put it to me in an oral remark at a conference (in response to Dominique Dos Santos Ferreira and Constantin Luft, "Rechtsfiktionen und Fiktionale Rede, Überlegungen im Anschluss an Wolfgang Kühne," in *Ebenen des Verstehens. Wolfgang Kühne im Gespräch*, eds. Martin Hoffmann and Tobias Martin (Paderborn: Mentis/Brill, 2024), 121–37).
 6. For an introduction see Frederick Kroon, Jonathan McKeown-Green and Stuart Brock, *A Critical Introduction to Fictionalism* (London: Bloomsbury, 2018).
 7. I use small caps (FICTION) to pick out concepts and single quotation marks ('fiction') strictly to mention linguistic items. Double quotation marks ("fiction") are reserved for quotations and scare quotes.
 8. I use 'juridical truth' or 'legal truth' to denote propositions which are true "according to law" or "according to a specific legal system."
 9. The expression 'talk' is meant as a technical (umbrella) term for any form of intersubjective discourse and as an antonym to 'thought'.
 10. Cf. Laura Zander, "Legal Fictions," in *Encyclopedia of Law and Literature* (last edited 22 October 2022), ed. Thomas Gutmann, Eberhard Ortland and Klaus Stierstorfer, [Legal Fictions in Theory and Practice, ed. Maksymilian Del Mar and William Twining \(Cham: Springer, 2015\), ix, x et seq.](https://lawandliterature.eu/index.php/en/content-en?view=article&id=42&catid=, 10, 1, 2, 49 et seq.
11. Cf. Maksymilian Del Mar,)
 12. See e.g., Rudolf von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Leipzig: Breitkopf und Härtel, 1865), 308 et seq.; Raphael Demos, "Legal Fictions," *International Journal of Ethics* 34, no. 1 (1923): 37, 44 et seq.; Lon L. Fuller, "Legal Fictions," *Illinois Law Review* 25, no. 5 (1930): 513–46; Raymundo Gama, "Presumptions and Fictions: A Collingwoodian Approach," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 347, 355; Michael Lobban, "Legal Fictions before the Age of Reform," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 199, 201 et seq.; Kristin Y. Albrecht, *Fiktionen im Recht* (Baden-Baden: Nomos, 2020), 133 et seq.; Liron Shmilovits, *Legal Fictions in Private Law* (Cambridge: Cambridge University Press, 2022), 53.
 13. Cf. Bradley Amour-Garb and Frederick Kroon, "Introduction," in *Fictionalism in Philosophy*, ed. Bradley Amour-Garb and Frederick Kroon (Oxford: University Press, 2020), 1.
 14. John L. Mackie, "A Refutation of Morals," *Australasian Journal of Philosophy* 24, no. 1/2 (1946): 77, 78.
 15. Or epistemological or methodological, one could add, cf. Amour-Garb and Kroon, *Introduction*, 12 et seq.
 16. See generally, Jiri Benovsky, *Eliminativism, Objects, and Persons, The Virtues of Non-Existence* (London/New York: Routledge, 2020).
 17. See Chris Daly and David Liggins, "In Defence of Error Theory," *Philosophical Studies* 149, no. 2 (2010): 209 and Hartry H. Field, *Science without Numbers* (Princeton, NJ: Princeton University Press, 1980).
 18. Cf. Wolfgang Kühne, *Abstrakte Gegenstände, Semantik und Ontologie*, 2nd ed. (Frankfurt a.M.: Vittorio Klostermann, 2007), 318 with reference to § 51 of Berkeley's "Principles of Human Knowledge."
 19. Cf. Rudolf Carnap, *Meaning and Necessity*, 2nd ed. (Chicago: Chicago University Press, 1956), 205.
 20. Kühne, *Abstrakte Gegenstände*, 320.
 21. Kühne, *Abstrakte Gegenstände*, 320.

22. Or epistemologically or methodologically, cf. Amour-Garb and Kroon, *Introduction*, 12 et seq.
23. See Stephen Yablo, "A Paradox of Existence," in *Empty Names, Fictions and the Puzzle of Non-Existence*, ed. Anthony Everett and Thomas Hofweber (Stanford, CA: CSLI Publications, 2000), 275–312; Stephen Yablo, "Go Figure, A Path through Fictionalism," in *Midwest Studies in Philosophy Volume XXV: Figurative Language*, ed. Peter A. French and Howard K. Wettstein (Oxford: Blackwell, 2001), 72, 80–7; Künne, *Abstrakte Gegenstände*, 320.
