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# Fictions of Omniscience

Karen Petroski

*Saint Louis University School of Law*

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## FICTIONS OF OMNISCIENCE

*Karen Petroski*\*

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, which has been understood to underpin many canons and interpretive practices that courts use in applying statutes. This Article presents the first comprehensive analysis of this phenomenon and proposes a new way to understand it. From this perspective, judicial assumptions of unrealistic legislative knowledge are not the unfair demands on legislatures that most commentators have considered them to be, but reassertions of the rules of the game judges and lawyers are playing. Far from impairing judicial legitimacy, imputations of omniscience to the legislature are expressions of the grounds of judicial legitimacy.

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\* Associate Professor of Law, Saint Louis University School of Law. I presented earlier versions of this project 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, and I thank the participants at those conferences, especially Vera Bergelson, Julie Lane, and Jessie Allen, as well as my colleagues Anders Walker and Matt Bodie, for their helpful suggestions. Thanks also to Samantha Schrage for research assistance.

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## INTRODUCTION

A statute is the expressed will of the legislative organ of 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>1</sup>

As John Chipman Gray's ironically resigned conclusion suggests, at the beginning of the twentieth century, legal commentators and judges were not pleased by any hint that their activities smacked of the supernatural. Things have not changed all that much in 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 Gluck and Lisa Shultz 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>2</sup> Their clear implication is that rules believed to be fictions should not be understood to be benign, at least not without some good explanation.

In that article and its companion, Gluck and Bressman make important contributions to a recent trend in scholarship on statutory interpretation, which has moved from broad theoretical questions toward empirical studies and narrower doctrinal investigations, and which has in many instances questioned longstanding justifications for specific principles of statutory interpretation, including classic canons of construction.<sup>3</sup> One such longstanding justification is the assumption of legislative "omniscience,"<sup>4</sup> which commentators understand to underpin 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 the ways those enactments have been applied by courts and agencies, and that courts may proceed to apply the

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<sup>1</sup> JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 170 (1909; 2d ed. 1921).

<sup>2</sup> Abbe 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).

<sup>3</sup> See Gluck & Bressman, *supra* note \_\_\_\_; see also, e.g., James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 *CAL. L. REV.* 1199, 1201-02 (2010) (offering new critique of reliance on canons).

<sup>4</sup> See Richard 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* note \_\_\_\_.

legislature's enactments in light of that awareness. Part I of this Article explains in detail 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 the deficiencies of that literature, which confirms the distaste judges and especially commentators have for legal fictions, but which does not otherwise describe practices that look much like the assumptions of legislative omniscience described in Part I. Still, the impression that those assumptions are fictions of some kind remains. This mismatch between theory and practice suggests that our traditional understanding of legal fictions may be incomplete. Exploring and confirming that hypothesis, Part II.B surveys the advances made in recent decades within other disciplines, including philosophy, cognitive science, and literary studies, in understanding the 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 some other situations in which judges assume that real or legally constructed figures have knowledge that is either empirically or logically unlikely. These situations include doctrines of constructive notice 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 figure of the "person having ordinary skill in the art" of patent law, which attributes to that person, among other characteristics, knowledge of all "prior art." The presence of legal constructs sharing features with assumptions of legislative omniscience elsewhere in the law 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? This concluding discussion proposes an alternative way of understanding judicial imputations of omniscience to legislatures that challenges that traditional view. On this account, these imputations are productive fictions, parts of a broader story judicial discourse tells about the aspirations of the legal system. Imputations of

omniscience are not imperfect empirical assessments of legislative reality, but direct expressions of the grounds of judicial legitimacy, which are, and will always be, ideals to be sought, not events that have already occurred.

### I. FICTIONS OF LEGISLATIVE OMNISCIENCE

Not uncommonly, a court will explain its conclusions regarding the meaning or application of statutory language by reference to information that the court assumes was known to “the legislature.” Often, this assumption concerns the legislature’s awareness of its own contemporaneous output,<sup>5</sup> the output of earlier sessions of the same legislature,<sup>6</sup> or the way courts and agencies have interpreted the output of such earlier sessions.<sup>7</sup> This legislative knowledge is assumed to extend, as well, to judicial decisions<sup>8</sup> and practices<sup>9</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, courts will impute similar awareness to the voters as a collective lawmaker.<sup>10</sup>

This Article, following the practice of many legal writers, takes these assumptions as imputing a kind of “omniscience” to the legislature.<sup>11</sup> Such

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<sup>5</sup> See, e.g., *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (“[I]dential words used in different parts of the same act are intended to have the same meaning.”)

<sup>6</sup> See, e.g., *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (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”).

<sup>7</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>8</sup> See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979) (noting that it is reasonable to for courts to presume that Congress is aware of judicial precedent); *Holmes v. Securities Investor Protection 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.”).

<sup>9</sup> See, e.g., *Astoria Federal 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>10</sup> See, e.g., *In re Harris*, 49 Cal. 3d 131, 136 (1989) (“[T]he drafters who frame an initiative 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>11</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

an imputation has long been criticized by commentators, but recently those critiques have gained a new dimension based on studies of the practices of and information available to real-life legislators and legislative drafters. A principal goal of this Article is to assess these imputations of omniscience in light of the new empirical critiques. First, however, it will describe the role that assumptions of omniscience play in legal justification and the different forms these assumptions take. Part I.A undertakes this background task; Part II.B clarifies commentators' critiques of these assumptions, and Part I.C situates the current debate in this context.

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

In a 1990 article, Professors Moglen and Pierce 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>12</sup> Moglen and Pierce identified these assumptions as “fictions.” Relatively often, as in the examples given above, courts present such assumptions of omniscience directly in justification of a result.<sup>13</sup> But according to commentators, the assumptions also have a close relation to a number of other statutory interpretation practices, including many canons. Judge Posner, indeed, has described imputations of omniscience as the principal justification for most canons.<sup>14</sup> When the assumptions serve this purpose, they are not always directly asserted by judges, but sometimes are read into judicial reasoning after the fact by commentators.

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legislatures to have is primarily knowledge of legal texts. Cf. Jonathan Culler, *Omniscience*, 21:1 NARRATIVE 22 (2004), discussed further *infra* notes \_\_\_ and accompanying text (discussing misuses of “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 discussions *infra* Part I.A.2.b.

<sup>12</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>13</sup> See *supra* notes \_\_\_ [beginning of Part I] for examples, and see table *infra* note \_\_\_.

<sup>14</sup> See Posner, *supra* note \_\_\_, at 811; see also, e.g., Gluck & Bressman, Part I, *supra* note \_\_\_, at 915 (2013) (“[T]he fiction of the unitary drafter . . . undergirds a huge number of interpretive rules. . . .”); Moglen & Pierce, *supra* note \_\_\_, at 1209 (“[T]he source of canons of construction, like other rules of interpretation, remains fiction.”); Abbe Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, forthcoming STAN. L. REV. [hereinafter Gluck & Bressman, Part II], MS at 3, 5 (contending that accuracy about “details of congressional practice” is important to justifying canons of interpretation).

Part IV will suggest that we should evaluate these two forms of the assumption differently. But to clarify the commentators' complaints, Part I.A.1 will briefly enumerate 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 is making them: whose knowledge is assumed, and what those "knowers" are assumed to have knowledge of. Despite a long tradition of 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 often explicit,<sup>15</sup> but just as often, according to commentators, other judicial practices simply presuppose legislative omniscience. These practices 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>16</sup> The rule against surplusage, instructing courts to give independent meaning to every word of an enactment, has also been so described.<sup>17</sup> Even more obviously based on assumptions of omniscience are the presumptions 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>18</sup> This presumption, if understood as tethered to

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<sup>15</sup> See *infra* note \_\_\_ [table of search results].

<sup>16</sup> Posner, *supra* note \_\_\_, at 813; see also William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 226-27 (2000) (noting that canon "makes greatest sense if the starting premise is something close to an omniscient legislative drafter").

<sup>17</sup> Posner, *supra* note \_\_\_, at 812.

