Encyclopedia of Law and Literature
Enzyklopädie Recht und Literatur

Edited by Thomas Gutmann, Eberhard Ortland, Klaus Stierstorfer

lawandliterature.eu

Legal Fictions

Last edited 22 October 2022

by Laura Zander

Recommended Citation:
Laura Zander (2022): Legal fictions, in: Thomas Gutmann, Eberhard Ortland, Klaus Stierstorfer, eds., *Encyclopedia of Law and Literature* (last edited 22 October 2022),
doi: 10.17879/12009571787
URL: https://lawandliterature.eu/index.php/en/content-en?view=article&id=42&catid=10

Legal Fictions

Last edited 22 October 2022

Lat. *fictio juris*, Ger. *juristische Fiktion*, *(Rechts-)Fiktion*, Fr. *fiction juridique*, Sp. *ficción jurídica*, It. *finzione giuridica* 1

1. a counterfactual element deliberately assumed or created by courts for administrative convenience, in order to apply, modify or extend a legal rule; as a judicial technique to make a rule applicable to new or unforeseen situations without rephrasing it, it is used today predominantly in common law jurisdictions, particularly in England;
2. a legal norm that regulates legal consequences and results from an act of legislative will in shape of a statutory or legislative fiction;
3. a fictitious or abstract entity, i.e. mental legal construct, e.g. person, state, organ;
4. in theoretical discourse (in contrast to normative or practical discourse) a counterfactual declaration, or one adverse to legal truth, e.g. the *terra nullius* doctrine;
5. legal concepts or instruments, that demonstrate or embody legal values or judgements, such as the reasonable man standard, or legal institutions based on such fictions;
6. derogatively used for a false representation in relation to legal ideology, or morally corrupted legal institutes, such as slavery;
7. literary narrative or literary text that deals with law in some capacity.

Legal fictions are legal rules, concepts or assumptions premised on deliberately false, or rather counterfactual assertions. They generally operate in the process of legal creation, modification or adaptation and may be used to selectively implement legal change without necessitating a broader legal reform. But legal fictions are also codified into statutes; as statutory fictions, they are usually not false in fact but only establish a true-false dichotomy within the law. Moreover, legal fictions are also employed in more abstract terms. They can come to act as legal metaphors or make more abstract legal constructs such as 'person' or 'organ' tangible. In such instances, however, their status as 'legal fictions' is controversial. In theoretical discourse, the term 'legal fiction' is also used derogatively, to denounce a legal ideology that appears patently false. Literary narrative or literary works that deal with law in some capacity are also frequently referred to as 'legal fictions'. The term is rendered problematic given its broad and often unreflective application to a variety of different phenomena and purposes, as well as a lack of proper distinction between theoretical and practical-normative discourse. Legal fictions are prevalent in, if not limited to common law jurisdictions, particularly England. 2

1. Introduction

Legal fictions are legal rules, concepts or assumptions premised on deliberately false assertions. Their reliance upon a legal declaration adverse to truth or deliberately false has attracted much controversy. Jeremy Bentham's notorious contempt for legal fictions was recorded in his rendering of them as "syphilis" that "carries into every part of the system the principle of rottenness" (Bentham 1843, V 92). Despite Bentham's disdain, fictions are prevalent in, if not limited to common law jurisdictions, particularly England. While legal fictions are equally common in Babylonian or rabbinic traditions, their European tradition developed from ancient Roman law. Etymologically derived from the Latin *fictio* (initially *finctio*) or *fingere*, the term relates to a variety of creative processes such as shaping, modelling, forming, moulding, sculpting, figuring, fashioning, transforming, creating, but also procreating. Transposed onto the level of mental activity, its etymology implies creativity and active production: to create images, to believe, to suppose, to dream, to invent art or artifice (even if falsely or maliciously), to simulate and therefore to plot, to weave, but also to adapt, to accommodate, to instruct, and to educate (Pugliatti 1968, 659). 3

The term 'legal fiction' then is used for a variety of different phenomena and purposes by legal entities such as courts, legislators, commentators and legal philosophers but also by scholars, critics and writers of literary fiction. The analysis of legal fictions is largely problematic because of the ambiguity of the term (Gama 2015, 355; Twining 2015, vii). This ambiguity is produced by the multiplicity of related concepts the term might refer to, yet also by the lack of precision with which it is often applied. In particular, critics refrain from making a proper distinction between theoretical and practical-normative discourse, and between theoretical and cognitive purposes. Moreover, the frequent emphasis on falsehood tends to generate logical confusion in terms of referential context; more often than not, scholars evidently fail to sufficiently distinguish between falsity *within* or *without* the context of the law. In the context of legal fictions, it is therefore not only helpful but necessary to clearly determine the respective frame of reference, to assess whether any claim may be true *in law*, true *in fiction* or true *in relation to the real world*. The difficulties encountered in the context of legal fictions do not only own to this deplorable neglect, but can be also attributed to the notorious ambiguity of the term 'fiction' and the arbitrariness of language on a more general scale; a trait that makes unambiguous communication or language usage often difficult or even impossible. 4

Legal fictions generally operate in the processes of legal creation, modification or adaptation. A fiction may modify or even extend an existing rule in order to make it applicable to new or unforeseen situations without rephrasing the rule, or it may regulate legal consequences as a result from an act of legislative will in the case of statutory or legislative fictions. In effect, legal fictions often come to implement legal change on codes that legislators are hesitant to change, or which are encumbered with impeding 5

limitations. But legal fictions are also codified into statutes, codes or laws, in which case they are sometimes also referred to as 'linguistic fictions', due to the linguistic nature of statutory fictionality (Petroski 2015, 133; Fuller 1967, 11–14). Since statutory fictions are usually not false in fact but only establish a true-false dichotomy within the law, some scholars do not deem statutory fictions to be legal fictions at all (Kletzer 2015, 9, 24–25). Furthermore, legal fictions are also employed in more abstract terms. They can act as legal metaphors which function as a form of procedure or a form of action. Moreover, fictitious entities may operate as instruments to make mental legal constructs tangible; e.g. concepts such as person, state or organ. Whether legal metaphors or abstract-theoretical concepts still constitute legal fictions is, however, controversial (Albrecht 2020, 265; Schauer 2015, 123, Kelsen 2020, 12). Some theorists want to fully exclude judicial or legal fictions from the scope of application (Albrecht 2020, 181; Esser 1969, 204).

6 The counterfactual element, so characteristic of legal fictions, may be attributed in reference to the law or the relation between the law and the 'real'. In the latter case and in contrast to the afore-mentioned normative/practical discourse, legal fictions can also include counterfactual declarations, or concepts in theoretical discourse, which are adverse to truth. Such a derogative usage may surface in the context of a legal ideology that appears manifestly false in view of either common sense or practical experience, e.g. the 'reasonable man standard', whose discriminatory potential has been variously discussed (Dolin 2007, 38–39; Kennedy 1993, 196–233; Raitt & Zeedyk 2000, 75).

7 It is probably two particular features that render legal fictions so highly controversial: On the one hand, it is their alleged artificiality, or 'falseness', that construes an image of the world that appears both "fanciful and distorted" against any alleged benchmark of the 'real' (Stern 2017, 314). Moreover, as legal fictions so often covertly implement legal change, it is their lack of transparency that challenges traditional conceptions of the law as solid, objective and truth-bearing. This is perhaps also the quality that most distinguishes legal fictions from related legal concepts such as presumption, analogy (*extensio*), deeming provision or hypothesis. In this context, critics have feared legal fictions to "carry the potential to de-stabilize truth, transparency, and justice of the legal order" (Geiser 2018, 11). This danger is increased by the fact that legal fictions replicate both the power and violence of language, a violence often rendered even more vicious by their conceptualization as 'intentional lies'. Especially if unacknowledged as fictions, they appear closer to deceptions, errors and false hypotheses than to a productive legal operation. Notwithstanding their apparent artificial rendering, it remains debatable if this deceptive quality truly distinguishes legal fictions from law's other "fabrications," whether this is a difference in degree, in kind or in mere visibility (cf. Stern 2020, 191–199).

8 Yet it is precisely this ambivalent quality of legal fictions that produces invention and generates creative potential. These mental activities facilitate the creation of new concepts, but also establish a proximity to the imaginative realm of literary fiction. Stressing

the analogies between legal fiction and conventional 'fiction', critics have frequently taken a broader humanistic approach to these concepts (Petroski 2015, 134). Especially in the area of law and literature scholarship, renewed interest on this dynamic has surged. Simon Stern, for instance, compares the narrative logic of legal fiction to the narrative logic of literary fiction, and thus proposes a spectrum to encompass varying modes of fictionality. Yet he also concedes that certain fictions are "singularly immune to the logic of plot" (Stern 2017, 320). In his latest work on legal fictions, he has likened legal fictions' distinctive function in law to metafiction in literature, in that they self-reflexively highlight law's own constructive operations (Stern 2020, 191–199). Despite the vital role of artifice in modern law, perhaps we need fictions and their distinct mechanisms to bring that realisation into visibility, Stern suggests (Stern 2020, 197).

9 In the early 1980s, Owen Barfield drew an analogy between legal fictions and figurative language usage, or rather metaphors in particular. Barfield thus likened the figurative expression of law in terms of legal fictions to that of language in terms of metaphor. The propagation of a pre-existing doctrine, simply a matter of technique or political strategy had, Barfield maintained, to be separated from the creation of new meaning, a process only possible through metaphor, or legal fictions, respectively (Barfield, 1981, 121). More recent legal theorists also frequently turn to linguistic or literary approaches to better understand legal fictions, and literary theorists or critics set out to examine legal discourse with literary methodology, for instance to study the narratological mechanisms of the law. In this regard, Karen Petroski has worked extensively on legal fiction as a linguistic phenomenon, drawing on Lon Fuller but also on much more recent scholarship (Petroski 2015, Petroski 2018). Her 2018 study, *Fiction and the Languages of Law* exposes many of the parallels between legal reasoning and fictional discourse through an examination of the U.S. Supreme Court's recent written pronouncements. In a similar vein, Hans J. Lind explores the intersection of law and literature from the distinct perspective of fictional discourse, in his 2020 study on *Fictional Discourse and the Law*. Lind is critical of approaches bound to a classical true-false dichotomy, which are, so he claims, still characteristic of the debate on legal fictionality. Instead, Lind's theoretical approach is directed towards the finding of a transdisciplinary criterion of fictionality (Lind 2020, 3–64).

10 Other scholars are less concerned with the theorization of legal fictions, but with the historic interaction between law and literature. In his theoretical and historical study, Dieter Polloczek analysed the links between legal fictions and notions of equity, literary tropes and the construction and representation of social bonds through sentiment, philanthropy and marginalisation. According to Polloczek, legal fictions such as Civil Death were considered vehicles of equity in classical common-law theory yet could always also be used to manipulate the intentions of the legislator or a previous judge. Due to their need to be translated into the individual context of a particular case, they could be also used to manipulate intentions for purposes other than equity (Polloczek 1999, 38). Eleanor Shevlin similarly juxtaposes the ways in which fictions operated within early

novels and the law, identifying a reciprocal, at times constitutive relationship between the two. Characterized not only by shared thematic concerns but also similar discursive practices, Shevlin traces the relationship to broader social, political, psychological and cultural alterations, visible for instance in their shared preoccupation with property (Shevlin 2012, 48). Acting as "cultural supplements to the official law", early novels, so Shevlin's claim, "afforded a forum for positing, championing, complicating, and dismissing competing opinions and solutions about how property should regulate social relations beyond the purview of the Court of Common Pleas, King's Bench, Chancery, and the Inns of Court" (Shevlin 2012, 50). According to Shevlin, the common law, recorded by Blackstone, "envisioned the world as being governed by and for the propertied", yet early fiction narratives offered "a multiplicity of views on how fictions of land, law, and self interacted in structuring and regulating society" (Shevlin 2012, 52).

11 Historically, the English common law has been replete with fictions, many of them procedural fictions, which have allowed the extension of legal jurisdiction or an existing form or action to be used for a new purpose. Most legal fictions were abolished by the 19th century legal reform. From the age of Enlightenment, critique on legal fictions in general, and the procedural fictions in particular, intensified, but the defence of legal fictions continued into the 19th century (Lobban 2015, 216). In response to criticism directed at the resulting multiplicity of procedures, costly process and incomplete rendering, however, procedural fictions at least were duly reformed between 1832 and 1852 (Lobban 2015, 217). The heyday of the theoretical debate on legal fictions probably lasted from the early 19th century to the first third of the 20th century. The prevalence of legal fictions in England perhaps originates in the conservativist commitment of English lawyers to the overarching legal myth that the common law has existed unaltered since the Middle Ages; a notion that itself acts as a rather persuasive legal fiction (Quinn 2015, 66). The common law tradition of precedents certainly reinforces such mythical renderings of the legal system, wherein judges do not make law but merely discover pre-existing law. Precisely for this reason, it is crucial to clearly distinguish between such fictions on an individual basis according to their respective conceptualization, and to ascertain whether they are ideologically, rationally or practically motivated.

12 Contemporary examples of extant legal fictions include the doctrine of corporate personhood, the process of adoption or the doctrine of attractive nuisance. In the case of the first two, a fiction enables the extension of a set of rights and duties: corporations are treated as individuals for the purpose of assigning them legal rights and duties and adopted children are treated as the natural children of their adopted parents not only for inheritance purposes, but in order to receive the full legal status of a natural child. The doctrine of attractive nuisance treats child trespassers as invitees in certain tort cases, in order to establish the owner's liability for incurred damages.