24. Cf. Künne, *Abstrakte Gegenstände*, 325.
25. See Wolfgang Künne, "Im übertragenen Sinne, Zur Theorie der Metapher," *Conceptus* XVII, no. 49/41 (1983): 181–200 and Oliver R. Scholz, "Some Issues in the Theory of Metaphor," in *Text and Discourse Constitution*, ed. János S. Petőfi (Berlin/New York: De Gruyter, 1988), 269–82.
26. Eklund, *Fictionalism*, § 0. (fuzzier and even more extensive definitions can be found in Mark Balaguer, "Fictionalism in the Philosophy of Mathematics," in *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/spr2023/entries/fictionalism-mathematics/> and Daniel Nolan, "Modal Fictionalism," in *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), ed. Edward N. Zalta and Uri Nodelman, <https://plato.stanford.edu/archives/win2022/entries/fictionalism-modal/>).
27. Cf. Künne, *Perception, Fiction, and Elliptical Speech*, 264 et seq. (for the sake of clarification, Künne himself is not a fictionalist about numbers).
28. See Tobias Klauk, "Fiktionalität in der Philosophie: Fiktionalismus," in *Fiktionalität, Ein interdisziplinäres Handbuch*, ed. Tobias Klauk and Tilmann Köppe (Berlin/Boston, MA: De Gruyter, 2014), 496–515.
29. Amour-Garb and Kroon, *Introduction*, 15 et seq.
30. John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35, no. 6 (1926): 655, 664–5 and Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019), 34.
31. Cf. Ferreira and Luft, *Rechtsfiktionen und Fiktionale Rede*, 130, 132.
32. Andrei Marmor, "Law as Authoritative Fiction," *Law and Philosophy* 37 (2018): 473–97; cf. also Geoffrey Samuel, "Is Law a Fiction?," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 31–54, Daniel Wodak, "Mere Formalities: Fictional Normativity and Normative Authority," *Canadian Journal of Philosophy* 49, no. 6 (2019): 828–50 and Adam Perry, "Legal Fictionalism" (working paper, <https://adamdperry.files.wordpress.com/2023/06/legal-fictionalism-6-25.pdf>).
33. Cf. Richard Joyce, "Moral Fictionalism," in *Fictionalism in Metaphysics*, ed. Mark E. Kalderon (Oxford: Oxford University Press, 2005), 287–313.
34. See Oliver R. Scholz, "'Und dieses dienet auch zur Auslegungskunst [...] – Zur Rolle von Präsumtionen in Recht und Hermeneutik," *Das achtzehnte Jahrhundert* 45, no. 2 (2021): 220, 225 et seq.
35. Cf. GW Leibniz, *Nouveaux Essais sur l'Entendement Humain*, IV, xvi, trans. Ernst Cassirer (Hamburg: Meiner, 1971), 9 and Scholz, *Auslegungskunst*, 226.
36. Cf. Leibniz, *Nouveaux Essais sur l'Entendement Humain*, IV, xvi, 9 and cf. Oliver R. Scholz, "The Methodology of Presumption Rules – Between the A priori and the A posteriori," in *The A priori and its Role in Philosophy*, ed. Nikola Kompa, Christian Nimitz and Christian Suhm (Paderborn: Mentis/Brill, 2009), 173–84.
37. Sometimes also known as 'praesum(p)tio iuris tanum' or 'praesum(p)tio iuris seu rationis'.
38. The German term 'Unschuldsvermutung' (literally conjecture of innocence) is grossly misleading, since it seems to imply a probabilistic judgement (cf. Scholz, *Auslegungskunst*, 232–3).
39. Cf. Leibniz, *Nouveaux Essais sur l'Entendement Humain*, IV, xvi, 9 and Scholz, *Auslegungskunst*, 226 et seq.
40. Cf. Leibniz, *Nouveaux Essais sur l'Entendement Humain*, IV, xvi, 9. It is controversial whether irrebuttable presumptions are to be classified as fictions, see Gama, *Presumptions and Fictions*; Albrecht, *Fiktionen im Recht*, 215 et seq.; Zander, *Legal Fictions*, 54 (even Vaihinger clearly distinguishes between *praesumptio* and *fictio*, cf. Hans Kelsen, "On the Theory of Juridic Fictions, With Special Consideration of Vaihinger's Philosophy of the As-If," trans. Christoph Kletzer, in *Legal Fictions in Theory and Practice* (Cham: Springer, 2015), 3, 10.

