



2014

# Fictions of Omniscience

Karen Petroski

*Saint Louis University School of Law*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Courts Commons](#), and the [Legislation Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Petroski, Karen (2014) "Fictions of Omniscience," *Kentucky Law Journal*: Vol. 103 : Iss. 4 , Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol103/iss4/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsu.uky.edu](mailto:UKnowledge@lsu.uky.edu).

# Kentucky Law Journal

VOLUME 103

2014–2015

NUMBER 4

## ARTICLES

### Fictions of Omniscience

*Karen Petroski*<sup>1</sup>

*Recent studies of the legislative process have questioned the rationales for many principles of statutory interpretation. One of those traditional rationales is the so-called fiction of legislative omniscience, thought to underlie many judicial approaches to statutory decisions. This Article presents the first comprehensive analysis of judicial assertions about legislative awareness and proposes a different way of understanding them. The proposed perspective compares fictions of legislative omniscience with similar but more widely accepted imputations of knowledge in other areas of law; it also draws on recent findings from other disciplines on the use and comprehension of statements about fictional situations. The comparisons suggest that, although judges impute unrealistic knowledge to legislatures, that imputation need not be characterized as an unrealistic demand or a naïve simplification of reality. Rather, the imputation is an important part of the account judges in our legal system typically give of legislative power. According to that account, the legislature, responsible for uttering the law, must have at least as much awareness of the law's content as the judiciary does. Whether such awareness is possible is beside the point. Rather than impairments of judicial legitimacy, judicial imputations of omniscience to the legislature are descriptions of the necessarily aspirational grounds of legal legitimacy.*

---

<sup>1</sup> Professor of Law, Saint Louis University School of Law. Thanks to Anders Walker, Matt Bodie, and Simon Stern, and to participants at the December 2013 meeting of the Law, Literature & the Humanities Association of Australasia and at the 2014 Annual Conference of the Association for the Study of Law, Culture, and the Humanities for helpful suggestions. Thanks also to Samantha Schrage for her research assistance.

<sup>2</sup> JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 170 (2d ed. 1921).

## INTRODUCTION

A statute is the expressed will of the legislative organ of a society; but until the dealers in psychic forces succeed in making of thought transference a working controllable force (and the psychic transference of the thought of an artificial body must stagger the most advanced of the ghost hunters), the will of the legislature has to be expressed by words, spoken or written . . . .<sup>3</sup>

Harvard law professor John Chipman Gray first presented this ironically resigned conclusion about the problem faced by statutory interpreters in 1909. Minus the irony, commentators have consistently offered similar diagnoses for most of the century since. Recent empirical work on the legislative process echoes Gray's concerns and mirrors his desire to purge legal discourse of any hint of the fantastic. Professors Abbe R. Gluck and Lisa Schultz Bressman put it this way in a recent article: "A threshold question for any empirical study of Congress is why interpreters treat rules that they believe to be fictions as benign ones."<sup>4</sup> Their implication is that rules believed to be fictions should not be understood as harmless—at least not without some good explanation.

In that article and its companion, Gluck and Bressman have made important contributions to a recent trend in scholarship on statutory interpretation, which has moved from broad theoretical questions toward empirical studies and doctrinal investigations. In many instances, this work has questioned longstanding justifications for specific principles of statutory interpretation, including classic canons of construction.<sup>5</sup> One such longstanding justification is the assumption of legislative "omniscience,"<sup>6</sup> which commentators have described as underlying many canons and practices. This fiction proposes that the legislature, as the agent responsible for enacting statutes, is somehow "aware" when it enacts those statutes of all its past enactments as well as their application by courts and agencies, and that courts may proceed to apply the legislature's enactments in light of that supposed awareness. Part I of this Article explains the alleged pervasiveness of this assumption, its fictional features, and the arguments that have been made against it.

Many of those arguments, Part I explains, are little more than an epithet: "fiction!" Strangely, critiques of the assumption of legislative omniscience have seldom drawn on the substantial (if outdated) literature on legal fictions. This failure might be due, as Part II.A suggests, to some deficiencies of that literature. Work on legal fictions confirms the distaste judges and especially commentators have for legal fictions, but it does not otherwise describe practices that look much

---

<sup>4</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 915 (2013) [hereinafter Gluck & Bressman, *Part I*].

<sup>5</sup> See *id.* at 902; see also, e.g., James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1201–02 (2010) (offering new critique of reliance on canons).

<sup>6</sup> See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983); see also discussion of the "omniscience" label *infra* notes 151–156.

like the assumptions of legislative omniscience described in Part I. Still, judges and scholars persistently describe those assumptions as fictions. This mismatch between theory and practice suggests that our traditional understanding of legal fictions may be incomplete. Exploring that hypothesis, Part II.B surveys the advances made in recent decades within other disciplines, including philosophy, cognitive science, and literary studies, in understanding various features of fictional discourse. Legal scholars have no good reason to continue to ignore this work, Part II concludes.

To explore the broader importance of both an updated understanding of legal fictions and a more nuanced grasp of assumptions of legislative omniscience, Part III explores other situations in which judges assume that real or legally constructed figures have knowledge that is either empirically or logically unlikely. These situations include the doctrine of constructive notice (in its many forms across multiple areas of law); the traditional prohibition on asserting ignorance of law as a defense to a criminal prosecution, often described as imputing a knowledge of the law to the criminal defendant; and the fictional patent-law figure of the “person having ordinary skill in the art,” who has, among other characteristics, knowledge of all pertinent “prior art.” The existence of these other legal constructs sharing features with assumptions of legislative omniscience supports the proposal advanced in Parts I and II that those assumptions might be products of something other than judicial ignorance or evasion.

Part IV returns to the central question of this Article: do assumptions of legislative omniscience undermine judicial legitimacy by painting an unrealistic portrait of lawmakers? The discussion in this concluding Part proposes an alternative way of understanding judicial imputations of omniscience to legislatures. On this account, these imputations are productive fictions, parts of a broader account that judicial opinions necessarily provide about the authority of statutory law and the aspirations of the legal system. Judges imply or presuppose legislative omniscience not as an imperfect empirical assessment of legislative reality, but as a direct expression of the grounds of statutory and judicial legitimacy, which is, and will always be, an ideal to be sought, not an event that has already occurred.

#### I. FICTIONS OF LEGISLATIVE OMNISCIENCE

Judges sometimes explain their conclusions regarding the meaning or application of statutory language by reference to information that the judge assumes was known to “the legislature.” This assumption may concern the legislature’s awareness of its own contemporaneous output,<sup>7</sup> of the output of earlier sessions of the same legislature,<sup>8</sup> or of the way courts and agencies have interpreted

---

<sup>7</sup> See, e.g., *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 860 (1986) (citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (“[I]dential words used in different parts of the same act are intended to have the same meaning.”)).

<sup>8</sup> See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (directing application of statute in manner “most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.”).

the output of such earlier sessions.<sup>9</sup> Assumed legislative knowledge sometimes extends, as well, to judicial decisions<sup>10</sup> and practices<sup>11</sup> that are not necessarily directly tied to the statutory provision that the court is currently applying. In jurisdictions where voters have power to create law directly, judges sometimes impute similar awareness to the voters as a collective lawmaker.<sup>12</sup>

This Article, following the practice of many legal writers, describes these assumptions as imputations of a kind of “omniscience” to the legislature.<sup>13</sup> Such imputations have long been criticized by commentators. The criticism has recently been strengthened by studies concerning the practices of and information available to real-life legislators and legislative drafters. A principal goal of this Article is to assess judicial imputations of legislative omniscience in light of these new empirical critiques. First, however, it will describe (in Part I.A) the role that assumptions of omniscience play in legal justification and the different forms these assumptions take. Part I.B then clarifies commentators’ critiques of these assumptions, and Part I.C situates the recent empirical work within this context.

### A. *The Scope and Function of the Fictions*

In a 1990 article, Professors Eben Moglen and Richard J. Pierce, Jr. described the imputations noted above as examples of “the largely implicit factual assumptions that judges make about the group behavior of legislators that are and have been the foundation of judicial interpretation of legislative documents.”<sup>14</sup> Moglen and Pierce identified these assumptions as “fictions.”<sup>15</sup> Sometimes, as in the examples given above, courts will present such assumptions of omniscience directly in justifying a result.<sup>16</sup> But according to commentators, the assumptions are

---

<sup>9</sup> See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress . . . can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”).

<sup>10</sup> See, e.g., *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring) (“Judicial inference of a zone-of-interests requirement . . . is a background practice against which Congress legislates.”); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–98 (1979) (noting that it is reasonable for courts to presume that Congress is aware of judicial precedent).

<sup>11</sup> See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles.”).

<sup>12</sup> See, e.g., *In re Harris*, 775 P.2d 1057, 1060 (Cal. 1989) (“[T]he drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source.”).

<sup>13</sup> The scare quotes indicate that the knowledge courts attribute to lawmaking bodies is not omniscience in the strictest sense; among other things, the knowledge courts deem legislatures to have is primarily knowledge of legal texts. See Jonathan Culler, *Omniscience*, 12 J. SOC’Y FOR STUDY NARRATIVE LITERATURE 22 (2004); see also *infra* notes 151–156 and accompanying text (examining various uses of the “omniscience” label). Still, the knowledge courts impute to legislatures is in many cases knowledge that actual legislators would not have, and there is a long tradition of referring to it as “omniscience.” See *infra* Part I.A.2.b.

<sup>14</sup> Eben Moglen & Richard J. Pierce, Jr., *Sunstein’s New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1211 (1990).

<sup>15</sup> *Id.*

<sup>16</sup> See *supra* notes 7–12 for examples; see also *infra* note 229.

also closely related to a number of other statutory interpretation practices, including many interpretive canons. Judge Posner, indeed, has described imputations of omniscience as the principal justification for most canons of statutory interpretation.<sup>17</sup> When the assumptions function in this way, they are not always directly asserted by judges; sometimes, they are read into judicial reasoning after the fact by commentators.

Part IV will suggest that we should evaluate these two forms of the assumption of omniscience differently. To clarify the complaints of commentators, Part I.A.1 will briefly survey the array of statutory-interpretation practices to which such assumptions have been linked. Part I.A.2 then examines the structure of the assumptions, regardless of who makes them, by examining whose knowledge is assumed and what the “knower” is assumed to have knowledge of. Despite the enduring criticism of these assumptions, they have never before been systematically analyzed in this way.

*1. Canons and Practices Presupposing Legislative Omniscience.*—Judicial assumptions of legislative omniscience are sometimes explicit.<sup>18</sup> But according to commentators, judges often presuppose legislative omniscience even when they do not explicitly refer to it. Judicial practices presupposing omniscience run the gamut from textual and structural canons of interpretation, to so-called substantive and extrinsic-source canons, to broader methodological positions on the appropriate judicial attitude toward statutory interpretation.

A number of widely followed textual and structural canons have been described as presupposing legislative omniscience. The *expressio unius* canon, for example, which directs a court to conclude that matter not expressly provided for in a statute’s text is outside the statute’s coverage, has been characterized as based on an assumption of omniscience, “because it would make sense only if all omissions in legislative drafting were deliberate.”<sup>19</sup> The rule against surplusage, instructing courts to give independent meaning to every word of an enactment, has also been so described.<sup>20</sup> Even more obviously based on assumptions of omniscience is the presumption of consistent usage underlying the “whole act” and “whole code” rules, which direct courts to give a word the same meaning everywhere it appears in an enactment or even the entire body of a legislature’s output.<sup>21</sup> This presumption, if

---

<sup>17</sup> See Posner, *supra* note 6, at 811; accord Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 730 (2014) [hereinafter Gluck & Bressman, *Part II*] (contending that accuracy of “details of congressional practice” is important to justifying canons of interpretation); Bressman & Gluck, *Part I*, *supra* note 4, at 915 (“[T]he fiction of the unitary drafter . . . undergirds a huge number of interpretive rules . . .”); Moglen & Pierce, *supra* note 14, at 1209 (“[T]he source of canons of construction, like other rules of interpretation, remains fiction.”).

<sup>18</sup> See *infra* note 229.

<sup>19</sup> Posner, *supra* note 6, at 813; see also William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 226 (2000) (noting that canon “makes greatest sense if the starting premise is something close to an omniscient legislative drafter.”).

<sup>20</sup> Posner, *supra* note 6, at 812.

<sup>21</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16

understood as tethered to legislative rather than judicial choices, seems to assume that an enacting legislature was aware of the ways particular words were used, and were meant to be used, in provisions enacted by previous sessions of the legislature.<sup>22</sup>

Commentators have also tied other well-known canons to assumptions of legislative omniscience. Both the avoidance canon, which directs courts to apply statutes so as to avoid constitutional concerns,<sup>23</sup> and the rule of lenity, which instructs courts to construe ambiguous criminal statutes in defendants' favor, have been so explained.<sup>24</sup> Judicial conclusions about the significance of legislative action (or inaction) following judicial interpretation of the provision being applied are especially difficult to explain without reference to assumptions of legislative omniscience. Of all the canons discussed here, these are the ones most often involving express judicial assertions about legislative knowledge.<sup>25</sup> Like all the canons, of course, these inferences from legislative behavior are used irregularly by courts. Judicial opinions do not always assume congressional awareness of prior

---

(1997) (referring to "fiction" underlying the principles that statutes should be construed as "internally consistent" and "compatible with previously enacted laws"); Buzbee, *supra* note 19, at 173 ("[C]ross-referencing of . . . provisions in different statutes is often justified with the use of the fiction that there is one Congress that knows how to achieve a certain goal . . . when 'Congress wants' to do so . . ."); Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 959 (1994) ("[W]hen legislators adopt language of earlier statutes in new laws . . . it is plausible to assume that . . . the legislature acted with knowledge of the previous law . . ." (internal emphasis omitted)).

<sup>22</sup> Other structural canons seem to rest on similar assumptions. One example is the presumption against repeals by implication (the rule that an earlier statute conflicting with a later one should be construed so as to keep both earlier and later enactments in effect). See Posner, *supra* note 6, at 812 (noting that the assumption that "whenever Congress enacts a new statute it combs the United States Code for possible inconsistencies with the new statute . . . would imply legislative omniscience in a particularly . . . unrealistic form"). Another illustration is the *in pari materia* rule (holding that enactments on similar subjects should be construed consistently with one another). See Sutro, *supra* note 21, at 957 n.59 ("*In pari materia* rests on the premise that 'when a legislature enacts a provision, it has available all the other provisions relating to the same subject matter . . .'"). The "borrowed statute" rule (the rule that when a legislature enacts a measure modeled on an enactment in another jurisdiction, the new enactment should be applied consistently with its application in the originating context) has also been described as resting on this assumption of omniscience. See *id.* at 958 ("Where the legislature of one jurisdiction adopts a provision . . . from . . . another jurisdiction, it is presumed that the enactment was made with knowledge of the prior interpretation . . .").

<sup>23</sup> James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 79 (1994) [hereinafter Brudney, *Chatter*] (noting the grounding of the avoidance canon in "the assumption that legislators should be regarded as reasonably aware of the existence of potential constitutional conflicts, including judicial decisions identifying such conflicts . . .").

<sup>24</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 958 ("[J]udges and theorists have been . . . wedded to justifying lenity on the basis of congressional knowledge.").

<sup>25</sup> These canons include the reenactment rule, which holds that "reenactment without change of a statute that the courts have interpreted in a particular way may be taken as evidence that the reenactment adopts that construction." Posner, *supra* note 6, at 813-14. The related acquiescence rule holds that a legislature's failure to amend a statute indicates assent to controlling judicial interpretations of that statute. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988) [hereinafter Eskridge, *Inaction*].

judicial interpretations of statutes. Sometimes, courts point out the unlikelihood of that assumption instead.<sup>26</sup> Still, courts engage in these practices often enough to make them the subject of much commentary.<sup>27</sup>

Assumptions of legislative omniscience have also been described as underlying broader positions on appropriate methods of statutory interpretation, including the two main such positions today: purposivism and textualism. Purposivist interpretation in the Hart and Sacks mold, which posits “reasonable legislators” as the generators of statutory text, also seems to presuppose that those legislators—not unlike the reasonable persons of other areas of law—have access to information that might not be available to their real-life counterparts.<sup>28</sup> Textualism has a more complex relation to assumptions of legislative omniscience. Some aspects of textualism imply a more cynical view of legislators’ capacities than purposivism does.<sup>29</sup> Yet textualists also rely heavily on many of the canons that seem closely linked to assumptions of legislative omniscience,<sup>30</sup> and textualists sometimes justify this reliance as a means of “disciplining” the legislature to draft more consistently, apparently presupposing legislators’ awareness of judicial activity.<sup>31</sup>

Judges do not make assumptions of legislative omniscience in every statutory case, and sometimes they explicitly disavow making such assumptions. Still, the notion seems to play a role in many accounts, by commentators and by judges

<sup>26</sup> See Eskridge, *Inaction*, *supra* note 24, at 75–76 (noting that “the Court [often] . . . explain[s] away legislative inaction by reference to Congress’ ignorance of the prior interpretation or to the lack of a clear line of interpretation by an agency or the courts”).

<sup>27</sup> See, e.g., Brudney, *Chatter*, *supra* note 23; Eskridge, *Inaction*, *supra* note 25.

<sup>28</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 88 (2005) (“At the heart of a purpose-based approach stands the ‘reasonable member of Congress’—a legal fiction . . .”); Moglen & Pierce, *supra* note 14, at 1212 (noting Hart and Sacks’s awareness that their approach rested on a fiction); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1148–49 (2011) (describing purposivist view of Congress as “far too rosy”).

<sup>29</sup> See Nourse, *supra* note 28, at 1134 (“Textualists . . . rely upon theories that treat Congress with contempt—assuming that its decisions can never be rational . . .”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (“[Legislation] theorists frequently work with . . . a jaundiced view of the capacities of . . . legislatures.”).

<sup>30</sup> Cf. Buzbee, *supra* note 19, at 180 (“The United States Supreme Court has in recent years made frequent use of the one-Congress fiction in its statutory interpretation cases. The practice appears most frequently in the opinions of Justice Scalia.”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 851–52 (2014) (“There has been a generally acknowledged trend toward textualist interpretation [relying on ordinary meaning and textual canons rather than legislative history or policy arguments] . . . over the last fifty years.”).

<sup>31</sup> See, e.g., Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 157–58 (1997) (“[S]yntax canons may . . . aid Congress in understanding how the judiciary will interpret its statutes, by providing it with a set of assumptions about how its statutes will be interpreted.”). *But see*, e.g., Nourse, *supra* note 28, at 1174 (“[C]ourts do not have the institutional capacity to discipline themselves to send a consistent enough message to Congress to change its behavior.” (citing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006))).



themselves, of what judges are doing when they interpret and apply statutes. It is therefore a little surprising that these assumptions have never been systematically dissected. The next section considers their structure.

*2. False or Improbable Suppositions Involved.*—Most assumptions of legislative omniscience involve two distinct suppositions that are potentially contrary to fact. One is that the legislature may be treated as a single intentional body. The other is that this entity is in some sense “omniscient.” These two suppositions are subject to somewhat different criticisms.

*2(a). Whose Knowledge?*—Assumptions of legislative omniscience seem to depend, as Professor Buzbee observed in a 2000 article, on the imputation of a collective “mind” to a legislature: “In opinions employing the one-Congress fiction [the treatment of successive sessions of the legislature as the same intending body], the legislature is often anthropomorphized, in the sense that it is treated as if it were a single natural person, albeit a person of superhuman omniscience and consistency of style.”<sup>32</sup> This sort of personification of the legislature has long been questioned, apart from any imputation of omniscience to the personified body. Professor Radin’s well-known 1930 broadside described it as an indefensible ascription of mental properties to something that by definition lacks them.<sup>33</sup> This argument notes the unlikelihood of individual legislators sharing mental states in a way that would allow observers to consider all those diverse mental states as part of a single one.<sup>34</sup> Professor Radin’s argument also asks how an after-the-fact interpreter could ever gain access to this mental state, were it to exist.<sup>35</sup> It is thus not just an argument about conceptual categories, but also one about cognitive limitations—an argument emphasizing our inability to read minds. Professor Radin’s and similar arguments have been enormously influential<sup>36</sup> but have never completely prevailed. Judicial opinions and commentary continue to refer to “legislative intent” and to argue for the value of the concept.<sup>37</sup>

---

<sup>32</sup> Buzbee, *supra* note 19, at 204–05. Professor Buzbee notes the paradox of the fiction as a justification for textual canons, since it involves “an odd . . . anthropomorphizing of the legislature by justices who generally shun any references to legislative intent [and] decline to draw inferences from legislative silence.” *Id.* at 245.