Ultimately, legal fictions constitute a paradox: Conservative while progressive, ambiguous yet pragmatic, both overt and covert, they are devices to grant legal rights and duties as much as to normativize and silence. Perhaps even more problematic, in their notorious 'counterfactual' conception, a false dichotomy between properly factual and fictional propositions is suggested, rendering the law an improper reproduction of the 'real'. Yet such an image of the law threatens to obscure the contradictory and already problematic nature of the 'real' itself. In his study on legal fictions, Quinn suggested, that perhaps "the most significant power wielded by judges and politicians" is "an epistemological power, a power precisely to supply the analogies by which the rest of us make legal sense of legal and political events" (Quinn 2015, 68). Yet if this is so, it is even more important to recognize, examine and question this epistemological power; an endeavour also enabled, complemented and furthered by any detailed study of legal fictions. In order to attest to the long-held notion that legal fictionality always serves equity (MacLean 1999, 5), legal fictions certainly have to be created and applied with self-critical caution. 13

2. Law

2.1. Early Origins

In the law of ancient Greece, legal fictions were neither analysed nor defined. This deficiency, together with the paucity of examples of the use of legal fictions, renders the conceptual analysis of legal fictions impractical in the Greek context (Olivier, 1973, 3). 14

2.1.1. Roman Law

Roman law, by contrast, made extensive use of legal fictions, even if the Romans were not inclined towards theorizing on the concept and practical usage (Olivier 1973, 3). Procedural fiction and friction in legal substance was often resolved by means of an operation that the Romans denoted as *fictio*. There are two pivotal reasons for the ubiquity of fictions in Roman law: On the one hand, a historical change with respect to legal sources occurred in the early 2nd century BCE; from then on, the praetor was granted the power not merely to hear cases but to create new legal actions, a power which was rapidly understood as a tool to circumvent statute law, without effecting any lasting impact on the legal statute itself (Ando 2015, 319). On the other hand, the rapid expansion of the empire demanded that the law account for new and unforeseen social, economic, ecological and linguistic realities (Ando 2015, 320). It was often by means of fictions that private individuals came to be informally invested with magisterial power, or that cases between aliens on alien soil were imagined by proxy as being lodged between Roman citizens in the city of Rome (Ando 2015, 320). In many such cases, the legal remedies employed by the Roman jurists were deemed fictions. Nevertheless, these operations were neither conceived as counterfactual nor as logical or legal falsehoods. From 15

a modern perspective, they appear closer to what might be described as analogical, in that two situations were construed as similar; as a result, a "symmetry of consequence" was deliberately ordered as legal consequence (Birks 1986, 94–99). The instrument of legal fictions thus allowed the Roman law to be progressive enough to adapt to legal change unforeseen by legal statues, while at the same time preserving its conservative character, by not requiring laws to be formally amended.

Only one extended treatment of fictions as foundational to Roman civil procedure has been preserved from classical antiquity. It can be found in the fourth book of Gaius's *Institutes*. Ironically, the one manuscript of that text to survive is missing the relevant page and, indeed, the sentence just prior to the apparent introduction of the topic of fictions (Ando 2015, 296). From this text it can be deduced that fictions could be granted by the praetor as the magistrate who exercised supervisory jurisdiction over the city of Rome. Since statutes were cumbersome to pass, Roman jurists understood it to be the responsibility of the praetor to supplement or correct statute law according to evolving social, material and economic realities (Ando 2015, 296). Gaius provides an enumeration of various exemplary fictions:

1. A fiction limited the power to seize real security from delinquent taxpayers by private tax farmers. The collection of taxes was first handled by the magistrates, but later performed by private tax farmers who by statute were also given the power to seize real security. According to the fiction, a debtor would be condemned to pay the same amount of money to a tax farmer which he would have been formerly compelled to pay in order to release his property, if it had been seized as security for the debt by a magistrate (Gaius *Institutes* 4.32).
2. *Actio servana*: A party who claimed possession of the property of an estate could bring an action as a fictitious heir; without such a fiction, the purchaser or would-be possessor of the goods of a deceased would not have been entitled to a direct action by statute law and could not allege that what formerly had belonged to the deceased was his, nor could the party demand that what was due to the latter should be paid to him. Under the fiction that he was the heir, he could assert his claim in an action as if he were heir to the property in question (Gaius *Institutes* 4.34).
3. *Actio Rutiliana*: The purchaser or possessor of the property of a bankrupt estate could similarly proceed under the fiction that he was the heir; under this fiction he could sue in the name of the deceased previous owner for recovery of goods or payment of debts, but the defendants would be obligated to pay in the name of the purchaser; this way his adversary would be condemned to pay him on this account the possessions of the deceased or what was due to him (Gaius *Institutes* 4.35).
4. *Actio publiciana*: Fictitious usucaption could be granted for an action by a party without the necessary full legal title. Had a party acquired possession lawfully but not yet completed the time period for usucaption, he could not, upon losing possession, sue for the item in statute law. In such a case, parties were allowed to employ the fiction that they had in fact completed the period of usucaption to be able to sue as (fictious) owners (Gaius *Institutes* 4.36).
5. Fictitious Roman citizenship could be feigned in the case of an alien, if he either sued or was sued in an action established by Roman laws, provided that the action could be lawfully extended to aliens, i.e. the action of theft, or for damage to property (Gaius

Institutes 4.37). Without the use of fictions, aliens would have been largely excluded from Roman courts, at least in Rome itself, despite being deeply integrated within Roman society (Ando 2015, 298).

6. In the case of a diminishment or forfeiture of civil rights, being unable to appear before a Roman court could be avoided by a fictitious reversal of the loss of civil rights. Forfeiture of civil rights could, for instance, result from coemption in case of a woman, and from arrogation in case of a man. In order that that party were unable to annul rights granted by Civil Law against him or her, an equitable action was granted by means of fiction, so that it could be feigned that the party had not suffered this particular disability (Gaius *Institutes* 4.38).

Some of these fictions apparently facilitated the scope of the law to expand in order to close the gaps between contemporary practice and statute law. Others wanted to embrace persons or actions excluded by statutory law by transferring a specific legal status onto the individual or fictitiously extending a party's legal position: the purchaser is treated as heir, the possessor as usucapion owner and the alien as citizen (Ando 2015, 298). Subsequently, the Roman fictions served to enable a circumvention of the law, in that it allowed under certain circumstances for legal consequences to be assumed, even if the conditions required by the strict law were not entirely fulfilled. Thereby the desired legal consequences could be enacted, even though the key legal facts were not fully met as generally ordered by the *ius civile*. This fiction then, could be said to really rely on the fact that the praetor does not make law, but merely applies it, whereas his alleged application of the law does in effect alter it (Kelsen 1919, 646). 17

According to Ando, there was no significant controversy surrounding legal fictions within the Roman context that we know of today, despite their ubiquitous presence (Ando 2015, 299). Apparently, it was indeed less controversial to extend the scope of application of a legal norm for an exceptional case by means of a fiction while leaving the general principles of Roman law – at least seemingly – undisturbed (Ando 2015, 305). Roman jurists never discussed the nature of, or endeavoured to explain or define, the concept of legal fictions, but deliberately employed them only to the extent that they could serve a practical purpose. The research of the Glossators marks the beginning of scientific research on the concept of legal fictions. By differentiating between presumption and fiction, they established that in case of the latter, the assumed fact is deliberately counterfactual and does not allow for proof of the contrary (Olivier 1973, 14). Moreover, fictions were invoked for the benefit of utility (*utilitatis causa*), operating contrary to the truth (*contra veritatem*), and were said to have *juris effectus*, i.e. to be lawful or have a lawful effect (Olivier 1975, 16). In contrast to the jurists of later periods then, these early scholars merely identified some key elements of legal fictions but did not assimilate them in order to devise a comprehensive definition (Olivier 1973, 18). Perhaps this is one of the reasons why legal fictions during the Roman empire did not arouse the huge anxiety that they did in later periods. 18

2.1.2 Babylonian Law

19 Despite the heading of this section, the term "Babylonian" must be viewed in a differentiated manner, since Babylon was dominated by very different cultures in the course of history and therefore a uniform understanding or conception of law cannot unconditionally be assumed. Insofar, the assertions made here refer primarily to the context of the *Codex Hammurabi*. What is however certain, is the fact that legal fictions are not unique to European legal contexts but have an equally long or even longer tradition beyond European origins. For instance, fictions were employed in the Mesopotamian law of the second millennium BCE, despite the essentially practical spirit that prevailed among Mesopotamian jurists; in this vein, fictional hypotheses have been preserved from the Hammurabi code, that were used to evade the application of imperative juridical norms (Pugliatti 1968, 660). In such cases, mandatory rules were considered substantially abrogated, and what was originally considered an expedient if fraudulent application of the law was resolved into a simple fiction (Boyer 1954, 87–90; Pugliatti 1968, 660). Such Babylonian fictions often suspended existing legal rules in order to provide a more effective legal instrument. The use of fictions in ancient Babylonian law facilitated the progress of positive law by helping to find new solutions. Moreover, it reveals a continuous effort towards the logical construction of the law; their methodology demonstrates a desire to rationally justify the creation of new legal instruments through analogical reasoning operating on counterfactual hypotheses (Boyer 1965, 108). Thus, the Babylonian jurists distinguished between the consequences attached to the imaginary fact – to be able to eliminate those which might be useless or embarrassing, yet they did not qualify the analogy in terms of any general principles (Pugliatti 1968, 662; Boyer 1965, 108). The difficulty resulting from the lack of transparency of legal fictions seems to have arisen as early as these ancient Babylonian laws, in that those instruments were applied without making obvious their artificial design or their tendency towards inconsistent application (Pugliatti 1968, 662).

2.1.3. Rabbinic Law

20 In rabbinic law, legal fictions can be found in rabbinic literature of all periods and geographical centres. The major sources of literature on legal fictions date back to the tannaitic period during the first two centuries CE and the amoraic period in ancient Palestine during approximately the third and late fourth centuries CE (Moscovitz 2015, 326). Whereas ritual fictions appear to dominate, they are equally present in civil law. In contrast to the mainly practical purpose of Roman legal fiction observed above, the scholastic character seems to be the most prominent quality of rabbinic legal fictions. In such a vein, they frequently facilitate the theoretical analysis and explanation of the law, instead of wanting the law to conform to the desired legal outcomes. Bound to a more theoretical objective, rabbinic fictions usually do not account for exceptions from given laws but emerge in the course of consolidating and generating general legal principles foundational to legal rules or statutes (Moscovitz 2015, 325). Therefore, legal fictions

in rabbinic literature are almost invariably not judicial fictions but legislative fictions (Moscovitz 2015, 327). Moscovitz provides various examples for rabbinic legal fictions, some of which employ fictional formulations for presumably stylistic rather than legal or conceptual considerations, whereas others do reflect legal considerations, and instruct to alter reality for legal purposes, instead of simply disregarding particular aspects of reality (Moscovitz 2015, 330–331).

2.2. Historic Development

There is a long history of a rich, conceptual debate on legal fictions and numerous major legal authorities have engaged with the topic. Between the final third of the 18th century and the first third of the 20th, legal philosophers and historians frequently discussed the concept and functions of legal fictions (Lind 2015, 85). Pierre de Tourtoulon provided perhaps the broadest and most favourable characterization. Most significant for the law's progress and practical growth, the law would remain practically empty, once stripped of every fiction, Tourtoulon said (Tourtoulon 1922, 388). 21

2.2.1. William Blackstone

William Blackstone (1723–1780), the judge and jurist whose *Commentaries on the Laws of England* (1765–69) continue to provide the best-known description of the doctrines of English law available, perceived fictions as "highly beneficial and useful" in furthering growth in legal doctrine and avoiding mischief in the application of general rules. Blackstone came to the defence of legal fictions in several passages of the *Commentaries*, based on historical precedent, by demoting their impact, and emphasizing their utility. Due to the maxim that no fiction shall extend to work an injury, fictions, he thought, operated to prevent mischief or to remedy an inconvenience that might result from the general rule of law (Blackstone 1979, III 43). Despite his favourable view on legal fictions, Blackstone was irritated by the strange logic on which they depend and considered their tendency to confuse and annoy a drawback (Blackstone 1979, III 43). Blackstone thus conceded that fictions tend to result in an administrative or doctrinal "labyrinth", nevertheless he deemed these complications a necessary consequence of a long-established and complex system of jurisprudence (Blackstone 1979, III 268). Blackstone's generous and somewhat sentimental attitude towards legal fictions is perhaps best preserved in his well-known metaphor of the common law as a Gothic castle, "erected in the days of chivalry, but fitted up for a modern inhabitant", while to Blackstone it is a construction "magnificent and venerable" in its "useless" embellishments, both "cheerful and commodious" even if the approach is "winding and difficult" (Blackstone 1979, III 268). 22