41. In the 20th century, this was still an infamous provision of German law in § 1589 II of the German Civil Code (cf. Hans-Peter Haferkamp, "Methodenehrlichkeit? – Die juristische Fiktion im Wandel der Zeiten," in *Zivil- und Wirtschaftsrecht im Europäischen und Globalen Kontext*, ed. Klaus Peter Berger et al. (Berlin: de Gruyter, 2006), 1077).
42. Cf. Hans Vaihinger, *The Philosophy of 'As-If'*, 2nd ed, trans. C.K. Ogden (London/New York: Routledge, 2021).
43. For the sake of clarification: the 'fictiones iuris' refer to "fictions in practice" (and not to the "fictions of legal theory"), cf. on the importance of the distinction Del Mar, *Introducing Fictions*, x.
44. Oza, *Fictions in Legal Reasoning*, 451.
45. Wolfgang Künne, "Fiktion ohne fiktive Gegenstände, Prolegomenon zu einer Fregeanischen Theorie der Fiktion," in *Fiktion, Wahrheit, Wirklichkeit, Philosophische Grundlagen der Literaturtheorie*, ed. Maria E. Reicher (Paderborn: Mentis/Brill, 2007), 54, 54 fn. 1. Following Jeremy Bentham, I use 'fictitious' (cf. Michael Quinn, "Fuller on Legal Fictions: A Benthamic Perspective," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 55, 56 et seq.) instead of 'fictive'.
46. Cf. Andreas Kablitz, "Literatur, Fiktion und Erzählung – nebst einem Nachruf auf den Erzähler," in *Im Zeichen der Fiktion, Aspekte fiktionaler Rede aus historischer und systematischer Sicht*, ed. Irina O. Rajewsky and Ulrike Schneider (Stuttgart: Franz Steiner, 2008), 13, 15 ("[Z]wischen dem Fiktiven als einer Eigenschaft des Dargestellten und dem Fiktionalen als einer Eigenschaft der Darstellung [ist] zu unterscheiden" ["Between the fictive as a property of the represented and the fictional as a property of the representation [is] to be distinguished" (transl. CL)].
47. Cf. Samuel Ulbricht, *Ethik des Computerspielens, Eine Grundlegung* (Berlin: J.B. Metzler, 2020), 41 fn. 84 ("Die kategorische Trennung von fiktional und fiktiv geht auf die Literaturwissenschaft zurück, hat sich im philosophischen Diskurs allerdings noch nicht durchgesetzt") ["The categorical separation of fictional and fictitious goes back to literary studies, but has not yet gained acceptance in philosophical discourse" (transl. CL)].
48. Cf. Amour-Garb and Kroon, *Introduction*, 6 et seq. On merely verbal disputes see David Chalmers, "Verbal Disputes," *The Philosophical Review* 120, no. 4 (2011): 515–66.
49. E.g., cf. Amour-Garb and Kroon, *Introduction*, 8 et seq.
50. E.g., cf. Amie L. Thomasson, *Fiction and Metaphysics* (Cambridge: Cambridge University Press, 1999).
51. E.g., cf. Kroon and Voltolini, *Fictional Entities*.
52. E.g., cf. Künne, *Fiktion ohne fiktive Gegenstände*, 58 et seq.
53. E.g., cf. Oliver R. Scholz, "Fiktionen, Wissen und andere kognitive Güter," in *Fiktionalität, Ein interdisziplinäres Handbuch*, ed. Tobias Klauk and Tilmann Köppe (Berlin/Boston, MA: De Gruyter, 2014), 209–34.
54. E.g., cf. Künne, *Fiktion ohne fiktive Gegenstände*, 57 et seq.
55. E.g., cf. Del Mar, *Introducing Fictions*, xxiv.
56. Laura Zander, *Legal Fictions*, 1.
57. See Section VI.
58. This step is, in all its complexities, of course a task for another day and outside the scope of the paper.
59. Cf. Emily Caddick Bourne, "Fictionalism," *Analysis Reviews* 73, no. 1 (2013): 147–62; cf. Francesco Berto and Matteo Plebani, *Ontology and Metaontology, A Contemporary Guide* (London: Bloomsbury, 2015), 83 et seq., 199 et seq.; cf. Adrian Bruhns, *Zur Ontologie fiktiver Entitäten und ihrer Beschreibung in der Fiktionstheorie und Literaturwissenschaft* (Göttingen: eDISS, 2017); cf. also Tobias Rosefeldt, "Was es nicht gibt. Eine Untersuchung des Begriffes der Existenz" (PhD diss., Universität Heidelberg, 2006).