<sup>33</sup> See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The least reflection makes clear that the [unitary] law maker . . . does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with words which some two or three men drafted . . .”).

<sup>34</sup> *Id.* at 870 (“That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference . . . . The chances that of several hundred men each will have exactly the same determinate situations in mind . . . are infinitesimally small.”).

<sup>35</sup> *Id.* at 870–71 (“It is not impossible that this knowledge could be obtained. But how improbable it is, even venturesome mathematicians will scarcely undertake to compute.”).

<sup>36</sup> Professor Smith has argued, for example, that rejection of legislative intent as a fiction is a central tenet of textualism. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1461–62 (2007).

<sup>37</sup> See, e.g., Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 51–60 (2014). Further, Professor Bressman has argued that the legislative intent construct is a fiction, but an “ordinary” and harmless, if not necessary, one. Lisa Schultz

Recent scholarship, described in more detail in Part I.B below, has added to this conceptual criticism of legislative personification an empirical dimension, inspired by the emphasis that text-focused statutory interpretation places on the details of legislative language. If we are concerned with the precise verbal formulations enacted, this argument goes, then we should consider where these formulations come from. Similarly, if courts want to send signals to the legislature to improve drafting practices, courts would do well to identify drafters accurately. More often than not, those who craft statutory language are not elected members of the legislature,<sup>38</sup> but professional drafters (career civil servants),<sup>39</sup> legislative staffers,<sup>40</sup> or lobbyists.<sup>41</sup> So even if we were to accept that elected legislators could act with one “mind” accessible to interpreters, this newer argument presents problems for treating statutory text as the creation of a single intending agent. For one thing, non-legislator drafters are not members of the political and legal body to which courts profess fidelity. A distinct problem, reminiscent of Radin’s concerns, is that drafters do not necessarily communicate what they know to elected legislators. Can the knowledge of non-elected drafters nevertheless be imputed to legislators? I return to this question below.

*2(b). Knowledge of What?*—The second set of potentially unrealistic suppositions involved in assumptions of legislative omniscience concerns the matters assumed to be “known,” taking for granted that there is some thing that could “know” it. Here, too, the simple label “legislative omniscience” conceals some complexity. Some of the knowledge imputed to legislators or legislatures is unlikely to have been known to any real human lawmaker or drafter because of ordinary human cognitive limitations. But some of the knowledge imputed would be logically impossible for anyone to have.

The first category (knowledge unlikely to be known due to cognitive limits), in turn, includes two kinds of imputed knowledge. First, it includes knowledge about non-technical (i.e., non-legal) matters, such as the contents of other legislators’ minds and regularities of language usage.<sup>42</sup> Second, and more commonly, it

---

Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2012–13, 2046–47 (2011).

<sup>38</sup> Brudney, *Chatter*, *supra* note 23, at 53 (“Most members [of Congress] most of the time do not participate in any way in drafting the text on which they are asked to vote.”).

<sup>39</sup> See generally Gluck & Bressman, *Part I*, *supra* note 4, at 965–68 (noting prevalence of “nonpartisan professional drafters”); Gluck & Bressman, *Part II*, *supra* note 17, at 739–41 (noting work by Legislative Counsel staffers); Shobe, *supra* note 30, at 826–29 (discussing “Legislative Counsel’s Role in Drafting”).

<sup>40</sup> Gluck & Bressman, *Part II*, *supra* note 17, at 755–56. (“The other main legislative drafting staff are personal staff—who work directly for elected members—and staff who work for the congressional leadership, to draft statutes according to their member’s preferences and with an eye towards reelection.”).

<sup>41</sup> *Id.* at 758 (noting that more than a third of the drafters interviewed by the authors described first drafts of bills as “typically written by . . . policy experts and outside groups, like lobbyists”); Shobe, *supra* note 30, at 847–49 (“Long-serving committee staff and legislative counsel anecdotally report that lobbyist involvement in the drafting process has increased significantly over the last twenty years.”).

<sup>42</sup> Cf. Stephen C. Mouritsen, Comment, *The Dictionary Is Not a Fortress: Definitional Fallacies*

includes knowledge of specific legal information, such as other provisions of “the code,”<sup>43</sup> the acts and intentions of previous sessions of the legislature,<sup>44</sup> intervening judicial or agency decisions concerning a previous version of the statute being interpreted,<sup>45</sup> and/or interpretive principles used by courts.<sup>46</sup>

The second broad category—including information that even the best-informed drafters and legislators could not possibly have—includes awareness of scenarios to which the statute might, in the future, be argued to apply.<sup>47</sup> This category also includes the knowledge imputed to drafters and legislators of the content and judicial interpretations of statutes not even enacted or proposed at the time of enactment of the statute being applied.<sup>48</sup>

These kinds of imputed knowledge are analytically distinguishable but sometimes superimposed. Professor Buzbee has described a related problem in terms of “layers of knowledge”:

[I]nterpretive inferences from interstatutory comparison . . . require at least one, if not both of the enacting Congresses to have the following highly unlikely layers of knowledge. They must: (1) know what laws will be the subject of interstatutory comparison, (2) know what linguistic consistency or inconsistency will be found significant by a reviewing court, and (3) share a common set of “interpretive conventions[.]”<sup>49</sup>

As Professor Buzbee’s account suggests, he considers the “highly unlikely” nature of this state of affairs—this compounding of impossibilities—to indicate the weakness of the practices allegedly justified by these assumptions.<sup>50</sup> His critical attitude

---

and a Corpus-Based Approach to Plain Meaning, 2010 BYU L. REV. 1915, 1936 (2010) (“[H]uman intuition about the frequency of lexical items is often unreliable.”).

<sup>43</sup> Posner, *supra* note 6, at 806 (“There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code . . .”).

<sup>44</sup> Buzbee, *supra* note 19, at 173; *see also supra* note 21 and accompanying text.

<sup>45</sup> Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 816 (2002); Posner, *supra* note 6, at 813–14; *see also supra* note 25 (concerning the reenactment rule).

<sup>46</sup> *See, e.g.*, Brudney, *Chatter*, *supra* note 23, at 78–79 (“[R]eliance [on the canons] is justified in part by the assumption that legislators should be thought of as reasonably attentive to and in agreement with the ‘background of customs and understandings of the way things are done.’”); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 398 (1998) (“[I]t is reasonable to presume that when Congress remains silent about the meaning of a particular statutory term, it has done so with the expectation that the term will be construed in a fashion consistent with prevailing canons of statutory interpretation.”).

<sup>47</sup> Posner, *supra* note 6, at 811 (“[A] statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.”); *cf.* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 61 (1991) (arguing that interpreting a statute by applying its literal language makes less sense with older statutes because legislators are unable to envision how that language will apply in the future).

<sup>48</sup> Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1126 (2012) (“[T]he Supreme Court sometimes applies the one-Congress fiction in order to render statutory language consistent with a judicial interpretation of a different statute that was issued after the statute in question was enacted.”).

<sup>49</sup> Buzbee, *supra* note 19, at 234.

<sup>50</sup> *Id.*

toward such assumptions is typical of contemporary commentators' views.

### B. Criticisms and Defenses

Although he was not the first to criticize assumptions of legislative omniscience,<sup>51</sup> Judge Posner has done much to highlight the phenomenon. In 1983 he wrote: "Most canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation or of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process."<sup>52</sup> Judge Posner's position is now virtually orthodoxy among commentators,<sup>53</sup> and his complaint about the "unrealistic" character of the assumption remains the central criticism of the practice. But this criticism takes several different forms, and it is not universally accepted. This part summarizes the main arguments against assuming legislative omniscience and the responses to those arguments by commentators. Part I.C assesses the current state of the debate after recent empirical interventions.

1. *Criticism of the Fictions of Legislative Omniscience.*—The longest-lived argument against assumptions of legislative omniscience, as the above quote from Judge Posner suggests, is that they are descriptively inaccurate. In 1940, Justice Frankfurter characterized inferences from legislative inaction as based on "speculative unrealities" and "quicksand."<sup>54</sup> Writing thirty years after Judge Posner, Professors Gluck and Bressman have largely reiterated this argument, at least as it concerns drafters' awareness of (and agreement with) interpretive canons, with

---

<sup>51</sup> Justice Frankfurter took issue with imputations of legislative omniscience, for example, more than 40 years before Posner published his well-known article. See *infra* note 54 and accompanying text.

<sup>52</sup> Posner, *supra* note 6, at 811.

<sup>53</sup> See, e.g., Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1046–47 (1991); Judge James L. Buckley, Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 241, 312–13 (1989); Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 59–60 (2007) ("[N]either members of Congress nor their staffs are cognizant of the great majority of judicial decisions addressing legislation within the jurisdiction of their committees."); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 758 (1984) (noting that arguments from legislative acquiescence, if based on the assumption that Congress is aware of judicial interpretations, are "absurd" given the "increase in the number of judicial decisions"); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 654–55 (1992); Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 656 (1987) ("[T]o the extent that [the canons'] applicability requires legislative awareness that 'the legislature is deemed to have knowledge of the rules of construction,' this is not the case."); Moglen & Pierce, *supra* note 14, at 1211 ("[M]ost legislators are ignorant of the overwhelming majority of 'legislative history.' Frequently, they are entirely unaware of the literal content of the statute itself."). But see Levin, *supra* note 48, at 1127 ("[T]he public is justified in relying on the one-Congress fiction to inform a statute's meaning," and "the Court should adopt the one-Congress fiction because it protects and respects legitimate reliance and expectations interests.").

<sup>54</sup> *Helvering v. Hallock*, 309 U.S. 106, 119–21 (1940).

extensive empirical support.<sup>55</sup> Assessing the current state of legal opinion on this question, they endorse the “common notion that the ‘omniscient’ drafter assumption is a fiction.”<sup>56</sup>

Descriptive inaccuracy is the main problem with assumptions of legislative omniscience, but not the only one. Judge Posner, again, was among the first to point out other negative consequences of these assumptions. Canons based on assumptions of legislative omniscience, he wrote, “promot[e] ‘judicial activism’” by “making statutory interpretation seem mechanical rather than creative,” thereby “conceal[ing,] often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision.”<sup>57</sup> Professor Buzbee, in his critique of the “one-Congress fiction” used to justify canons of consistent usage, makes a similar point.<sup>58</sup> Ultimately, Professors Gluck and Bressman agree, although they use less accusatory language: “[W]e can best understand these rule of law canons [such as the presumption of consistent usage] . . . in terms of their appearance of neutrality and the related desire to constrain judicial discretion.”<sup>59</sup> Even if courts do not intend to deceive by assuming legislative omniscience, these assumptions could be understood as signs of a distinct judicial vice—not surreptitious activism, but laziness or a kind of professional egocentrism, a disinclination to learn more about the realities of legislative process and practice.<sup>60</sup>

A separate set of less prominent objections to assuming legislative omniscience is based not on concerns with inaccuracy, but on concerns with incoherence. Assumptions of legislative omniscience seem to be inconsistent with some other judicial practices. When reviewing the constitutionality of statutes, for example,

---

<sup>55</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 907 (“[T]here were a host of canons that our respondents [congressional counsel] told us that they do not use, either because they were unaware that the courts relied on them or *despite* known judicial reliance [because of the respondents’ awareness of their descriptive inaccuracy].”) (emphasis in original). According to Professors Gluck and Bressman, the result of this congressional rejection and disregard for some canons means that “none of the publicly stated justifications for their application holds.” *Id.* at 954. Professors Gluck and Bressman present their empirical study as a response to commentators’ habit of referring to the so-called “descriptive” canons as “accurate generalizations of the way legislators communicate through statutory text.” Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 *VAND. L. REV.* 561, 572 (1992). Professor Ross also argued that inaccuracy is grounds for rejecting an interpretive practice: “As for the canon that nothing in statutory text can be treated as surplusage, even if Congress were too embarrassed to admit to its sloppy drafting habits by overturning the canon itself, perhaps this canon too is so contrary to real life experience that courts should simply stop using it.” *Id.*

<sup>56</sup> Gluck & Bressman, *Part II*, *supra* note 17, at 738.

<sup>57</sup> Posner, *supra* note 6, at 816–17.

<sup>58</sup> Buzbee, *supra* note 19, at 236 (“When courts start to refer to materials other than the primary textual provision, . . . they . . . have given themselves a more open interpretive field.”); *cf.* Grabow, *supra* note 53, at 752 (“By attributing to Congress’ silence its acquiescence in a judicial or administrative construction . . . the Court is able to act as if it is merely finding, rather than making the law. This allows the Court in effect to shield its exercise of choice.”).

<sup>59</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 962.

<sup>60</sup> See, e.g., Muriel Morisey, *Liberating Legal Education from the Judicial Model*, 27 *SETON HALL LEGIS. J.* 231, 267 (2003) (“The canons of construction and convenient judicial maxims are used as substitutes for careful statutory analysis.”).

courts arguably assume something close to the opposite of legislative omniscience.<sup>61</sup> It also seems inconsistent for courts to impute to legislatures an awareness of context that courts themselves may admit to lacking.<sup>62</sup> A more extreme critique, harking back to Professor Radin, contends that statutes and judicial applications of them do not form a coherent body of information, so that imputing knowledge of this information to legislatures does not provide rational support for judicial conclusions.<sup>63</sup>

Given the wide agreement that, for whatever reason, assumptions of legislative omniscience are indefensible, what explains their persistent use, both in explicit judicial statements and as unstated premises for such an array of judicial practices? One possibility is that the assumptions are not always as problematic as the commentary has assumed. Eventually, I will argue for this position. However, as I show below, this argument has not previously been made and defended in a way that avoids the criticisms just outlined. Another possibility is that some judicial practices that we view as based on this assumption can be better justified on other grounds. Professors Gluck and Bressman have suggested this possibility in their recent work, discussed in Part I.C. Before examining their position, I turn to existing defenses of assumptions of legislative omniscience.

*2. Responses to the Criticisms*—Courts and commentators sometimes assert the legitimacy of assumptions of legislative omniscience without considering their descriptive accuracy.<sup>64</sup> Increasing acceptance of the criticisms described above, however, has made such assertions more vulnerable.

An alternative response is to directly question the main objection to assumptions of legislative omniscience: the claim that they are descriptively inaccurate. This response may be understood as a challenge to the “omniscience” label or as a challenge to the position that canons may only be justified by reference to these assumptions. Either way, some judicial practices seem easy to justify without assuming legislative omniscience or telepathy. Professor Buzbee, for instance, has argued that the *expressio unius* canon is less offensive on the score of descriptive inaccuracy than is the practice of applying the same interpretation to a

---

<sup>61</sup> See Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn't Know*, 30 U. RICH. L. REV. 653, 660 (1996) (noting the Supreme Court's “movement away from judicial deference to Congress' factual deliberations and conclusions” in certain areas of constitutional law). Spence argues that this movement is related to, or at least has an affinity with, textualism, in that both “enhance judicial power at the expense of Congress.” See *id.* at 679–81.

<sup>62</sup> Cf. Moglen & Pierce, *supra* note 14, at 1232 (“[The] caseload [of judges] precludes them from engaging in extensive research to determine the combination of political pathologies that gave rise to a particular statutory provision . . .”); *id.* at 1233, 1241–42, 1244 (discussing the inevitability of inconsistency in interpretive conclusions, given the distributed nature of the federal judiciary and the limited caseload capacity of Supreme Court).

<sup>63</sup> See, e.g., Eskridge, *Inaction*, *supra* note 25, at 83 (“Congress cannot be presumed to ‘know’ an administrative interpretation that is unsettled even in the minds of the administrators.”).

<sup>64</sup> See, e.g., *supra* Part I.A.1.; see also Davies, *supra* note 46, at 398 (“The notion that Congress legislates against the backdrop of existing law—including both statutory and judge-made law—is no novel proposition.”); Mank, *supra* note 45, at 868 (“It is appropriate to assume that Congress is aware of significant judicial decisions when it enacts a statute.”).

term appearing in statutory provisions enacted at different times.<sup>65</sup> Other scholars have pointed out that many drafters examine statutory context before drafting a new provision;<sup>66</sup> that official drafting manuals reflect some of the canons often justified by reference to legislative omniscience;<sup>67</sup> that committee staff may be aware of “major” judicial decisions relevant to proposed legislation;<sup>68</sup> and that legislators sometimes do register awareness of (some) judicial interpretations in legislative history documents.<sup>69</sup> Professors Gluck and Bressman acknowledge that some drafters are aware of, and rely on, some judicial and scholarly practices, including some canons and case law, consistent with judicial assumptions to this effect.<sup>70</sup> A recent article by Jarrod Shobe, discussed at more length in Part I.C, explains in detail how drafters’ examination of statutory context and relevant judicial actions, as well as awareness of judicial practices in applying statutes, has become more common in the federal legislature since the 1990s.<sup>71</sup>

A slightly different response to criticisms of legislative omniscience accepts omniscience as a worthwhile goal and seeks to increase the descriptive accuracy of the assumption by, in effect, enabling closer approximations to omniscience through institutional design. Mechanisms already exist in many states for informing legislators of judicial activity and of the effects of particular enactments

<sup>65</sup> Buzbee, *supra* note 19, at 228–29 (“The *expressio unius* canon . . . is . . . aspirational, but it does not rest on counterfactual assumptions of omniscient legislators able to know both the universe of similar provisions in other statutes and which provisions and linguistic differences would be viewed as significant by a reviewing court.”).

<sup>66</sup> Cf. Barry Jeffrey Stern, *Teaching Legislative Drafting: A Simulation Approach*, 38 J. LEGAL EDUC. 391, 394 (1988) (“I ask students to accompany their drafts with commentary that reviews the coverage of the proposed statutes and highlights differences between the proposal and existing law.”).

<sup>67</sup> See B.J. Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 193 (2010) (listing canons of consistent usage, the rule against surplusage, and the rule against implied repeals as “supported by federal legislative drafting manuals”).

<sup>68</sup> Frost, *supra* note 53, at 4 (“[O]n many occasions Congress has recognized judicial confusion about the meaning of legislation and amended unclear statutory language.”); *id.* at 29–34 (discussing cases and studies documenting this recognition, including Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001)). *But see* Katzmann, *supra* note 53, at 662 (discussing the results of a statutory revision project finding that committee staff were generally unaware of relevant court decisions unless they were “major”).

<sup>69</sup> See Brudney, *Chatter*, *supra* note 23, at 64 (“[I]f a reenacted statute contains numerous and substantial modifications in text, if it was enacted following a more inclusive legislative process, and if the case commented on by the committee has been more prominently featured in public debate, there is a stronger basis for imputing such familiarity and endorsement to Congress.”).

<sup>70</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 949 (describing “feedback canons”: canons that respondents are aware the court uses and incorporate when drafting for that reason); *id.* at 948 (“Thirteen percent [of respondents] . . . said that they examine prior [constitutional] case law . . . in anticipation of judicial ruling.”).