2.2.2. Jeremy Bentham

The eminent jurist and philosopher Jeremy Bentham (1748–1832) displayed a highly-critical attitude to fictions, somewhat obscured by inconsistencies both of expression and of argument, but his objections to legal fictions are traceable to their use in "deceptive or fallacious argument" (Quinn 2015, 56, 55). For Bentham, a legal fiction was a "false assertion […] which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true" (Bentham 1843, IX 77). With regard to legal or moral fictitious entities, such as "obligation" or "power," the usefulness of this category of legal fictions "is conditioned on their capacity to be successfully paraphrased" (Quinn 2015, 65). Bentham's most scathing critique was directed at theoretical fictions which he considered "fallacies", denouncing the entire category as either "wishful theoretical fancy or illicit judicial lawmaking" (Quinn 2015, 65; Lind 2015, 85). More precisely, Bentham considered legal fictions, such as the legal maxim 'the king can do no wrong', to be an "instrument of fraud and extortion" contrived by judges "to make the individual pay, as if it were the plain and honest expression of his will, for a tissue of absurdities, which have no more natural connexion with it than a chapter out of the adventures of Baron Munchausen, or the tales of Mother goose" (Bentham 1839, XII, 582). In Bentham's view, it is the English lawyer whose legal lucre surpasses all competitors of any other nation and within whose field of legal practice the administration of justice by means of legal fictions amounts to the "most pernicious and basest sort of lying" (Bentham 1839, XII, 582). Whereas Bentham saw theoretical legal fictions as a tool for an illegitimate usurpation of legislative function by the judiciary, he was less critical of legal fictions in their manifestation as abstract legal entities, which he considered indeed necessary. As a necessary component of language, concepts such as "obligation" or "power" are, according to Bentham, essential for communicating with the outside world. Language needs such abstract concepts because only in this way can it reach beyond the substance of real objects (Quinn 2015, 60; Albrecht 2020, 109). 23

2.2.3. Friedrich Carl von Savigny

German jurist Friedrich Carl von Savigny (1779–1861) considered fictions a critical factor in the development of law. Legal fictions, according to Savigny, allow for new rules and doctrines to be put into effect in harmony with existing legal institutions. With the help of fictions, legal change can be implemented without causing any unnecessary disturbance and, at the same time, preserving legal certainty. As stated in Savigny's doctrine of the legal nature of juristic persons, the concept of "person" does not merely denote the human individual, but, in a larger sense, any Rechtssubjekt or separate rights and duties bearing legal entity. Savigny's framing of juristic persons as "artificial subjects, conceived merely by our imagination" has, however, been frequently misconstrued as fiction theory which denies the legal reality of juristic persons, especially of corporations (Savigny 1840, 236; Pollock 1911, 219–223). Yet Savigny's use of abstract-philosophical terms for his observations on the legal nature of the juristic person was not exactly in- 24

tended to refer to a "fiction," thus denying its legal reality, but to emphasize its lack of organic existence (Koessler 1949, 443). Pursuant to Savigny, the legal person is a theoretical construct that allows for legal attribution.

2.2.4. Sir Henry Maine

Sir Henry Sumner Maine (1822–1888), comparative jurist and historian, echoed Blackstone to some degree in his take on legal fictions, if almost a century later. Subscribing to an evolutionary theory of legal history, Maine attributed legal fictions to a specific function within the historical development of law. Whereas Maine agreed with Blackstone that legal fictions were anachronisms from the past, he considered them of far higher importance than did Blackstone. According to Maine, they are quite balanced in that they can "satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present" (Maine 2012, 26–7). According to Maine's definition, legal fictions are assumptions that deliberately conceal, or affect to conceal, "the fact that a rule of law has undergone alteration, its letter remaining unchanged; its operation being modified" (Maine 2012, 26). Maine was convinced that the value of legal fictions could not be appreciated if detached from the evolutionary process of legal reform, as they merely preceded legal change by legislation. Whereas he judged legal fictions to be "invaluable expedients for overcoming the rigidity of law" in some formative stages, he found fictions to work against coherent understanding of legal rules in more mature stages of the process, such as the stage the law had acquired by the time of his own writing. The day of legal fictions, Maine thus writes, "has long since gone by". He considered it "unworthy" of contemporary legal practice "to effect an admittedly beneficial object by so rude a device as a legal fiction". No longer "innocent," the anomaly of legal fictions had begun "to make the law either more difficult to understand or harder to arrange in harmonious order". By the time of Maine, legal fictions had become "the greatest of obstacles to symmetrical classification, framing the law "a mere shell," that had been "long ago undermined," while "a new rule hides itself under its cover". For the law to "assume an orderly distribution, it will be necessary," Maine assessed, "to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it" (Maine 2012, 27–8). 25

2.2.5. Rudolf von Jhering

Another German legal scholar, Rudolf von Jhering (1818–1892) famously categorized legal fictions into historical and dogmatic, the former serving as instruments for changing the law, whereas the latter arrange and classify existing law, often in new or creative ways. The category of historic fictions is to some degree a deceptive one; while the fiction's purpose is changing the law, the specific means of operating this change by use of a fiction simultaneously sets out to conceal that very aspect (Demos 1923, 44). The best-known instance of a dogmatic fiction is a corporation's rendering as a person, whereby it can assume a nationality, be treated as alien enemies, or be granted diplomatic protec- 26

tion. There is no metaphysical consideration involved here, but a legal concept is merely extended in the scope of its application. To Jhering, the primary function of all fictions is just such an analogical extension, thus he famously called them 'crutches' (Jhering 1924, 297).

2.2.6. Hans Vaihinger

27 German neo-Kantian philosopher Hans Vaihinger (1852–1933) published his best-known work, *Die Philosophie des Als Ob* (*The Philosophy of 'As-If'*), in 1911, which was translated into English by C.K. Ogden and published in 1924. Elaborating on a functionalistic theory of knowledge in general, Vaihinger construed "juridic fictions" as analogous to mathematical or scientific fictions. Subsequently, they do not in principle differ from epistemological fictions (Vaihinger 1913, 447). Mathematical concepts such as negative numbers or infinity do not resemble reality but are neither counterfactual to actual reality. Both characterized by its end and means, a fiction's purpose is the cognition of this 'reality'. This cognition is accomplished by means of a fabrication, a thought process that requires a deliberate mental detour from 'reality' and thus establishes the contradiction to actuality which facilitates epistemological insight. Legal fictions then are intellectual devices that enable a deeper comprehension of the legal system, in the same vein as mathematical or scientific devices allow one to discern a deeper understanding of 'reality'. Legal fictions aim at the comprehension of the law, at the intellectual mastering of the legal order (Kelsen 2015, 5). Nevertheless, Vaihinger was also aware of the concept's complications, in particular its potential threat to marginalized groups: "In legal practice", he wrote, "the employment of fiction may lead both to benefits and also to the grossest forms of injustice, as when all women were treated as if they were minors" (Vaihinger 1965, 148).

2.2.7. Hans Kelsen

28 Austrian jurist, legal and political philosopher Hans Kelsen (1881–1973) built on Vaihinger's work. Key to conceptualizing legal fictions, according to Kelsen, is a clear-cut distinction between the fictions of legal theory and *fictiones juris*, the fictions of legal practice. Judicial or legislative fictions, Kelsen says, do not constitute fictions in Vaihinger's sense since they do not facilitate any thought processes or acquisition of knowledge (Kelsen 1919, 639). As an act of will, they serve to regulate, to provide a norm of action, instead. Though often framed in the "as-if" conditional normally found in epistemological fictions, they lack the object of cognition despite the similar wording. The legislator or judge simply broadens a norm and extends it in scope to regulate conduct in a new or unforeseen case. The law in such a case operates without any fiction, nor any contradiction to actuality (Kelsen 1919, 642). The function of the legislator in such a case is limited to the act of attaching legal consequences to certain situations. Theoretical fictions, on the other hand, are auxiliary concepts or constructions that are intended, for instance, to make the concept of the legal subject or the concept of subjective

law conceivable (Kelsen 1919, 633). As to the fictions of "freedom" and of the "social contract" which Vaihinger deemed crucial for the establishment of public criminal law, Kelsen states that they are not fictions of legal theory, but rather ethical or legal entities (Kelsen 1919, 650). As such concepts are not part of the factual world, they are also incorrectly labelled as fictions. With regard to the truth value of 'proper' theoretical fiction, Kelsen makes plain that normative cognition is not directed at actual 'reality' at all. Therefore, normative concepts can be inherently contradictory, however they cannot possibly contradict 'reality' (Kelsen 1919, 656). Consequently, for Kelsen, legal fictions can facilitate cognitive or normative purposes. Yet, when they work by establishing a full legal equivalence by placing two different cases under the same rule, this may result in an illegitimate modification of the existing rules or a legitimate legislative operation (Gama 2015, 360).

2.2.8. Lon Fuller

29 American legal philosopher Lon Fuller (1902–1978) is perhaps the best-known theorist of legal fictions. In his 1930 article series for the *Illinois Law Review*, later published as a book by Stanford University, he stated that a legal fiction differs from a lie "by the fact that it is not intended to deceive," but "adopted by its author with knowledge of its falsity" (Fuller 1967, 6–7). Fuller acknowledges that there is an element of disbelief or "partial untruth" in the use of legal fictions, a fact that would surely be clear to others (Fuller 1967, 8). In his work then, Fuller provided what for many has become the classic definition of the legal fiction:

> "A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility" (Fuller 1967, 9).

30 Fuller takes direct recourse to Vaihinger's assessment of fictions as "expedient, but consciously false" assumptions (Fuller 1967, 7). Appreciatively inclined towards most historical and dogmatic fictions, Fuller was critical towards their foundation on pretence. "A fiction taken seriously, i.e. 'believed'" is no longer beneficial, but "becomes dangerous and loses its utility" (Fuller 1967, 9–10). In the context of Roman fictions, for instance, Fuller emphasized that it was indeed their stated falsehood that operated as harmful whereas, on the surface, they appeased "a longing for an appearance of conservatism" (Fuller 1967, 37). "By framing innovations in terms of older rules," some justification for them was secured, "even though the pretenses involved carried on their face the acknowledgement of their falsity" (Fuller 1967, 37).

31 Although Fuller's work on legal fictions seems indispensable, it has attracted criticism. Kenneth Campbell argued, for instance, that Fuller's work, while exceptionally rich in examples, falls well short of crafting a theory of legal fiction (Campbell 1983, 340–341). This critique is echoed by Burkhard Schafer and Jane Cornwell, who find it particularly problematic that Fuller fails to establish the criteria that are both necessary and sufficient

to distinguish legal fictions from a whole variety of other phenomena, such as perjury, mistakes or mere metaphorical expressions (Schafer & Cornwell, 2015, 178–179).

After Fuller and many centuries of rich, conceptual debate on legal fictions, the theoretical interest in them ceased. Instead, theorizing on legal fictions "fell for several decades into relative jurisprudential obscurity" (Lind 2015, 86). Indeed, so few law journal articles were published in the following decades that Louise Harmon could rightly observe that legal fictions had become nearly forgotten by 1990 (Lind 2015, 86; Harmon 1990, 1–71). 32

2.3. Modern Conceptual Debate

Renewed theoretical interest surged once again in the 21st century. New philosophical inquiry increasingly began to focus on the conceptualization of legal fictions as well as possible definitions. Other scholars critically examined the doctrinal or normative status of legal fictions across various legal regimes. Additionally, much of the more recent debate on legal fictions has demonstrated a tendency to condemn legal fictions in the Benthamic tradition. Under this new scholarship, according to Douglas Lind, "the legal fiction has become, for the most part, an inflammatory concept marking a legal doctrine or regime as manifestly unjust, needlessly complex, or intentionally deceptive" (Lind 2015, 87). What unites historical scholars with contemporary scholarship on legal fictions is the sentiment of fictions as "falsehoods," or "consciously false assumptions" (Lind 2015, 87). Despite a predominantly critical stance, there has been much recent debate about possible definitions of legal fictions, their artificiality and their alleged opacity. 33

2.3.1. Defining Legal Fictions

Whereas various scholars still rely on Fuller's definition of legal fictions, there is no agreement on their ontological quality or sustaining doctrine. The wide range of approaches extends not only to possible definitions of legal fictions, but also to their classification and foundational status. 34

For Pierre Olivier, a legal fiction is "a legal rule by which the same legal results are ascribed to a specific fact (the fiction base) as those attached to another fact (the feigned fact)" (Olivier 1975, 21). On the one hand, this formulation seems not entirely without its problems, since it describes the fiction as a 'rule', whereas the fiction explicitly aims to avoid the establishment of a general or new rule. On the other hand, this definition seems to resemble that of an analogy, which is indeed very similar to a legal fiction, but certainly not to be equated with one. It appears more accurate when he later describes the legal fiction as "an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being 35

permitted by law or employed in legal science" (Olivier 1975, 81). Maksymilian Del Mar, in contrast, finds it more accurate still, to qualify a legal fiction as "a 'suspension' of an operative fact rather than an 'assumption' of fact made" (Del Mar 2015, 229). According to Del Mar, an assumption is precluded by the fact that one positively knows there is evidence to the contrary. Moreover, he rejects as unnecessary the probability standard assumed by Olivier. Subsequently, Del Mar defines legal fictions as "any suspension of one or more of the required operative facts leading to the imposition of an associated normative consequence, whether this suspension is introduced because of (1) the absence of proof of some previously required fact; or (2) the presence of proof to the contrary" (Del Mar 2015, 225). In one of the most recent studies on fictions in German, Kristin Albrecht defines a legal fiction as a conceptual construct in law that artificially deviates from a superior rule (which refers to said conceptual construct) in order to fulfil a supraordinate purpose of the law (Albrecht 2020, 226).

36 Petroski on the other hand, takes less of an issue with the definition's particular phrasing but rather with its underlying rationale. The idea that fictions are "consciously counterfactual propositions", Petroski writes, "is historically contingent and incomplete". Instead, she prefers to think of fictions as communicative devices, signalling the futility of further justification to a non-legal audience (Petroski 2015, 132). Petroski is not the first to focus on the linguistics of legal fictions; scholars ever since Fuller have treated fictions as a linguistic phenomenon. But even before Fuller, such an interest had already surfaced; for instance, with the conception of Vaihinger's theory of the "as-if" and Kelsen's reworking of said approach; or with Bentham, who also regarded the legal fiction as a special form of linguistic fiction.