60. This abbreviation is a shortened form of 'if and only if'.
61. Cf. Amour-Garb and Kroon, *Introduction*, 8.
62. Amour-Garb and Kroon, *Introduction*, 8.
63. Cf. Künne, *Perception, Fiction, and Elliptical Speech*, 264 et seq.; Precursors of this strategy are David Lewis, "Truth in Fiction," *American Philosophical Quarterly* 15, no. 1 (1978): 37–46 and Edmund Husserl, "Intentionale Gegenstände" (1894), in *Husserliana XXII – Aufsätze und Rezensionen (1890-1910)* (Den Haag: Nijhoff, 1979), 304–48.
64. The talk about 'representandum' (the entity being represented) and 'representans' (the

- entity that represents) is necessary to be as precise as possible. In particular, I want to avoid misleading phrases such as 'x is referred to in a sentence,' since "referring is not something an expression does; it is something one can use an expression to do" (Peter F. Strawson, "On Referring," *Mind* 59, no. 235 (1950): 320, 326). The formulation 'its representans is part of a sentence' is certainly more cumbersome, yet also more accurate.
65. Cf. Ferreira and Luft, *Rechtsfiktionen und Fiktionale Rede*, 129.
 66. Cf. David Lewis, *Truth in Fiction*.
 67. Needless to say, Lewis own account is much more sophisticated (his paper contains three different analyses of 'true in fiction' in terms of possible-world semantics).
 68. For the discussions in legal theory see Visa AJ Kurki, "Can Nature Hold Rights? It's Not as Easy as You Think," *Transnational Environmental Law* 11, no. 3 (2022): 525–52.
 69. Cf. Jan Alber, *Unnatural Narrative: Impossible Worlds in Fiction and Drama* (London: University of Nebraska Press, 2016).
 70. Francesco Berto, Mark Jago and Christopher Badura, "Fiction and Fictional Objects," in *Impossible Worlds*, ed. Francesco Berto and Mark Jago (Oxford: Oxford University Press, 2019), 239–66.
 71. On hyperintensionality see Francesco Berto and Daniel Nolan, "Hyperintensionality," in *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), ed. Edward N. Zalta, <https://plato.stanford.edu/archives/sum2021/entries/hyperintensionality/>; Mark Jago, *The Impossible: An Essay on Hyperintensionality* (Oxford: Oxford University Press, 2014); cf. Greg Restall, "Ways Things Can't Be," *Notre Dame Journal of Formal Logic* 38, no. 4 (1997): 583–97.
 72. Berto, Jago and Badura, *Fiction and Fictional Objects*, 245 (with the distinction between inconsistent fictions due to narrative oversight and intentionally inconsistent ones).
 73. Cf. § 1923 II of the German Civil Code (the example is, in a way, the Sherlock Holmes of Civil Law scholarship about fictions).
 74. Richard Hanley, "As good as it gets: Lewis on truth in fiction," *Australasian Journal of Philosophy* 82, no. 1 (2004): 112, 121.
 75. Berto, Jago and Badura, *Fiction and Fictional Objects*, 246.
 76. Graham Priest, "Sylvan's Box," *Notre Dame Journal of Formal Logic* 38, no. 4 (1997): 573, 575 et seq. cf. Berto, Jago and Badura, *Fiction and Fictional Objects*, 246.
 77. Cf. Peter van Inwagen, "Creatures of Fiction," *American Philosophical Quarterly* 14, no. 4 (1977): 299–308; Saul A. Kripke, *Reference and Existence: The John Locke Lectures [1973]* (Oxford: Oxford University Press, 2013); for a recent and very sophisticated account (the theory of "pleonastic entities") see Stephen Schiffer, "Pleonastic Propositions," in *The Things We Mean* (Oxford: Oxford University Press, 2003), 49–89.
 78. Kripke, *Reference and Existence*, 72 (in our terminology: "brought both a novel and a fictitious character into being").
 79. Cf. Terence Parsons, *Nonexistent Objects* (Yale: University Press, 1980); cf. Graham Priest, *Towards Non-Being*, 2nd ed (Oxford: Oxford University Press, 2016); cf. also Francesco Berto, "Modal Meinongianism and fiction: the best of three worlds," *Philosophical Studies* 152, no. 3 (2011): 313–34.