<sup>71</sup> Shobe, *supra* note 30, at 813 (“Today, statutes are thoroughly researched and written by large groups of experts who are more aware of what courts and agencies are doing than ever before . . . .”); *id.* at 827 (“Legislative counsel view part of their role as helping staff to understand the existing statutory framework and how a new bill will fit into that framework.”); *id.* at 831–32 (arguing that legislative drafters are increasingly aware of canons of interpretation); *id.* at 842 (“[A]ttorneys in [the American Law Division, an office of the Congressional Research Service,] are especially responsible for providing analysis of case law and constitutional issues, while legislative counsel are especially attuned to how laws fit in to the current statutory scheme.”).

on other parts of the jurisdiction's code—and vice versa, for informing judges of legislative activity responding to judicial interpretations.<sup>72</sup> A similar mechanism has been repeatedly recommended at the federal level.<sup>73</sup> Jarrod Shobe's position, noted above, is that we have basically already achieved this goal: he maintains that such mechanisms do exist *de facto* in the federal Congress, through the combined efforts of drafters in the Offices of Legislative Counsel, the American Law Division of the Congressional Research Service, and committee staffers.<sup>74</sup>

Not all responses to the criticisms outlined in Part I.B.1 focus on the descriptive accuracy of assumptions of legislative omniscience. Some commentators have argued that it is rarely if ever necessary to assume legislative omniscience because the practices usually justified by reference to this assumption can be justified on other grounds, such as an independent judicial obligation to ensure legal coherence.<sup>75</sup> Most recently, Professors Gluck and Bressman have suggested that many

canons derive their most powerful justification from “rule of law” norms—the idea that interpretive rules should coordinate systemic behavior or impose coherence on the *corpus juris*. Justices Scalia and Breyer . . . have suggested that even fictitious canons are justifiable on the ground that it is the role of courts to impose systemic coherence on the law.<sup>76</sup>

This position is not strictly speaking a defense of the assumption of omniscience, but an argument for retaining some of the practices commentators have traditionally justified by reference to the assumption.

In this sense, none of the positions described so far really amount to a defense of the assumption of omniscience itself. Only a few commentators have taken this more radical position. One way to defend the assumption directly is to describe it as no more descriptively inaccurate than any of the other assumptions lawyers and judges routinely make in applying legal texts and attributing motivation to actors.

---

<sup>72</sup> See Abrahamson & Hughes, *supra* note 53, at 1060–73 (describing such mechanisms in states like North Carolina, Alaska, Oregon, New York, and Mississippi).

<sup>73</sup> See, e.g., *id.* at 1048–49, 1076 (describing such proposals, including those by Judge Benjamin Cardozo, Judge Henry Friendly, and then-Judge Ruth Bader Ginsburg); Frost, *supra* note 53, at 24 (discussing these proposals); Ruth Bader Ginsburg & Peter W. Huber, Commentary, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1417–20 (1987); Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”: Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 140 (2007) (discussing the potential benefits of a project to make House and Senate Legislative Counsel more aware of basic rules and principles when drafting legislation).

<sup>74</sup> See generally Shobe, *supra* note 30, at 818–51 (discussing the Offices of the Legislative Counsel, the Congressional Research Service, and committee staffers).

<sup>75</sup> For example, Professor Eskridge has argued that the drawing of inferences from legislative inaction can be justified by reference to principles of public notice and reliance. Eskridge, *Inaction*, *supra* note 25, at 108 (“[W]hat the Court is doing in these cases is to place upon Congress the institutional burden of responding to ‘building block’ agency and judicial interpretations of statutes when Congress disagrees with them.”). Similarly, Professor Buzbee has argued that the “one-Congress fiction” might be justified by “the Court’s obligation to make sense of the *corpus juris*.” Buzbee, *supra* note 19, at 193.

<sup>76</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 961.



Professors Moglen and Pierce's 1990 article contains the most elaborate articulation of this position to date.<sup>77</sup>

As Parts II through IV will show, I am sympathetic to this view but believe it can be presented even more convincingly. One problem with the argument presented by Professors Moglen and Pierce is that it bears the now-discredited marks of poststructuralism circa 1990, a theoretical attitude that no longer commands wide respect. Indeed, one could conceive of the differences between the positions of Professors Moglen and Pierce, on the one hand,<sup>78</sup> and Professors Gluck and Bressman, as well as Jarrod Shobe, on the other, as a portrait in miniature of changing fashions in legal interdisciplinary work from 1990 to 2015—a turn from humanities-oriented to social science-oriented models for arguments about legal method.

### C. Current Debates

Statutory-interpretation scholarship, like many other areas of legal scholarship, has recently taken an empirical turn. Some especially prominent examples of this vein of scholarship bear directly on the topic of this Article: what we can and cannot assume to be known to the generators of statutory language. In two articles in the *Stanford Law Review*, Professors Gluck and Bressman have reported on their survey of 137 legislative drafters in the federal Congress;<sup>79</sup> in the *Columbia Law Review*, Jarrod Shobe places some of their conclusions in question based on his own set of interviews and his personal experience in the federal Office of Legislative Counsel for the House of Representatives.<sup>80</sup> This Part explores the light these recent interventions shed on the subject of this Article.

Both studies presume that the knowledge and intentions of the actual drafters of legislation do and should matter to judicial practices. Both studies indicate that this knowledge matters because courts refer to it in explaining their activity with respect to statutes.<sup>81</sup> One of the main targets of Professors Gluck and Bressman's

---

<sup>77</sup> Moglen & Pierce, *supra* note 14, at 1208 (“[S]ometimes it is necessary for us to create fictive contexts . . . to understand complex and ambiguous events.”); *id.* at 1208–09 (“Interpretive fictions are conventionalized descriptions that make communication comprehensible by providing a common basis for the social process of interpretation. Many if not most interpretive fictions recount a stylized view of the speaker or main participant.”); *id.* at 1217 (“Fiction is a response to the indeterminacy problem: if we cannot ascertain the actual facts that lie behind words, we can at least agree on a story about the origin of those words that permits consistent interpretation under most circumstances.”); *see also, e.g.*, Brudney, *Chatter*, *supra* note 23, at 82 (“Discerning motivation or attributing collective understanding, based on a record that documents oral as well as written statements, is a traditional judicial function that competent and fair-minded judges should be expected to perform.”).

<sup>78</sup> *See, e.g.*, Moglen & Pierce, *supra* note 14, at 1216 (“The practical obstacles to determining the reality of the legislative process . . . are merely a clue to the deeper intractability of the enterprise resulting from the inherent indeterminacy of the historiographic process itself.”).

<sup>79</sup> Gluck & Bressman, *Part I*, *supra* note 4; Gluck & Bressman, *Part II*, *supra* note 17.

<sup>80</sup> Shobe, *supra* note 30, at 811.

<sup>81</sup> One could read Professors Gluck and Bressman as more narrowly criticizing the textualist “disciplining” justification for the use of text-focused canons, but they do not seem to regard their goal as limited in this way. Gluck & Bressman, *Part I*, *supra* note 3, at 951 (“[J]udges rarely justify their use

studies is the default model of judicial attitudes toward the legislature in the statutory-interpretation context—what Gluck and Bressman call, following standard practice, the “faithful-agent” model, under which the court’s role is to effectuate what the legislature has signaled it wants done.<sup>82</sup> Gluck and Bressman argue that this model assumes facts about the making of statutes that in many cases do not match reality. They conclude that courts and commentators should develop new justifications for judicial practices to replace those justifications, like the faithful-agent model, that are out of step with drafters’ understandings of the legislative process or that drafters simply do not consider optimal. If courts and commentators cannot develop such justifications, Gluck and Bressman contend, courts should stop engaging in the practices.<sup>83</sup> Practices falling into this category, in their account, include several of the most popular canons typically linked to assumptions of legislative omniscience, including the presumption of consistent usage.<sup>84</sup> This argument extends the standard critique of assumptions of legislative omniscience described above, applying it to a greater number of practices and providing new data supporting the claim of descriptive inaccuracy. Like those earlier criticisms, however, this theory is grounded in a concern about basing judicial practices on descriptively inaccurate suppositions.

Without targeting assumptions of omniscience explicitly, Professors Gluck and Bressman hint at their awareness of the double fictionality of that assumption. They note that the traditional justifications for many canons assume not only an omniscient drafter, but a single type of omniscient drafter.<sup>85</sup> Their second article stresses the fragmented character of the drafting process, in which different types of staffers have input at different stages into different aspects of a draft, and often do not communicate with staffers working on other aspects of the draft or other drafts.<sup>86</sup> As a result, Professors Gluck and Bressman concede that it might not be

---

of canons as entirely unrelated to congressional practice—no doubt because such justifications are difficult to reconcile with the faithful-agent paradigm . . . and the related desire not to appear ‘activist.’”)

<sup>82</sup> Gluck & Bressman, *Part I*, *supra* note 4, at 907 (“[I]n light of our findings, the faithful-agent model seems incapable of bearing the full weight of modern interpretive practice.”).

<sup>83</sup> They note that some canons not endorsed by drafters may be justified on rule-of-law grounds—by courts’ obligation to impose coherence on the law—but note that this justification is jeopardized by courts’ irregular use of canons. Gluck & Bressman, *Part I*, *supra* note 4, at 962 (“[B]oth coherence and coordination arguably provide justification for any . . . interpretive rule. . . . But we do not believe that judges are successfully applying the current interpretive regime to advance rule of law goals.”).

<sup>84</sup> *Id.* at 955–56 (“[I]n the context of both the rule against superfluities and the whole act and whole code rules, one might imagine continued application of those canons in those limited circumstances in which one can confirm that they do approximate drafting reality.”); Gluck & Bressman, *Part II*, *supra* note 17, at 783–84 (noting that “presumptions of consistent usage . . . [and] the rule against superfluities . . . seem ripe for elimination if a drafting-based model [of justification] is the goal”).

<sup>85</sup> Gluck & Bressman, *Part II*, *supra* note 17, at 738 (“This is a bigger point than the common notion that the ‘omniscient’ drafter assumption is a fiction. Even assuming an omniscient drafter exists, there are simply too many categories of different types of omniscient drafters to make general assumptions across them.”).

<sup>86</sup> *Id.* at 746–47 (discussing this problem within the Offices of the Legislative Counsel); *id.* at 749–50 (same with respect to congressional committee staffers’ knowledge and jurisdiction). Professors

possible to sum up in any descriptively accurate way “the kind of staff, process, and structural variety”<sup>87</sup> that in fact characterizes the legislative process.<sup>88</sup> Given all of these problems with the canons—problems that have, after all, been pointed out for decades, if not always supported so devastatingly—why do judges continue to insist on assuming a posture of faithful agency (or, in the terms with which this Article is concerned, making any assumptions about what legislators do or do not know)? On this point, as suggested above, Professors Gluck and Bressman appear to agree with Judge Posner: courts do this because they fear being seen as “lawmakers” rather than “law appliers.”<sup>89</sup>

Jarrold Shobe’s recent article challenges some of these points while agreeing with others. Shobe argues that drafters are more aware of many of the canons and other matters they are traditionally assumed to know than accounts like those of Professors Gluck and Bressman allow. Specific canons supposedly based on assumptions of omniscience, such as the “whole act” rule, the rule against implied repeals, and the *in pari materia* rule, may in fact be based on accurate assumptions about drafters’ knowledge of other statutes and other parts of an enactment.<sup>90</sup> Shobe does not go so far as to claim that assumptions of legislative omniscience are factually accurate. He grants that the information known to drafters is distributed across many individuals,<sup>91</sup> acknowledges that drafters do not always share information when multiple legislators are working on parallel proposals,<sup>92</sup> and concedes that drafters cannot always anticipate scenarios in which the language they draft may be ambiguous.<sup>93</sup> Nevertheless, his account shares important features with Professors Gluck and Bressman’s. Shobe, too, assumes that descriptive accuracy about drafters’ knowledge and intentions is an appropriate goal. Indeed, he embraces this goal more unequivocally than Professors Gluck and Bressman do. His conclusions differ from theirs only in the connection he perceives between

---

Gluck and Bressman acknowledge that Legislative Counsel are aware of legal context, including judicial decisions, other statutes, and interpretive principles, but stress the limits of this awareness due to the “silo[ing]” of Legislative Counsel. *Id.* at 746–47 (noting that eleven of twenty-eight Legislative Counsels interviewed opined that the specialization of Legislative Counsel is “an impediment to consistent usage across statutes involving different subjects or different committees”).

<sup>87</sup> *Id.* at 736.

<sup>88</sup> *Id.* at 738 (“[A] theory based on how Congress drafts may be impossible to accomplish.”); *id.* at 779 (querying how valuable it would be to reground interpretive principles on actual practice “when much of what is uncovered [about actual practice] is too complex or otherwise impossible for doctrine to absorb,” e.g., “information about individual staff reputations” that is important to drafting choices); *id.* at 782–83 (making similar point about knowledge of committee jurisdiction and history).

<sup>89</sup> *Id.* at 778 (“The pull of th[e] faithful-agent premise derives from the persistent discomfort that judges have in admitting ‘lawmaking’ in the statutory context . . .”).

<sup>90</sup> Shobe, *supra* note 30, at 859–60 (noting, *inter alia*, that “[a] modern statute . . . is generally drafted by a group of drafters who are aware of the contents of the entire statute,” and concluding that “judges should use these canons with greater confidence when interpreting modern statutes”).

<sup>91</sup> *See id.* at 842 (“[A]ttorneys in ALD are especially responsible for providing analysis of case law and constitutional issues, while legislative counsel are especially attuned to how laws fit in to the current statutory scheme.”).

<sup>92</sup> *Id.* at 828.

<sup>93</sup> *Id.* at 875 (noting that this type of ambiguity of application, which Shobe calls “dynamic ambiguity,” “is impossible to eradicate”).

judicial imputations of knowledge and reality: Shobe contends that drafters are, if not omniscient, at least far more aware than skeptics claim.

This debate thus comes down to a disagreement over the degree of descriptive inaccuracy in assumptions of omniscience (and related assumptions about legislators' and drafters' mental states). All parties to the debate seem to accept that, to be justified, imputations of omniscience to the legislature should be at least approximately accurate.<sup>94</sup> Deeply illuminating as they are, neither of these two recent accounts considers whether assumptions of omniscience might be justifiable on grounds other than descriptive accuracy. The rest of this Article explores resources and arguments suggesting this possibility, with a focus on accounts of similar unrealistic mental-state attributions outside the law (Part II) and elsewhere in the law (Part III).

## II. WHAT WE (DON'T) KNOW ABOUT LEGAL FICTIONS

Commentators sometimes express their concern about the descriptive inaccuracy of assumptions of legislative omniscience by labeling the assumptions "fictions."<sup>95</sup> In this way, critics of these assumptions can draw on the connotations of illegitimacy that the "fiction" label has long carried in Anglo-American law.<sup>96</sup> As the author of a 2002 Harvard Law Review student note put it, "the term 'legal fiction' has . . . become nothing more than a catchphrase used casually to dismiss particular falsities in the law."<sup>97</sup>

As this quote suggests, and as Part II.A will explain, calling assumptions of omniscience "fictions" does not significantly advance our understanding of them—but this is due more to the deficiencies of legal thinking about fictions than anything else. With only a few exceptions, legal scholarship has treated legal fictions as unrelated to, or at least different in kind from, other types of "fiction" that people generate and use. Work on legal fictions has accordingly been largely

<sup>94</sup> Neither side directly takes on the older, legal realist-influenced critique of legislative personification. Commentators do touch on that problem, but they discuss it in terms of institutional design and information management, rather than category confusion or telepathy.

<sup>95</sup> See, e.g., Note, *Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228, 2249 (2002) [hereinafter *Lessons from Abroad*] ("Regardless of the reasons for the decline of th[e] old debate [over 'substantive legal fictions']", it is still early in the debates over the interpretive . . . fictions [e.g., fictions of legislative omniscience]. These fictions . . . are more subtle and more sophisticated . . . , but it is precisely for these reasons that [they] are potentially more dangerous.").

<sup>96</sup> Although criticism of legal fictions predates him, Jeremy Bentham still epitomizes this attitude. Bentham abhorred legal fictions: "[I]n English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness." Jeremy Bentham, *The Elements of the Art of Packing, As Applied to Special Juries, Particularly in Cases of Libel Law*, in 5 THE WORKS OF JEREMY BENTHAM 92 (J. Bowring ed., 1843) (emphasis in original); see also C. K. OGDEN, BENTHAM'S THEORY OF FICTIONS cxvi (1932); Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 7 HARV. L. REV. 249, 250 (1893); Nomi Maya Stolzenberg, *Bentham's Theory of Fictions—A "Curious Double Language"*, 11 CARDOZO STUD. L. & LITERATURE 223 (1999) (explaining the relationship between Bentham's theory of legal fictions and his broader theory of linguistic fictions).

<sup>97</sup> *Lessons from Abroad*, supra note 95, at 2249.

inattentive to studies of fictions and fictionalizing in other disciplines—including, notably, philosophy, cognitive science, and literary studies—done over the past several decades.<sup>98</sup> Part II.B considers some conclusions of this non-legal work relevant to the subject of this Article.

### A. Legal Fictions

Most legal commentators—though not all—agree about the defining characteristics of legal fictions. As this part will explain, however, those agreed-upon characteristics are oddly limited, do not seem to match how lawyers and laypeople persistently use the term “fiction,” and fail to justify the term’s negative legal connotations. Although scholarship on legal fictions does provide some useful concepts for thinking about and evaluating the assumptions described in Part I, it leaves just as many questions unanswered.

1. *Legal Fiction Orthodoxy*.—Over more than two centuries of Anglo-American writing on legal fictions, two components of the term’s classic definition have remained largely unchanged. First, virtually all commentators agree that legal fiction is distinct from deceptive falsehood. Both fictions and falsehoods involve departures from truth, but a fiction’s lack of descriptive accuracy is known, not concealed.<sup>99</sup> There has been little agreement, however, about exactly what kind of things merit the “legal fiction” label, that is, whether a legal fiction is a concept or thought, a factual proposition (a reference to a state of affairs in the world), a linguistic formulation, or something more like a legal rule.<sup>100</sup>

---

<sup>98</sup> Partial counterexamples include: David Gawthorne, *Fictionalising Jurisprudence: An Introduction to Strong Legal Fictionalism*, 38 AUSTL. J. LEGAL PHIL. 52 (2013) (discussed *infra* note 131); Moglen & Pierce, *supra* note 14; Stolzenberg, *supra* note 96; *Lessons from Abroad*, *supra* note 95.

<sup>99</sup> Jeremy Bentham defined the term in this way: “By fiction, in the sense in which it is used by lawyers, understand a false assertion of [a] privileged kind, . . . which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true.” Jeremy Bentham, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM 76–77, at 1–2 (J. Bowring ed., 1843). An 1893 article in the Harvard Law Review quotes Best as defining a fiction as “a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible.” Mitchell, *supra* note 96, at 252. Lon Fuller provided a largely parallel account in 1930, defining a legal fiction as either “(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.” LON L. FULLER, LEGAL FICTIONS 9 (1967) (Fuller originally published the essays, later republished as LEGAL FICTIONS, in the Illinois Law Review in 1930 and 1931); *see also, e.g., Comment, Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies*, 35 WAYNE L. REV. 1449, 1452 (1989) (“[A] legal fiction is an analytical device in which a court recognizes the falsity of a particular proposition, but consciously treats the proposition as true in its reasoning.”); Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 TEL AVIV U. STUD. L. 33, 35–36 (1990) (“A legal fiction is a proposition . . . , which rests in whole or in part on factual premises known to be inaccurate . . .”).