37 Stern conceptualizes the fiction as "legal version of the metaphor," and finds the term "legal fiction" best reserved for what Alf Ross describes as "posed propositions" (Stern 2015, 157). Since legal fictions depend "on a truncated causal chain that excludes any consequence other than the doctrinal consequence", Stern asserts that they nevertheless "lack the generative potential of metaphors" (Stern 2015, 157). Their narrative logic is "an essential and commonplace feature in law", and law's narrative quality the rule rather than the exception (Stern 2017, 314). A fiction is created to obtain a certain authorization, while metaphors incite the imagination to make further connections. Stern describes this process on a linguistic and cognitive level; in a fiction, the jurist forgoes the comparison of two categories together with its attendant rationale. The jurist simply asserts the exchange of one category with another, and thereby forecloses any opportunity for extension. Ultimately, as Stern delineates, by "replacing the simile with a metaphor and presenting the relationship as an identity, the jurist eliminates the generative effects that the analogy would promote" (Stern 2015, 160). Even if this exhibits a level of artifice, according to Stern, it is not so different from the many other "fabrications" the law abounds with. Instead of defining fictions according to content, Stern suggests distinguishing fact from fiction according to the differentiations that readers make when encountering material, associating it with one or the other (Stern 2015, 160). Kristin

Albrecht distinguishes metaphors as distinctively descriptive and implicit as compared to fictions, which, she insists, are prescriptive and explicit and thus should be rendered as normative metaphors (Albrecht 2020, 208–209). Del Mar, by contrast, contends that it is "an interesting exercise to trace the genealogy of terms used in the law" but he is uncertain "how including fictions under the canopy of metaphors in legal language assists us to understand them better" (Del Mar 2015, 236). Perhaps this is one of the reasons why many contemporary scholars rely on the workings of legal fictions rather than on their qualification through definition. Accordingly, Nancy Knauer identifies the traditional legal fiction as "enabler" that serves "to facilitate the application of the law to novel legal questions and circumstances" (Knauer 2010, 9). Whereas some legal fictions indeed consist of "bald untruths", most "operate more in the realm of metaphor", a realm that, according to Knauer, operates on an "as if" assumption, not unlike Vaihinger had suggested more than a century ago (Knauer 2010, 9–10).

2.3.2. Classifying Legal Fictions

38 Much of the contemporary debate on legal fictions is dedicated to the distinction between different categories of fictions, and these classifications are in turn instrumental for including or excluding particular examples from the overall class of legal fictions. One crucial distinction is drawn between theoretical fictions and fictions of practice, and thus it is argued that fictions in practice are not in fact fictions at all. Genuine fictions, according to Kelsen, are only fictions of legal theory; if a judge, or the legislator employs a fiction in a statute or a specific ruling, there is simply no fiction involved. A rule is laid down or a decision made, but such an act can never be counterfactual, since no claim on the 'real' is made. Whereas the result might be *contra legem*, wrong in law, it cannot conflict with reality (Kelsen, 1919, 639). In spite of Kelsen's line of argument, many theorists view practical fictions as fictions nevertheless and treat them accordingly.

39 From a historical perspective, Michael Lobban distinguishes between 'factual' fictions and 'metaphysical' fictions. The former, as Lobban argues, were procedural fictions that the common law was replete with since they allowed one form to be used for novel purposes and subsequently for the three common law courts to expand their business in the later Middle Ages (Lobban 2015, 201). 'Metaphysical' fictions, on the other hand, were more abstract, i.e. "rules created by the law, rather than the parties, to solve particular conceptual doctrinal problems" (Lobban 2015, 204). Presumption and representation are among the five historical examples Lobban enumerates: the personal unity of husband and wife would be an example of the latter. Moreover, Lobban identifies so-called 'explanatory' fictions specifically employed to justify or make sense of the law. In effect, more closely resembling an analogy, such fictions employed metaphors to help describe a rule of law, i.e. the position of the king (Lobban 2015, 206). In some cases, they served no other purpose than to justify a rule that was fixed, in which case Lobban defines them as historical fictions (Lobban 2015, 207).

In his 1930 article, Fuller differentiated between exploratory, emotive, expository, descriptive, historical and apologetic or merciful fictions. For Fuller, exploratory fictions are constructions "feeling the way" toward some new and more general principle (Fuller 1930b, 528). He further distinguished expository from "emotive" fictions. In case of the former, the author uses the fiction as a means of conveying what he had in mind, perhaps simply to achieve a succinct mode of expression. Emotive fictions, on the contrary, are employed for "less worthy-purposes", as when the author prefers "a pretense to a plain statement of fact because of the emotive force of the pretense" (Fuller 1930b, 516). Descriptive fictions serve as a "convenient shorthand", indicating that the purpose of the fiction is to avoid an inconvenient circumlocution, and as much as to make clear that it is possible to avoid the fiction by spelling the thing out, in replacing the truncated causation with a more elaborate explanation (Fuller 1930b, 537). Historical fictions, Fuller asserts, were often introduced for motives of policy or convenience, emotional or intellectual conservativism, all of which resulted in an effort to introduce new law in the guise of the old (Fuller 1930b, 519–524). Last on his list, apologetic or merciful fictions apologize "for the necessity in which the law finds itself of attributing to the acts of parties legal consequences which they could not even remotely have anticipated" (Fuller 1930b, 539). 40

In a more recent approach, Raymundo Gama takes recourse to Riccardo Guastini, when he delineates a mere four key constellations for the application of legal fictions: Firstly, statutory or legislative fictions, such as the statutory fiction of the unborn child. Secondly, historical, creative or jurisprudential legal fictions, i.e. a judicial technique conceived to modify an existing rule in order to make it applicable to new situations; for instance, to extend a court's jurisdiction. Thirdly, he names fictitious entities, i.e. mental constructs of the legal science, such as the concepts of person, state and organ. Lastly, legal fictions denote instances of false representation in relation to an ideology, as the fiction that judges do not make the law (Gama 2015, 359). In Kelsen's view, the former two would most probably be disqualified as fiction. 41

This rather brief survey of different concepts of and approaches to the classification of fictions clearly illustrates that none of these categories are set in stone or are given beforehand. It also reveals to what degree the status or category of legal fictions depend on the different doctrinal approach and the lines drawn by it. Moreover, the disparity between the varying specifications – whether formalistic or functionalistic – shows that legal fictions are a living mechanism, subject to different theoretical currents. They are, however, also quite versatile in that they are able to adapt to their various intended functions. 42

2.3.3. The Artificiality of Legal Fictions

Bentham famously denounced legal fictions as "sham," whereas Schauer finds their "basic problem" to be the fact that "a fiction is, by definition, untrue" (Schauer 2015, 114). Del Mar avers that to "call a fiction a 'statement' seems artificial, especially in the adjudicatory context where it is surely more usefully understood as a device of reasoning" (Del Mar 2015, 225). Del Mar is certainly not alone, when he finds a tendency for 'fiction' to be used as a term of disparagement in legal argument (Lee 2015, 256). The fanciful nature of legal reasoning through legal fictions appears to indicate for many that the user of said fiction is guilty of the allegedly "diabolic tendency" to manipulate language (Birks 1986, 83). If the legal fiction is conceptually framed as "intentional untruth in the law", there is little surprise at the subsequent irritation felt in its encounter in "an institution allegedly committed to truth-finding" (Schauer 2015, 114). The fiction has a questionable reputation of deception, or manipulation, or even a lie, posing a fanciful or bizarre distortion of 'reality'. This is the reason, why "relying on a legal fiction is overwhelmingly pejorative these days" (Schauer 2015, 113). Yet any conception of legal fictions along a true-false dichotomy may be missing the point. 43

As Gama asserts, fictions are "neither statements nor assertions", nor are they "consciously false assertions or statements formulated with consciousness of their falsity". Instead, fictions are "created in the application of law" and therefore do not intend or pretend to assert empirical truth (Gama 2015, 362). Fictions operate "at the level of rules" by which, irrespective of their legitimacy, a judge extends the application of an existing rule to a situation of fact that cannot be subsumed under that rule, and thus "creates a new rule" (Gama 2015, 362). 44

In a similar vein, Douglas Lind calls the tradition of equating "consciously false assertions" with legal fictions "unfortunate," a theoretical conception that "marginalizes all fictions as metaphysically suspect regardless of social value, and compromises the integrity of law and judicial decision-making". Instead, he wants legal fictions to be understood as "propositional legal truths", i.e. doctrines, rules, principles, asserted in "conscious recognition" that they are inconsistent in meaning or perhaps otherwise "in semantic conflict with true propositional claims" made outside or within the law (Lind 2015, 83). As long as a fiction "works some efficiency or functional improvement within the system of law", it has "value and utility", according to Lind (2015, 83). Yet he also concedes that a fiction can be inconvenient and problematic once it "generates confusion or incoherence, frustrates ability to function" or "does not work some genuine utility within law" (Lind 2015, 83). Such are for Lind nullification and falsifying fictions, in that they either serve a deliberate effort to avoid legal responsibility or produce adverse social consequences. Lind reverts in this context to the frequently cited example of *terra nullius* (Lind 2015, 102–105). Ultimately, it is their "intersystemic inconsistency", not falsehood, that for Lind "marks a legal proposition as a fiction" (Lind 2015, 102). 45

Stern, by contrast, likens the narrative logic of legal fictions to the narrative logic of fiction. Since legal fictions arbitrarily curtail the chain of causal effects and display a highly artificial kind of truncated causation, they can make the law's image of the world seem distorted or bizarre (Stern 2017, 313–314). According to Stern, it is their "ostentatiousness" that makes these doctrines "seem brazen about their fabricated status", and even, Stern asserts, "emphatically capricious and fallacious" (Stern 2017, 314). A spectrum that encompasses varying modes of legal fictionality might reveal otherwise obscure connections between more openly creative doctrines, and those relegated to the category of legal truths or facts (Stern 2017, 322). What is "true in law", no matter how widely true in that domain, "is still a legal fiction so long as it fails to correspond to our experience of the world", and this is precisely what "makes it a fiction" (Stern 2015, 164). Moreover, in his most recent work on legal fictions, Stern argues somewhat surprisingly, that legal fictions self-referentially reveal the law's own constructiveness. It is legal fictions in particular, Stern purports, that make visible the artifice of law, together with its constructive capacity (Stern 2020, 197). 46

Petroski resolves the controversy surrounding the falseness or fabricated nature of legal fictions in the more general terms of specialized language usage. The viability of both term and concept, Petroski asserts, depend not so much on the law's tendency towards self-delusion or mystification of power relations, or a constant need for adjustment of legal norms to accommodate new circumstances. Instead, she suggests that "legal conventions of communication will always be slightly out of step with conventions used outside the legal sphere, and many legal actors acting in good faith will likely continue to note and compensate for that disparity" (Petroski 2015, 154). 47

Legal fictions, in short, are an inherently dynamic resource that can, perhaps, be most easily appreciated over time. Legal fictions are not necessarily signs of the immaturity of the system, as Bentham once claimed, but can, if wisely used, enable lawgivers and judges to benefit from their mechanisms; they can be both flexible, and responsive, while, at the same time, providing some reliable stability. Yet, perhaps it is precisely the ambivalent quality of legal fictions that produces invention and generates creative potential, as indicated earlier. Ultimately, it may be the qualities of legal fictions that both jurists and laypersons find most bewildering or logically confusing, that enable mental activities that facilitate the creation of new concepts. By the same token, awareness of their inherent challenges may generate creative as well as critical potential much like imaginative power does in the realm of literary fiction. 48

2.3.4. The Opacity of Legal Fictions

Another major criticism levelled at legal fictions is their intrinsic risk of obscurity. Again, it was probably Bentham who first accused legal fictions of enabling lawyers to maliciously conceal their law-making activities. Even Fuller conceded that "fiction may obscure the process of legislating". Whereas Fuller did not believe that fictions could de- 49

ceive anyone into the belief that no change had occurred in the law, he did admit that they could indeed create the impression that the change had been no greater than by an analogy, an overt extension of legal principles (Fuller 1930b, 519–520). Whereas Fuller was correct to qualify this distinction as one not of kind but of degree, legal transparency certainly is not trivial. Stern, therefore, deems doctrines to be "so entirely creatures of the law that no one would mistake them for anything else" (Stern 2020, 196). Nevertheless, he also likens the function of legal fictions in law to that of metafiction in literature, in that they highlight law's constructive nature and are perhaps necessary for us in order to realise its artificiality (Stern 2020, 197).

50 Accordingly, Peter Smith distinguishes 'new legal fictions' from classic legal fictions not only by their broad application but by their greater tendency toward misrepresentation and judicial opacity. Smith argues that whereas classic legal fictions are deliberately employed as an artificial device to moderate legal change in the process of adjudicating over a particular circumstance, new legal fictions are often implemented without recognition of their falsity to facilitate the justification of received or newly established legal doctrine (Smith 2007, 1470). Smith thus critiques the legal rule prohibiting an "ignorance of the law" defence, a doctrine based on the assumption that individuals are always aware of the totality of their legal rights and duties (Smith 2007, 1459–60). According to Smith, the rule, if generally uncontested, is patently false in light of both common sense and practical experience. Ultimately, such "new legal fictions" conceal normative choices by "masking" them "with ostensibly factual" assumptions (Smith 2007, 1474). To avoid the resulting deception, new legal fictions have to be consciously analysed for their fictional qualities so that their contemporary juridical value and their relationship to normative expressions of legal authority can be fully assessed. While Del Mar avers that fictions are not so much "obscurantist" as they are "tentative" (Del Mar 2015, 233), one should not easily discard the concerns broached by Smith. In the modern age, legal change should never be opaque or obscured and it should always be relied upon to note, analyse and critically assess even minor legal developments. Since legal fictions have an inherent tendency to implement legal change covertly or invisibly, scholars carry a special responsibility to pay particular attention and watch such developments vigilantly in order to identify any undesired changes in time, and be able to correct them – if necessary.