<sup>18</sup> Stephen H. Sutro, *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."); Buzbee, *supra* note \_\_\_, at 173 (noting that the "cross-referencing of . . .



legislative rather than judicial choices, appears to impute to the legislature awareness of the ways particular words were used, and were meant to be used, in enactments by previous sessions of the legislature.<sup>19</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>20</sup> and the rule of lenity, which instructs courts to construe ambiguous criminal statutes favorably to defendants,<sup>21</sup> have been so explained. Canons that base inferences on 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>22</sup> Like all the canons, of

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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. . . .’); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 104 (1997) (referring to “fiction” underlying principle that statutes should be construed as internally consistent and “compatible with previously enacted laws”).

<sup>19</sup> Other structural canons seem to rest on similar assumptions. These include 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 \_\_\_, 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. . . .”); the *in pari materia* rule (the rule that enactments on similar subjects should be construed consistently with one another); see Sutrø, *supra* note \_\_\_, at 957 (“*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. . . .’”); and 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); 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>20</sup> James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response*, 93 MICH. L. REV. 1, 79 (1994) (noting grounding of 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>21</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 958 (“[J]udges and theorists have been . . . wedded to justifying lenity on the basis of congressional knowledge.”).

<sup>22</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,” see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988), and the acquiescence rule, which holds that a legislature’s failure to amend a statute indicates assent to

course, these are applied irregularly. Courts do not always assume congressional awareness of prior judicial interpretations of statutes, but will sometimes point out the unlikelihood of that assumption.<sup>23</sup> Still, courts engage in these practices often enough to have made them the subject of extensive commentary.<sup>24</sup>

Assumptions of legislative omniscience might also underpin broader positions on appropriate methods of statutory interpretation, including the two main such positions today, those advocated by purposivists and textualists. 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>25</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>26</sup> On the other hand, textualists rely heavily on many of the canons that seem closely linked to assumptions of legislative omniscience,<sup>27</sup> and they sometimes justify this reliance as a means of “disciplining” the legislature to draft more consistently, apparently presupposing legislators’ awareness

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controlling judicial interpretations of that statute.

<sup>23</sup> See Eskridge, Inaction, *supra* note \_\_\_, 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>24</sup> See, e.g., Eskridge, Inaction, *supra* note \_\_\_; Brudney, Chatter, *supra* note \_\_\_.

<sup>25</sup> HENRY M. HART, JR., & ALBERT M. SACKS, 2 THE LEGAL PROCESS 1148-79 (1958). See also Moglen & Pierce, *supra* note \_\_\_, at 1212 (noting Hart & Sacks’ awareness that their approach rested on a fiction); STEVEN BREYER, ACTIVE LIBERTY 88 (2005) (“At the heart of a purpose-based approach stands ‘the reasonable member of Congress’—a legal 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>26</sup> See, e.g., Nourse, *supra* note \_\_\_, 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) (arguing that “legislation scholars generally work with . . . a jaundiced view of the capacities of . . . legislatures”).

<sup>27</sup> Cf. Buzbee, *supra* note \_\_\_, at 180 (arguing that the “Supreme Court has in recent years made frequent use of the one-Congress fiction in its statutory interpretation cases.”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 851-53 (2014) (describing “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”).

of judicial activity.<sup>28</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 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 such supposition is that the legislature may be treated as a single intentional body. The other is that this entity has some kind of “omniscience.” These two suppositions are subject to somewhat different criticisms.

### a. Whose Knowledge?

Assumptions of legislative omniscience seem to depend, as Professor Buzbee observed in a 2000 article, on imputation of a collective “mind” to the 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>29</sup> This sort of personification of the legislature has long been questioned, apart from any imputation of omniscience to the personified body. Max Radin’s 1934 broadside described it as an indefensible ascription of mental properties to something

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<sup>28</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 \_\_\_, 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. . .”).

<sup>29</sup> Buzbee, *supra* note \_\_\_, at 204-05. Professor Buzbee notes the irony 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.

that by definition lacks them.<sup>30</sup> This argument first observes the impossibility of individual legislators’ having access to one another’s mental states in a way that would allow observers to consider all those diverse mental states part of a single one. The argument also asks how an after-the-fact interpreter could ever gain access to this mental state, were it to exist. It is thus not just an argument about conceptual categories, but also one about cognitive limitations—an argument about how unrealistic it is to assume anyone is telepathic. Radin’s and similar arguments have been enormously influential<sup>31</sup> but have never completely prevailed. Judicial opinions and commentary continue to refer to legislative “intent” and even to argue for the value of that label.<sup>32</sup>

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 interpretation places on the details of legislative language. If courts are concerned with the precise linguistic formulations enacted, this argument goes, then courts should consider who actually produces those formulations. (Similarly, if courts want to discipline the generators of statutory language, they would do well to identify those generators accurately.) More often than not, those who craft statutory language are not elected members of the legislature,<sup>33</sup> but professional drafters (career civil servants),<sup>34</sup> legislative staffers,<sup>35</sup> or lobbyists.<sup>36</sup> Even if we were to accept that elected legislators could act with

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<sup>30</sup> See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1934) (“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>31</sup> Peter Smith has argued 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, 1462-63 (2007).

<sup>32</sup> See, e.g., Richard Elkins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39 (2014). Professor Bressman has argued that the legislative intent construct is a fiction, but an “ordinary” and harmless, if not necessary, one. See, e.g., Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2012-13, 2046-47 (2011).

<sup>33</sup> Brudney, Chatter, *supra* note \_\_\_, 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>34</sup> See generally Gluck & Bressman, Part I, *supra* note \_\_\_; Gluck & Bressman, Part II, *supra* note \_\_\_; Shobe, *supra* note \_\_\_.

<sup>35</sup> Gluck & Bressman, Part II, *supra* note \_\_\_.

<sup>36</sup> See, e.g., Shobe, *supra* note \_\_\_, at 847-49 (noting increase in “lobbyist involvement in the drafting process . . . over the past twenty years”); Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 30 (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,

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, harking back to Radin’s concern, is that drafters do not necessarily communicate the information they know to elected legislators. Can the matters known to non-elected drafters nevertheless be imputed to legislators? Should they be? I return to these questions below.

b. Knowledge of What?

The second set of potentially unrealistic suppositions involved in assumptions of legislative omniscience concerns the knowledge assumed, 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 cognitive limitations and the volume of information involved. But some of the knowledge imputed would be logically and existentially impossible for anyone to have.

The first category, in turn, embraces two kinds of imputed knowledge: knowledge about non-technical (i.e., nonlegal) matters, such as the contents of other legislators’ minds and regularities of language usage,<sup>37</sup> and, more commonly, knowledge of specific legal information, such as other provisions of “the code,”<sup>38</sup> the acts and intentions of previous sessions of the legislature,<sup>39</sup> intervening judicial or agency decisions relating to a previous version of the statute being interpreted or to related statutes,<sup>40</sup> and/or interpretive principles used by courts.<sup>41</sup>

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like lobbyists”).

<sup>37</sup> Cf. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1936 (2010) (explaining how “human intuition about lexical frequency is frequently unreliable”).

<sup>38</sup> Posner, *supra* note \_\_\_, at 806 (“There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code. . .”).

<sup>39</sup> See especially Buzbee, *supra* note \_\_\_, at 173 (discussed *supra* note \_\_\_, concerning whole code rule).

<sup>40</sup> Posner, *supra* note \_\_\_, at 813-14 (see also *supra* note \_\_\_, concerning reenactment rule); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 816 (2002) (“[F]or statutes enacted between 1964 and 1975, the Court had usually presumed that Congress was likely to have relied on the liberal implication [of private rights of action] standards at the time. . .”).

<sup>41</sup> See, e.g., Brudney, Chatter, *supra* note \_\_\_, at 78-79 (noting that “reliance [on the

The second category—of knowledge that would by definition be impossible for drafters or legislators to have—includes knowledge of scenarios to which the statute might, in future, be argued to apply.<sup>42</sup> This category also includes the knowledge imputed to drafters and legislators of the content and judicial interpretations of statutes not yet enacted or proposed at the time of enactment of the statute being applied.<sup>43</sup>

These areas of imputed knowledge are analytically distinguishable but sometimes superimposed. Professor Buzbee described the phenomenon as a matter of “layers of knowledge”: “[I]nterpretive inferences from interstatutory comparison . . . require at least one, if not both . . . enacting Congresses to have the following highly unlikely layers of knowledge[:]. . . (1) [knowledge of] what laws will be the subject of interstatutory comparison, (2) [knowledge of] what linguistic consistency or inconsistency will be found significant by a reviewing court, and (3) [knowledge of a shared] common set of ‘interpretive conventions[.]’”<sup>44</sup> As Professor Buzbee’s account suggests, he considers the “highly unlikely” nature of this state of affairs—this compounding of impossibilities—to constitute a significant problem for the practices that rest on these assumptions. His critical attitude toward assumptions of legislative omniscience is typical of contemporary commentators’ views, the subject of the next two sections.