<sup>100</sup> Pierre J.J. Olivier, author of the most comprehensive recent treatment of legal fictions (one that addresses European as well as Anglo-American approaches), canvasses the variations and argues that the label should be applied only to factual propositions used as premises for legal reasoning, not to rules or statements of other kinds. *See* PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE 35 (1975) (“[I]t is wrong to say [as Fuller does] that a fiction is a statement: a fiction is an

The second widely accepted feature of legal fictions concerns their purpose. The classic account in English-language commentary is that legal fictions are a way for judges to adapt law to unforeseen circumstances: legal fictions let a judge (and the parties) pretend the facts of a case are something other than what they are.<sup>101</sup> A corollary of this point is that fictions are necessary only when such adaptation is necessary. If legal rules change to accommodate new circumstances, then fictions are no longer needed and become objectionable.<sup>102</sup> Notably, this view of legal fictions does not contemplate their use by commentators. Unlike their Continental counterparts, Anglo-American legal scholars lack a strong tradition of self-awareness about the fictions they use to explain judicial (and other legal) activity.<sup>103</sup>

Consensus on these points in Anglo-American writing has not contributed to agreement on other aspects of the phenomenon. Work on legal fictions has had a frustrating tendency to develop a new set of principles and a new framework for classification with each new study.<sup>104</sup> These taxonomies have not built on one another, resulting in a proliferation of overlapping frameworks instead of a single increasingly elaborated one. In the mid-nineteenth century, Sir Henry Maine described legal fictions as just one of three kinds of devices for legal response to changed circumstances, the other two being equity and legislation.<sup>105</sup> On Maine's account, legal fictions were the most primitive such devices, tending to be supplanted by equity and then by legislation as legal systems matured. Later writers have not necessarily perceived legal fictions as competing with legislation in this way. In 1893, for example, Oliver Mitchell classed legal fictions in three categories:

---

assumption, a process of thought which may be subsequently expressed as a statement, but it is not in the first place a statement.”)

<sup>101</sup> Sir Henry Maine was a prominent advocate of this position. See HENRY SUMNER MAINE, *ANCIENT LAW* 21–22 (1986) (“I . . . employ the expression ‘Legal Fiction’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.”); see also OLIVIER, *supra* note 100, at 89–90 (“Anglo-American jurists see [concealment of the fact that ‘a judicial decision is not in harmony with the existing law’] as the main function of the fiction in law.”); Mitchell, *supra* note 96, at 262 (“The only use and purpose . . . of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of judges.”).

<sup>102</sup> This position was especially strongly articulated by Hans Vaihinger, but it is still widely held. See, e.g., H. VAHINGER, *THE PHILOSOPHY OF ‘AS IF’: A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND* 12–13, 98 (C.K. Ogden trans., 1924); James B. Stoneking, Note, *Penumbra and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making*, 87 W. VA. L. REV. 859, 865 (1985) (“A fiction’s status as a temporary measure seemingly calls for its eventual removal.”).

<sup>103</sup> Olivier is critical of Anglo-American writers for “concentrat[ing] exclusively on one aspect [of legal fictions], viz. that the fiction conceals . . . the fact that a judge is allowed, under cloak of the fiction, to ‘change’ the law. . . . [This] represents a one-sided view of the function of the legal fiction. . . . [L]egal fictions are not only employed by judges, but by legislators and legal scientists.” OLIVIER, *supra* note 100, at 36.

<sup>104</sup> See, e.g., *id.* at 18 (“After [Dutch author T.] Boey [who defined “fiction” in a 1773 legal dictionary published in the Netherlands], all remembrance of this definition and of the elements of the fiction concept seems to have sunk into oblivion. Jurists seem to be struggling to define and analyse the fiction *de novo*.”).

<sup>105</sup> MAINE, *supra* note 101, at 20.

the first two involved judicial assertions of unproven facts for purposes of applying a legal rule, like Maine's understanding of legal fictions, while the third comprised what Mitchell calls "[f]ictions of relation,"<sup>106</sup> or fictions involving imputation or deeming, something that could occur pursuant to a legislative act.<sup>107</sup> Then, in the early 1930s, Lon Fuller classed the legal fictions addressed by Maine, Mitchell, and other legal writers as "fictions of legal technique,"<sup>108</sup> contrasting them with "jurisprudential fictions."<sup>109</sup>

These commentators, and others, agreed on a few basic points—that fictions are distinct from falsehoods and that judges sometimes use them to reach just results when the law seems outmoded or too restrictive—but overall, their work did not generate any clear agenda for legal reform or scholarship. In the half-century since Fuller's book of essays was published, legal academics have only occasionally addressed the topic. Usually, they have followed Bentham in considering legal fictions objectionable because they do not correspond to anything in the actual world.<sup>110</sup> Much less often, legal academics have argued that fictions are a permanent feature of legal discourse and do not deserve their negative reputation.<sup>111</sup> Both perspectives are unsatisfactory. The traditional critique of legal fictions has trouble explaining the persistence of constructs that we keep calling by that name, other than by reference to persistent judicial bad faith. But the defenses of legal fictions, most of which date to the 1980s, have had difficulty doing justice to the

<sup>106</sup> Mitchell, *supra* note 96, at 253.

<sup>107</sup> Examples described by Mitchell include imputing an act to someone who did not perform it and deeming an act to have occurred in a particular location or at a particular time. *Id.* at 255.

<sup>108</sup> See FULLER, *supra* note 99, at 130.

<sup>109</sup> See *id.* This category Fuller further subdivided into "exploratory fictions," which let judges "feel their way incrementally toward some new legal principle or theory," and "abbreviatory fictions," used primarily "for the purpose of expounding legal doctrine already in existence," among which Fuller included the concepts of corporate personhood and constructive notice. *Id.* at 81; L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 528, 537 (1930). Hans Vaihinger, Fuller's inspiration on this point, called these "theoretical fictions." HANS VAHINGER, *supra* note 102, at 111. On Vaihinger's influence on Fuller, see Karen Petroski, *Legal Fictions and the Limits of Legal Language*, 9 INT'L J. L. CONTEXT 485, 489–91 (2013).

<sup>110</sup> See, e.g., Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 2 (1990) (focusing on a particular example of a "dangerous legal fiction"); P. Smith, *supra* note 36, at 1495; *Lessons from Abroad*, *supra* note 95, at 2249; cf. Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 20–23 (2010) (arguing that "empirical legal errors"—assertions made by courts that are descriptively inaccurate—should not be considered legal fictions because they do not fit Fuller's model).

<sup>111</sup> See Moglen, *supra* note 99, at 38 (arguing that because of common-law courts' responsibilities with respect to the partitioning of factual and legal questions, "the legal fiction as a trope of common-law thought is chronologically persistent"); R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290, 290. 316–17 (1981); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 915 (1986) ("In law, to work with words may mean to be caught continuously in the act of creating legal fictions."). Olivier acknowledges this type of argument repeatedly but disagrees with it. See, e.g., OLIVIER, *supra* note 100, at 47 ("[T]he wide interpretation of the word fiction, to include all abstract notions, . . . must be rejected. . . . [T]he wide concept of fiction is based on a very naive concept of reality . . . . If all abstract notions were fictions, the concept of reality, being an abstract notion, must itself be a fiction, making it futile to argue about 'reality' or to classify some entities as 'real' and others as 'unreal' or 'fictitious'.")

unambiguous connection we demand between legal discourse and actual life (a demand exemplified by the work discussed in Part I.C). The orthodox approach to legal fictions also fails to resolve, or to suggest a way to resolve, many of the puzzles raised by the assumptions of omniscience described in Part I.

2. *How Fictions of Omniscience Fit In.*—The consensus framework for discussing legal fictions does not do much to help us understand the assumptions of omniscience described in Part I. Those assumptions do not seem to fit the classical model; even if one selects just a single framework, assumptions of legislative omniscience have a tendency to fall between categories, and these assumptions have features that the classic account of fictions does not mention.<sup>112</sup>

For one thing, although judges very likely wield these assumptions with awareness of their untruth, judges do not seem to make the assumptions in order to adjust legal rules to unanticipated circumstances. Nor are the assumptions stand-ins for facts that would otherwise be susceptible to processes of legal proof.<sup>113</sup> Thus, they are not “practical” fictions, to use Vaihinger’s and Fuller’s classification scheme. And while commentators sometimes suggest that these assumptions, if once useful, can now safely be discarded,<sup>114</sup> courts do not seem to conceive of the assumptions as only temporarily useful. Yet assumptions of legislative omniscience are not exactly “theoretical” fictions either, at least not as described by commentators on statutory interpretation.<sup>115</sup> The standard position on theoretical fictions, following Vaihinger, is that they are useful for analysis and discussion of complex matters (akin to scientific and economic models).<sup>116</sup> But commentators

<sup>112</sup> Cf. P. Smith, *supra* note 36, at 1461–63 (arguing that interpretive canons are based on “new” legal fictions).

<sup>113</sup> See, e.g., Moglen & Pierce, *supra* note 14, at 1209 (explaining that classic “legal fictions” operate by . . . presuming the facts of lawsuits rather than by explicit amendment of the rules of law that would otherwise apply . . .”).

<sup>114</sup> Professors Gluck and Bressman, for example, suggest that fictions underlying interpretive practices might have arisen due to the immaturity of understandings of statutory interpretation: “One way to understand the past seventy years of universalizing doctrinal and theoretical work [in the field of statutory interpretation] is as the foundational work necessary to establish a field. Our findings raise the possibility that the recent focus on legislation . . . is only a temporary stop along the way to a more nuanced . . . understanding . . .” Bressman & Gluck, *Part II*, *supra* note 17, at 800. See also Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256 (1990) (“[A]n important contribution of twentieth-century jurisprudence has been a measure of self-consciousness about the existence of legal fictions, and an understanding that they are obstacles to thought. We do not need interpretive fictions. Instead we need interpretive principles—ones that can be defended in substantive or institutional terms.”). Olivier also takes this position. See OLIVIER, *supra* note 100, at 107 (“A fiction should be a symptom signalling an unsolved problem, and we should be prepared to solve that problem and find the truth rather than to perpetuate the fiction.”).

<sup>115</sup> They might be “theoretical fictions” as they are used by courts. Olivier describes “theoretical fictions” as used not only by commentators but also by lawyers and judges. OLIVIER, *supra* note 100, at 156 (“All jurists . . . practice legal science whenever they examine, analyse and explain the law. . . . I regard a fiction as theoretical when it is used to analyse or explain the law. It is . . . not a fiction in law, but a fiction concerning the law. It is often difficult to distinguish between practical and theoretical fictions.”). But applying this label to the assumptions does not explain the academic consensus regarding their inappropriateness.

<sup>116</sup> See, e.g., *id.* at 91–93.



identify assumptions of legislative omniscience as *inadequate* premises for certain interpretive practices. That is, commentators impute these assumptions to courts as theoretical presuppositions that are inaccurate and therefore should not be presupposed. The classic account of legal fictions makes it difficult to explain why commentators persist in this imputation without cynically assuming that commentators are, consciously or not, constructing a straw man to use in broader critiques of judicial practice.

The standard account of legal fictions also does not provide much guidance on how to handle the specific contrary-to-fact assumptions involved in fictions of legislative omniscience. Is the key problem with these assumptions the imputation of an impossible mental state, the imputation of that impossible mental state to an inconceivable agent, the compounding of contrary-to-fact suppositions involved, two or more of these problems, or something else entirely?<sup>117</sup> Modern work on legal fictions gives us no tools for addressing these questions (or those raised by the analogous fictions described in Part III).<sup>118</sup>

Avoiding all of these issues, commentators who call assumptions of omniscience “fictions” have not generally linked their criticisms to the literature on legal fictions. Rather, commentators seem to use the label for rhetorical effect. It allows them to appeal to the accumulated connotations of the term “fiction” as referring to devices that undermine law’s search for the truth,<sup>119</sup> that allow judges to assume a stance of passivity,<sup>120</sup> and that are not necessary in an enlightened legal system.<sup>121</sup> It does not necessarily follow, however, that the label is inaccurate. Perhaps the mismatch between the classic account of legal fictions and the ways these assumptions of legislative omniscience operate stems from an inadequate conceptualization of legal fictions themselves. Given that this conceptualization has not significantly changed since the early twentieth century, it might well be susceptible to improvement.

### B. Other Approaches to Fiction

The possibility that the classic approach to legal fictions might be deficient is

---

<sup>117</sup> When they have acknowledged these different contrary-to-fact assumptions, commentators have tended to treat them as all equally problematic (because all descriptively inaccurate) without further analysis. See, e.g., Buzbee, *supra* note 19, at 234; P. Smith, *supra* note 36, at 1460–65.

<sup>118</sup> Medieval European commentators writing on legal fictions distinguished between fictions concerning possible states of affairs and fictions concerning impossible states of affairs, and condemned only the latter. See OLIVIER, *supra* note 100, at 15–16 (describing these positions); Ian Maclean, *Legal Fictions and Fictional Entities in Renaissance Jurisprudence*, LEGAL HIST., Dec. 1999, at 1, 9, 12. Modern practice treats legal fictions as equally defensible or indefensible, whether or not the untrue facts they posit are possible.

<sup>119</sup> See, e.g., P. Smith, *supra* note 36, at 1480–89 (discussing the value of judicial candor).

<sup>120</sup> See, e.g., Gluck & Bressman, *Part II*, *supra* note 17, at 778; OLIVIER, *supra* note 100, at 90 (“It is argued that the use of fictions undermines respect for the law in as much as fictions portray it as being devious and deceptive.”); *Lessons from Abroad*, *supra* note 95, at 2233 (“[T]he legal fiction [is traditionally characterized as] wield[ing] a deceptive power that allow[s] judges to assume a legislative function.”).

<sup>121</sup> *Lessons from Abroad*, *supra* note 95, at 2232 (noting that in the nineteenth century, “[m]any denounced the legal fiction as a crude and anachronistic device that had outlived its usefulness”).

supported by the fact that other disciplines have developed far more robust theories of fiction over the past quarter century—almost entirely since the last wave of scholarly defenses of legal fictions in the 1980s. With very few exceptions,<sup>122</sup> no recent writing on fictions for legal audiences has taken any account of this work. This section examines some key features and conclusions from these other disciplines.<sup>123</sup>

*1. Philosophers on Fictional Utterances and Attitudes.*—At least since the early twentieth century, philosophers of language and mind have been debating the status of the referents of fictional statements—most often, the question of whether or not fictional characters exist, and if they do exist, in what sense.<sup>124</sup> This question is closely related to the question of whether statements that we know to be fictional can nevertheless be said to be “true,” and if so, in what sense. A puzzle addressed by many writing in this tradition is the natural tendency most of us would have to say that, for example, the sentence “Sherlock Holmes lived at 221B Baker Street” is true, even though it refers to a fictional character and his fictional residence.

As this summary suggests, most philosophers have focused on analyzing individual fictional propositions, not entire fictional works.<sup>125</sup> This focus seems artificial when compared with our everyday experiences with fictional narratives, but it makes the philosophical work easy to translate to the legal context, since legal fictions in their classic form also take the form of propositions rather than extended narratives. Philosophers exploring the “truth” of fictional statements have generally agreed that any analysis requires distinguishing three different types of statements about fictional entities.<sup>126</sup> One type of statement is the kind exemplified in the

<sup>122</sup> See generally, e.g., Gawthorne, *supra* note 98 (discussed at more length *infra* note 132); Simon Stern, *The Third-Party Doctrine and the Third Person*, 16 NEW CRIM. L. REV. 364 (2013); Stolzenberg, *supra* note 96.

<sup>123</sup> Major works discussing the features and conclusions of theories of fiction over the past quarter century include, but are not limited to: BRIAN BOYD, *ON THE ORIGIN OF STORIES: EVOLUTION, COGNITION, AND FICTION* (2009); GREGORY CURRIE, *THE NATURE OF FICTION* (1990); SHAUN NICHOLS & STEPHEN P. STICH, *MINDREADING: AN INTEGRATED ACCOUNT OF PRETENCE, SELF-AWARENESS, AND UNDERSTANDING OTHER MINDS* (2003); AMIE L. THOMASSON, *FICTION AND METAPHYSICS* (1999); KENDALL L. WALTON, *MIMESIS AS MAKE-BELIEVE: ON THE FOUNDATIONS OF THE REPRESENTATIONAL ARTS* (1990); LISA ZUNSHINE, *WHY WE READ FICTION: THEORY OF MIND AND THE NOVEL* (2006).

<sup>124</sup> The origins of this debate are usually traced to Bertrand Russell, *On Denoting*, 14 MIND 479, 485–93 (1905) and the turn-of-the-century work of ALEXIUS MEINONG, *ÜBER GEGENSTANDSTHEORIE SELBSTDARSTELLUNG* (1988). See generally CHARLES CRITTENDEN, *UNREALITY: THE METAPHYSICS OF FICTIONAL OBJECTS* (1991) (discussing the existence of and uses for fictional objects); Fred Kroon & Alberto Voltolini, *Fiction*, STAN. ENCYCLOPEDIA OF PHIL. (July 2011), <http://plato.stanford.edu/entries/fiction> (addressing the debate between Meinong and Russell and examining the different roles fictional entities play in discourse).

<sup>125</sup> The work of Stacie Friend is critical of this tendency. See Stacie Friend, *Fictive Utterance and Imagining II*, 85 PROC. OF THE ARISTOTELIAN SOC. 163, 175 (2011) (“[W]e should consider, not how the parts of the work add up to the whole, but instead how the whole work is embedded in a larger context: in particular, the practices of reading, writing, publishing, and so on.”).

<sup>126</sup> See CURRIE, *supra* note 123, at 30–33.

previous paragraph, which Gregory Currie has called a “fictive” utterance.<sup>127</sup> A second is a statement that compares fictional entities across fictions, such as “Sherlock Holmes was more of a tortured genius than Hercule Poirot.” Currie calls these “transfictive” utterances.<sup>128</sup> The third is the type of statement that comments on a fiction’s relation to reality: “Sherlock Holmes was a great fictional character” is an example of such a “metafictive” utterance.<sup>129</sup>

Perhaps the most obvious features of these examples are that (1) it seems reasonable to say that each could be evaluated for its truth or falsity, and (2) evaluating the truth or falsity of each must be done from within a different frame of reference—the fictional narratives of Conan Doyle for the first, fictive utterance; the narratives of Conan Doyle plus those of Christie for the transfictive utterance; and the world in which Conan Doyle and Christie wrote their narratives (and in which the narratives are read) for the metafictive utterance. Philosophers have proposed a number of ways of evaluating the truth of these different types of statements.<sup>130</sup> What is important for purposes of this Article is simply the observation that statements referring to fictional things and people are not all of the same kind, and that the different kinds involved do not correspond to those typically proposed by writers on legal fictions. This observation in turn suggests the possibility of augmenting the classic legal account by considering the internal logic of particular legal fictions and those fictions’ relations to one another, as well as the multiple frames of reference within which they are used.

A second major theme in philosophical work on fiction concerns the necessity of considering the attitudes of those making and responding to fictional statements. Many philosophers discuss this issue in terms of “pretense,” following influential early accounts by John Searle and David Lewis.<sup>131</sup> An especially popular account along similar lines, one that has been taken up by many non-philosophers, is Kendall Walton’s account of fiction as “make-believe.” Walton describes fictional

<sup>127</sup> See *id.* at 31–32.

<sup>128</sup> See *id.* at 171–72.

<sup>129</sup> See *id.* at 158–62.

<sup>130</sup> The standard account for fictive utterances is that of David Lewis, who proposed that their truth could be assessed by reading them as “prefixed” by phrases situating them within particular discursive contexts. David Lewis, *Truth in Fiction*, 15 AM. PHIL. Q. 37, 37–38 (1978). For example, we would normally evaluate the truth of a statement like “Holmes lived at 221B Baker Street” by asking whether a human being by that name did live on a real street with that name. Lewis proposed that we could evaluate the truth of this particular sentence by reference to the fiction in which the Sherlock Holmes character appears, for example by (perhaps silently) recasting the statement to read, “In Conan Doyle’s stories about Sherlock Holmes, Holmes lived at 221B Baker Street,” and then evaluating its truth by reference to the content of Conan Doyle’s stories, not living human beings or actual streets. This approach allows us to say that the statement “Holmes lived at 221B Baker Street” is true, even though it does not refer to any actual human being, a result consistent with our habits of thinking and speaking about fictional propositions. This is only one element of Lewis’s approach, but it is the most widely accepted element.