 80. The "ideal driver" is a doctrinal fiction invented by legal scholars to interpret an earlier version of the German Road Traffic Act.
 81. Cf. Peter Simons, "On What There Isn't: The Meinong-Russell Dispute," in *Philosophy and Logic in Central Europe from Bolzano to Tarski, Selected Essays* (Dordrecht: Kluwer, 1992), 159–91.
 82. Cf. Rosefeldt, *Was es nicht gibt*, 36.
 83. This is certainly not the most prominent condition, since it is implicitly entailed by [iv] and is therefore often not made transparent.
 84. Cf. Searle, *The Logical Status of Fictional Discourse* and cf. Gareth Evans, *The Varieties of Reference* (Oxford: Oxford University Press, 1982). For the details of semantic pretense-involving approaches to fictionalism (and comparisons with pragmatic accounts) see also Bradley Armour Garb and James A. Woodbridge, *Pretense and Pathology* (Cambridge: Cambridge University Press, 2015), 39 et seq.
 85. Cf. e.g., Zander, *Legal Fictions*, 16.
 86. Note that meinongianism claims that (12)-(13) involve entities which 'are there' without 'being existent' (whatever that means).
 87. For the general problem see Brian H. Bix, "The Normativity of Law," in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak

- and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 585–605.
88. On the following see Ferreira and Luft, *Rechtsfiktionen und Fiktionale Rede*, 134 et seq.
89. Künne, *Fiktion ohne fiktive Gegenstände*, 60 et seq.
90. Kelsen, *On the Theory of Juridic Fictions*, 9.
91. *Ibid.*, 16.
92. *Ibid.*, 9.
93. *Ibid.*, 13.
94. *Ibid.*, 12 (“in der Wirklichkeit des Gesetzes [H]ergestelltes”).
95. *Ibid.*, 12 (“in Wirklichkeit nicht [H]erzustellendes”).
96. Oza, *Fictions in Legal Reasoning*, 458.
97. For some historical prejudices against the *fictio iuris* see Haferkamp, *Methodenehrlichkeit*.
98. Cf. e.g., Lon L. Fuller, *Legal Fictions* (Stanford University Press, 1967); Jeremy Bentham, *The Works of Jeremy Bentham, Vol. V*, ed. John Bowring (Edinburgh: William Tate, 1843), 13; Demos, *Legal Fictions*, 57; Louise Harmon, “Falling Off The Vine: Legal Fictions And The Doctrine of Substituted Judgment,” *Yale Law Journal* 100 (1990): 63; Nancy J. Knauer, “Legal Fictions and Juristic Truth,” *St. Thomas Law Review* 23 (2010): 1, 3, 6, 24; Alina Ng Byote, “The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship,” *NYU Journal of Legislation & Public Policy* 17, no. 3 (2014): 707, 720; Erik Encarnacion, “On Raphael Demos’s ‘Legal Fictions,’” *Ethics* 125, no. 2 (2015): 540–2; Shmilovits, *Legal Fictions in Private Law*.
99. Certainly, there can be overlaps, if one assumes in accordance with some versions of contemporary truth-making theories that anything that doesn’t exist can’t be true either. For an introduction, see Jamin Asay, *Truth-Making* (Cambridge: University Press, 2023).
100. Cf. Künne, *Abstrakte Gegenstände*, 299.
101. Cf. Christian Folde, *Exploring Fictional Truth* (Frankfurt a.M.: Vittorio Klostermann, 2021).
102. Cf. e.g., Roscoe Pound, “Spurious Interpretation,” *Columbia Law Review* 7, no. 6 (1907): 379–86; Larry Alexander and Emily Sherwin, “Deception in Morality and Law,” *Law and Philosophy* 22 (2003): 393, 417, 422 et seq., 426; Ng Byote, *The Conceits of Our Legal Imagination*, 731; Douglas Lind, “The Pragmatic Value of Legal Fictions,” in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 83, 87. In this respect, the classic definition by Fuller (as false statements not intended to deceive, see Quinn, *Fuller on Legal Fictions: A Benthamic Perspective*, 56) is, of course, a commendable exception.