### B. Criticisms and Defenses

Although he was not the first to make the observation,<sup>45</sup> Judge Posner

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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>42</sup> Posner, *supra* note \_\_\_, 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).

<sup>43</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 . . . statute that was enacted after the statute in question. . . .”).

<sup>44</sup> Buzbee, *supra* note \_\_\_, at 234.

<sup>45</sup> See *infra* note \_\_\_ [citation from *Helvering v. Hallock*].

has done much to highlight the phenomenon of imputing omniscience to the legislature. 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>46</sup> Judge Posner’s position is now virtually orthodoxy among commentators,<sup>47</sup> and his complaint about the “unrealistic” character of the assumption remains the core of criticism of the practice. But this criticism is not completely uniform, and it has not gone without response. 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 quote above from Judge Posner suggests, is that they are descriptively inaccurate. In 1940, Justice Jackson characterized inferences from legislative inaction as based on “speculative unrealities”

<sup>46</sup> Posner, *supra* note \_\_\_\_, at 811.

<sup>47</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); James L. Buckley, *Remarks at the Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241 (May 22-24, 1988); 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 (1985) (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”); Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 629, 656 (1987) (“I agree with Judge Posner that . . . [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.”); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653 (1992); Moglen & Pierce, *supra* note \_\_\_\_, 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.”); Shobe, *supra* note \_\_\_\_, at 809 (summarizing comments to this effect). *But see* Levin, *supra* note \_\_\_\_, at 1127 (arguing that “the public is justified in relying on the one-Congress fiction to inform a statute’s meaning” and that “the Court should adopt the one-Congress fiction because it protects and respects legitimate reliance and expectations interests”).

and “quicksand.”<sup>48</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) canons, with extensive empirical support.<sup>49</sup> Assessing the current state of legal opinion, they note, with agreement, that it is a “common notion that the ‘omniscient’ drafter assumption is a fiction.”<sup>50</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 flowing from such 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 opinions 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>51</sup> Professor Buzbee, in his critique of the “one-Congress fiction” used to justify canons of consistent usage, makes a similar point.<sup>52</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

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<sup>48</sup> *Helvering v. Hallock*, 309 U.S. 106, 120 (1940).

<sup>49</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 907 (2013) (noting “a host of canons that our respondents [congressional counsel] told us they did 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]”); *id.* at 954 (noting that, for the rule against superfluities and presumptions of consistent usage, “none of the publicly stated justifications for their application holds”). Professors Gluck and Bressman’s articles respond 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>50</sup> Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 12.

<sup>51</sup> Posner, *supra* note \_\_\_, at 816-17.

<sup>52</sup> Buzbee, *supra* note \_\_\_, at 236-37 (“When courts start to refer to materials other than the primary textual provision . . ., they . . . have given themselves a more open interpretive field. . .”) *See also* Grabow, *supra* note \_\_\_, 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 . . . to shield its exercise of choice.”).



discretion.”<sup>53</sup> Even if courts do not intend to deceive by assuming legislative omniscience, these assumptions could also be construed as signs of a distinct judicial vice—not surreptitious activism, but laziness or professional narcissism, a disinclination to learn more about the realities of legislative process and practice.<sup>54</sup>

A separate set of objections to assuming legislative omniscience, much less prominent in commentary on statutory interpretation, 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. One such argument would note that in their other interactions with legislatures, especially when reviewing the constitutionality of statutes, courts often assume not legislative omniscience, but legislative ignorance.<sup>55</sup> Another would note that courts cannot consistently impute to the legislature a kind of awareness that courts themselves lack and occasionally admit to lacking.<sup>56</sup> A deeper critique, harking back to Professor Radin, would contend that even if the entire universe of legal information were known to legislators, that information lacks any coherence.<sup>57</sup>

Given the breadth of 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 a wide 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, but as I show below, this argument has not

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<sup>53</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 962-63.

<sup>54</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.”).

<sup>55</sup> See especially 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 shares affinities with, textualism, in that both “enhance judicial power at the expense of Congress.” See *id.* at 679-81.

<sup>56</sup> Cf. Moglen & Pierce, *supra* note \_\_\_, at 1232 (1990) (“[The] actual 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 inevitability of inconsistency in interpretive conclusions, given distributed nature of federal judiciary and limited caseload capacity of Supreme Court).

<sup>57</sup> See, e.g., Eskridge, Inaction, *supra* note \_\_\_, at 83 (“Congress cannot be presumed to ‘know’ an administrative interpretation that is unsettled even in the minds of the administrators.”).

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

Occasionally, courts and commentators assert the legitimacy of assumptions of legislative omniscience without considering their descriptive accuracy.<sup>58</sup> Such assertions have become more vulnerable, however, as the criticisms described above have become more widely accepted.

Alternatively, one might directly question the main critique of assumptions of legislative omniscience: the claim that they are descriptively inaccurate. This response could be understood as a challenge to the “omniscience” label. Some judicial practices can be justified, that is, as assuming something less than 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 the same term when it appears in statutory provisions enacted at different times.<sup>59</sup> Other scholars have pointed out that many drafters examine statutory context before drafting a new provision;<sup>60</sup> that official drafting manuals reflect some of the canons often justified by reference to legislative omniscience;<sup>61</sup> that committee

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<sup>58</sup> See, e.g., *supra* notes \_\_\_ [beginning of Part I]; Mank, *supra* note \_\_\_, at 868 (“It is appropriate to assume that Congress is aware of significant judicial decisions when it enacts a statute.”); Davies, *supra* note \_\_\_, at 398 (“The notion that Congress legislates against the backdrop of existing law—including both statutory and judge-made law—is no novel proposition.”).

<sup>59</sup> Buzbee, *supra* note \_\_\_, 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 statutes and linguistic differences would be viewed as significant by a reviewing court.”). See also, e.g., Ross, *supra* note \_\_\_, at 574 n.70 (“Although legislators cannot be expected to be fully cognizant of the entire statutory corpus juris, it is unlikely that drafters will use virtually identical language from related statutes by accident.”).

<sup>60</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>61</sup> See BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and*

staff may be aware of “major” judicial decisions relevant to proposed legislation;<sup>62</sup> and that legislators sometimes do register awareness of (some) judicial interpretations in legislative history documents.<sup>63</sup> Professors Gluck and Bressman acknowledge that some drafters are aware of, and rely on, some judicial practices, including some canons and case law, consistent with judicial assumptions to this effect.<sup>64</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 and more common practice in the federal legislature since the 1990s.<sup>65</sup>

A slightly different response to criticisms of assuming 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 on other parts of

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*Statutory Interpretation*, 120 YALE L.J. 185, 193 (2010) (listing canons of consistent usage, rule against surplusage, and the rule against implied repeals as “supported by federal legislative drafting manuals”).

<sup>62</sup> Frost, *supra* note \_\_\_, at 4 (noting that “on many occasions Congress has recognized judicial confusion about the meaning of legislation and amended unclear statutory language”); *id.* at 29-33 (discussing studies documenting this recognition, including Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001)); *but see also* Buzbee, *supra* note \_\_\_, at 211 & n.139 (2000) (citing Katzmann, *supra* note \_\_\_, at 662 (reporting the results of a project on statutory revision finding that, in most instances, committee staff were not aware of relevant court decisions unless they were “major” in some way)).

<sup>63</sup> See Brudney, Chatter, *supra* note \_\_\_, 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>64</sup> See, e.g., Gluck & Bressman, Part I, *supra* note \_\_\_, at 949 (2013) (describing “feedback canons”); *id.* at 948 (“Thirteen percent [of respondents] . . . said that they examine prior [constitutional] case law . . . in anticipation of judicial ruling.”).