<sup>131</sup> In a 1975 essay, Searle argued that making a fictive utterance involves “pretending” to assert something. John R. Searle, *The Logical Status of Fictional Discourse*, 6 NEW LITERARY HIST. 319, 325–26 (1975). Lewis agreed that “[s]torytelling [i.e., the making of statements about fictional people, places, and things] is pretence.” Lewis, *supra* note 130, at 40.

works as “props” akin to those used by children in (non-deceptive) games of pretend.<sup>132</sup> Just as children may make believe that, for example, a banana is a telephone and generate additional imaginary propositions and behavior on the basis of their attitude toward that “prop,” older individuals use fictional narratives and other representational artifacts (including, perhaps, such things as judicial opinions and scholarly articles) as props in more complex and consequential games of make-believe. Walton, unlike many other theorists of fiction, argues passionately for fiction’s generative power. He stresses the capacity of fictional “props” to open up new possibilities for thought and action. (Of course, the thought and action such artifacts make possible is not always normatively desirable, but this is a distinct point.) Walton’s generally positive account of fiction is an unusual approach within philosophy but has proven attractive to scholars in other fields seeking to understand the generation and use of fictional statements.<sup>133</sup>

2. *Cognitive Scientists on Fiction, Mindreading, and Metacognition.*—Among the disciplines influenced by Walton’s make-believe theory are psychology and cognitive science.<sup>134</sup> Many areas of recent psychological research relate to issues studied under the fiction” rubric in other fields, including investigations of play and non-deceptive pretense in children, investigations of empathy and “mindreading” (described further below),<sup>135</sup> and investigations of metacognition.<sup>136</sup>

As the above brief discussion of Walton’s work suggested, the play behavior that children widely and spontaneously exhibit shares several features with adult games of “make-believe,” including the generation and appreciation of fictional representations in various media. Cognitive scientists have added to this observation findings on the close relationship between children’s pretense behavior and their ability to engage in mindreading (the attribution of desires, beliefs, and intentions to others), as well as the prediction of behavior and the experience of

<sup>132</sup> See WALTON, *supra* note 123, at 69.

<sup>133</sup> Law is an exception. A recent article by David Gawthorne is one of the only attempts by a legal scholar to engage seriously with recent philosophical approaches to fiction. Gawthorne, *supra* note 98, at 52. Gawthorne argues that philosophical fictionalism can ground a more satisfactory jurisprudence than traditional positivist and natural-law positions. *Id.* Fictionalism is the position that fictional referents have value, but not truth value. See R. M. SAINSBURY, FICTION AND FICTIONALISM 152 (2010). According to Gawthorne, “[f]ictionalising social ontology remains the only principled approach to explaining our fantastic powers over institutional things,” such as law. Gawthorne, *supra* note 98, at 58. Gawthorne does not address particular legal fictions at any length, but focuses on legal discourse as a whole as fictional: “It is suggested, both that there is a human capacity to maintain such a robust fictional discourse of law and that this describes what actually occurs to varying degrees in modern societies.” *Id.* at 72.

<sup>134</sup> See Alan Richardson, *Defaulting to Fiction: Neuroscience Rediscovered the Romantic Imagination*, 32 POETICS TODAY 663, 663–64 (2011) (“[A]t the beginning of the twenty-first century, *imagination* suddenly became a term to conjure with in the sciences of brain and mind.”).

<sup>135</sup> See generally NICHOLS & STICH, *supra* note 123 (discussing studies of fiction as they relate to investigations of empathy and mindreading).

<sup>136</sup> See, e.g., METACOGNITION: KNOWING ABOUT KNOWING (Janet Metcalfe & Arthur P. Shimamura eds., 1994) (discussing the psychological research relating to investigations of metacognition).

empathy.<sup>137</sup> Shaun Nichols and Stephen Stich, reviewing much of the research in this area, have proposed that a single set of cognitive mechanisms accounts for our abilities to pretend, to attribute mental states to others, and to detect and report on our own mental states, including our perceptions, beliefs, and inferences from these beliefs.<sup>138</sup> These mechanisms—partly innate, and partly developed through interactions with other individuals and artifacts—allow us to navigate complex social situations, to coordinate behavior, to trust others, and to develop many further specialized cognitive and behavioral skills. Notably, and perhaps counterintuitively, psychologists have found that we use these same mechanisms to “read” the “minds” of (i.e., impute mental states to) non-human “characters,” like geometrical shapes, if they are placed in rudimentary narrative contexts.<sup>139</sup>

Our ability to detect and report our own mental states, or our thinking and reasoning about our own thinking and reasoning, is sometimes labeled “metacognition.” One aspect of metacognition not yet touched on but relevant to the philosophical debates about fiction, as well as to understanding legal fictions, is the skill known as “source monitoring,” the ability to “tag” our beliefs according to the sources from which we learned them.<sup>140</sup> Our general comfort with source monitoring explains the ease with which we comprehend the differences between the kinds of fictive utterances identified by Currie, as well as our virtually automatic processing of information from a wide variety of sources in everyday life. Among other things, source monitoring allows us to adjust our degree of commitment to various propositions or beliefs. We might, for example, be willing to act on a friend’s assertion that it is raining by dressing appropriately without being willing

<sup>137</sup> Work on the processes of reader identification with characters explores the tendency of readers to take up an “internal perspective” when reading narratives, “even when the narrative does not specify any particular perspective” for the reader to assume. Amy Coplan, *Empathic Engagement with Narrative Fiction*, 62 J. OF AESTHETICS & ART CRITICISM 141, 142 (2004). From such observations, researchers have inferred that reading fictional narratives helps readers develop “theory of mind”—an understanding that others’ mental states differ from one’s own—and to parse social situations in terms of individuals’ motivation and expectations. See, e.g., Raymond A. Mar & Keith Oatley, *The Function of Fiction is the Abstraction and Simulation of Social Experience*, 3 PERSP. ON PSYCHOL. SCI. 173, 173 (2008) (“[C]arefully crafted literary stories are not flawed empirical accounts, but are . . . simulations of selves in the social world. . . . The function of fiction can thus be seen to include the recording, abstraction, and communication of complex social information in a manner that offers personal enactments of experience, rendering it more comprehensible than usual.”); see also David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCI. 377, 377 (2013). The psychological work on reader identification with fictional characters has also been influential in recent literary scholarship.

<sup>138</sup> See generally NICHOLS & STICH, *supra* note 123 (advancing the proposal that a single set of cognitive mechanisms is responsible for our abilities to pretend and to attribute mental states).

<sup>139</sup> Mar & Oatley, *supra* note 137, at 179 (citing, *inter alia*, G. Abell, F. Happé, & U. Frith, *Do Triangles Play Tricks? Attribution of Mental States to Animated Shapes in Normal and Abnormal Development*, 15 COGNITIVE DEV. 1 (2000)) (noting studies that have shown “that humans spontaneously ascribe intentional states to even simple circles and triangles when they move in ways that look like chasing, fighting, and so on”); see also Daniel Schwarz, *Character and Characterization: An Inquiry*, 19 J. OF NARRATIVE TECHNIQUE 85, 90 (1989) (arguing that anthropomorphizing betrays an interest in human motivation and other minds).

<sup>140</sup> See Marcia K. Johnson, Shahin Hashtroudi, & D. Stephen Lindsay, *Source Monitoring*, 114 PSYCH. BULLETIN 3, 3, 11–14 (1993) (describing functions of source monitoring).

to say that we have a firm belief that it is in fact raining. Source monitoring is important not only to general social functioning but also to many areas of specialized activity, such as legal practice.<sup>141</sup>

These paragraphs have only scratched the surface of the vast psychological literature on the workings of imagination, pretense, and fiction. The overall theme of this literature, however, is remarkably uniform. According to psychologists, pretense, fiction writing, and fiction reading are independently valuable activities. They are not evasions of real-life experience, but useful additions to and tools for enhancing it. This generally positive attitude toward pretending and fiction in recent cognitive science has made that work especially attractive to scholars of literary fiction seeking new ways to explain the value of the artifacts they study and the legitimacy of studying them.

3. *Literary Scholars on the Elements and Significance of Omniscience*—Since the turn of the twenty-first century, literary scholars have increasingly incorporated psychological (and, to a lesser extent, philosophical) approaches into their work. Cognitive scientists' findings have allowed literary scholars to argue that the activities of reading and writing fiction develop important capacities, including theory of mind<sup>142</sup> and metacognitive skills,<sup>143</sup> as well as empathy<sup>144</sup> and the notion

---

<sup>141</sup> Andrew Elfenbein has argued that expert reading allows a kind of “offline” processing of routine components of text, which then become invisible to the reader, while enabling more sophisticated processing of other textual components. Andrew Elfenbein, *Cognitive Science and the History of Reading*, 121 PMLA 484, 485 (2006) (“The very expertise of literary critics may render [some] aspects [of reading] invisible because their skills have become so routinized. Far from leading to shallow or superficial results, such routinization enables sophisticated . . . readings . . .”). Expert reading practices that involve the differentiation and juggling of multiple sources may make the metacognitive workout that reading provides more intense and effective. *Id.* at 498 (“The discipline of literary criticism fosters metacognitive abilities by engaging with a remarkably wide range of texts . . . which encourage the development of varied reading strategies.”).

<sup>142</sup> ZUNSHINE, *supra* note 123, at 17–18, for example, argues generally that reading fiction is a way to practice mindreading skills. Similarly, BOYD, *supra* note 123, at 15, 49, describes art, including fiction, as a form of “cognitive play” that “speed[s] up our capacity to process patterns of social information [and] to make inferences from other minds.” See also H. Porter Abbott, *Reading Intended Meaning Where None Is Intended: A Cognitivist Reappraisal of the Implied Author*, 32 POETICS TODAY 461, 465, 467 (2011) (noting how personification of an implied author meshes with “the illusion of wholeness that our ‘folk psychology’ regularly confers upon the communicating self”); Schwarz, *supra* note 139, at 90, 92, 100, 104 (arguing that characterization implies an interpersonal or transpersonal attitude and offers training in theory of mind); Murray Smith, *On the Twofoldness of Character*, 42 NEW LITERARY HISTORY 277, 277 (2011) (“[W]e can and do respond to [literary] characters in ways that parallel our responses to real individuals . . .”).

<sup>143</sup> See Vanessa L. Ryan, *Reading the Mind: From George Eliot’s Fiction to James Sully’s Psychology*, 70 J. HISTORY IDEAS 615, 615–17 (2009) (describing how accounts of the value of reading fiction by nineteenth-century psychologist James Sully anticipated contemporary cognitive science); Smith, *supra* note 142, at 279–81, 283, 291 (discussing how perceptions of character involve twofold recognition of a represented “person” and of the constructed or “configurational” aspect of the representation).

<sup>144</sup> Empathy with characters is the chief mechanism by which fiction reading is thought to develop theory-of-mind capacities. See, e.g., SUZANNE KEEN, *EMPATHY AND THE NOVEL* (2007) (analyzing the “comprehensive account of the relationships among novel reading, empathy, and altruism”); Richard Walsh, *Why We Wept for Little Nell: Character and Emotional Involvement*, 5 NARRATIVE 306, 313

of objective truth.<sup>145</sup> Two lines of inquiry in literary scholarship relevant to the subject of this Article have received less attention in philosophy and cognitive science: the fictional representation of impossible scenarios<sup>146</sup> and the type of impossible representation we call “omniscience.”

One useful addition made by literary scholarship to the philosophical and the psychological work on fiction is the insight that verisimilitude makes less difference than one might expect to the experience of reading fiction.<sup>147</sup> A fantastic narrative, just like a realistic narrative, can be analyzed and deliver benefits in all of the ways described above.<sup>148</sup> It is just as easy for readers to empathize with characters presented by omniscient third-person narrators as it is for them to empathize with first-person narrators.<sup>149</sup> Readers can empathize with, and attribute intention to, fictional figures that do not resemble themselves—even “characters” that are not purporting to be human.<sup>150</sup>

A classic impossible device in Western literary fiction is what we have come to call the omniscient third-person narrator: the narrator who tells us not only what the characters in the narrative did, but also what was going on in their fictional minds.<sup>151</sup> In an important 2004 essay that sparked an extended debate, Jonathan

(1997) (arguing that our emotional response to real people is analogous to our emotional response to fictional characters).

<sup>145</sup> See Rebecca Goldstein, *The Fiction of the Self and the Self of Fiction*, 47 MASS. REV. 293, 298–99 (2006) (arguing that practice in identifying with fictional points of view trains us in assuming the attitude necessary to conceive of transpersonal and interpersonal truths).

<sup>146</sup> Philosophers have tended to view “impossible” fictions as deviant forms of reference. See Diane Proudfoot, *Possible Worlds Semantics and Fiction*, 35 J. PHIL. LOGIC 9, 31–32 (2006) (observing that “many philosophers take the view that impossible fictions are peculiar or non-standard[,]” but that “[u]nfortunately for this view, many fictions are impossible fictions”) (emphasis omitted). What is conventionally called “omniscient narration,” Proudfoot notes, is impossible in this sense: “Many nineteenth-century European and American novels contain descriptions of the undisclosed thoughts of the characters and so are paradigmatic cases of impossible fiction.” *Id.* at 33.

<sup>147</sup> See, e.g., Richardson, *supra* note 134, at 666–67 (noting the prevalence of “impossibilities” in fiction and observing that “virtually every known human culture features popular oral tales and myths that indulge in similar impossibilities” to those found in contemporary American popular culture, such as the TWILIGHT series and the movie *Avatar*).

<sup>148</sup> See Rick Busselle & Helena Bilandzic, *Fictionality and Perceived Realism in Experiencing Stories: A Model of Narrative Comprehension and Engagement*, 18 COMM. THEORY 255, 256, 258, 260, 266, 269–71 (2008) (making this point and noting the impossible components of many otherwise realistic, or internally coherent, genre narratives, such as crime dramas, mystery, and science fiction).

<sup>149</sup> Suzanne Keen, *Readers’ Temperaments and Fictional Character*, 42 NEW LITERARY HISTORY 295, 297 (2011).

<sup>150</sup> See *id.* at 302.

<sup>151</sup> See, e.g., Paisley Livingston & Andrea Sauchelli, *Philosophical Perspectives on Fictional Characters*, 42 NEW LITERARY HISTORY 337, 354 (2011) (describing such a narrator as an “impossible agent”). Brian Boyd argues that fictional figures that possess omniscience, such as deities, serve a social-control function by causing us to postulate a figure that can see into our minds. BOYD, *supra* note 123, at 204–05. Similarly, in his 2004 essay, Jonathan Culler notes that the idea of omniscient narration seems to have arisen from “the frequently articulated analogy between God and the author” of a work of fiction, but Culler contends that we should understand the analogy the other way around. That is, “the example of the novelist, who creates his world . . . helps us to imagine the possibility of a creator, a god, a sentient being, as undetectable to us as the novelist would be to the characters who exist in the universe of the text this god created.” Culler, *supra* note 12, at 23.

Culler argued that this label is a misnomer, and his analysis informed some of the distinctions made earlier in this Article.<sup>152</sup> Professor Culler considered “omniscience” an imprecise label for narratorial features, since it “conflates and confuses several different factors” present in so-called omniscient narration.<sup>153</sup> According to Professor Culler, these factors include “(1) the performative authoritativeness of many narrative declarations, which seem to bring into being what they describe; (2) the reporting of innermost thoughts and feelings, such as are usually inaccessible to human observers”; (3) narrators’ occasional “flaunt[ing]” of their “godlike ability to determine how things turn out”; and “(4) the synoptic impersonal narration of the realist tradition,” or the selective filtering of relevant information by conventional omniscient narrators.<sup>154</sup> Professor Culler surmised that the second of these functions is responsible for the conventional “omniscience” label.<sup>155</sup> When we read about what characters are thinking from an apparently external perspective, he suggested, we are inclined to “invent a person to be the source of textual details, but since this knowledge is not that which an ordinary person could have, we must imagine this invented person to be godlike, omniscient.”<sup>156</sup>

Professor Culler’s broader conclusions in this essay have not been widely accepted, perhaps because they are difficult to reconcile with the kinds of psychological findings discussed in the previous Part. Professor Culler also did not succeed in getting critics to abandon the “omniscient narrator” term.<sup>157</sup> Still, his breakdown of the various features of omniscient narration is a useful analytical tool. Although Professor Culler and his interlocutors were discussing literary narratives, many of their observations seem to describe legal discourse just as accurately. The functions performed by omniscient narrators, in particular, are strikingly similar to those performed by the classic judicial “narrator,” the voice operating in the conventional judicial opinion.<sup>158</sup> That voice likewise “bring[s] into being” legal relations; “report[s]” thoughts (both those mental states relevant to legal

---

<sup>152</sup> See Culler, *supra* note 12, at 22–24. Responses to this essay included William Nelles, *Omniscience for Atheists: Or, Jane Austen’s Infallible Narrator*, 14 J. SOC’Y FOR STUDY NARRATIVE LITERATURE 118, 120 (2006); Barbara K. Olson, “Who Thinks This Book?” Or Why the Author/God Analogy Merits Our Continued Attention, 14 J. SOC’Y FOR STUDY NARRATIVE LITERATURE 339 (2006); Meir Sternberg, *Omniscience in Narrative Construction: Old Challenges and New*, 28 POETICS TODAY 683 (2007). See also Jonathan Culler, *Knowing or Creating? A Response to Barbara Olson*, 14 J. SOC’Y FOR STUDY NARRATIVE LITERATURE 347 (2006).

<sup>153</sup> Culler, *supra* note 12, at 22.

<sup>154</sup> *Id.* at 26.

<sup>155</sup> *Id.* at 28.

<sup>156</sup> *Id.* Culler suggested, following Nicholas Royle, that we use the term “telepathy” rather than “omniscience” to refer to the phenomenon of inside views of characters’ minds. *Id.* at 29 (citing and discussing NICHOLAS ROYLE, *THE UNCANNY* 261 (2003)).

<sup>157</sup> See, e.g., Paul Dawson, *The Return of Omniscience in Contemporary Fiction*, 17 NARRATIVE 143, 149 (2009).

<sup>158</sup> See JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 240–41 (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 101–02 (1990); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 205–07 (1990).



determinations and others, like the “mental state” of a legislature); sometimes “flaunt[s]” its ability to “determine how things [will] turn out”; and selectively filters relevant information.<sup>159</sup> Lawyers and other judges reading such opinions are thus in a position analogous to that taken by the readers of novels with omniscient narrators. Moreover, within those opinions, judicial narrators present themselves as the readers of yet another authorial performance, that of the legislature. When judges impute omniscience to this author of the law, they are acknowledging its role as the law’s creator and the meaningfulness of its creations.

*4. Preliminary Implications for Understanding Fictions of Omniscience.*—Legal scholarship has been virtually oblivious to the work discussed in this Part. The above sketch has focused on some concepts important to that work, but absent from the legal scholarship on fictions. These concepts include the importance of clarifying the frames of reference, or “worlds,” within which fictional statements are made, in assessing the truth value of those statements; the significance of particular attitudes, both natural and conventional, in understanding and using fictional statements; the possibility that fiction making and reading might be valuable human activities rather than deviant or deceptive acts; and the central, rather than subordinate, role of “impossible” fictions in providing this value.

In Part IV, I will return to these issues in more detail, building on the information examined in Part III concerning other legal fictions of omniscience. It is, however, possible at this point to suggest some adjustments to the classic account of legal fictions that advance our understanding of assumptions of legislative omniscience. Legal doctrines that presuppose deliberate action and expressions of will (like the “faithful-agent” construct) all require us to make inferences about the “minds” of others. These inferences are like what cognitive scientists call mindreading. In everyday life, we develop the ability to draw such inferences by imagining states of mind in both real and fictional people.<sup>160</sup> The legal postulation of such “minds” is closely analogous to their narrative postulation. In both spheres, such postulations involve the generation of props for use in readers’ games of make-believe that such “minds” exist and have contents different from the readers’ own. Both statutes and the (implicitly or explicitly) personified legislature can be understood as props of this kind. Perhaps, then, fictions of legislative omniscience, when asserted by judges, both enable and remind those whose practices rely on the meaningfulness of legislative output (such as lawyers and judges) to make certain imaginative, but perfectly everyday, leaps outside their own minds.