2.3.5. Related Concepts

51 Various closely related concepts are also subject to the current debate on legal fictions. Apart from the explicit extension of a legal rule through analogy, abstract legal concepts, deeming provisions, and presumptions are perhaps the most closely related ones.

52 As illustrated above, some theorists want to delimit theoretical, abstract legal concepts from legal fictions. Del Mar thus finds that thinking of them as virtual rather than fictional helps to visualise the distinction. As an example, Del Mar names the concept of

'legal personality' among the 'virtual entities' in the law (Del Mar 2015, 236). According to Gama, legal fictions are mental constructs, false assumptions or false assertions, in theoretical discourse only, yet not in practical-normative discourse (Gama 2015, 361–362). A fiction rule introduced by the judge instead supposes a tacit abrogation of an existing law then to be substituted with a new rule (Gama 2015, 363). Others, however, in the tradition of Kelsen, view such fictions as the most proper legal fictions.

53 Deeming provisions are also often likened to legal fictions, and have sometimes been treated as standard illustrations of the concept, e.g. by Fuller (Stern 2015, 168). Deeming provisions resemble the metaphorical form not unlike the fiction, by specifying that certain activities will be treated as instances of that very conduct, explicitly regulated by the norm. Yet, in contrast to fictions, they do not feature the same truncated causal logic, but rather create legal equivalence for disparate circumstances, thus in effect regulating the scope of application for a particular legal consequence. Frequently created with a broader ambit from the outset, deeming provisions are more easily eligible for extension than fictions (Stern 2015, 169). This holds even more true for deeming provisions established in the common law, rather than by statute, "because of the ineluctable pull of analogical reasoning in common-law argumentation" (Stern 2015, 169). In short, deeming provisions are very closely related to legal fictions, and share common properties. What clearly distinguishes them, however, is their level of transparency. Whereas legal fictions deliberately conceal the fact that a new legal consequence is enacted into law, this is overt and obvious in the case of deeming provisions. Therefore, it makes sense not to categorically treat them as legal fictions, but to examine them individually to be able to discern their distinct operations and constraints (Stern 2015, 170).

54 Presumptions are also closely related to legal fictions, but again, they operate somewhat differently. Instead of assuming or suspending a required operative fact, they determine the likelihood of an operative fact being present. In such a vein, they frequently shift the burden of proof of the operative fact, or simply exclude rebuttal of the fact. Legal fictions, by contrast, simply make the operative fact (momentarily) irrelevant or unnecessary to the imposition of the related normative consequence (Del Mar 2015, 226). Presumptions are typically employed in contexts where a certain intention or a certain causal link needs to be proved, but cannot be (Del Mar, 2015, 226). In the Continental tradition, as Gama illustrates, presumptions are characterized as "inferences, mental operations and logical procedures by which an unknown fact is inferred from a known fact", either established by a rule of law, or according to the discretion of a judge (Gama 2015, 353). Moreover, Gama proposes, that in light of the ambiguity of both terms it may be convenient to avoid talking about the relationship between presumptions and legal fictions in general. Rather, Gama suggests, one should look at both concepts, as well as their relationship, at the level of rules, i.e. presumption rules and legal fiction rules. From such a perspective, Gama avers, the mental process involved in

the creation of such rules would be more evident, even if it cannot provide an adequate account of their different qualities (Gama 2015, 362).

Nancy Knauer illustrates how recent scholarship has sought to expand the category 55
of legal fictions branching out into new directions. There is a tendency, she observes, to include legal rules, presumptions, doctrines and constructions, categories that are no longer necessarily acknowledged to be false or are themselves demonstrably false (Knauer 2010, 6). Among the new categories of fictions, referred to by Knauer, are "discredited legal regimes", a category that arose out of the field of law and literature (Knauer 2010, 27–39). Accordingly, scholars have extended the concept of legal fiction to include past legal regimes based on conceptually or morally corrupted systems such as slavery or colonial land policy. While apparently persuasive in their historical moment, such systemic injustice either "lacked the staying power of moral truth" or simply relied on a "factual misstatement" (Knauer 2010, 28, 37). Knauer, however, rightly concludes, these so-called new legal fictions can be more accurately described as empirical legal errors, discredited legal regimes, or complex statutory schemes, but represent a fundamentally different phenomenon from those described by Fuller. Either not acknowledged to be false or, in some cases, not in fact demonstrably false, these phenomena present a distinct set of concerns that can be more profitably studied as a separate category (Knauer 2010, 19).

2.4. Key Functions of Legal Fictions

Legal fictions fulfil a wide range of functions and tasks. Their aims often also depend on 56
the legal party or institution that construes or uses them. From the legislative perspective, legal fictions may serve to explain the law, to visualize its workings or to sustain its ideologies. Sometimes referred to as abstract or metaphysical fictions, they aim at making the workings of the law tangible for non-jurists. They may further serve as auxiliary constructs, to construe or extend rights and obligations, as, for instance, in the concept of a company as a legal person. Moreover, the use of legal fictions might also support legal change. On the one hand, doctrinal or institutional progress might be thus enabled, without having to master the burden of 'proper' legal change. On the other hand, it may allow for a trial run of a new regulation, in order to better estimate its consequences. In contrast to the last argument, the use of legal fictions may perhaps actually inhibit statutory reform, rather than prompt (permanent) legal change. By way of relieving individual parties affected, it may create the illusion that change is not pressing or at all necessary, thus forestalling a lasting legal reform.

From the point of view of the judiciary, legal fictions may allow the introduction of 57
tentative change, without dismantling any general rules or principles; a course of action that leaves the initial rule intact. This is particularly significant, since the common law relies so heavily on precedents: legal fictions sustain the law's conservatism without leaving too large of a gap in its workings. Only by relieving an individual party, will no

lasting legal change be construed that would bind all future cases. Alldridge thus identifies "fictions as a mechanism for gentle amelioration of undesirable laws", in particular, as a tool for mitigating the excessive harshness of the law, as created, for instance, by the capital punishment so gratuitously meted out by the Bloody Code (Alldridge 2015, 367). Moreover, legal fictions frequently shift the burden of proof, and might construe pragmatic solutions for situations in which no conclusive proof can be produced, thus serving as procedural and sometimes linguistic expedients. From a historic viewpoint, judicial fictions have often served to obtain an extension of jurisdictions. In parts, this may have been for simple pragmatic reasons, to close unintentional jurisdictional gaps in a pragmatic fashion or be able to grant judicial relief, where legally, there had been none. In other instances, however, this mainly served economic purposes, allowing individual courts to secure a wider caseload and the subsequent increase of fees as much as it allowed them to ascend in the relative hierarchy. From the perspective of a litigant, legal fictions might be expedients to achieve a quicker, more convenient, or less costly legal solution, or to obtain any legal remedy at all, despite not meeting the requirements of the relevant form of action or rule.

2.5. Notorious Historical Fictions

58 There exists a long list of examples of legal fictions, some historical, some still in use today. In some instances, the underlying assumptions have so much become part of everyday legal dealings that they no longer appear vexing or artificial, e.g. adoption or a company's legal personhood. Some historical fictions became necessary to escape the pernicious consequences of the excessively strict penal legislation – the notorious Bloody Code, which provided, as it were, capital punishment as the only available remedy. This is the case with benefit of clergy, pleading the belly, and the insanity defence (Alldridge 2015, 369–370). Other fictions, such as the doctrine of attractive nuisance are still regularly employed today, as a measure to construe a landowner's liability for injuries to children trespassing on the land if the former was caused by an object likely to attract children. The following examples illustrate some of the most notorious or controversial historical fictions. Between them, perhaps it becomes obvious, why some scholars tend to disparage the use of legal fictions, while at the same time, upholding arguments for their initial emergence and their continuous benefits.

2.5.1. Benefit of Clergy

59 The Benefit of Clergy originates in the Concordat of Avranches of 1172 (Alldridge 2015, 370). This compromise reconciled Henry II of England with the Catholic Church. Whereas the King was purged of any guilt in Thomas Becket's murder (1170) in the Concordat, in return he granted considerable concessions to the Church. Among others, he agreed to allow appeals to the papacy in Rome, and exempted the clergy from the jurisdiction of the secular courts (with the exceptions of a few crimes, such as high treason, highway robbery and arson). In the next two centuries, a literacy test came to

serve as evidence of the clerical status of the defendant. Originally intended to prove their clerical status by demonstrating their ability to read from the Latin Bible, over the course of the centuries literate laymen came to claim this exemption likewise (Baker 2001, 33–34, 127). During Edward III's reign in 1351, the benefit of clergy was formalised into a statute that officially extended this clerical privilege to all who could read (25 Edw. III, c. 4). Unofficially, the benefit was even further extended: Since the literacy test was traditionally performed with one and the same Biblical passage, the first verse of Psalm 51 (*Miserere mei, Deus, secundum misericordiam tuam*), illiterate persons memorized the appropriate Psalm. Subsequently, Psalm 51:1 became known as the "neck verse", capable of saving a person's neck from hanging, the usual outcome in secular courts, by transferring the case to the ecclesiastical courts – more lenient in trial methods as well as punishment (Baker 2001, 39–40, 127). To counter this ecclesiastical leniency and the abuses of the benefit of clergy, several reforms were undertaken. In 1488, Henry VII decreed that non-clergymen could not plead the benefit of clergy more than once. To enforce this order, defendants who availed themselves of the clerical privilege were branded on the thumb. The brand disqualified a defendant from pleading the benefit in the future. In 1512, Henry VIII further restricted the privilege by making certain felonies nonclergyable (4 Henry VIII. C. 2). In 1575, Elizabeth radically reformed the effect of the benefit of clergy by statute (18 Eliz. I c. 7). While before, the benefit barred a case from secular jurisdiction being transferred to an ecclesiastical court, under the new system, the benefit of clergy was pleaded between conviction and sentencing (Blackstone 1979, IV 360). As a result, it no longer nullified the conviction. Under the new statute, first-time offenders could obtain partial clemency to have their sentence altered: This meant that instead of the likely hanging, they were branded and incarcerated for up to a year (Blackstone 1979, IV 362). In the next two centuries the number of people who could plead benefit of clergy further increased, just as the benefit of doing so was steadily restricted. This meant, for instance, that the benefit was partially extended to women in 1624 (women acquired equal privileges only in 1691), whereas various seemingly minor property crimes such as housebreaking, shoplifting goods (over 5 shillings) and sheep or cattle theft became felonies exempt from the benefit of clergy and earned their perpetrators automatic death sentences under the Bloody Code (Blackstone 1979, IV 362). Benefit of clergy was formally abolished for commoners with the Criminal Law Act of 1827. Since peers apparently retained the privilege for some time afterwards, a final act was passed to completely revoke the benefit of clergy in 1841 (4 & 5 Vict. c. 22).

The fiction of pregnancy and the fiction of insanity respectively, were also legal fictions that acted as a defence or pleas after conviction to avoid the harsh consequence of capital punishment in England (Alldridge 2015, 371–373). As with the benefit of clergy, these were often extended to cases where pregnancy or mental illness were not actually present.

2.5.2. The Bill of Middlesex

61 The notorious legal fiction of the bill of Middlesex was developed in the King's Bench to gain jurisdiction over cases that were traditionally within the jurisdiction of the Court of Common Pleas. Whereas the Common Pleas presided over the criminal jurisdiction, the King's Bench had jurisdiction only over pleas of the crown. In addition, each court had jurisdiction in all personal actions over its own affairs and those imprisoned at court, since they were already present. From the 14th century onwards, the King's Bench also retained unlimited criminal jurisdiction throughout the realm – that is, throughout the county of Middlesex where the Bench sat. As it turned out, this exemption was soon to develop into a popular legal fiction (Baker 1979, 40). During the 15th century, all common law courts were threatened by the growing importance of the equitable jurisdiction of the Court of Chancery, while the King's Bench had lost much of its proper work to the assizes. Equitable jurisdiction became increasingly attractive, due to its relatively less formalized and more flexible procedures. Moreover, opponents could be arrested more easily than before the Common Law Courts. From 1500, the King's Bench made a concerted effort to counteract the decline in writs and to make their own proceedings more attractive to potential plaintiffs. The bill of Middlesex was one of these reforms aimed at extending their jurisdiction (Baker 1979, 40). Faster and cheaper than the Common Pleas and the Court of Chancery, the Court of the King's Bench became increasingly popular once the legal fiction of the bill of Middlesex was established.