<sup>65</sup> Shobe, *supra* note \_\_\_, at 813 (“Today, statutes are more 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 aware of canons of interpretation); *id.* at 842 (noting that “attorneys in ALD [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”).

the jurisdiction's code—and vice versa, informing judges of legislative activity responding to judicial interpretations.<sup>66</sup> A similar mechanism has been repeatedly recommended at the federal level.<sup>67</sup> Jarrod Shobe's position, noted above, is that we are basically already there: he maintains that such mechanisms do exist *de facto* in the federal Congress, through the combined efforts of drafters in the Office of Legislative Counsel, the American Law Division of the Congressional Research Service, and committee staffers.<sup>68</sup>

Not all responses to the criticisms outlined in Part I.B.1 focus on descriptive accuracy. Some commentators have argued that it is just not 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>69</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>70</sup> This position is not strictly speaking a defense of the assumption of omniscience, but an argument for retention of some of the practices traditionally justified by reference to the assumption.

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<sup>66</sup> See Abrahamson & Hughes, *supra* note \_\_\_, at 1060-72 (describing such mechanisms in North Carolina, Alaska, Oregon, New York, and Mississippi).

<sup>67</sup> See, e.g., Abrahamson & Hughes, *supra* note \_\_\_, at 1048, 1076 (describing such proposals by Judge Henry Friendly, Judge Cardozo, and then-Judge Ruth Bader Ginsburg); Frost, *supra* note \_\_\_, at 24 (discussing these proposals); 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 project to make Legislative Counsel in House and Senate more aware of basic rules and principles when drafting legislation); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987).

<sup>68</sup> See, e.g., Shobe, *supra* note \_\_\_, at 818-51.

<sup>69</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 \_\_\_, 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 \_\_\_, at 193.

<sup>70</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 961.

In this sense, none of the positions described so far really amounts to a defense of the assumption of omniscience itself. Only a few commentators have taken this rather 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. Professors Moglen and Pierce's 1990 article contains the most elaborate articulation of this position to date.<sup>71</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 simplified poststructuralism circa 1990, a theoretical attitude that no longer commands much respect. Indeed, one could see the differences between the positions of Professors Moglen and Pierce, on the one hand,<sup>72</sup> and Professors Gluck and Bressman, as well as Jarrod Shobe, on the other, as a portrait in miniature of changing fashions in legal interdisciplinarity from 1990 to 2014, a turn from humanities-oriented to social science-oriented models for arguments about legal method.

### C. Current Debates

In recent years, scholarship on statutory interpretation, like many other areas of legal scholarship, has taken an empirical turn. Some especially prominent recent 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 report on their survey of 137

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<sup>71</sup> Moglen & Pierce, *supra* note \_\_\_, at 1208 (“[S]ometimes it is necessary for us to create fictive contexts . . . to understand complex and ambiguous events.”); *id.* at 1208-09 (“These contextualizing stories about the world are what we mean by the phrase ‘interpretive fictions.’ 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 \_\_\_, at 81-82 (“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>72</sup> *See, e.g.*, Moglen & Pierce, *supra* note \_\_\_, 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.”).

legislative drafters in the federal Congress; in the *Columbia Law Review*, Jarrod Shobe places some of their conclusions in question, based on his own set of interviews and personal experience in the federal Office of Legislative Counsel. This Part explores the extent to which these recent interventions do and do not shed light 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 make reference to it in their explanations of their activity with respect to statutes.<sup>73</sup> One key point argued by Professors Gluck and Bressman is that the most general standard 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—cannot justify many judicial practices.<sup>74</sup> This is so, they contend, because that model assumes facts about the making of statutes that in many cases do not match reality. Professors Gluck and Bressman conclude that courts and commentators should develop new justifications for those judicial practices that do not reflect drafters’ understandings of the legislative process or that drafters simply do not consider optimal, and that if courts and commentators cannot develop such justifications, courts should stop engaging in the practices.<sup>75</sup> The practices falling into this category include several of the most popular canons typically linked to assumptions of legislative omniscience, including the presumption of consistent usage.<sup>76</sup>

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<sup>73</sup> One could see Gluck and Bressman as more narrowly critiquing the textualist “disciplinary” 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 \_\_\_, at 951 (noting that “judges rarely justify their use 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>74</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 907 (“[I]n light of our findings, the faithful-agent model seems incapable of bearing the full weight of modern interpretive practice.”).

<sup>75</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 weakened by courts’ irregular use of canons. Gluck & Bressman, Part I, *supra* note \_\_\_, at 962 (“[W]e do not believe that judges are successfully applying the current interpretive regime to advance rule of law goals.”).

<sup>76</sup> Gluck & Bressman, Part I, *supra* note \_\_\_, at 955-56 (noting that, “in the context of both the rule against superfluities and the whole act and whole code rules, one might imagine continued application of these canons in those limited circumstances in which one can confirm that they do approximate drafting reality”); Gluck & Bressman, Part II, *supra*

This argument absorbs the standard critique of assumptions of legislative omniscience described above, and extends that critique by applying it to a greater number of practices, as well as by providing new data supporting the claim of descriptive inaccuracy. But like those earlier criticisms, it is basically a concern about basing judicial practices on suppositions that are descriptively inaccurate.

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 also a single “type[] of omniscient drafter.”<sup>77</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>78</sup> As a result, Professors Gluck and Bressman concede that it might not be possible to sum up in a compact legal theory, in any descriptively accurate way, “the kind of staff, process and structural variety” that in fact characterize the legislative process.<sup>79</sup> Given all 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

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note \_\_\_, MS at 51, 52, 54 (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>77</sup> Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 11-12 (“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>78</sup> Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 17-19 (discussing this problem within Offices of Legislative Counsel), 21-22 (same with respect to congressional committee staffers’ knowledge and jurisdiction). They 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 “siloeing” of Legislative Counsel. *Id.* at 17-19 (noting that 11 of 28 Legislative Counsel interviewed opined that the specialization of Legislative Counsel is “an impediment to consistent usage across statutes involving different subjects or different committees.”).

<sup>79</sup> Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 10; *see also id.* at 11 (“[A] theory based on how Congress drafts may be impossible to accomplish.”); *id.* at 49 (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 52-53 (making similar point about knowledge of committee jurisdiction and history).

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>80</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 regarding which courts impute knowledge to them, than accounts like that of Professors Gluck and Bressman allow. Specific canons depending on assumptions of omniscience, such as the “whole act” rule, the rule against implied repeals, and the *in pari materia* rule, may be based on accurate assumptions about drafters’ knowledge of other statutes and other parts of an enactment.<sup>81</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 multiple individuals.<sup>82</sup> He acknowledges that drafters do not always share information when multiple legislators are working on parallel proposals.<sup>83</sup> And he does not claim that drafters can always anticipate scenarios in which the language they draft may be ambiguous.<sup>84</sup> Nevertheless, Shobe’s account shares important features with that of Professors Gluck and Bressman. Like them, he 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 match he perceives between judicial imputations of knowledge and reality: he contends that drafters are, if not omniscient, at least more aware than cynics claim.

This debate comes down to disagreement over how descriptively inaccurate assumptions of omniscience (and other related assumptions

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<sup>80</sup> Gluck & Bressman, Part II, *supra* note \_\_\_, MS at 47-48 (“The pull of th[e] faithful-agent premise derives from the persistent discomfort that judges have in admitting ‘lawmaking’ in the statutory context. . .”).

<sup>81</sup> Shobe, *supra* note \_\_\_, at 856-60 (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>82</sup> Shobe, *supra* note \_\_\_, 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>83</sup> Shobe, *supra* note \_\_\_, at 828-29.