---

<sup>159</sup> Culler, *supra* note 13, at 26. Regarding the performance of these functions by judicial narrators, in addition to the sources cited in the previous note, see Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1615 (1986) (focusing on the non-judicial “audience” for these performances, rather than on the audience made up of other judges and lawyers).

<sup>160</sup> See Suzanne Keen, *A Theory of Narrative Empathy*, 14 *NARRATIVE* 207, 219 (2006) (citing and discussing David S. Miall’s theories, works, and studies).

## III. OTHER FICTIONS OF OMNISCIENCE

This Part addresses some fictions of omniscience in other areas of law. It starts with the group of fictions involving the imputation of knowledge from one individual to others in joint undertakings such as principal-agent relationships, some corporate contexts, and some criminal conspiracies. In many circumstances, the law deems such individuals to be, as it were, telepathically connected, sharing one another's mental states. In some respects, these doctrines are the closest relatives of fictions of legislative omniscience; like those fictions, these doctrines operate in several areas and rarely receive critical scrutiny by judges.

Similar devices in two other contexts have received significantly more attention: the controversial fiction imputing knowledge of the criminal law to criminal defendants (making unavailable to them the defense of ignorance or mistake of law), and the less controversial fiction of the "person having ordinary skill in the art," a construct unique to patent law but sharing several features with the assumptions discussed in Part I.<sup>161</sup>

*A. Constructive Notice of Information Known to Others*

1. *Scope and Function.*—Doctrines of constructive or imputed notice are deeply rooted in many areas of law yet seldom receive direct attention. The most comprehensive scholarly treatment of these principles remains an 1883 article by William L. Scott in the *American Law Review*.<sup>162</sup> Scott addressed five kinds of constructive notice: constructive notice of registered property documents, constructive notice under the doctrine of *lis pendens*, constructive notice arising out of actual notice (the familiar idea of being "on notice"), constructive notice arising out of willful blindness, and a principal's constructive notice of matters known to his or her agent.<sup>163</sup> The first three of these forms of constructive notice, in some ways, resemble assumptions of legislative omniscience more than the last two, as they involve imputed knowledge of available and legally relevant information. But as Scott explains, these forms of constructive notice are theoretically unproblematic;

---

<sup>161</sup> Space does not permit discussion of a number of other ways in which the law imputes impossible or unlikely knowledge to real or fictional actors. One example of such a doctrine is the fraud-on-the-market theory used in securities law. See, e.g., Randy D. Gordon, *Fictitious Fraud: Economics and the Presumption of Reliance*, 9 INT'L J. L. CONTEXT 506, 509–511 (2013); P. Smith, *supra* note 36, at 1455–57. Another example is the reasonable person. See MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

<sup>162</sup> William L. Scott, *Constructive Notice, Its Nature and Limitations*, 17 AM. L. REV. 849 (1883). Although commentators on statutory interpretation have characterized implied legislative intent as a kind of "constructive" intent, there appear to have been no extended studies of the conceptual relationship between constructive legislative knowledge and doctrines of constructive knowledge in other areas of law. See, e.g., Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 281–82 (2011).

<sup>163</sup> Scott, *supra* note 162, at 859–63, 882–83; see also *The Doctrine of Constructive Notice*, 4 L. COACH 157, 157–58 (1924) (outlining similar list and stating that "[i]mputed knowledge is what one's agents know").

they can be explained as restatements of a legal duty to inform oneself of relevant information before taking action.<sup>164</sup>

Knowledge imputed from an agent to his or her principal seems different. Usually, principals enlist agents so that the principals do not need to learn all that the agents learn. The law condones this use of agents, so it would be inconsistent for the law to impose on the principal a duty to learn all the agent knows. Why impute the agent's knowledge to the principal, then? Scott spends most of his article<sup>165</sup> on this form of imputed knowledge, which has become the model for many similar forms of imputation to be discussed shortly. Scott's conclusion is that this form of constructive notice can be justified only (1) as a way to protect innocent third parties,<sup>166</sup> and (2) more basically, as grounded in a principle of substitution, or legal identification, between principal and agent.<sup>167</sup>

As Scott recognized, this far more fictional-seeming conception of constructive knowledge was easy to extend to larger principal-agent-style relationships, like those involved in corporations.<sup>168</sup> This concept has been extended to other less formalized kinds of legally recognized joint action as well. Examples include the following:

- In some scenarios of vicarious liability, information known to, or the state of mind of, an employee will be imputed to the employer contrary to fact.<sup>169</sup>

---

<sup>164</sup> See, e.g., Scott, *supra* note 162, at 860; see also Rudolf Callmann, *Constructive Notice and Laches: A Study on the Nature of Legal Concepts*, 42 TRADEMARK REP. 395, 396 (1952) (making a similar point with respect to imputation to trademark registrants of knowledge of previously registered trademarks). These forms of constructive notice also impute to an actor knowledge of information that is generally possible to acquire, so holding actors responsible for acquiring it does not seem unrealistic. Similarly, constructive notice based on willful blindness is imputed knowledge of facts that would have been known had the actor not closed his or her eyes to them, not facts that would have taken any unusual effort to learn.

<sup>165</sup> Scott devotes eighteen out of forty-two pages to this topic, far more space than he spends on any other variety of constructive notice. Scott, *supra* note 162, at 864–82.

<sup>166</sup> *Id.* at 858.

<sup>167</sup> *Id.* at 871 (“[I]t would seem that the theory of legal identifications,—of *alter ego*,—that by intendment of the law the principal is present in the transaction in the person of his agent, the agent's act being his act, and the agent's knowledge his knowledge, is the more logical and consistent ground upon which to rest the doctrine in all classes of agency.”).

<sup>168</sup> See *id.* at 890–91 (discussing this extension). Corporate personality may be the earliest legal fiction (treated as such by medieval European commentators) that we still recognize in a similar form. See OLIVIER, *supra* note 100, at 17 (discussing treatment of corporate personality by canonists). As a number of commentators have noted, the fiction of corporate personality has significant analogies to the notion of legislative intent. See, e.g., Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 104–05 (2006) (noting parallels between notions of legislative intent and corporate responsibility, as well as orthodox conceptions of the group intentionality of juries and appellate panels). Professor Radin famously criticized legislative intent as a fiction. Radin, *supra* note 33, at 870. His contemporary Felix Cohen criticized corporate agency along similar lines in *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–14 (1935).

<sup>169</sup> See Abril & Olazábal, *supra* note 168, at 113 (“If a rogue employee commits a crime unbeknownst to and without the direct or indirect encouragement of his superiors, and . . . benefits his employer, the employer may be liable for the employee's actions.”).

- In prosecutions of individuals for criminal conspiracy, the conspiratorial group’s “intention” may be attributed to each individual, regardless of proof of that individual’s actual mental state, for purposes of establishing the criminal liability of that individual.<sup>170</sup> A defendant to a conspiracy charge need not have actual knowledge of “all its details” or all the participants in the conspiracy to be convicted.<sup>171</sup>
- Similarly, under so-called *Pinkerton* liability, a criminal defendant can be held individually liable for crimes committed by his or her co-conspirators, despite lacking knowledge and the mental state required for a freestanding conviction, as long as the defendant agreed to the group’s aims and the separate crime bore some general causal relation to the conspiracy.<sup>172</sup>
- In the criminal prosecution of a corporation, the knowledge of corporate employees may, under some circumstances, be aggregated to establish the mens rea required to convict the corporation, so that the corporation as a whole may be said to “know” the facts making its conduct illegal, even though no single employee had such knowledge.<sup>173</sup>
- By extension, in actions under the federal securities statutes, the knowledge of directors, officers, and employees—and perhaps even of those outside the corporation—may be imputed to a corporation to

---

<sup>170</sup> See Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 152–53 (2007) (“[B]y virtue of the criminal agreement, the act and intentions of one become the act and intentions of the other . . .”).

<sup>171</sup> See *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

<sup>172</sup> *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946); see also *United States v. Alvarez*, 755 F.2d 830, 850 (11th Cir. 1985); Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 618–19 (2008) (citing *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir. 1991)) (noting that at least one court has held that “a defendant could be vicariously liable for substantive crimes that were committed *before* he even joined the conspiracy . . .”).

<sup>173</sup> *United States v. Bank of New England*, 821 F.2d 844, 855–56 (1st Cir. 1987); Abril & Olazábal, *supra* note 168, at 86 (describing this approach); see generally Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210 (1997). Hagemann and Grinstein are critical of this doctrine; they contend that only commentators, not courts, have approved conviction based on the aggregation of such knowledge absent a showing of “willful blindness” on the part of the organization. See *id.* at 211, 227.

establish the scienter required for the corporation's liability.<sup>174</sup>

Some other, slightly more exotic, extensions of the principle include the following:

- In strict products liability, knowledge of a product's dangers available at the time of litigation is imputed to the manufacturer as of the time of manufacture.<sup>175</sup>
- For Fourth Amendment purposes, knowledge supplying probable cause to search or arrest that is held by one member of a police force may be deemed held by those other members who actually carry out the search or arrest.<sup>176</sup>

Some of these variants depart more from the basic principal-agent scenario than others. The most straightforward extensions impute knowledge or a mental state from an employee to an individual employer or from one criminal co-venturer to another.<sup>177</sup> When knowledge or a state of mind is imputed to a group rather than an individual, the doctrine involves not only a kind of thought transference but also personification of something that does not possess a mind in the ordinary sense. Not surprisingly, commentary and controversy have focused more on these latter scenarios than on the simpler ones.<sup>178</sup> The final two examples above seem even

<sup>174</sup> *City of Monroe Emps. Ret. Syst. v. Bridgestone Corp.*, 387 F.3d 468, 506 (6th Cir. 2004), as amended by *City of Monroe Emps. Ret. Syst. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005) (applying this approach); *Abril & Olazábal*, *supra* note 168, at 153–54 (“When a major corporate event . . . is a part of the public record or has been highly publicized, a corporation should be deemed to ‘know’ it for purposes of proving the corporation’s scienter.”).

<sup>175</sup> See, e.g., Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1192 (1992) (“Many courts . . . impute[] the knowledge of the product’s danger available at the time of trial to the manufacturer as of the time of the product’s manufacture.”).

<sup>176</sup> See Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1086 (2007) [hereinafter Stern, *Constructive*] (citing and discussing *United States v. Gillette*, 245 F.3d 1032 (8th Cir. 2001)). Stern describes the typical operation of what he calls the “constructive-knowledge rule” as follows: “[S]everal officers are investigating a crime, none personally has probable cause, one of them conducts a search or arrest anyway, and the court lets in the evidence on the theory that the officers knew enough in the aggregate to support probable cause.” *Id.*

<sup>177</sup> On the latter point, see Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617–20, 624, 634–35 (1984) (discussing imputed culpability, i.e., state of mind, in doctrines of complicity and vicarious liability, as well as felony murder, as analogous in important respects).

<sup>178</sup> See, e.g., Hagemann & Grimstein, *supra* note 173, at 210 (considering the potential problems arising from aggregating individual knowledge to create a corporate state of mind); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1285–98 (2000) (describing the debate surrounding this theory and proposing a resolution); Stern, *Constructive*, *supra* note 176, at 1085–89.

more anomalous, for different reasons. In strict products liability, the knowledge in question is not only being imputed to a non-human entity but also by definition could not have been known to anyone, human or not, at the time it is deemed to have been known. In the probable-cause scenario, the doctrine seems to supply perverse incentives stifling actual information-sharing. The acceptability of these two scenarios, despite their bizarre features, is probably due at least partly to the remarkable solidity of the basic paradigm—the “identification” of one mind with another that Scott describes with so little hesitation as an unproblematic legal device.

*2. Justifying Constructive Knowledge.*—Why are these doctrines acceptable? At one time, commentators had no hesitation in describing constructive notice doctrines as “fictions,”<sup>179</sup> but that label is seldom applied to these areas of law any longer. They appear now to be considered, in many forms, just ordinary legal rules.

The standard justifications for these principles fall into three general categories. The first is more a matter of stipulation than justification: it is the simple identity explanation that Scott offered.<sup>180</sup> This explanation seems less useful, however, the further one travels from the core principal-agent model.

Another set of explanations is normative. Constructive knowledge is sometimes justified as necessary to protect innocent third parties<sup>181</sup> or to hold culpable actors—be they individuals or groups, such as corporations—responsible for the effects of their actions.<sup>182</sup> Relatedly, constructive knowledge doctrines are sometimes justified on a kind of deterrence rationale, harking back to Scott’s observation about constructive notice of legally relevant facts. The idea is that if a beneficial result would follow from imposing a legal duty on a person to inform him- or herself about the matters in question, then the law is justified in treating that person as having so informed him or herself, regardless of the facts.<sup>183</sup>

No one normative rationale, however, seems to fit each of the examples listed above equally well.<sup>184</sup> And some—notably the imputation of knowledge among police officers for probable-cause purposes—appear to lack any good normative

<sup>179</sup> See, e.g., VEPA P. SARATHI, V.K. VARADACHARI’S LEGAL FICTIONS 30, 33, 83 (2d ed. 2012).

<sup>180</sup> See *supra* notes 167 and accompanying text.

<sup>181</sup> See Scott, *supra* note 162, at 858.

<sup>182</sup> See, e.g., Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 112 (1916) (“If th[e] employer is compelled to bear the burden of his servant’s torts even when he is . . . without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby to be obtained.”); Robinson, *supra* note 177, at 619 (describing responsibility as justification for imputed criminal liability); Wertheimer, *supra* note 174, at 1209–10 (arguing that strict products liability, without a state-of-the-art defense, is necessary for reasons similar to those offered by Professor Laski).

<sup>183</sup> See, e.g., Robinson, *supra* note 177, at 626, 658–59 (discussing deterrence rationale for doctrines of vicarious criminal liability); Scott, *supra* note 162, at 860.

<sup>184</sup> See, e.g., Hagemann & Grinstein, *supra* note 173, at 240 (criticizing aggregation of mental states within corporations for purposes of criminal liability). Hagemann and Grinstein acknowledge that the doctrinal modification they propose—adding a willful blindness element—also involves imputing information to actors. *Id.* at 246. (“[T]he willful blindness doctrine imputes to defendants knowledge that they never actually acquired. The collective knowledge rule, on the other hand, takes knowledge that does exist, albeit in separate locations, and accumulates it.”). See also discussion *infra* Part III.B.

justification. Indeed, the main justification for that doctrine seems to be evidentiary. If the individual officers would eventually have shared the information they each possessed, then the lawfulness of the search or arrest should not turn on an accident of timing.<sup>185</sup> An evidentiary rationale can be generated for the other variations on the constructive-knowledge theme as well. In each case, we accept imputing one actor's knowledge or mental state to another actor because it would be too difficult or uncertain to confirm the presence or absence of that knowledge or mental state in the actor to whom they are imputed. In the core principal-agent scenario, it does not really matter whether the principal actually knew every detail of what the agent did; determining whether the principal did know this is gratuitous, given the principal's legal relationship to the agent.<sup>186</sup> Similarly, co-conspirators might share intentions and knowledge to different degrees. Determining the precise extent of their shared knowledge would consume at least as much time as proving objective elements of the crimes in question, with no assurance of a clear conclusion.<sup>187</sup>

The evidentiary perspective also helps to explain why we no longer consider at least the more basic constructive-knowledge doctrines to involve legal fictions. In a principal-agent relationship, the "facts" of the principal's mental state do not matter beyond those necessary to establish the relationship. The law now defines such facts as irrelevant. We accordingly have no basis for considering the law's approach to these matters to be counterfactual or fictional. In this area, then, notions that were once considered fictions have been so thoroughly absorbed into legal practice and discourse that they have become just another way of establishing the premises for a legal conclusion. Since this type of legal premise does not depend on the presentation of evidence in the traditional sense, it does not displace or conflict with the establishment of factual premises for a legal conclusion.

To explore this point further, the next part turns to a principle from criminal law—the maxim "ignorance of the law is no defense"—that is sometimes described as akin to constructive-knowledge doctrines.<sup>188</sup> This maxim, however, unlike the doctrines discussed just above, is still often characterized as a fiction.

---

<sup>185</sup> Cf. Stern, *Constructive*, *supra* note 176, at 1115 (discussing possibility of justifying constructive-knowledge doctrine by reference to inevitable-discovery doctrine). Despite presenting this possibility, Stern does not endorse the doctrine, noting its asymmetrical application: "[T]he courts feel most compelled to reject the idea of omniscience when there is a risk that imputing information to the acting officer would make the officer liable for a civil rights violation." *Id.* at 1140.

<sup>186</sup> Cf. William N. Eskridge, Jr., "Fetch Some Soupmeat", 16 *CARDOZO L. REV.* 2209, 2218 (1995) (showing how any agent will need to "fill in the blanks" in a principal's directives).

<sup>187</sup> See, e.g., Robinson, *supra* note 177, at 620 n.31 ("The evidentiary theory is most often employed to support imputation of mental rather than objective elements. One would expect such a pattern of application since the evidentiary rationale responds to problems of proof, and proof of mental elements is more difficult than proof of objective elements.").

<sup>188</sup> Cf. Douglas N. Husak, *Varieties of Strict Liability*, 8 *CAN. J.L. & JURISPRUDENCE* 189, 212 (1995) (discussing *ignorantia* maxim as variety of strict liability).

### B. *The Legal Knowledge of the Criminal Defendant*

1. *Scope and Function*—The maxim “ignorance of the law is no defense” refers to the general denial to criminal defendants of the defense that they were not aware that their conduct was against the law. In some formulations, the maxim looks like a fiction, deeming the criminal defendant to know the law (and precluding assertions to the contrary). While the legitimacy of equating the bar on this defense with an imputation of knowledge to a defendant is problematic, the maxim remains in wide use as a shorthand reference to the rule.<sup>189</sup>

The ignorance-of-the-law fiction is of very long standing, perhaps even longer than the doctrines discussed in the previous section.<sup>190</sup> Unlike principal-agent constructive notice, this fiction does not involve telepathy; rather, it imputes to the defendant knowledge of publicly available information. In this respect, it is closer kin to the recorded-title and *lis pendens* forms of constructive notice, as well as to some versions of the fiction of legislative omniscience.

Like fictions of legislative omniscience, and unlike many forms of constructive notice, this fiction does not function as a direct premise for legal conclusions. Rather, it is a way of justifying the rule denying defendants use of an ignorance-of-law defense—but only sometimes. Exceptions to that bar have probably always been recognized,<sup>191</sup> most notably when it would have truly been impossible for the defendant, or anyone in the defendant’s position, to have known of the law making conduct an offense (because, for example, that law had not yet been made public).<sup>192</sup> Over the past few centuries, courts have permitted an

---

<sup>189</sup> One early commentator, Jeremiah Smith, argued that the bar on the ignorance-of-the-law defense could not be considered equivalent to an assumption about criminal defendants’ knowledge. Jeremiah Smith, *Surviving Fictions II*, 3 ST. LOUIS L. REV. 24, 24–25 (1918) (quoting JOHN AUSTIN, 1 LECTURES ON JURISPRUDENCE 497 (3d ed. 1869) (“There is no such presumption [of the criminal defendant’s knowledge of the law]. . . . It is a fiction. . . . That any actual system of law is knowable by those who are bound to obey it ‘is so notoriously and ridiculously false that I shall not occupy your time with proof to the contrary.”)). The only justification needed for the substantive rule barring the defense, Smith argued, is the impossibility of judging a defendant’s claim to ignorance. *Id.* at 25.

<sup>190</sup> By some accounts, imputations of knowledge of the law to criminal defendants, regardless of their actual states of knowledge, dates back to Roman law. See, e.g., Vera Bolgár, *The Present Function of the Maxim Ignorantia Iuris Neminem Excusat—A Comparative Study*, 52 IOWA L. REV. 626, 627 (1967); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77–79 (1908). Other commentators date its origin to early English law. See Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 643–45 (1941). Professor Smith has identified it as a “new legal fiction.” P. Smith, *supra* note 36, at 1459. Regardless of its exact age, the principle has long been widely applied in Anglo-American law. See, e.g., Davies, *supra* note 46, at 344 n.9; Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 36–39 (1939); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487, 489–90 (2012); Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392 (1986).