62 Traditionally, a claim before the King's Bench or the Common Pleas had to be initiated by an original writ, which first required a complaint made in Chancery (Jones 2001, 2). If a plaintiff were to sue for several issues, the court would have to issue an individual writ for each individual issue, and to ensure that the defendant appeared in court. This could be achieved with the help of the local sheriff, but even if successful, the whole process was cumbersome and costly. The troublesome and lengthy process of summoning the opponent to court or rather "getting him out of bed and fixing the day for trial" is reproduced at large in Owen Barfield's "Poetic Diction and Legal Fiction" (Barfield 1981, 118, 116–120). By alleging that a defendant had committed trespass in Middlesex, the bill allowed the King's Bench to circumvent traditional jurisdiction and take over cases assigned to other common law courts. The defendant would be arrested by the court marshal for trespass, but the bill could extend to cover other issues such as detinue or debt, that the plaintiff wished to sue for (Jones 2001, 4). This way, the rulings could be obtained more quickly and at less cost. Over time, the procedure became even more fictious. Initially, the fiction hinged on an actual trespass and required a writ of trespass from the Chancery for the arrest. However eventually, the trespass writ would be obtained upon occasion of a merely fictional trespass in Middlesex so that the King's Bench could issue their own bill of arrest. The trespass charge was quietly dismissed, and the King's Bench ruled only on the originally intended criminal charges – the charges it legally had no jurisdiction over. This fiction allowed the King's Bench to

deliberately woo litigants with competitive costs and a quicker result, while a Common Pleas litigant still required the very costly original writ from Chancery (Baker 1979, 41). Eventually, the King's Bench became more popular for common pleas than the Common Pleas (Baker 1979, 42). Once this legal fiction was widely established, the King's Bench could increase their case load significantly, whereas it dropped in the Common Pleas and Chancery. The latter issued injunctions in an attempt to stop the bill's use; nevertheless, change was only realized by the introduction of the Uniformity of Process Act of 1832. Whereas this fiction finds its origins in the King's Bench, and its proper jurisdiction over those in the custody of its prison, by the 18th century, it had lost all connection with the real fact situations which had given birth to it (Lobban 2015, 201).

63 The use of legal fictions was also common beyond the bill of Middlesex to bring cases within the jurisdiction of another court and to thus bypass formal venue. An extension of jurisdiction through fictitious supposition was quite common in English legal history. One simple legal fiction, intended to benefit from the substantially lesser caseload of the Court of the Exchequer, extended the court's jurisdiction to all types of cases involving debt. Initially, the Exchequer's jurisdiction covered all cases involving taxes and other obligations to the Crown (Wurzel 1939, 40). Since the Court had only very limited jurisdiction with respect to private matters, it had a much lighter caseload than the other superior courts. To benefit from the ensuing swift procedure, litigants, who commenced an action in the Exchequer for debt, came to plead by means of the fictious assertion that they owed money to the King, which they could not pay because their debtor had in turn wrongfully withheld payment to them (Perry 2000, 154). The original debtor was not entitled to rebut this allegation, otherwise it would have threatened to oust the Exchequer from their jurisdiction.

64 This use of legal fictions to extend jurisdiction dates back to as early as medieval times, when they were employed to bring cases within the jurisdiction of the common law courts, i.e. overseas territories were fictitiously relocated to England. As Baker writes, a plaintiff could simply claim that a contract was made at Calais when in Kent. He could not be refuted by the court since false statements of geography were a question of fact and the court only decided upon law. The Kentish jury, on the other hand, "could not find that the contract, though made in Kent, was not made at Calais, because the place was in law immaterial" (Baker 1979, 131). Courts could issue writs of prohibition, to contain other analogous devices threatening to curtail the common law jurisdiction, but such fictious geographies were not among them. Fictional pleading of venue goes back to the historical fictions of early Roman law and was generally accepted as a legal adaptation that effectively rectified unjust application of rigid rules (Lind 2015, 101).

2.5.3. The Action of Ejectment

Legal fictions were not merely used by litigants to find swifter and less costly procedures, but to adapt existing forms of actions to the particular needs of their cases. Among these was the action of ejectment, a common law action to recover the possession of, or title to, land. In late medieval times, boundary disputes often featured in the old real actions and the various assizes. Yet real tenants who had been ousted from their land had the difficulty of not being able to use the action for wrongful dispossession of land as a remedy because, as mere tenants, they had no title to the land. It was only the original title holder, who could sue in a real action. This legal situation left many tenants without an appropriate remedy. The remedy of ejectment, on the contrary, was not a real action but a personal action. Highly fictitious in its technical operation, the remedy was still less technical and more efficient than the older real actions. In the form of a tort, the action could be instigated only to correct a wrong that had been done to a person. The action of ejectment relied on the creation of not one, but two fictitious parties; a fictitious lease and a fictitious ouster '*vi et armis*'. More precisely, in such cases, a fictitious lease by the real claimant to a fictitious nominal plaintiff, John Doe, was claimed. The declaration asserted that "Doe had entered into the lands in question 'and was thereof possessed', until one Richard Roe – another fictitious person, known as the 'casual ejector' entered 'with force and arms' and ejected him" (Lobban, 2015, 201). Moreover, the declaration included a letter, written by Roe to the real defendant, that summoned him to appear in court as substitute defendant, or else Roe would suffer judgment against him, and the real defendant would thus be disposed of the land in question (Wentworth, 1799, 41–42). If the real defendant did apply, the Court allowed him to defend the action only on condition that he admitted the three fictitious assertions: the lease, the entry and the ouster, which together with the title formed the necessary prerequisites to uphold the action of ejectment. Ultimately, by means of the fictious lease to Doe and the fictious forceful ejectment by Roe, the crucial wrongful assault to a person was construed, relying upon the action of ejectment. Perhaps, the fictious lessees 'John Doe' and 'Richard Roe' were real people at some point, perhaps acquaintances of the real claimant used to enable the requisite grounds for this relief (Baker 2001, 34). This fiction became so common, that by the mid-17th century, the higher courts had begun to allow parties to use this form without going through the process of granting actual leases (Lobban 2015, 201). The legal fiction of ejectment is certainly among the most curious excesses of English legal history. The use of the action, together with its fictitious suitors, was eventually abolished by the Common Law Procedure Act of 1852. The demise of the infamous Doe and Roe attracted widespread public interest, and various verses were written about their passing (Holdsworth IX, 1966, 414, 432–433). G.M. Young even lists their deaths in his chronology of deceased personalities in his portrait of Victorian England, without speaking to their merely fictional status (Young 1936, 196).

The action of ejectment features most prominently in Samuel Warren's *Ten Thousand a-Year* (1841). A highly popular 19th-century novel in both the United States and Europe, it not only chronicles the life of its iconic protagonist Tittlebat Titmouse but provides an elaborate account of contemporary law in general, and ejectment in particular. While Warren's rendering of legal fictions in the novel primarily exploits the curious nature of such legal instruments, he is explicitly critical of such "destructive nonsense of pleading" in the "Notes and Illustrations" he later added to the novel (Warren 1881, 1371; Stone 1985, 133). Though the specific context for this harsh critique is not so much the action of ejectment but the bill of Middlesex, it is quite surprising on Warren's part. Not a supporter of Bentham's radical reforms, but instead a legal practitioner and staunch conservative himself, Warren generally tended to defend rather than denounce legal idiosyncrasies and technicalities (Stone 1985, 133–134; Steig 1969, 166). In this light, his stance in both the novel and his subsequent notes becomes all the more significant. 66

3. Literature

In literature, legal fictions appear in different capacities. On the one hand, they are more or less openly incorporated, addressed or negotiated in fictional texts; on the other hand, fictional works that deal with legal plot elements, legal actors or matters of fact are sometimes referred to as legal fictions. Since they deal with legal matters as 'legal fictions', these works appear to imply – whether consciously or not – that such novels form an independent literary generic sub-section. The latter category of 'legal fictions', however, despite frequently featuring somewhat misleading titles, merely refers to conventional approaches of the law in literature variety. 67

3.1. Legal Fictions in Literature

There are various levels upon which legal fictions are incorporated into the textual fabric of literary fictions. Only very few literary narratives explicitly revolve around legal fictions, while there is a much broader range of texts that critically engage with them unobtrusively. Dickens' works, for instance, contain numerous allusions to legal fictions (e.g. in *The Pickwick Papers*, *Oliver Twist*, *Nicholas Nickleby*, *The Old Curiosity Shop*, *Martin Chuzzlewit*, *The Battle of Life*, *Dombey and Son*, *Bleak House*, *Hard Times*, *Little Dorrit*), all listed in more detail in Stone's inventory (Stone 1985, 136–154). In many of these instances, however, Dickens seems to be extending the legal sense of 'fiction' to describe not only fictions of the law, but fictions about the law (Stone 1985, 139). 68

Other novels negotiate the underlying legal foundational ideologies, i.e. sustaining fictions upon which the legal discourse rests. Accordingly, various mid-19th-century sentimental novels have been observed as identifying "emerging liberal formation principles as legal fictions", while other late-19th century gothic and realist works apparently "seek to dispel or de-fictionalize the inventions" (Geiser 2018, 21). In a more general 69

sense, sustaining fictions underwrite both legal and social myths such as equal contractual bargaining power, the allegedly indissoluble unity of person of both wife and husband through the legal fiction of coverture or the concept of legal bastardy denoted by filius nullius, according to which children born out of wedlock (and even children born prior to a later annulment) were rendered parentless for inheritance purposes.

3.1.1. Overt Legal Fictions in Literature

One of the more explicit examples of the literary play with legal fictions comes from the 70
Savoy operas of W. S. Gilbert and Arthur Sullivan. Through their renowned theatrical partnership, Gilbert and Sullivan satirized the abuses of the British legal system, whether "its maze of regulations, the corruption of power, the folly of obeying incomprehensible rules, the privileges of rank that undermine equality before the law", or "the charade of courtroom solemnities concealing bias or incompetence" (Kertzer 2010, 25–6). In particular, their operas frequently revolve around moments when the social standing of legal fictions appears unstable. Legal fictions thus are rendered "preposterous by wordplay and equivocation, by treating figurative expressions literally (insisting on the letter of the letter of the law), or by arranging a conflict of jurisdictions" (Kertzer 2010, 28). This is the case, for instance, in *The Gondoliers* (1889), when Giuseppe Palmieri requests that he and his brother also be recognized individually, despite serving jointly as King of Barataria. He pleads for this factual recognition, so that the brothers might each receive individual portions of food as they have "two independent appetites". Nevertheless, the Court, made up of fellow Gondolieri, refuses his plea, arguing that the joint rule "is a legal fiction, and legal fictions are solemn things" (Gilbert, 1962, 131). Another notable example is Gilbert's final collaboration with Sullivan, *The Grand Duke* (1896). In this opera, Gilbert employs the comic device of a 'Statutory Duel', in which the duelists draw cards rather than daggers, thus inventing an alleged legal fiction whereby the loser suffers only a social death, instead of an actual death. In this merely legal exchange, a contractual exchange of identities is treated literally rather than figuratively (Kertzer, 2010, 29). In this instance, as in several others, W. S. Gilbert's employs his "favorite trick of treating legal fiction as literal fact" (Kertzer, 2010, 138).

Among the few literary examples, in which legal fictions are explicitly employed, is 71
also H. G. Well's novel *Joan and Peter* (1918). In the novel, the protagonist's parents die in a sailing accident and the order of death has to be established for the purpose of determining the line of succession. Since it cannot be ascertained which parent died first, the father's prolonged survival is fictionally attributed to his being of the stronger sex and thus more likely to do so. At first, therefore, the paternal will determines Peter's legal guardianship, but when this assumption proves to be false through a later witness statement, legal guardianship is altered according to the deceased mother's last will. Quite ironically, Wells himself based his fiction on a false assumption: The doctrine of survival

presumed the order of succession in similar cases not based on gender but on age, and still does to this day.

William Empson's poem "Legal Fiction" (1928) is also among the more obvious ex- 72
amples of rather explicit critique on legal fictions; his criticism is particularly directed against the legal assumptions applied in the wider context of property ownership. Empson's four-stanza meditation on "the fantastic, even cosmic, implications of 'an ancient principle of law'" demonstrates the "fictiveness of the conceit" instead of "its factual underpinning" (Waithe 2012, 279, 296). Assuming the mythical viewpoint that the legal fiction of property ownership extends in scope to both "Heaven and Hell" (6), Empson's poem tackles the wrongness of placing too much trust in the clarity of the law; in its solidity and accuracy, and any overreaching or boundless conception of one's own legal status or one's own rights. In Empson's rendering, the law is ultimately as uncertain and tentative as the human condition; a point that he makes by employing a hyperbolic conception of property ownership that stretches in its extensive scope from mythical hell to foreign galaxies but is further complicated by the varying and wavering of the earth's axis. The alleged fixedness of property is thwarted by the earth's constant rotating movement. In Empson's rendering, the legal fiction becomes ultimately "a concept both fanciful and deeply rooted", a negotiation of "the worldly power of imagination," by bringing "an institutionally recognised conceit into service as a poetic conceit" and thus reversing "the usual terms of poetry's suspension of disbelief" (Waithe 2012, 296).

3.1.2. Covert Legal Fictions in Literature

In contrast to such rare examples of texts that openly broach the issue of legal fictions, 73
there are many authors who instead tend to examine the underlying ideologies or devote themselves to the practical handling, dangers and criticism of the resulting legal practice.

2.1.2.1. Contractual Agency

A perennial favourite among 18th- and 19th-century novelists is the questionable con- 74
tractual capacity of women, especially in the realm of the private or domestic sphere. Many female heroines struggle with the stark contrast between cultural myths of contractual liberties and the respective legal realities. The woman's bargaining power remains questionable at best, as much in the selecting of a spouse, as in the process of negotiating the subsequent marriage settlements. In Samuel Richardson's epistolary novel, *Pamela; or, Virtue Rewarded* (1740), the eponymous heroine, in her adamant refusal to settle for less than her due, manages to elevate her station, thus promoting her from the status of an imprisoned domestic servant who is merely sexually objectified property, to the rank of gentlewoman and equal marital subject; her superior virtue apparently capable of erasing any impeding class distinction.