<sup>84</sup> Shobe, *supra* note \_\_\_, at 872-75 (noting that this type of ambiguity of application, which Shobe calls “dynamic ambiguity,” “is impossible to eradicate”).



about legislators' and drafters' mental states) are. All parties seem to accept that, to be justified, imputations of omniscience to the legislature should be at least approximately descriptively accurate. Neither side directly takes on the older, legal realist–influenced critique of legislative personification; these commentators do touch on the problem, but they cast it in terms of institutional design and information management rather than category confusion or telepathy. Absorbing and 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 that suggest they can, 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 with the descriptive inaccuracy of assumptions of legislative omniscience by labeling the assumptions “fictions.”<sup>85</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, often without any further implications.<sup>86</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>87</sup>

As this quote suggests and as Part II.A will explain, calling assumptions of omniscience “fictions” does not materially advance our understanding of

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<sup>85</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>86</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 rotteness.” Jeremy Bentham, *The Elements of the Art of Packing*, in 5 WORKS OF JEREMY BENTHAM 92 (J. Bowring ed., 1843). See also C.K. OGDEN, *BENTHAM’S THEORY OF FICTIONS* (1932); Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 8 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>87</sup> *Lessons from Abroad*, *supra* note \_\_\_\_, at 2249.

them—but this result is due more to the deficiencies of our recent thinking about legal fictions than anything else. With only a few partial 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. The work on legal fictions has accordingly been largely inattentive to work on fictions and fictionalizing in other disciplines—notably philosophy, cognitive science, and literary studies—done over the past twenty-five years.<sup>88</sup> Part II.B considers some conclusions of this non-legal work that bear on 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 explain how lawyers and laypeople persistently use the term, and add up to an anemic portrait of legal fictions that fails to justify the negative connotations attached to the term. While 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 classic definition have remained largely unchanged. First, virtually everyone agrees that fiction is distinct from deceptive falsehood. Both fiction and falsehood involve departures from truth, but a fiction’s lack of descriptive accuracy is known, not concealed.<sup>89</sup>

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<sup>88</sup> Counterexamples include *Lessons from Abroad*, *supra* note \_\_\_\_; Moglen & Pierce, *supra* note \_\_\_\_; Stolzenberg, *supra* note \_\_\_\_; and Simon Gawthorne, *Fictionalising Jurisprudence: An Introduction to Strong Legal Fictionalism*, 38 AUSTRALIAN J. OF LEGAL PHIL. 52 (2013), discussed *infra* note \_\_\_\_.

<sup>89</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, *Continental Code*, 9 WORKS 77-78 (J. Bowring ed., 1843), *reprinted in* OGDEN, *supra* note \_\_\_\_, at cxvi. An 1893 article in the Harvard Law Review quotes Best on Evidence and Presumptions 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 \_\_\_\_, 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 FULLER, LEGAL FICTIONS 9 (1967). *See also, e.g.*, K. Scott Hamilton, *Prolegomenon to*

Although commentators agree on this feature of legal fictions, however—fictions involve some mutually understood departure from “truth”—there has been little agreement about exactly what kind of things merit the “legal fiction” label, that is, whether a legal fiction is a concept or thought, a proposition of fact (a reference to a state of affairs in the world), a linguistic formulation, or something more like a legal rule.<sup>90</sup>

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 new and unforeseen circumstances: legal fictions allow this by letting a judge (and the parties) pretend the facts of a case are other than what they are.<sup>91</sup> A corollary of this point would seem to be that fictions are necessary only when such adaptation is necessary; if the legal rules themselves are changed to accommodate circumstances appropriately, fictions are no longer needed

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*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 UNIV. 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>90</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 assumption, a process of thought which may be subsequently expressed as a statement, but it is not in the first place a statement.”).

<sup>91</sup> Sir Henry Maine was a prominent advocate of this position. See HENRY SUMNER MAINE, *ANCIENT LAW* 21-22 (1861) (“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 Mitchell, *supra* note \_\_\_, 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.”); OLIVIER, *supra* note \_\_\_, 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.”). 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 \_\_\_, at 36.

and become objectionable.<sup>92</sup>

Consensus on these two 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>93</sup> These taxonomies have not built on one another, so instead of an increasingly elaborated framework we have a proliferation of overlapping ones. In the mid-nineteenth century, Sir Henry Maine described legal fictions as themselves just one of three basic kinds of devices for legal change and adjustment to new circumstances, the other two being equity and legislation.<sup>94</sup> On Maine's account, legal fictions were the most primitive such device, tending to be supplanted by equity and then by legislation as a legal system matures. But later writers did not necessarily perceive legal fictions as competing with legislation in this way. In 1893, for example, Oliver Mitchell classed legal fictions in three categories: the first two involve judicial assertions of unproven facts for purposes of applying a legal rule, like Maine's understanding of legal fictions, while the third comprises what Mitchell calls "[f]ictions of relation,"<sup>95</sup> or fictions involving imputation or deeming, something that could occur pursuant to a legislative act.<sup>96</sup> Then, in the early 1930s, Lon Fuller classed the legal fictions that Maine, Mitchell, and other legal writers had focused on as "fictions of legal technique,"<sup>97</sup> contrasting them with "jurisprudential fictions" (Hans Vaihinger, Fuller's inspiration on this point, called these

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<sup>92</sup> Countless examples of this position, which was especially strongly articulated by Hans Vaihinger, exist. See, e.g., HANS VAHINGER, *THE PHILOSOPHY OF 'AS IF': A SYSTEM OF THE THEORETICAL, PRACTICAL, AND RELIGIOUS FICTIONS OF MANKIND* 12-13, 98 (1911; C.K. Ogden trans., 1924); James B. Stoneking, *Penumbra and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making*, 87 W. VA. L. REV. 859, 865-66 (1985) ("A fiction's status as a temporary measure seemingly calls for its eventual removal.").

<sup>93</sup> See OLIVIER, *supra* note \_\_\_, at 18 ("After [Dutch author T.] Boey [in a 1773 legal dictionary published in the Netherlands], all remembrance of the definition and of the elements of the fiction concept seems [sic] to have sunk into oblivion. Jurists seem to be struggling to define and analyse the fiction ab novo.").

<sup>94</sup> Maine, *supra* note \_\_\_, at 20.

<sup>95</sup> Mitchell, *supra* note \_\_\_, at 253.

<sup>96</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. Mitchell, *supra* note \_\_\_, at 255.

<sup>97</sup> FULLER, *supra* note \_\_\_, at 130. Fuller originally published the essays later republished as FULLER, *supra* note \_\_\_, in the *Illinois Law Review* in 1930 and 1931.

“theoretical fictions”).<sup>98</sup>

These commentators, and others, agreed on basic points—that fictions are distinct from falsehoods, that judges sometimes use them to reach just results where the law seems outmoded or too restrictive—but overall, their work did not generate any clear agenda for either legal reform or scholarship. In the years since Fuller’s book of essays was published, legal academics have only occasionally addressed this topic, usually arguing that legal fictions are still objectionable, basically for the reasons articulated by Bentham (that is, because they do not correspond to anything in the real world).<sup>99</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>100</sup> Both perspectives are unsatisfactory: the 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, and the defenses of legal fictions, most of which date to the 1980s, have had difficulty doing justice to the unambiguous connection we demand between legal discourse and real life (a demand exemplified by the work discussed in Part I.C). This orthodox framework, such as it is, also fails to resolve, or

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<sup>98</sup> FULLER, *supra* note \_\_\_, at 4. 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 existing legal doctrine,” among which Fuller included the concepts of corporate personhood and constructive notice. *Id.* at 82. On Vaihinger’s influence on Fuller, see Karen Petroski, *Legal Fictions and the Limits of Legal Language*, 9 INT’L J. OF LAW IN CONTEXT 485 (2013).

<sup>99</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 particular example of a “dangerous legal fiction”); P. Smith, *supra* note \_\_\_, at 1495; Lessons from Abroad, *supra* note \_\_\_, 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>100</sup> See 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.”); R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290 (1981); Moglen, *supra* note \_\_\_, 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 chronically persistent”). Olivier acknowledges this type of argument repeatedly, but does not agree with it. See, e.g., OLIVIER, *supra* note \_\_\_, 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 naïve concept of reality. . . . If all abstract notions were fictions, the concept of reality, being an abstract notion, must itself be a fiction, making it difficult to argue about ‘reality’ or to classify some entities as ‘real’ and others as ‘unreal’ or ‘fictitious.’”).

to suggest a way to resolve, many of the puzzles raised by assumptions of omniscience and 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 simply makes no mention of.<sup>101</sup>

For one thing, although judges very likely wield these assumptions with awareness of their untruth, it does not seem that judges make the assumptions in order to adjust legal rules to unanticipated circumstances. The assumptions are not stand-ins for facts that would otherwise be susceptible to processes of legal proof.<sup>102</sup> Thus, they are not “practical” fictions, to use *Vaihinger’s* and *Fuller’s* classification scheme. Moreover, while commentators sometimes suggest that these assumptions might once have been useful, but can now safely be discarded,<sup>103</sup> courts do not seem to conceive of these 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>104</sup> The

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<sup>101</sup> *Cf.* P. Smith, *supra* note \_\_\_\_, at 1461-63 (arguing that interpretive canons are based on “new” legal fictions).