<sup>191</sup> Some have argued that the principle has always been honored in the breach. See, e.g., Bolgár, *supra* note 190, at 640–41 (“[F]rom the time the rule begins to appear in the courts of the United States, . . . it was used more as a means for balancing considerations of equity than as a basis for strict judicial interpretation.”).

<sup>192</sup> See, e.g., Hall & Seligman, *supra* note 190, at 657.



ignorance-of-the-law defense in an increasing number of additional situations.<sup>193</sup>

As the irregular application of the rule might suggest, the accompanying fiction has been extensively analyzed. In fact, it is probably the most criticized of all fictions discussed in this Article. The next section summarizes some themes of this analysis.

2. *Justifications for the Fiction.*—There are two standard rationales for imputing knowledge of the law to criminal defendants. One is evidentiary: allowing the defense of ignorance-of-the-law would lead to irresolvable disputes over the state of individual defendants' knowledge.<sup>194</sup> Prosecutors would have no straightforward way to rebut a defendant's assertion of ignorance.<sup>195</sup> Since some assumptions need to be made to prove a defendant's state of mind in any event, it is more efficient to assume a uniform state of knowledge on the defendant's part, one that coincides with the collective state of knowledge of prosecutor, defense counsel, and judge (if not the jury pool). The second rationale, a normative one often attributed to Oliver Wendell Holmes,<sup>196</sup> proposes that withholding the defense will encourage members of the public to learn what the law requires and forbids. If courts adhere to the rule, this argument goes, then the public will learn that criminal defendants are deemed to know the law. This awareness will encourage potential lawbreakers to inform themselves about the law, since they will know they cannot use ignorance as a defense should they break the law and be prosecuted.<sup>197</sup>

Both rationales have been criticized. The most frequent criticism, like the standard critiques of legislative omniscience, stresses the inaccuracy of the fiction as

---

<sup>193</sup> For a discussion of one notable context in which these exceptions have emerged, see Davies, *supra* note 46, at 343 (discussing and criticizing the trend towards increasing exceptions to the *ignorantia legis* principle). See also Ratzlaf v. United States, 510 U.S. 135, 146–49 (1994); Cheek v. United States, 498 U.S. 192, 199–204 (1991); United States v. Murdock, 290 U.S. 389, 393–98 (1933). For commentary, see Hall & Seligman, *supra* note 190, at 642 (“There are now a number of exceptions to the rule, and their creation and shaping is largely the product of American judicial decision since the beginning of the nineteenth century.”); Dan M. Kahan, *Ignorance of the Law Is an Excuse: But Only for the Virtuous*, 96 MICH. L. REV. 127, 150 (1997); Alexander P. Robbins, Comment, *After Howard and Monetta: Is Ignorance of the Law a Defense to Administrative Liability for Aiding and Abetting Violations of the Federal Securities Laws?*, 74 U. CHI. L. REV. 299, 310–17 (2007) (arguing against allowing the defense in this context); Mark D. Yochum, *Ignorance of the Law Is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 223 (1989) (criticizing trend toward allowing defense in tax crime prosecutions); Mark D. Yochum, *The Death of a Maxim: Ignorance of the Law Is No Excuse (Killed by Money, Drugs, and a Little Sex)*, 13 ST. JOHN'S J. LEGAL COMMENT. 635, 639–40 (1999) [hereinafter Yochum, *Death*].

<sup>194</sup> See, e.g., Perkins, *supra* note 190, at 44 (noting that “recognition of [the] ignorance of law . . . defense would . . . present to the jury ‘questions incapable of solution’”).

<sup>195</sup> See, e.g., Bolgár, *supra* note 190, at 627–28; Davies, *supra* note 46, at 353 n.53; John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 67 (1997); Perkins, *supra* note 190, at 41, 44.

<sup>196</sup> Davies, *supra* note 46, at 354; Parry, *supra* note 195, at 67.

<sup>197</sup> See Bolgár, *supra* note 190, at 655–56 (“[T]he necessity that laws must be known by responsible and free citizens arose . . . from the theory that citizens are responsible, that they are free, and that the law in its enacted form . . . should recognize this responsibility and respect this freedom.” (emphasis in original)).

a description of defendants' actual states of knowledge. Given this inaccuracy, critics contend, the imputation of legal knowledge to defendants is not a realistic evidentiary presumption, so the evidentiary rationale is weak.<sup>198</sup> Nor does the rule seem to have been effective in encouraging lawful behavior, so the normative rationale lacks support.<sup>199</sup> This double-barreled criticism may explain many of the exceptions American courts have permitted. And it has probably strengthened over time: as criminal laws multiply, the discrepancy between the knowledge that the fiction imputes to any given criminal defendant and that defendant's actual knowledge becomes greater,<sup>200</sup> while the difficulty of proving the defendant's actual knowledge presumably remains about the same, so the evidentiary presumption becomes increasingly unsupportable, while the normative rationale becomes ever more unrealistic.<sup>201</sup>

So far, the arguments concerning this fiction seem to parallel some of those made about fictions of legislative omniscience. But another contribution to this literature has moved beyond this framing of the issues in an interesting way. Although he does not call the imputation a "fiction," in a 1997 article Professor Dan Kahan advanced an alternative account of the imputation as a motivated departure from accurate description.<sup>202</sup> Professor Kahan argued that, contrary to the Holmesian rationale, lawmakers and judges do not forbid the ignorance-of-law defense because they want citizens to inform themselves about the law. If this were the goal, Professor Kahan argues, then the appropriate standard would be something akin to negligence, under which defendants would be held liable only if they had culpably failed to try to inform themselves about the law. Holding defendants strictly liable regardless of their efforts to inform themselves, he continues, does not provide the right incentive.<sup>203</sup> According to Professor Kahan,

<sup>198</sup> See, e.g., *id.* at 638 ("[L]aw *might* or *ought* be knowable by all who are bound to obey it, but that any actual system *is* knowable, is ridiculously and notoriously false."); Hall & Seligman, *supra* note 190, at 660 ("[I]t is not . . . an exaggeration to say that it is literally impossible for a citizen to assemble all the relevant rules . . . which might apply to his daily conduct . . ."); Keedy, *supra* note 190, at 78 ("Under modern conditions, . . . it would hardly be seriously maintained that [the law is certain and capable of being ascertained].").

<sup>199</sup> It is unfair, this argument continues, to hold a defendant responsible for violating a law of which the defendant was unaware; when a defendant does not know that his or her conduct is illegal and is subjected to criminal liability anyway, the defendant's punishment is out of step with the purposes of imposing criminal liability. See, e.g., Grace, *supra* note 190, at 1395–96 (arguing for "a mistake of law defense for laws that criminalize ordinary behavior"); see also Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 1–5 (1995).

<sup>200</sup> See, e.g., Davies, *supra* note 46, at 350 n.38; Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 83 (2011) ("The expectation that the law is 'definite and knowable' is no more tenable for police today than it is for the lay public."); Pilcher, *supra* note 199, at 14 ("[E]ven if there was once a time when the criminal law was so simple and limited in scope that such a presumption was justified, it is now an 'obvious fiction' and 'so far-fetched . . . as to be quixotic.'"); Grace, *supra* note 190, at 1395–96 ("[I]n modern times, this presumption is largely fictional.").

<sup>201</sup> Some have predicted that, as a result, courts will eventually abandon the bar on the ignorance defense. See Yochum, *Death*, *supra* note 193, at 673.

<sup>202</sup> Kahan, *supra* note 193.

<sup>203</sup> *Id.* at 133–36, 140.

the ban on the ignorance-of-the-law defense is best explained as a device of “prudent obfuscation” that judges use to veil their need for “flexibility to adapt the law to innovative forms of crime *ex post*.”<sup>204</sup> Judges cannot directly avow their need for such flexibility, since they do not want their decisions to seem standardless. In some respects, this explanation resembles the classic conception of legal fictions described above, according to which they allow judges to adjust law to new circumstances.<sup>205</sup> But it is difficult to understand the argument as a defense of the classic understanding of legal fictions. Professor Kahan considers the imputation of legal knowledge to criminal defendants to be both descriptively inaccurate and probably permanently necessary.<sup>206</sup> To him, the device allows judges to conceal what they are really doing (adjusting the application of legal rules to circumstances) by saying that they are doing something else (just assuming that all know the law).<sup>207</sup> While this departure from descriptive accuracy might seem inconsistent with a legal commitment to ascertaining the truth, Professor Kahan suggests that this latter commitment sometimes rightly gives way to other normative goals.<sup>208</sup>

The persistence of this fiction is not easy to explain, and I do not propose to explain it in this Article. The tenacity of this fiction in the face of criticism does, however, reinforce my conclusion about the inadequacy of the classic understanding of legal fictions. Recognizing the ignorance-of-the-law maxim as a fiction has not led either to its disavowal or to its conclusive justification as a known falsehood. The continued meaningfulness of the maxim also suggests that assumptions of omniscience may play an important role in legal justification even when they are recognized as descriptively inaccurate. The legal device discussed in the next part offer an especially good example of the justificatory utility of assumptions of omniscience.

### C. The PHOSITA's Knowledge of the Pertinent Prior Art

1. *Scope and Function.*—Patent law in the United States and elsewhere<sup>209</sup> makes extensive use of a construct known as the “person having ordinary skill in the art,” now often called the PHOSITA.<sup>210</sup> This phrase refers to the perspective from

<sup>204</sup> *Id.* at 139–41 (“[T]he doctrine attempts to discourage legal knowledge (prudent obfuscation) so that individuals will be more inclined to behave morally (legal moralism).” (emphasis omitted)).

<sup>205</sup> See *supra* note 105 and accompanying text. As discussed above, however, under that conception, such adjustments are necessarily not permanent features of the law. Professor Kahan, in contrast, posits a permanent need for flexibility in criminal law, and it is not clear that his argument is necessarily limited to criminal law.

<sup>206</sup> See Kahan, *supra* note 193, at 150.

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 152.

<sup>209</sup> See Richard Weiner, *Nonobviousness: Foreign Approaches, in* NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY 7:402 (John F. Witherspoon ed., 1980); see also *infra* notes 210 & 212.

<sup>210</sup> This abbreviation was coined by Cyril A. Soans, *Some Absurd Presumptions in Patent Cases*, 10 PAT. TRADEMARK & COPYRIGHT J. RES. & ED. 433, 438 (1966), and adopted by the Federal Circuit in *Kimberly-Clark Corp. v. Johnson & Johnson*, 745 F.2d 1437, 1454 n.5 (Fed. Cir. 1984), but the underlying notion dates to a mid-nineteenth-century Supreme Court decision, *Hotchkiss v.*

which judges assessing the validity and scope of patent claims are to apply a number of the law's requirements. The original context in which this construct arose, and still perhaps the most challenging and important context in which it applies, is that of determining the obviousness of an invention. The inventor of a new product or process may receive a patent only if it would not have been "obvious" to the PHOSITA to make the product or use the process at the time of its invention.<sup>211</sup>

Patent law also requires patent examiners and judges to assume the PHOSITA's perspective in other areas, including assessment of the novelty and utility of an invention,<sup>212</sup> as well as an assessment of whether the patent application's description enables the invention.<sup>213</sup> Nonobviousness, however, is by many accounts the most important inquiry based on the construct.<sup>214</sup> It is also the context in which the PHOSITA construct's nature and application is most illuminating for the topic of this Article.

In the obviousness context, the PHOSITA has two key characteristics: first, it is an entirely hypothetical perspective, and second, it has "omniscient" knowledge of the pertinent prior art. The PHOSITA has famously been described as a "ghost[]"<sup>215</sup> and a "doppelganger,"<sup>216</sup> and the Federal Circuit and Supreme Court

*Greenwood*, 52 U.S. 248, 253 (1850) (referring to the "ordinary mechanic acquainted with the business" in connection with the precursor to modern nonobviousness analysis).

<sup>211</sup> 35 U.S.C. § 103 (2012) (requiring that the "non-obvious[ness]" of an invention be assessed from the perspective of "a person having ordinary skill in the art to which the claimed invention pertains."). Similar standards appear in the patent law of Canada and the European Union. See Canada Patent Act, R.S.C. 1985, c. P-4, § 28.3 ("The subject-matter defined by a claim in an application for a patent . . . must be subject-matter that would not have been obvious . . . to a person skilled in the art or science to which it pertains . . ."); European Patent Convention art. 56, Sept. 2013, 2013 O.J. (L 17) page 116 ("An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.").

<sup>212</sup> An invention is novel if it is not anticipated by the prior art, which includes publications and issued patents existing at the time of the invention. Since 1876, U.S. courts have held that prior art may anticipate a patent if the prior art "exhibit[s] the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it . . ." *Cohn v. U.S. Corset Co.*, 93 U.S. 366, 370 (1876). An invention is useful if it performs some benefit and is not impossible to construct, operate, or generate. In assessing the utility of an invention, U.S. courts similarly ask "whether a person having ordinary skill in the art . . . has reason to doubt the objective truth of the [patent] applicant's assertions" regarding the benefit and operability of the invention described. Sean B. Seymore, *Patently Impossible*, 64 VAND. L. REV. 1491, 1493 (2011).

<sup>213</sup> The Patent Act explicitly mentions a "skilled in the art" perspective in connection with enablement: the patent disclosure must "contain a written description of the invention . . . in such . . . terms as to enable any person skilled in the art to which it pertains . . . to make and use the same . . ." 35 U.S.C. § 112(a) (2012).

<sup>214</sup> See, e.g., Joseph P. Meara, *Just Who is the Person Having Ordinary Skill in the Art? Patent Law's Mysterious Personage*, 77 WASH. L. REV. 267, 272 (2002) (calling obviousness "the most litigated aspect of patent law"); John O. Tresansky, *PHOSITA—The Ubiquitous and Enigmatic Person in Patent Law*, 73 J. PAT. & TRADEMARK OFF. SOC'Y 37, 37 (1991) ("The most frequent use of the skill level in an art . . . is in determining whether an invention meets the . . . condition for patentability of nonobviousness . . .").

<sup>215</sup> *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566 (Fed. Cir. 1987) (describing PHOSITA as "not unlike the 'reasonable man' and other ghosts in the law").

have repeatedly emphasized its difference from the perspectives of actual inventors, patent applicants, examiners, and judges.<sup>217</sup> The PHOSITA is a fictional figure that judges are directed to tailor-generate for each inquiry into obviousness. Sometimes, the PHOSITA's likeness to a fictional character is very close to the surface, as this passage from a 1966 opinion illustrates:

We think the proper way to apply the . . . obviousness test to a case like this is to first picture the inventor as working in his shop with the prior art references—which he is presumed to know—hanging on the walls around him. One then notes that what [the] applicant . . . built here he admits is basically a Gerbe bag holder [an invention disclosed in a prior art reference] having air-blast bag opening to which he has added two bag retaining pins. . . . [The applicant] would have said to himself, 'Now what can I do to hold them more securely?' Looking around the walls, he sees Hellman's envelopes with holes in their flaps hung on a rod [another prior art reference]. He would then say to himself, 'Ha. I can punch holes in my bags and put a little rod (pin) through the holes. That will hold them. After filling the bags, I'll pull them off the pins as does Hellman. Scoring the flap should make tearing easier.'<sup>218</sup>

This vignette engages most extensively with the PHOSITA's imaginary, constructed status. It mentions only in passing the other crucial characteristic of the PHOSITA posited for inquiries into obviousness: the PHOSITA is "presumed to know" all the "prior art references," that is, all available information about related or "pertinent" inventions existing when the inventor conceived the claimed invention (or, now, when the inventor applied for a patent on it), regardless of the salience of that information.<sup>219</sup> These two characteristics make the PHOSITA surprisingly similar to at least some fictions of legislative omniscience. The

---

<sup>216</sup> Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1187 (2002).

<sup>217</sup> See, e.g., Ruiz v. A.B. Chance Co., 234 F.3d 654, 666–67 (Fed. Cir. 2000); Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448, 454 (Fed. Cir. 1985); In re Kleinman, 484 F.2d 1389, 1392 (C.C.P.A. 1973).

<sup>218</sup> In re Winslow, 365 F.2d 1017, 1020 (C.C.P.A. 1966); see also Dan L. Burk, *Do Patents Have Gender?*, 19 AM. U.J. GENDER SOC. POL'Y & L. 881, 890–91 (2011). This scene captures the standard features of the PHOSITA in the nonobviousness analysis: this person knows all of the pertinent prior art and is in that sense omniscient. The person is also capable of combining these prior art teachings to come up with a putatively new invention that is, nevertheless, obvious to this PHOSITA, and therefore unpatentable. The PHOSITA is less inventive, in other words, than the successful patent applicant, even though the PHOSITA also knows more than the successful patent applicant does or often can know about the pertinent prior art.

<sup>219</sup> See, e.g., Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 454–55 (1818); In re Rouffet, 149 F.3d 1350, 1357 (Fed. Cir. 1998) ("The legal construct . . . presumes that all prior art references in the field of the invention are available to this hypothetical skilled artisan."); Tresansky, *supra* note 214, at 40–41 ("While an inventor is no longer presumed to have knowledge of all material prior art, the hypothetical PHOSITA, although possessed only of ordinary skill, is presumed to be aware of all of the pertinent prior art."); Jonathan J. Darrow, Note, *The Neglected Dimension of Patent Law's PHOSITA Standard*, 23 HARV. J.L. & TECH. 227, 235 (2009) ("[T]he PHOSITA is presumed to have read, understood, and remembered every existing reference from the prior art." (citing, *inter alia*, Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 493 (1900) (holding that an inventor must have familiarity with all preexisting devices))).

PHOSITA is acknowledged to be an unreal construct, not just because it does not correspond to any actual human being, but also because it knows a body of information that no actual person would be at all likely, or in some cases able, to know.

Unlike the omniscient legislature, however, the PHOSITA is largely seen as not only defensible, but indispensable. Embrace of the PHOSITA has, to be sure, shifted over the years as judicial definition of its characteristics has passed from the Supreme Court to the Federal Circuit and back again, but commitment to the construct itself has never been in question—rather, debates over it have concerned the best way to conceive of and use the device.<sup>220</sup> Commentary on the PHOSITA has thus explored some issues seldom addressed in connection with other fictions of omniscience.

*2. Justifications for the Construct.*—Although the PHOSITA’s paradoxical features might seem to make the perspective difficult for a decision-maker to assume, courts appear willing to assume a PHOSITA-like perspective to assess an increasingly wide variety of questions. Most commentators also seem to view the construct not as a problem but as a useful and important device.

The PHOSITA’s two features—its imaginary status and its omniscience—are typically justified differently. The detachment of the PHOSITA perspective from any actual person’s perspective is usually described as a tool for preventing hindsight bias. Otherwise, it might be tempting for an examiner or judge to regard an achieved invention as obvious, even though it would not have been obvious to the inventor’s contemporaries.<sup>221</sup> Forcing decision-makers to displace themselves from their real-life vantage points in space and time compels them to step back from their own assumptions—to engage in metacognition. This understanding of the PHOSITA’s function may explain commentators’ tendency to recommend that the PHOSITA’s characteristics be sharpened and specified, or made more “lifelike.” Some scholars have suggested, for example, limiting the prior art to which the PHOSITA would have access<sup>222</sup> or endowing the PHOSITA with

---

<sup>220</sup> The Supreme Court’s 2007 decision in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), clarified that the PHOSITA should be understood as able to combine the “teachings” of scattered prior art references to achieve obvious insights rather than simply able to extrapolate from shortcomings of particular prior inventions, contrary to the Federal Circuit’s then-prevailing test for obviousness in light of prior art: “The idea that a [PHOSITA] designer hoping to make [an invention like the one at issue in *KSR*] would ignore [a particular prior art reference] because [it] was designed to solve [a different problem] makes little sense. A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *Id.* at 420–21. This standard suggests an even greater role for judicial fictionalizing, in the sense of imaginatively taking the PHOSITA’s perspective, than the Federal Circuit had at that point been willing to endorse. See generally Peter Lee, *Patent Law and the Two Cultures*, 120 *YALE L.J.* 2, 51–56 (2010) (discussing *KSR* in context of Supreme Court’s recent patent jurisprudence).