Daniel Defoe's *Moll Flanders* (1722) appears less celebratory of female contractual capacities, depicting both the heroine's potential and limitations to successfully bargain on her own behalf. Belonging to the popular genre of criminal autobiographies, the novel was allegedly not written by Defoe himself, but the author assigns authorship to his titular heroine. Accordingly, Moll chronicles her own hardships and misfortunes, her moral devolution and attempted repentance through the course of one unofficial and five official marriages. Moll's rational and practical approach to her predicament dismantles the sustaining fictions that underpin both the myth of marital unity and libertarian contractual agency. Moll freely solicits a variety of temporary unions, rationalized on practical necessity as much as on contemporary market ideologies and thus challenges cultural myths of marital permanence, female weakness and male domination. Yet her eventual economic success and personal happiness come at a price. Out of her twelve children, five die and only one is reunited with her as an adult. Moreover, Moll's acts of self-empowerment are consistently unlawful and immoral; her rise enabled only by her status as an outlaw, and paradigm of necessity and fluid moral register. In Defoe's novel, it seems, female agency and libertarian ideals are realised only against, not because, of the law. 75

In Wilkie Collins' *The Woman in White* (1859), Laura Fairlie's unfortunate choice of husband seems uncoerced, though strongly influenced by familial obligations; contractual freedoms regarding the marriage arrangement are virtually nonexistent. Despite the misgivings of the family lawyer over the financial terms of the marriage settlement, her future husband, Sir Percival Glyde, pressures Laura into a marriage without any settlement in equity, so that upon Laura's death the entirety of her fortune will pass on to him. All things considered, it is this marriage without settlement that leaves Laura completely legally unprotected and allows her treacherous husband to usurp her fortune by faking her death and imprisoning her under a false name in an asylum. 76

Richardson's tragic heroine, Clarissa, is equally unprotected by the law, despite her conviction of a right to voluntary consent. For a time, it appears as if *Clarissa*'s (1748) eponymous heroine can maintain some measure of contractual agency, even if faced with various obstacles presented by her family that enforces the said lack of legal protection. Therefore, "Clarissa's position as a heroine-victim" has been read as a "sober lesson in the realities of female agency and of private contract" (Geiser 2018, 66). For Clarissa at least, moral virtue and decency cannot guarantee self-preservation through a beneficial marital contract. In Lovelace's "recklessness and lawlessness", conversely "the fictions of classical contract theory" are revealed (Geiser 2018, 66). 77

In Charlotte Smith's gothic-inspired novel, *Emmeline, the Orphan of the Castle* (1788), the heroine's ability to contract marriage fully informed and voluntarily, is strictly limited; her powerlessness emphasized by gothic tropes such as isolation, dispossession, madness and oppression. Emmeline's fate resembles that of many other heroines, in that her lack of rank and fortune is to be remedied by the physical and economic security of 78

marriage. Whereas Emmeline is ultimately successful in her violent refusal to act as a female commodity through marital exchange, this is instead achieved through patriarchal compassion on her uncle's side, not through any contractual agency of her own.

79 Jane Austen also explores female contractual capacity and its limitations in various of her novels of manners that fuse social realism with romantic sentimentalism. Austen's novels are notorious for their concern with the difficulties and pitfalls of courtship and her female heroines' struggles to negotiate marriage against the social context of property, status and class. In contrast to some of the other authors, Austen bestows some bargaining power upon her heroines, though never untethered from society's regulating forces. While Austen frequently incorporates legal instruments such as entails to account for her protagonists' economic predicaments (to be witnessed, for instance, with the Bennet sisters in *Pride and Prejudice*), she is conspicuously silent on the subject of settlements, dower rates and separate estates. Austen instead uses various marriage subplots to negotiate between material and personal demands. To this end, she frequently juxtaposes marriage as a mere economic requirement; an attempt to gain the necessary maintenance that marital coverture promises, with a concomitant refusal of property-centred marriages – the all-too-commonly envisioned romantic unions solely based on emotional needs and personal desires, i.e. love, equality, respect and affection. While mediating the demands of social determination through duty or status against the growing opportunities to act upon individual free will within the social sphere of rural gentry, there never seems to be any hope for the law to protect any of these heroines.

3.1.2.2. Marital Coverture

80 The lack of legal protection female heroines suffered with regard to the legal doctrine of marital coverture is another favourite 'covert' legal fiction in the 18th- and 19th-century novel. This common law doctrine, retained from medieval times, stipulated unity of persons in a marriage. In such a vein, coverture construed a paradox under which married women were persons as well as property, while being denied a separate legal personality. According to this doctrine, a woman's legal existence was suspended during the marriage by incorporation or consolidation into that of the husband. No longer a *feme sole* but a *feme covert*, the married woman could no longer own or transfer property or make a will independently of her husband, contract in her own name and sue or be sued. In exchange for the husband's control of her property, the husband had to provide for her and was responsible for any debts she incurred. Moreover, the husband had the right to 'physically correct' his wife; the right to enforce the return of a runaway wife and the absolute right to child custody. Only very few exceptions to this loss of legal subjectivity were granted the wife, such as a right to some personal necessities, i.e. clothes and jewels, and the right to dower which commenced upon the husband's death. Over time, some additional options for procuring separate property through marriage settlements became available to wives in equity. The only other persons who lacked an independent legal existence under the common law of England were children, felons

and the insane. "So great a favourite is the female sex of the laws of England", Blackstone notoriously wrote, that "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit" (Blackstone 1979, I 433).

81 Among the many novels that negotiate the various restrictions on women's legal subjectivity, and their limited capacity to protect themselves against economic ruin by unfit husbands, is Daniel Defoe's novel *Roxana: The Fortunate Mistress* (1724). Defoe's heroine is thrust into an arranged marriage, devoid of property rights and is forced to watch helplessly as her husband squanders the marital estate and bankrupts the family business. Subsequently, once Roxana has succeeded in re-establishing herself economically, she is adamantly set against remarrying, aware that the common law's legal fiction of coverture divests the wife of her liberty, estate, authority and name through marriage, ultimately erasing her legal identity. All things considered, the novel remains ambiguous on whether it is the rigidity of legal coverture and subsequent economic female dependence that leads to Roxana's tragic ending or rather her questionable self-interest and moral corruption.

82 Yet, it is not only unhappy or involuntary marital unions that leave female heroines legally impotent. Frances Burney's *Cecilia* (1782) experiences a range of losses as a result of her deliberate union with the man of her own choosing, whether her name, her estate or her status as vested lineal heiress, she loses all as a result of the marriage. Thus, even after she successfully overcomes the obstacles she is faced with in the course of the novel, her happiness ultimately remains somewhat tainted, an imperfect one, due to these losses suffered.

83 In *The Woman in White*, the law of coverture and subsequent erasure of female identity becomes the novel's central paradigm. Through marriage, Laura Fairlie loses her name, her property and her social position. But this is not enough; the real deprivation only starts a little after the wedding, when her newly-wed husband stages her death and incarcerates her in a mental asylum. The symbolic 'civil death' by marriage, is thus followed by an alleged actual one, that strips her basically of all remaining rights, of her family, her home and her freedom. Yet it is not only with respect to Laura Fairlie that coverture becomes a metonym for the loss of feminine identity; all the novel's central characters experience similar threats (Ledwon 1993, 10). Anne Catherick, Marian Halcombe, or even Countess Foscoe are all affected in some way by the law; the latter's 'civil death' transforms the once fiery and irascible woman into a petrified shell, thus the ultimate embodiment of the spirit of coverture in so far as the Count and the Countess, as the former asserts, "have but one opinion between us, and that opinion is mine" (Collins 1985, 146). Veiled, ghostly and unrecognizable, the Woman in White haunts Collins' novel, a cautionary parable of the cultural myths and sustaining ideology of the legal fiction of coverture.

3.1.2.3. Legal Bastardy

Another legal fiction quite frequently encountered in the English novel, is legal bastardy or *filius nullius*, a concept decreeing a person as 'nobody's child'. Like coverture, *filius nullius* erases the identity of the children affected. In *The Woman in White*, Sir Percival Glyde's efforts to silence the eponymous Anne Catherick are ultimately revealed as nothing but his desperate – and ultimately futile attempts – to protect the secret of his own bastardy. Less a victim of the bastardy laws, but one hunted by fear and thus turned villain, Sir Percival's name, status and estate all depend on the well-kept secret of his illegitimate birth. Yet instead of revealing, and subsequently revoking his usurped status, the novel has to eliminate the villain completely, in order to fully cleanse the heroine of his tainting presence and also, perhaps more importantly, to free her again to remarry and resolve the romance plot into a happy ending. Collins' interest in and criticism of the legal fiction of *filius nullius* is most distinct in *No Name* (1862). His female heroine Magdalen loses her name, her fortune and her social position after the sudden death of her parents and the subsequent discovery of her illegitimacy. Determined not to simply accept this unfair disenfranchisement, she sets out on a dark and morally questionable journey to reclaim what the law has taken from her. 84

The issue of *filius nullius* is also addressed in Elizabeth Inchbald's *A Simple Story* (1791). In this novel of passion, Miss Milner commits the unforgivable transgression of being unfaithful to her husband, during his long absence in the West Indies. Her wrong does not only cause her marriage to break down but her husband subsequently refuses to acknowledge their only child, Matilda. Only a desperate letter that she writes on her deathbed can convince her former husband to permit Matilda to live on one of his estates, on the condition that he never sees her. Subsequently, Matilda becomes the personification of 'nobody's child' (a status also ascribed to children born in wedlock as a consequence of later annulment), merely a shadow existence that haunts her 'former father's' house. Even if the latter comes to his senses just in time to prevent his daughter's imminent rape (only made possible by the unprotected status he left her in in the first place) and thus enables paternal reconciliation and Matilda's subsequent love marriage, her ordeal nevertheless vividly illustrates the burden that this legal instrument imposed upon innocent children. 85

Less dark, yet equally pointed, Jane Austen's *Emma* (1815) addresses the erasure of identity through legal bastardy. The indeterminacy of Harriet Smith appears to license the protagonist to "use the young woman as raw material for her fiction making" (Smith 1992, 167). On various occasions, Austen's terminology broaches the issue of Harriet's uncertain status as well as the absurdity of the social reliance on said status. During the course of the novel, Emma's match-making, if misled on various levels, is based on her re-inscription of Harriet as a lady with a genteel background. The desirability of each potential candidate is equally based on the compatibility of status. Even the perfect happiness of the novel's ending, concluding not only with Harriet's, but also Emma's 86

happy (and socially adequate) marital union, cannot fully dislodge the feeling that these romantic confusions would not otherwise have been possible without the legal loss of identity, specifically intended by the bastardy legislation, and otherwise could have protected Harriet against such trying adversities.

The preceding synopsis of legal fictions in British literature does not, of course, aspire to be exhaustive. It may, however, provide some useful insight into how some particularly popular or controversial fictions are transposed into literature, and how they sustain and enrich the plot structure, or how the textual fabric aesthetically reflects the underlying fictions and legal structures. 87

3.2. Legal Fictions as Literature?

Whereas the previous section covered literature that incorporates, addresses or negotiates legal fictions in fictional works, fictional works that deal with legal plot elements, legal actors or matters of fact are also sometimes referred to as 'legal fictions'. These titles tend to denote fictional works that deal with legal matters as 'legal fictions', as if to imply that these novels form an independent literary generic sub-section. Such 'legal fictions', however, despite their somewhat misleading titles, merely identify conventional approaches of the law in literature variety. 88

Harriet Murav, for instance, explores the relationship between law, literature and authority in *Russia's Legal Fictions* (1998) of the 19th and 20th century. Basing her argument on the long-lasting conflict between the Russian writer and the law, she explores how Sukhovo-Kobylin, Akhsharumov, Suvorin, Dostoevsky, Solzhenitsyn and Siniavskii were all 'put on trial'. Therefore, the authors' own writings on their experience with the law bear testimony to the history of Russian literary trials. Whether it be censorship, libel or even murder, these cases are placed within their particular historical context and in relation to the specific culture of their time. According to Murav, writers claim authority not only as composers of fiction but as particular lawgivers in the realm of the real, while the government turns to the realm of the literary to exercise its power. In the course of her study, Murav provides a history of the literary treatment of the jury trial as well as of the development of a professional bar in late Imperial Russia. Moreover, Russia's Legal Fictions explores various theories of criminality, sexuality, punishment and rehabilitation in both Imperial and Soviet Russia. 89

Kathleen Loncar's *Legal Fiction: Law in the Novels of Nineteenth Century Women Novelists* (1995) provides a rich source of material illustrating a variety of legal areas that were significant in 19th-century fiction by female authors. In a series of chapters, Loncar covers criminal law, industrial law, constitutional law, property law and family law, thus illustrating the pertinent legal issues of the period in reference to her selected corpus. Whereas the book appears to be less interested in theoretical or analytical approaches, it provides a helpful overview of the legal concerns delineated by a broad range of female novelists, 90

stretching from George Eliot and Jane Austen to the Brontë sisters, Elizabeth Gaskell and E.P. Thomson, and she does not neglect some of the less well-known voices, such as Mrs. Henry Woods, Maria Edgeworth, Mrs. Oliphant or Charlotte Elizabeth.

91 In her *Legal Fictions: Constituting Race, Composing Literature* (2014), Karla F.C. Holloway explores how black authors of literary fiction have engaged with the law's constructions of race since the era of slavery, thus arguing that U.S. racial identity is the creation of U.S. law. In line with her focus on the resonances between the literary and the legal discourse, Holloway reads Toni Morrison's *Beloved* (1987) and Charles Johnson's *Middle Passage* (1990) as narratives about personhood and property and Nella Larsen's *Passing* (1929) as profoundly influenced by contract law. These legal resonances in works of fiction are not only a thematic concern, but Holloway shows how some novels also structurally mirror evidence law, e.g., David Bradley's *The Chaneysville Incident* (1981) and Ralph Ellison's *Invisible Man* (1952). Ultimately, so Holloway's claim, the selected authors reframed fundamental questions about racial identity, personhood, and the law from the 19th into the 21st century, revealing the black body as one thoroughly bound by law.