<sup>102</sup> *See, e.g.,* Moglen & Pierce, *supra* note \_\_\_\_, 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>103</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. . . .” Gluck & Bressman, Part II, *supra* note \_\_\_\_, MS at 71. *See also* Cass 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, e.g.,* OLIVIER, *supra* note \_\_\_\_, at 107 (“A fiction should be a symptom signalling an unsolved problem, and we should be prepared to solve the problem and find the truth rather than to perpetuate the fiction.”).

<sup>104</sup> They might be “theoretical fictions” as they are used by courts. Olivier describes

standard position on theoretical fictions is, following Vaihinger, that they are useful and even necessary devices for purposes of analysis and discussion of complex matters (akin to scientific and economic models).<sup>105</sup> But commentators 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 by courts. Why do commentators impute them to courts, then? The classic approach to legal fictions makes it difficult to answer this question without cynically assuming that commentators are, consciously or not, constructing a straw man for use in broader critiques of judicial practice.

The standard account of legal fictions also does not provide much guidance on how to handle the precise 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>106</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>107</sup>

Avoiding all of these issues, commentators who call these assumptions “fictions” have not generally explained use of that label by reference to the legal accounts of legal fictions. Rather, commentators seem to use the label

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“theoretical fictions” as not used not only by commentators but by lawyers and judges. OLIVIER, *supra* note \_\_\_, 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 theoretical consensus regarding their inappropriateness.

<sup>105</sup> See, e.g., OLIVIER, *supra* note \_\_\_, at 87, 91-93.

<sup>106</sup> When they have acknowledged these different contrary-to-fact assumptions, commentators have tended to treat them as equivalently problematic (because all descriptively inaccurate) without further analysis. See, e.g., Buzbee, *supra* note \_\_\_, at 234; P. Smith, *supra* note \_\_\_, at 1460-65.

<sup>107</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 \_\_\_, at 15, 16 (describing these positions); Ian Maclean, *Legal Fictions and Fictional Entities in Medieval Jurisprudence*, 20:3 LEGAL HIST. 1, 9, 12 (1999). Modern practice treats legal fictions as equally defensible or indefensible, whether or not the untrue facts they posit are possible.

for rhetorical effect—it allows them to appeal to the accumulated connotations of the “fiction” term as referring to devices that undermine law’s search for the truth,<sup>108</sup> that allow judges to assume a stance of passivity,<sup>109</sup> and that are not necessary in an enlightened, non-primitive legal system.<sup>110</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 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>111</sup> no recent writing on fictions for legal audiences has taken any account of this work. This section examines some of its key features and conclusions.<sup>112</sup>

#### 1. Philosophers on Fictional Utterances and Attitudes

<sup>108</sup> See, e.g., P. Smith, *supra* note \_\_\_, at 1480-89 (discussing value of judicial candor).

<sup>109</sup> See, e.g., Gluck & Bressman, Part II, *supra* note \_\_\_, at 47-48; Lessons from Abroad, *supra* note \_\_\_, at 2232-33 (2002) (“[T]he legal fiction [is traditionally characterized as] wield[ing] a deceptive power that allow[s] judges to assume a legislative function.”); OLIVIER, *supra* note \_\_\_, at 90 (“It is argued that the use of fictions undermines respect for the law inasmuch as fictions portray it as being devious and deceptive.”).

<sup>110</sup> Lessons from Abroad, *supra* note \_\_\_, 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”).

<sup>111</sup> See, e.g., Simon Stern, *The Third-Party Doctrine and the Third Person*, 16 NEW CRIM. L. REV. 364 (2013); Gawthorne, *supra* note \_\_\_ (discussed at more length *infra* note \_\_\_); Stolzenberg, *supra* note \_\_\_.

<sup>112</sup> Major works include, but are not limited to, KENDALL L. WALTON, *MIMESIS AS MAKE-BELIEVE: ON THE FOUNDATIONS OF THE REPRESENTATIONAL ARTS* (1990); GREGORY CURRIE, *THE NATURE OF FICTION* (1990); AMIE THOMASSON, *FICTION AND METAPHYSICS* (1999); SHAUN NICHOLS & STEPHEN P. STICH, *MINDREADING: AN INTEGRATED ACCOUNT OF PRETENCE, SELF-AWARENESS, AND UNDERSTANDING OTHER MINDS* (2003); LISA ZUNSHINE, *WHY WE READ FICTION: THEORY OF MIND AND THE NOVEL* (2006); and BRIAN BOYD, *ON THE ORIGIN OF STORIES: EVOLUTION, COGNITION, AND FICTION* (2009).



At least since the early twentieth century, philosophers of language and mind have been debating the status of the referents of fictional statements—the question of whether or not fictional characters exist, and if they do, in what sense they exist.<sup>113</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 they can be said to be true. 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. Since around 1990, such concerns have again become a topic of acute philosophical interest.

As this framing of the central issues suggests, most philosophers have focused on individual propositions, not entire fictional works.<sup>114</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. As philosophers have pursued answers to the questions noted above, they have generally agreed that those answers must be able to handle three different types of statements about fictional entities, and that the answers may need to be different for each type.<sup>115</sup> One type of statement is the kind exemplified in the previous paragraph, which Gregory Currie has called a “fictive utterance.”<sup>116</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 was”; Currie calls these “transfictive” utterances.<sup>117</sup> And the third is the type of statement that comments on the fiction’s relation to reality; “Sherlock Holmes was a great fictional character” is an example of such a

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<sup>113</sup> The origins of this debate are usually traced to Bertrand Russell, *On Denoting*, 14 MIND 473 (1905), and ALEXIUS MEINONG, ÜBER GEGENSTANDSTHEORIE (1904). For useful overviews, see CHARLES CRITTENDEN, UNREALITY: THE METAPHYSICS OF FICTIONAL OBJECTS (1991); Fred Kroon & Alberto Voltolini, *Fiction*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 2011), available at <http://plato.stanford.edu/entries/fiction/>.

<sup>114</sup> The work of Kendall Walton and Stacie Friend is critical of this tendency. See WALTON, *supra* note \_\_\_, at 88-89; 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>115</sup> See especially CURRIE, *supra* note \_\_\_, at 30-33.

<sup>116</sup> CURRIE, *supra* note \_\_\_, at 171-72.

<sup>117</sup> CURRIE, *supra* note \_\_\_, at 171-72.

“metafictive” utterance.<sup>118</sup>

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 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>119</sup> what is important for purposes of this Article is simply the observation that statements referring to fictional things and people fall into multiple categories, and the categories 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 in analyzing those statements. Often this concern is discussed in terms of “pretense,” following influential early accounts by John Searle and David Lewis.<sup>120</sup> An especially popular account along these

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<sup>118</sup> CURRIE, *supra* note \_\_\_, at 172-73.

<sup>119</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 a phrase identifying them as relative to a particular discursive context. David Lewis, *Truth in Fiction*, 15 AM. PHIL. Q. 37, 38 (1978). For example, we would normally evaluate the truth of the statement “Holmes lived at 221B Baker Street” by asking whether a human being by that name did live on a real street with that name. But Lewis proposed that we could evaluate the truth of that sentence by reference to the fiction in which the Sherlock Holmes character appeared, 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>120</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*, 6:2 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 pretense.” Lewis, *supra* note \_\_\_,

lines, one that has been taken up by many non-philosophers, is Kendall Walton's account of fiction as "make-believe." Walton describes fictional works as "props" akin to those used by children in (nondeceptive) games of pretend. Just as children 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," so do older individuals use fictional narratives and other representational artifacts (such as judicial opinions and scholarly articles) as props in more complex and channeled games of make-believe.<sup>121</sup> The wide appeal of Walton's theory may be due not only to its richness but also to the persuasiveness of his case for the generative power of fiction, his emphasis on how these kinds of artifacts 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 focus on this aspect of fiction contrasts dramatically with the attitude that older philosophical debates—like most discussions of legal fictions—took toward fictional sentences as impoverished or deficient (because not "really" referring) propositions.<sup>122</sup>

## 2. Cognitive Scientists on Fiction, Mindreading, and Metacognition

Among the disciplines in which Walton's make-believe theory has had considerable influence are psychology and cognitive science. Work on the generation and processing of fictional or fictive utterances by real people in these disciplines has also increased tremendously in volume over recent decades.<sup>123</sup> Many areas of psychological research relate to issues studied

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at 40.