103. Cf. Ferreira and Luft, *Rechtsfiktionen und Fiktionale Rede*, 137. More than once, it has been pointed out that legal fictions have to be distinguished from lies, see Demos, *Legal Fictions*, 57; cf. also Katrin Althans, “A Shocking Deception: Legal Fictions and Lying in *The Woman in White* and *No Name*,” in *Being Untruthful: Lying, Fiction, and the Non-Factual*, ed. Monika Fludernik and Stephen Packard (Baden-Baden: ergon, 2021), 247–64.
104. Cf. Daniel Klerman, *Legal Fictions as Strategic Instruments* (Berkeley, CA: eScholarship, 2009), 1 (pointing to Henry S. Maine’s position of attributing legal fictions with Common Law’s „superstitious disrelish for change”).
105. Cf. Emanuel Viebahn, “They Lying-Misleading Distinction: A Commitment-Based Approach,” *The Journal of Philosophy* 118, no. 6 (2021): 289–319. And such non-literal attempts to mislead (like undisguised lies) are morally quite innocent compared to intentional deceptions or fraudulences.
106. Cf. e.g., Bentham, *The Works of Jeremy Bentham*, 13. His bashing of the *fictio iuris* as “syphilis” and “principle of rottenness” has become notorious, cf. Fuller, *Legal Fictions*, 2 et seq.
107. Del Mar, *Introducing Fictions*, xvi–xx.
108. See Daniel J. Sharfstein, “Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860,” *Minnesota Law Review* 91, no. 3 (2007): 592–656.
109. See above (III).
110. Stuart Banner, “Why Terra Nullius? Anthropology and Property Law in Early Australia,” *Law and History Review* 23, no. 1 (2005): 95–131.
111. Tim Stretton and Krista J. Kesselring, *Married Women and the Law: Coverture in England and the Common Law World* (McGill-Queen’s: University Press, 2013).
112. Cf. e.g., Hillel Steiner, “Is the right to bequeath a supernatural power?,” in *Inheritance and the Right to Bequeath, Legal and Philosophical Perspectives*, ed. Hans-Christoph Schmidt am Busch, Daniel Halliday and Thomas Gutmann (Abindon/New York: Routledge, 2022), 57, 68.

113. Translated: Nobody is held to the impossible. It is a corollary of the well-known moral principle "ought implies can."
114. Cf. *ibid.*, 68.
115. Cf. Mark Greenberg, "The Moral Impact Theory of Law," *Yale Law Journal* 123, no. 5 (2014): 1288-1342; John Hasnas, "Is there a moral duty to obey the law?," *Social Philosophy and Policy* 30, no. 1/2 (2013): 450-479; Christopher H. Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005); David Lefkowitz, "The Duty to Obey the Law," *Philosophy Compass* 1, no. 6 (2006): 571-98; very critical with regard to a general obligation is Joseph Raz, "The Obligation to Obey the Law," in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 232-49.
116. Lani Watson, *The Right to Know: Epistemic Rights and Why We Need Them* (Abingdon/New York: Routledge, 2021).
117. See Balaguer, *Fictionalism in the Philosophy of Mathematics*, and above (II).
118. Frederick Schauer, "Legal Fictions Revisited," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 113.
119. Admittedly, some might also see it as an exclusively metaphysical program.
120. E.g., Dewey, *The Historic Background of Corporate Legal Personality*.
121. Kurki, *A Theory of Legal Personhood*, 34; Matthias Lehmann, "Der Begriff der Rechtsfähigkeit," *Archiv für die civilistische Praxis* 207, no. 2 (2007): 207, 225, 228.
122. Kurki, *A Theory of Legal Personhood*, 34.
123. See e.g., Zander, *Legal Fictions*, 59.
124. Oza, *Fictions in Legal Reasoning*, 451.
125. As they were subject to the jurisdiction of the ecclesiastical courts, *ibid.*
126. Cf. Zander, *Legal Fictions*, 59.
127. Cf. Lind, *The Pragmatic Value of Legal Fictions*, 105 et seq.
128. See for an attempt, Shmilovits, *Legal Fictions in Private Law*, 175 et seq.
129. Del Mar, *Introducing Fictions*, x.
130. Kelsen, *On the Theory of Juridic Fictions*, 10.
131. Cf. Vaihinger, *The Philosophy of 'As-If'*.
132. Knauer, *Legal Fictions and Juristic Truth*, 9.
133. Karen Petrosky, "Legal Fictions and the Limits of Legal Language," in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining (Cham: Springer, 2015), 131, 132.
134. Cf. Schauer, *Legal Fictions Revisited*.

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