92 Trish Ferguson's book on *Thomas Hardy's Legal Fictions* (2014) examines how Hardy's prose fiction reflects his role as an acting magistrate with a lifelong interest in the law. Ferguson places her study in the historical context of some of the most significant legal reforms of the 19th century, such as the birth of adversarial trial procedure, the evolving definition of legal insanity, the campaign for legal equality for married women, as well as an intensified concern with the necessity of land law reform. Despite the notable influence of sensation fiction, it is Hardy's modernist form of training in judicial reasoning, Ferguson argues, that led Hardy to reject conventional endings and instead to leave legal questions unanswered for his readership in a deliberate effort to engage them in the debates.

References

Statutes Cited

Concordat of Avranches of 1172

25 Edw. III, c. 4, 1351

Bill of Middlesex

4 Henry VIII. c. 2, 1512

18 Eliz. I c. 7, 1575

Criminal Law Act of 1827

Uniformity of Process Act of 1832

4 & 5 Vict. c. 22, 1841

Common Law Procedure Act of 1852

Works Cited

Kristin Y. Albrecht (2020): *Fiktionen im Recht*, Baden-Baden: Nomos.

Peter Alldridge (2015): Some Uses of Legal Fictions in Criminal Law, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 367–384.

Clifford Ando (2015): Fact, Fiction, and Social Reality in Roman Law, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 295–323.

Jane Austen (1813): *Pride and Prejudice*, London: T. Egerton.

Jane Austen (1815): *Emma*, London: J. Murray.

J. H. Baker (1979): *An Introduction to English Legal History*, 4th ed., London: Butterworths.

J. H. Baker (2001): *The Law's Two Bodies: Some Evidential Problems in English Legal History*, Oxford: OUP.

Owen Barfield (1981): Poetic Diction and Legal Fiction, in: Dorothy L. Sayers (ed.), *Essays Presented to Charles Williams*, Grand Rapids, MI: Eerdmans, 106–127.

Jeremy Bentham (1838–1843): *The Works of Jeremy Bentham*, Published Under the Superintendence of his Executor, John Bowring, 11 Volumes, Edinburgh: William Tait.

Peter Birks (1986): Fictions Ancient and Modern, in: Neil MacCormick / Peter Birks (eds.), *The Legal Mind: Essays for Tony Honoré*, Oxford: Clarendon, 83–101.

William Blackstone (1979): *Commentaries on the Laws of England*, 4 Volumes, Chicago: University of Chicago Press.

Georges Boyer (1954): Sur quelques emplois de la fiction dans l'ancien droit oriental, *Revue International des Droits de l'Antiquité* 1, 73–100.

Georges Boyer (1965): De la fiction dans l'ancien droit oriental, in: Georges Boyer, *Mélanges d'histoire du droite oriental*, Paris: Librairie du Recueil Sirey, 87–108.

Frances Burney (1782): *Cecilia, or Memoirs of an Heiress*, London: Payne and Cadell.

Kenneth Campbell (1983): Fuller on Legal Fictions, *Law & Philosophy* 2:3, 339–370.

Wilkie Collins (1862): *No Name*, London: Sampson Low, Son & Co.

Wilkie Collins (1985): *The Woman in White*, New York: Signet.

[Daniel Defoe] (1722): *The Fortunes and Misfortunes of the Famous Moll Flanders, &c., Who was Born in Newgate, And, during a Life of Continu'd Variety for Threescore Years, besides Her Childhood, was Twelve Year a Whore, Five Times a Wife (wherof once to her own Brother) Twelve Year a Thief, Eight Year a Transported Felon in Virginia, at last Grew Rich, liv'd Honest, and Died a Penitent. Written from her Own Memorandums*, third edition corrected, London: Chetwood.

Daniel Defoe (1724): *The Fortunate Mistress: Or, A History of the Life and Vast Variety of Fortunes of Mademoiselle de Beleau, Afterwards Call'd the Countess de Wintselsheim, in Germany, Being the Person Known by the Name of the Lady Roxana, in the Time of King Charles II*, London: Warner, Meadows, Harding & Edlin.

Maksymilian Del Mar (2015): Legal Fictions and Legal Change in the Common Law Tradition, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 225–253.

Raphael Demos (1923): Legal Fictions, *International Journal of Ethics* 34:1, 37–58.

Kieran Dolin (2007): *A Critical Introduction to Law and Literature*, Cambridge: CUP.

William Empson (1928): Legal Fiction, *Cambridge Review* 50 (30 Nov. 1928), 171.

Josef Esser (1969): *Wert und Bedeutung der Rechtsfiktionen: Kritisches zur Technik der Gesetzgebung und zur bisherigen Dogmatik des Privatrechts*, Frankfurt am Main: Klostermann.

Trish Ferguson (2014): *Thomas Hardy's Legal Fictions*, Cambridge: CUP.

Lon L. Fuller (1930a): Legal Fictions, *Illinois Law Review* 25:4, 363–399.

Lon L. Fuller (1930b): Legal Fictions, *Illinois Law Review* 25:5, 513–546.

Lon L. Fuller (1930c): Legal Fictions, *Illinois Law Review* 25:8, 877–910.

Lon L. Fuller (1967): *Legal Fictions*, Stanford, California: Stanford University Press.

Gaius (1991): *Institutiones. The Institutes of Gaius*, transl. Francis De Zulueta, Oxford: Clarendon Press.

Raymundo Gama (2015): Presumptions and Fictions: A Collingwoodian Approach, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 347–366.

Suzanna Geiser (2018): *Legal Fictions, Literary Narrative, and the Historical Truth: The Jurisprudence of Marriage in the Long Eighteenth Century*, Diss. University of North Carolina at Chapel Hill, ProQuest Dissertation & Theses Global.

William S. Gilbert (1962): *The Savoy Operas*, London: Macmillan.

Louise Harmon (1990): Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment, *The Yale Law Journal* 100, 1–71.

William Holdsworth (1966): *A History of English Law: In Sixteen Volumes*, London: Methuen.

Karla F. C. Holloway (2014): *Legal Fictions. Constituting Race, Composing Literature*, Durham: Duke University Press.

Elizabeth Inchbald (1791): *A Simple Story*, London: Robinson.

Rudolf von Jhering (1924): *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Leipzig: Breitkopf & Härtel.

N. G. Jones (2001): The Bill of Middlesex and the Chancery, 1556-1608, *Journal of Legal History* 22:3, 1-20.

Hans Kelsen (1919): Zur Theorie der juristischen Fiktionen. Mit besonderer Berücksichtigung von Vaihingers Philosophie des Als Ob, *Annalen der Philosophie* 1, 630–658.

Hans Kelsen (2015): On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If, transl. Christoph Kletzer, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 3–22.

Helena Kennedy (1993): *Eve Was Framed*, London: Vintage.

Jonathan Kertzer (2010): *Poetic Justice and Legal Fictions*, Cambridge: CUP.

Christoph Kletzer (2015): Kelsen on Vaihinger, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 23–29.

Nancy J. Knauer (2010): Legal Fictions and Juristic Truth, *St. Thomas Law Review* 23, 1–49.

Maximilian Koessler (1949): The Person in Imagination or Persona Ficta of the Corporation, *Louisiana Law Review* 9:4, 435–449.

James Lee (2015): Fictions in Tort, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 255–274.

Leonora P. Ledwon (1993): *Legal Fictions: Constructions of the Female Legal Subject in Nineteenth-Century Law and Literature*, Diss. University of Notre Dame, ProQuest Dissertation & Theses Global.

Douglas Lind (2015): The Pragmatic Value of Legal Fictions, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 83–109.

Hans J. Lind, Ed. (2020): *Fictional Discourse and the Law*, New York: Routledge.

Michael Lobban (2015): Legal Fictions before the Age of Reform, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 199–223.

Kathleen Loncar (1995): *Legal Fiction. Law in the Novels of Nineteenth Century Women Novelists*, Montreux: Minerva Press.

Ian MacLean (1999): Legal Fictions and Fictional Entities in Renaissance Jurisprudence, *The Journal of Legal History*, 1–24.

Henry Sumner Maine (2012): *Ancient Law. Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, Cambridge: CUP.

Leib Moscovitz (2015): Rabbinic Legal Fictions, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 325–346.

Harriet Murav (1998): *Russia's Legal Fictions*, Ann Arbor: The University of Michigan Press.

Pierre J. J. Olivier (1973): *Legal Fictions: An Analysis and Evaluation*, Leiden: Beugelsdijk.

Pierre J. J. Olivier (1975): *Legal Fictions in Practice and Legal Science*, Rotterdam: Rotterdam University Press.

Richard Ross Perry (2000): *Common-Law Pleading: Its History and Principles*, New Jersey: Lawbook Exchange.

Karen Petroski (2018): *Fiction and the Languages of Law: Understanding Contemporary Legal Discourse*, Cham: Springer.

Karen Petroski (2015): Legal Fictions and the Limits of Legal Language, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 131–156.

Frederick Pollock (1911): Has the Common Law Received the Fiction Theory of Corporations, *Law Quarterly Review* 27, 219–235.

Dieter Polloczek (1999): *Literature and Legal Discourse. Equity and Ethics from Sterne to Conrad*, Cambridge: CUP.

Salvatore Pugliatti (1968): Finzione, in: *Enciclopedia del Diritto*, Vol. 17. Milano: Giuffre, 658–673.

Michael Quinn (2015): Fuller on Legal Fictions: A Benthamic Perspective, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 55–82.

Fiona Raitt / Suzanne Zeedyk (2000): *The Implicit Relation of Psychology and Law*, London: Routledge.

Samuel Richardson (1741): *Pamela: Or, Virtue Rewarded. In a Series of Familiar Letters, from A Beautiful Young Damsel, To Her Parents. Now first Published In Order to Cultivate the Principles of Virtue and Religion in the Minds of the Youth of Both Sexes*, In Two Volumes, Second edition, London: C. Rivington / J. Osborn.

Samuel Richardson (1748): *Clarissa. Or, the History of a Young Lady: Comprehending the Most Important Concerns of Private Life. And Particularly Shewing, the Distresses that May Attend the Misconduct Both of Parents and Children, in Relation to Marriage*, London: Richardson.

Friedrich Carl von Savigny (1840): *System des heutigen römischen Rechts*, Vol. II, Berlin: Veit.

Burkhard Schafer / Jane Cornwell (2015): Law's Fictions, Legal Fictions and Copyright Law, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 175–195.

Frederick Schauer (2015): Legal Fictions Revisited, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 113–129.

Eleanor Shevlin (2012): Legal Discourse and Novelistic Form, in: Robert L. Caserio / Clement Hawes (eds.), *The Cambridge History of the English Novel*, Vol. 52, Cambridge: CUP, 46–62.

Charlotte Smith (1788): *Emmeline, the Orphan of the Castle*, London: T. Cadell.

Peter Smith (2007): New Legal Fictions, *The Georgetown Law Journal* 95, 1435–1496.

Phoebe Anne Smith (1992): *Jane Austen and 'the Lady's Law:' Literary and Legal Fictions*, Diss. Emory University, ProQuest Dissertation & Theses Global.

Michael Steig (1969): Subversive Grotesque in Samuel Warren's Ten Thousand a-Year, *Nineteenth-Century Fiction* 24:2, 154–168.

Simon Stern (2015): Legal Fictions and Exclusionary Rules, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, 157–173.

Simon Stern (2017): Legal and Literary Fictions, in: Elizabeth S. Anker / Bernadette Meyler (eds.), *New Directions in Law and Literature*, New York: Oxford University Press, 313–326.

Simon Stern (2020): Legal fictions and legal Fabrication, in: Hans J. Lind (ed.): *Fictional Discourse and the Law*, New York: Routledge, 191–199.

Marjorie Stone (1985): Dickens, Bentham, and the Fictions of the Law: A Victorian Controversy and Its Consequences, *Victorian Studies* 29:1, 125–154.

Pierre de Tourtoulon (1922): *Philosophy in the Development of Law*, New York: Macmillan.

William Twining (2015): Preface, in: Maksymilian Del Mar / William Twining (eds.), *Legal Fictions in Theory and Practice*, Cham: Springer, v–vii.

Hans Vaihinger (1913): *Die Philosophie des Als-ob*, 2nd ed., Berlin: Reuther & Reichard.

Hans Vaihinger (1965): *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind*, transl. C. K. Ogden, London: Routledge.

Marcus Waithe (2012): Empson's Legal Fiction, *Essays in Criticism: A Quarterly Journal of Literary Criticism* 62:3, 279–301.

Samuel Warren (1881): *Ten Thousand a-Year*, Oersey City: Frederick D. Lenn.

H. G. Wells (1918): *Joan and Peter*, London: Cassell.

John Wentworth (1799): *A Complete System of Pleading*, Dublin: J. Moore.

Harold Wurzel (1939): The Origin and Development of Quo Minus, *Yale Law Journal* 49:1, 39–64.

George Malcolm Young (1936): *Victorian England: Portrait of an Age*, London: Oxford University Press.

How to cite this entry

Laura Zander (2022): Legal Fictions, in: Thomas Gutmann / Eberhard Ortland / Klaus Stierstorfer, eds., *Encyclopedia of Law and Literature* (last edited 22 October 2022),
doi: 10.17879/12009571787,
URL: https://lawandliterature.eu/index.php/en/content-en?view=article&id=42&catid=10