<sup>121</sup> WALTON, *supra* note \_\_\_\_, at 69.

<sup>122</sup> A recent article by Simon Gawthorne is one of the only attempts by a legal scholar to engage seriously with recent philosophical approaches to fiction. Gawthorne, *supra* note \_\_\_\_. Gawthorne argues that philosophical fictionalism can ground a more satisfactory jurisprudence than traditional positivist and natural-law conceptions of the nature of law. (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 powers over institutional things," such as law. Gawthorne, *supra*, 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." Gawthorne, *supra*, at 72.

<sup>123</sup> See Alan Richardson, *Defaulting to Fiction: Neuroscience Rediscovered the Romantic Imagination*, 32:4 *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.").

under the fiction rubric in other fields, including investigations of play and nondeceptive pretense in children, investigations of “mindreading”<sup>124</sup> and empathy, and investigations of metacognition.<sup>125</sup>

As the above brief discussion of Walton’s work suggested, the play behavior that children spontaneously and nearly universally exhibit seems to share a number of features with adult forms of pretense, 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: to attribute desires, beliefs, and intentions to others; to predict behavior based on those attributions; and to experience empathy.<sup>126</sup> Shaun Nichols and Stephen Stich, seeking to summarize and reconcile much of the research in this area, have proposed that a single set of cognitive mechanisms is responsible for our abilities to pretend, to attribute mental states to others, and to detect and report on our own mental states, including our perceptions, our beliefs, and our inferences from those beliefs.<sup>127</sup> These mechanisms—partly innate, and partly developed through interactions with other individuals and artifacts—are crucial for navigating complex social situations, coordinating behavior, trusting others, and developing many specialized behavioral and cognitive skills. Notably, and perhaps surprisingly, psychologists have found that we use the same mechanisms to “read” the “minds” of (i.e., impute mental states to) non-human “characters,” like geometrical shapes, if they are placed in

<sup>124</sup> See generally NICHOLS & STICH, *supra* note \_\_\_\_.

<sup>125</sup> See, e.g., METACOGNITION: KNOWING ABOUT KNOWING (Arthur P. Shimamura & Janet Metcalfe eds., 1991).

<sup>126</sup> Work on 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. Raymond A. Mar & Keith Oatley, *The Function of Fiction Is the Abstraction and Simulation of Social Experience*, 3:3 PERSPECTIVES ON PSYCHOLOGICAL SCI. 173, 181 (2008); see also Amy Coplan, *Empathic Engagement with Narrative Fiction*, 62:2 J. OF AESTHETICS & ART CRITICISM 141, 146-48 (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 motivation and expectations. See, e.g., Mar & Oatley, *supra*, at 173 (“[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, rendering it more comprehensible than usual.”); David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCI. 377 (Oct. 18, 2013). This work has been influential in recent literary scholarship.

<sup>127</sup> See generally NICHOLS & STICH, *supra* note \_\_\_\_.

rudimentary narrative contexts.<sup>128</sup>

Our ability to detect and report on our own mental states, or our thinking and reasoning about our own thinking and reasoning, sometimes receives the label “metacognition.” One aspect of metacognition not touched on so far but relevant to the philosophical debates about fiction, as well as to understanding legal fictions, is the skill known as “source monitoring”: our ability to “tag” our beliefs according to the sources from which we learned them.<sup>129</sup> Our facility at source monitoring explains the ease with which we comprehend the differences between the kinds of fictive utterances identified by Currie, as well as our handling of information from a wide variety of sources in everyday life. 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 to say that we have a firm belief that it is, for a fact, raining, based on our assessment of the friend’s reliability. Source monitoring is important to general social functioning but also to many areas of specialized activity, such as legal practice.<sup>130</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

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<sup>128</sup> Mar & Oatley, *supra* note \_\_\_\_, at 179 (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”) (citing, *inter alia*, G. Abell, F. Happe, & U. Frith, *Do Triangles Play Tricks? Attribution of Mental States to Animated Shapes in Normal and Abnormal Development*, 15 COG. DEV. 1 (2000)); *see also* Daniel Schwarz, *Character and Characterization: An Inquiry*, 19:1 J. OF NARRATIVE TECHNIQUE 85, 90 (1989) (arguing that anthropomorphizing betrays an interest in human motivation and other minds).

<sup>129</sup> *See* Marcia K. Johnson, Shahin Hashtroudi, & D. Stephen Lindsay, *Source Monitoring*, 114:1 PSYCH. BULL. 3, 3, 11-12, 13-14 (1993) (describing functions of source monitoring).

<sup>130</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*, 121:2 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.”).

uniform. According to psychologists, pretense and fiction writing and reading are independently valuable activities, 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 who are seeking new ways to explain the worth 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 human capacities, including theory of mind<sup>131</sup> and metacognitive skills,<sup>132</sup> as well as empathy<sup>133</sup> and the notion of objective truth.<sup>134</sup> Two lines of inquiry in literary scholarship relevant to the subject of this Article have received less attention in philosophy and

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<sup>131</sup> ZUNSHINE, *supra* note \_\_\_, for example, argues generally that reading fiction is a way to practice mindreading skills. Similarly, BOYD, *supra* note \_\_\_, describes art, including fiction, as a form of “cognitive play,” *id.* at 16, that “speed[s] up our capacity to process patterns of social information, [and] to make inferences from other minds,” *id.* at 49. See also Schwarz, *supra* note \_\_\_, at 90, 92, 100, 104 (arguing that characterization implies an interpersonal or transpersonal attitude and offers training in theory of mind); H. Porter Abbott, *Reading Intended Meaning Where None Is Intended: A Cognitivist Reappraisal of the Implied Author*, 32:3 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”); Murray Smith, *On the Twofoldness of Character*, 42:2 NEW LITERARY HIST. 277, 277 (2011) (“[W]e can and do respond to [literary] characters in ways that parallel our responses to real individuals.”).

<sup>132</sup> See M. Smith, *supra* note \_\_\_, 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); Vanessa L. Ryan, *Reading the Mind: From George Eliot’s Fiction to James Sully’s Psychology*, 70:4 J. OF THE HIST. OF IDEAS 615 (2009) (describing how accounts of the value of reading fiction by nineteenth-century psychologist James Sully anticipated twentieth-century cognitive science).

<sup>133</sup> Empathy with characters is the chief mechanism by which fiction reading is thought to develop theory-of-mind capacities. See, e.g., Richard Walsh, *Why We Wept for Little Nell: Character and Emotional Involvement*, 5:3 NARRATIVE 306, 313 (1997) (arguing that our emotional response to real people is analogous to our emotional response to fictional characters); SUZANNE KEEN, EMPATHY AND THE NOVEL (2010).

<sup>134</sup> See Rebecca Goldstein, *The Fiction of the Self and the Self of Fiction*, 47:2 MASS. REV. 293 (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).

cognitive science: the fictional representation of impossible scenarios<sup>135</sup> and the type of impossible representation we call “omniscience.”

One useful addition made by literary scholarship to both the philosophical and the psychological work on fiction is an emphasis on the relative irrelevance of verisimilitude to the experience of reading fiction.<sup>136</sup> A fantastic narrative, just like a realistic narrative, can be analyzed and deliver benefits in all the ways described above.<sup>137</sup> It is just as easy for readers to empathize with characters presented by third-person narrators as it is for them to empathize with first-person narrators.<sup>138</sup> Readers can empathize with, as well as attribute intention to, fictional figures who do not resemble themselves, even “characters” that are not purporting to be human.<sup>139</sup>

A classic “impossible” device in Western literary fiction is what we have come to know as 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>140</sup> In an important 2004 essay that

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<sup>135</sup> Philosophers have tended to view “impossible” fictions as deviant forms of reference. See Diane Proudfoot, *Possible Worlds Semantics and Fiction*, 35:1 AM. 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”). 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.” Proudfoot, *supra*, at 33.