<sup>221</sup> See Tresansky, *supra* note 214, at 49–50.

<sup>222</sup> See Natalie A. Thomas, *Secondary Considerations in Nonobviousness Analysis: The Use of Objective Indicia Following KSR v. Teleflex*, 86 *N.Y.U. L. REV.* 2070, 2102 (2011) (making this recommendation); see also Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 *DUKE L.J.* 919, 959–63 (2011) (making similar recommendation in the context of novelty).

ordinary economic incentives and motives.<sup>223</sup>

The hindsight-bias justification does not directly apply, however, to imputations of “omniscience”<sup>224</sup> to the PHOSITA. This feature of the PHOSITA has been more gingerly defended. One rationale offered for it should seem familiar: assuming omniscience is thought to avoid “difficult issues of proof related to the inventor’s actual knowledge.”<sup>225</sup> But the characteristic is also required by the necessarily public nature of the inquiry involved in nonobviousness (and other patent validity) analyses. An inventor is entitled to a patent if the invention claimed would not have been obvious to anyone with the technical competence to use it—not just if the invention was not obvious to the actual inventor. To determine whether this is the case, a decision-maker must necessarily consider the information that might have been available to potential competitor-inventors, and not just the information actually known to the inventor. Both the PHOSITA’s hypothetical status and its omniscience help courts answer that central question.

As noted, the PHOSITA’s omniscience has been treated more skeptically than its fictionality. The chief reason for this skepticism will by now be easy to anticipate: omniscience is a descriptively inaccurate feature for even a fictional construct to have, since it could not realistically be imputed to any real inventor, patent applicant, examiner, or judge.<sup>226</sup> This argument, however, is far less widely endorsed than the analogous argument against assumptions of legislative omniscience. Overall, judges and commentators seem untroubled by both features of the PHOSITA—its fictionality and its omniscience.

Yet the parallels between the PHOSITA and assumptions of legislative omniscience are striking. Both involve a posited perspective that is deemed to have a special generative relationship to a legally significant text that needs construal. And both impute to that perspective an unrealistic access to publicly available technical and largely textual matter—and, through that matter, to the “minds” of other members of the relevant specialist community. The discontinuities between the PHOSITA and the other fictions considered in this Article are also, however, worth noting. The PHOSITA is far more elaborated—more theorized and more richly “characterized”—than either assumptions of legislative omniscience or the various doctrines of constructive notice. And the PHOSITA appears far more

---

<sup>223</sup> Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1598–1600 (2011). Professors Abramowicz and Duffy also argue that courts should allow the PHOSITA perspective to be that of a corporate entity, thus incorporating some of the kinds of fictions discussed in Part III.A above. *Id.* at 1615–16.

<sup>224</sup> Darrow, *supra* note 219, at 235 nn.39 & 40 (discussing differing characterizations of the PHOSITA’s omniscience).

<sup>225</sup> *Id.* at 235.

<sup>226</sup> See, e.g., Abramowicz & Duffy, *supra* note 223, at 1606–07 (“The mind of this hypothetical person comes equipped with a complete and thorough knowledge of all legally pertinent prior art, far more knowledge than could be possessed by any average or actual researcher.”); Daralyn J. Durie & Mark A. Lemley, *A Realistic Approach to the Obviousness of Inventions*, 50 WM. & MARY L. REV. 989, 991–94 (2008) (arguing that PHOSITA perspective should be applied based “on what the PHOSITA and the marketplace actually know and believe”); Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1500 (2001) (explaining inaccessibility of much prior art).

firmly accepted than either the assumption of legislative omniscience or the criminal defendant's imputed legal knowledge. The divergences noted in the latter two areas between what commentators are saying and what courts are doing are largely absent in patent law. Part IV draws on these patterns to suggest a reconceptualization of the work done by assumptions of legislative omniscience in judicial opinions and commentary.

#### IV. EXPLAINING THE PATTERNS AND EVALUATING THE FICTIONS OF LEGISLATIVE OMNISCIENCE

The discussion so far has shown, first, that commentators widely disapprove of assumptions of legislative omniscience, considering them descriptively inaccurate fictions that, because of their inaccuracy, undermine judicial legitimacy. Standard accounts of legal fictions, however, do not indicate exactly why these assumptions are problematic. In fact, the assumptions commentators criticize do not really seem to fit the standard accounts of legal fictions at all. Part II suggested an explanation for this apparent mismatch: the limited scope of our understanding of legal fictions, which has not advanced much beyond the form it had reached in the early twentieth century. Work on the phenomenon of fiction in other scholarly disciplines, in contrast, has advanced far beyond early twentieth-century models. These advances suggest a variety of ways of building out our understanding of legal fictions. Such an updated understanding might, among other things, take account of the frames of reference within which propositions about fictional entities are advanced and/or discussed, as well as the potential functions, other than supplying accurate description, that such propositions might perform for writers and especially readers. Part III then explored the presence in other legal areas of propositions similar to the so-called fictions of legislative omniscience. Unlike assumptions of legislative omniscience, doctrines of constructive notice and the PHOSITA device are not generally considered threats to the legitimacy of judicial decision-making.

These observations suggest that certain aspects of assumptions of legislative omniscience might not be as troubling as virtually all commentators have assumed. Other aspects of those assumptions, however, might deserve further analysis and perhaps the criticism they have received. Either way, the usual casual dismissal of assumptions of legislative omniscience is not warranted. The remaining paragraphs of this Article will draw on the material presented in earlier Parts to support this conclusion.

A significant theme emerging from the discussion in Parts II and III is the importance of clarifying the frames of reference from within which assertions about fictional entities are made in considering the work those assertions do. One could think of these frames of references as discourse "worlds." A fictive utterance about Sherlock Holmes is made from within the discourse world of a narrative concerning Sherlock Holmes. A transfictive or metafictional utterance about Sherlock Holmes is made from within a different discourse world, one that



includes the fictional discourse world but also allows for assertions about matters of fact outside that narrative that can be evaluated for descriptive accuracy. This kind of clarification is a basic step in philosophical analysis of fiction and fictionalizing. Part III.A showed how Professor Kahan, without using precisely the same terminology, seems to have arrived at a similar conclusion in analyzing the *ignorantia maxim*.<sup>227</sup> Understanding assumptions of legislative omniscience can benefit from a similar treatment. References to these assumptions (sometimes characterizing them as fictions) occur from within two frames of reference: the world of judicial discourse and the world of scholarly discourse.

Since the scholarly criticism of these assumptions focuses on their operation within the first world, that of judicial discourse, most of this Part will address that frame of reference. But it is also important to consider how the assertions function within the second world, that of scholarly discourse. Assertions about assumptions of legislative omniscience within this frame of reference are like transfictional or, more often, metafictional utterances. They identify the assumptions as fictions and evaluate them using the same standards that we use to evaluate references to actual entities. Scholarly assertions about these particular assumptions are not the kind of “theoretical fictions” identified by Vaihinger, Fuller, and other writers on legal fictions. These scholarly assertions are used not to justify doctrine, but to criticize it, or more precisely to propose a faulty justification for it. In this way, they resemble assertions about fictional characters that find fault with the characters for not being real people. It is, nevertheless, mainly due to this commentary that we recognize the assumptions of legislative omniscience as fictions (and indeed, they are fictions), even though commentators’ observation that the assumptions are fictions does not much advance our understanding of them, for the reasons presented above.<sup>228</sup>

The scholarly commentary focuses, of course, on the propriety of judges’ assertions about legislative omniscience, or of judicial assertions that scholars think presuppose this omniscience. Judges’ assertions need to be analyzed differently from scholars’, since judges make their assertions within a different discourse world. Put differently, when scholars make assertions about judicial assumptions of legislative omniscience, they are telling stories about courts (and, in recent scholarship, about legislatures as well). Judges making assertions about what legislatures know are, in contrast, telling stories mainly about legislatures (but perhaps also about judges), and more specifically about what the law is and what rules it includes.

Although judges often make claims about what legislatures know, judges do not usually identify these assertions as fictions, and they do not often explicitly impute “omniscience” to legislatures. Rather, most often judges deem the legislature to be

---

<sup>227</sup> See *supra* notes 203–205 and accompanying text.

<sup>228</sup> In addition to collapsing the worlds of scholarly and judicial discourse, some scholarship in this area collapses both such worlds with the further distinct discourse worlds of non-legal everyday life and of statutory enactments. Cf. Gluck & Bressman, *Part II, supra* note 17, at 785 (asking, in arguing against the rule against redundancies, “Does the average citizen not repeat herself for emphasis or to ‘cover all the bases’ . . . ?”).

aware of or to know certain specific information.<sup>229</sup> But within the story that judicial opinions collectively tell about the body of legal rules, we can take these deemings to be assertions that the legislature “knows” something that it might not actually have known or had the capacity to know, and in that sense to impute something like omniscience—a superhuman state of knowledge—to the legislature.<sup>230</sup> As Part I discussed, this deeming has two distinct components: the personification of the legislature and the imputation to that personified collective of certain unlikely knowledge. Because the material discussed above has clearer implications for the second of these components, this discussion will consider it first.

The presence elsewhere in the law of imputations of unrealistic knowledge (as discussed in Part III), and their complete acceptance in some of those other areas, suggests that there is not necessarily anything inherently problematic about the unrealistic nature of these imputations. Indeed, the apparently independent development of these deemings in diverse legal areas suggests that they might perform some useful function. Whatever this function is, it is not that of accurate description. But the deemings might be useful for other purposes. The classic theory of legal fictions holds that such fictions may have value as tools for legal adjustment or as theoretical justifications for legal rules. Neither of these accounts seems to fit the imputation of unrealistic knowledge to a legislature. The work from psychologists and literary scholars discussed in Part II, however, suggests a

<sup>229</sup> Judicial opinions usually simply “presume,” “assume,” or “deem” the legislature to be aware of certain information; they rarely describe these presumptions, assumptions, or deemings as fictions (and they rarely call the knowledge “omniscience”), as the table below suggests. This table summarizes results of Westlaw searches in the database of all state and federal cases, run July 2, 2014:

Search string	Number of results
(presum! /s legis! /s know!)	7,950
(presum! /s legis! /s awar!)	4,947
(presum! /s legis! /s omnisc!)	7
(assum! /s legis! /s know!)	2,268
(assum! /s legis! /s awar!)	1,942
(assum! /s legis! /s omnisc!)	15
(deem! /s legis! /s know!)	1,026
(deem! /s legis! /s awar!)	817
(deem! /s legis! /s omnisc!)	0
(fict! /s legis! /s know!)	293
(fict! /s legis! /s awar!)	22
(fict! /s legis! /s omnisc!)	2

Search Results, WESTLAWNEXT, <https://a.next.westlaw.com/> (use the search bar to type in the exact “search string” presented in each row; then click on “Cases”; then narrow by using “All Dates Before 07-03-2014”).

<sup>230</sup> For further typical examples of this kind of deeming, see *Liberty Loan Corp. of Ill. v. Federal National Mortgage Ass’n*, 492 N.E.2d 237, 238 (Ill. App. Ct. 1986) (“[T]he legislature is presumed to be aware of judicial decisions which have construed prior legislation and where no change is made are considered to be in accord with the decision.” (citing *Kozak v. Ret. Bd. of Firemen’s Annuity & Benefit Fund of Chi.*, 447 N.E.2d 394, 398 (Ill. 1983) (“We must presume that in adopting that amendment the legislature was aware of judicial decisions concerning prior and existing law and legislation.”))).

different sense in which fictions can be useful: practice in imputing mental states to fictional characters may be useful to readers in exercising and confirming their abilities to impute mental states to others as well as to engage in metacognition, reflecting on the sources and limits of their own beliefs and predictions. These abilities do not give us access to any definitive truth (we are neither telepathic nor omniscient), but they are indispensable to our everyday lives, as well as to legal behavior and discourse.

Within judicial discourse, when a judge imputes an unlikely awareness to a legislature, the judge is telling a story in which the legislature has knowledge that the judge him- or herself would not necessarily have before doing research or receiving information from parties or clerks. Considered in this light, the judge imputing unrealistic knowledge to the legislature might be not making an unfair demand, but rather describing (and enacting) what it would be like to be omniscient, presenting that state as an ideal one for actors in the legal system to be in, and attributing that ideal state to the legislature as the utterer, or “narrator,” of statutory law.<sup>231</sup> Judges might do this, as well, to remind themselves and their colleagues of their obligations and to reassert the basic rules of the game they are playing. Those rules include the legal aspirations to approach, as nearly as possible, the accurate imputation of mental states, as well as complete and impartial access to and use of all pertinent information.<sup>232</sup> In this regard, courts’ imputations of “omniscience” to the legislature can be understood simply as reaffirmations of these goals as among the master rules of the legal game and invitations to all engaged in the game to keep taking the legislature’s pronouncements seriously. Legislative supremacy entails a kind of legislative omnipotence—the power to declare the law subject only to constitutional constraints. Such omnipotence makes little sense without omniscience. It is difficult to describe the enactments of an uninformed lawmaker as deserving respect.

Although it proceeds in less familiar terms, this explanation of the functions of assertions of legislative omniscience is consistent with the empirical and political values embraced in even the most recent commentary on statutory interpretation. Of course, we can never fully meet our aspirations to perfectly accurate mental state imputation and command of the entire body of legal rules, but empiricists aspire to a similar completely informed perspective. They just propose a different path toward that goal. And the ideals implied by references to omniscience are very much like the “rule of law” principles that Professors Gluck and Bressman propose as a potential justification for many of the canons they identify as based on

---

<sup>231</sup> This argument is consistent with, but goes well beyond, Professor Smith’s argument that “[j]udges . . . cling to premises, either consciously or subconsciously, that will produce legal rules with positive expressive value.” Smith, *supra* note 36, at 1478. Professor Smith is ultimately unwilling to endorse this as a full defense of the legal fictions he discusses: “The argument for dispensing with judicial candor is strongest when the court uses the new legal fiction to serve a legitimating function, but even in such cases we must be skeptical about the need for obfuscation.” *Id.* at 1491.

<sup>232</sup> *Cf.* Nourse, *supra* note 28, at 1124 (describing resort to legislative history as appropriate because it functions as “a process of externalized self-discipline by which the interpreters’ ideological predispositions are measured against the best information about other people’s meanings”).

inaccurate characterizations of legislative activity.<sup>233</sup>

The account just provided suggests a value—a rhetorical, expressive, and perhaps even cognitive value rather than one related to truth—for the judicial practice of imputing unrealistic knowledge to a legislature. It has not addressed whether the other component of the legislative omniscience fiction—the personification of the legislature—has any similar value. Like the imputation of unrealistic knowledge, the practice of personifying a collective for legal purposes occurs in many areas of law, most obviously in the personification of business associations.<sup>234</sup> This Article has not sought to canvass these parallels systematically. Nevertheless, the material presented in Part II suggests some of the observations we could make and some of the questions we might ask in a study of personifying fictions. For one thing, the personification of groups is not unique to legal practices and ways of talking. From childhood, we impute mental states to things that cannot have them.<sup>235</sup> But does it make sense for us to think of reading the “mind” of a group, or to aspire to do so, within legal discourse? If we say that we can do so, are we enacting or reinforcing any basic aspirations of our legal system? Might it make more sense to develop another set of terms, different from those we use to talk about human beings, for explaining why we hold these groups responsible for some of their collective acts and for deciding when we will do so? Such an approach could allow us to be more sensitive to the differences among the various groups we recognize as legal actors. It might make sense, for example, to impute to a group like a legislature, whose primary reason for assembly and functioning is the capacity to perform legal acts, a legally ideal “mental state,”<sup>236</sup> while it might not make as

---

<sup>233</sup> See Gluck & Bressman, *Part I*, *supra* note 4, at 961. Professors Gluck and Bressman contend that for this justification to be a workable one, courts must themselves actually behave consistently rather than merely aspire to consistency. See *id.* at 962. This argument, however, assumes that legislatures are the primary or only audience for judicial opinions.

<sup>234</sup> See *supra* note 167. There are important differences between imputations of unrealistic knowledge and personifications of groups. Most basically, the personification of groups does not seem directly linked to avowed aims of our legal system, such as accurate mental-state imputation and command of the legal corpus, in the same way that assumptions of omniscience are. Omniscience is (an admittedly extreme expression of) a fundamental legal ideal in a way that the treatment of groups as knowing agents is not.

<sup>235</sup> See *supra* note 137 and accompanying discussion. Popular responses to the legal personification of collectives tend to be far more skeptical than the attitudes of many commentators and judges. See, e.g., David Post, *What's Wrong with the Hobby Lobby Decision*, WASH. POST (July 9, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/09/whats-wrong-with-the-hobby-lobby-decision/> (“[I] have a hard time conceptualizing how this fictional person, Hobby Lobby, Inc., has a religion, and a hard time conceptualizing how it exercises that religion.”) (discussing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)); Dave Schmidt, *Local Voices, North Zone, Mar. 30: Tax Burden*, CHI. TRIB. (Mar. 30, 2011), [http://articles.chicagotribune.com/2011-03-30/opinion/ct-vp-0330localvoicesnorthzoneletters20110330\\_1\\_mortgage-interest-tax-burden-tax-rate](http://articles.chicagotribune.com/2011-03-30/opinion/ct-vp-0330localvoicesnorthzoneletters20110330_1_mortgage-interest-tax-burden-tax-rate) (criticizing Tribune editorial supporting elimination of tax deduction for mortgage interest payments: “Why should a business (which is, after all, a legal fiction) be able to take out a loan for the purchase of an asset and write off the interest but a family (made up of non-fictional, real people) be unable to do the same thing? . . . What you are proposing is an insult to the real, living, breathing persons who make up this country at the expense of fictional entities who only exist via the fiction of legal ‘personhood’ under state corporate law.”).

<sup>236</sup> *But see* Nourse, *supra* note 28, at 1148–49 (describing purposivist view of Congress as

much sense to do the same for groups assembled for other purposes.

#### CONCLUSION

Commentators routinely condemn assumptions of legislative omniscience as unrealistic fictions that, because of their inaccuracy, undermine judicial legitimacy. But the classic account of legal fictions does not tell us exactly why these assumptions are problematic, largely because that classic account has remained undeveloped since the early twentieth century. Advances in other disciplines toward a more nuanced understanding of fictional discourse suggest several ways of improving our understanding of legal fictions, including fictions of legislative omniscience. When we take the insights of philosophers, cognitive scientists, and literary scholars into account, and consider fictions of legislative omniscience alongside similar, more widely accepted, unrealistic imputations of knowledge to legal actors in other areas of law, we can justify at least some elements of assumptions of legislative omniscience in a new way. Judges' imputations of unrealistic knowledge to legislatures are not unfair demands, but important parts of the story judges tell about the law, that story according to which judges are authorized to make legal decisions about what the legislature has done. These imputations of omniscience assert, as a legal ideal, the possibility of completely accurate description of mental states and full command of the legal corpus. In particular, the imputations seem to be necessary corollaries of the principle of legislative supremacy. In this way, these imputations are reminders of the basic rules of the game judges and lawyers play. This account is not a complete defense of judicial assumptions of legislative omniscience; it leaves for another day a full answer to the question of whether the personification of the legislature into an entity capable of knowledge is also defensible. But as long as we treat the legislature as a legal actor, we should not be concerned about imputing unrealistic knowledge to it. Far from impairing judicial legitimacy, such imputations are expressions of the grounds of both legislative and judicial legitimacy.

---

"describ[ing] judicial, not legislative, virtue: 'precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts'").