<sup>136</sup> See, e.g., Richardson, *supra* note \_\_\_\_, at 666-67 (noting the prevalence of “impossibilities” in fiction, and observing, “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>137</sup> See especially Rick Busselle & Helena Bilandzic, *Fictionality and Perceived Realism in Experiencing Stories: A Model of Narrative Comprehension and Engagement*, 18 COMMUN THEORY 255, 256, 260, 266, 270-71 (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>138</sup> Suzanne Keen, *Readers’ Temperaments and Fictional Character*, 42:2 NEW LITERARY HIST. 295, 302 (2011).

<sup>139</sup> See Keen, 2011, *supra* note \_\_\_\_, at 297.

<sup>140</sup> See, e.g., Paisley Livingston & Andrea Sauchelli, *Philosophical Perspectives on Fictional Characters*, 42:2 POETICS TODAY 337, 354 (2011) (describing such a narrator as an “impossible agent”). Brian Boyd argues that fictional figures who possess omniscience, such as deities, serve a social-control function by causing us to postulate a figure who can see into our minds. BOYD, *supra* note \_\_\_\_, at 204-05. Similarly, near the beginning of 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

sparked an extended debate, Jonathan Culler argued that this label is a misnomer, and his analysis has informed some of the qualifications presented earlier.<sup>141</sup> Culler considered “omniscience” an imprecise label for narratorial features; it “conflates and confuses several different factors” present in so-called omniscient narration, he argued.<sup>142</sup> According to Culler, these 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>143</sup> Culler surmised that the second of these functions is responsible for the conventional “omniscience” label: when we read about what characters are thinking from an apparently external perspective, he suggested, we are inclined to “invent a person to be a 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>144</sup> Culler’s broader conclusions in this essay have not been widely accepted, perhaps because they seem oblivious to the kinds of findings discussed in the previous part; he did not succeed in getting critics to abandon the “omniscient narrator” term.<sup>145</sup>

But Culler’s breakdown of the various features of omniscient narration

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fiction, but Culler contends that we should understand the analogy to work the other way, that is, that “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 use as the novelist would be to the characters who exist in the universe of the text this god created.” Culler, *supra* note \_\_\_\_, at 23.

<sup>141</sup> Culler, *supra* note \_\_\_\_. Responses to this essay included William Nelles, *Omniscience for Atheists*, 14 NARRATIVE 118 (2006); Barbara K. Olson, “Who Thinks this Book?” Or Why the Author/God Analogy Merits Our Continued Attention, 14 NARRATIVE 339 (2006); Jonathan Culler, *Knowing or Creating? A Response to Barbara Olson*, 14 NARRATIVE 347 (2006); Meir Sternberg, *Omniscience in Narrative Construction*, 28 POETICS TODAY 683 (2007).

<sup>142</sup> Culler, *supra* note \_\_\_\_, at 22.

<sup>143</sup> Culler, *supra* note \_\_\_\_, at 26.

<sup>144</sup> Culler, *supra* note \_\_\_\_, at 28. Culler suggests, following Nicholas Royle, that we should use the term “telepathy” rather than “omniscience” to refer to this phenomenon of inside views of characters’ minds. *Id.* at 29 (citing and discussing NICHOLAS ROYLE, *THE UNCANNY* 261 (2003)).

<sup>145</sup> See, e.g., Paul Dawson, *The Return of Omniscience in Contemporary Fiction*, 17:2 NARRATIVE 143, 149 (2009); Abbott, *supra* note \_\_\_\_, at 466-68, 470, 477-78.



is a very useful tool for analysis. Although Culler and his interlocutors were discussing imaginative narratives, many of their observations are pertinent to understanding legal discourse. The functions performed by omniscient narrators, in particular, seem remarkably parallel to those performed by the classic judicial “narrator,” the voice operating in the conventional judicial opinion,<sup>146</sup> who likewise “bring[s] into being” legal relations; “report[s]” thoughts (both those mental states relevant to legal 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>147</sup> Reading such opinions, lawyers and other judges are put in a position analogous to that taken by the readers of novels with omniscient narrators.

#### 4. Preliminary Implications for Understanding Legal Fictions

Legal scholarship has been virtually oblivious to the work just described. The above sketch identifies a number of concepts important to that work but absent from scholarship on legal fictions. These concepts include the importance of clarifying the frames of reference, or “worlds,” within fictional statements are made, in assessing their truth value; the related importance of particular attitudes, both natural and acquired or conventional, in understanding and using fictional statements; the possibility that fiction making and reading might be valuable human activities rather than deviant or quasi-deceptive acts; and the central, rather than subordinate, role of “impossible” fictions in providing this value.

In Part IV, I will return to these points in more detail, building on the information about legal parallels to fictions of legislative omniscience examined in Part III. It is, however, possible at this point to present some preliminary additions to the classic account of legal fictions that shed light on assumptions of legislative omniscience. Legal doctrines that rest on notions of 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

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<sup>146</sup> See, e.g., JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J. L. & HUMAN.* 201 (1990).

<sup>147</sup> In addition to the sources cited in the previous note, see especially Robert Cover, *Violence and the Word*, 8 *YALE L.J.* 1601 (1986). Cover focuses on the non-judicial “audience” for these performances, rather than on the audience made up of other judges and lawyers.

ordinary life, we develop the ability to draw such inferences by imagining states of mind in both real and fictive people.<sup>148</sup> The legal postulation of such “minds” is very closely analogous to their narrative postulation, and postulations in both spheres involve fiction-making: generating a prop for use in readers’ making believe that such “minds” exist and have contents different from the readers’ own. Fictions of legislative omniscience, when asserted by judges, both enable and remind those whose practices rely on such props (lawyers and judges, but not all scholars) to make certain imaginative, but perfectly everyday, leaps outside their own minds.

### III. OTHER FICTIONS OF OMNISCIENCE

This Part addresses some fictions of omniscience in other areas of law. It starts with the ill-defined body of fictions relating to 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 a 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 cousins of fictions of legislative omniscience; like those fictions, these doctrines operate in a variety of legal areas and rarely receive critical scrutiny by judges.

Similar devices in two other areas, in contrast, have received significantly more attention; for that reason, I address them separately. These are 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 much 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>149</sup>

#### A. *Constructive Notice of Information Known to Others*

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<sup>148</sup> Suzanne Keen, *A Theory of Narrative Empathy*, 14:3 NARRATIVE 207, 219 (2006) (citing and discussing David S. Miall, *On the Necessity of Empirical Studies of Literary Reading*, 14 FRAME 43 (2000)).

<sup>149</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. These include, but are not limited to, the fraud-on-the-market theory used in securities law, see, e.g., P. Smith, *supra* note \_\_\_, at 1455-57; Randy D. Gordon, *Fictitious Fraud: Economics and the Presumption of Reliance*, 9 INT’L J. OF LAW IN CONTEXT 506 (2013); and the reasonable person, see especially MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

## 1. Scope and Function

Doctrines of constructive or imputed notice are so deeply rooted in so many areas of law that they seldom receive direct attention. The most comprehensive scholarly treatment of these principles apparently remains an 1883 article by William Scott in the *American Law Review*.<sup>150</sup> Scott addresses five kinds of constructive notice—notice of registered property documents, notice under the doctrine of *lis pendens*, constructive notice arising out of actual notice (the notion 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>151</sup> The first three of these forms of constructive notice, in some ways, resemble assumptions of legislative omniscience more than the last, as they involve the imputation to a party of legally relevant information that is available to be known. But as Scott explains, these forms of constructive notice are theoretically unproblematic; they can be explained as restatements of a legal duty to inform oneself of relevant information before taking action.<sup>152</sup> Moreover, these forms of constructive notice impute to an actor knowledge of information that is, generally, possible to acquire, unlike the knowledge imputed to the legislature on many versions of the legislative omniscience fiction.<sup>153</sup>

But information 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 do, and the law condones this type of relationship. 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

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<sup>150</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 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 (2011).

<sup>151</sup> Scott, *supra* note \_\_\_, at 859-63, 882-83; see also *The Doctrine of Constructive Notice*, 4 LAW COACH 157-58 (1924) (outlining similar list and stating, “[i]mputed knowledge is what one’s agents know”).

<sup>152</sup> See, e.g., Scott, *supra* note \_\_\_, at 860; see also Rudolf Callmann, *Constructive Notice and Laches: A Study in the Nature of Legal Concepts*, 42 TRADEMARK REP. 395, 396-72 (1952) (making a similar point with respect to imputation to trademark registrants of knowledge of previously registered trademarks).

<sup>153</sup> 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 effort to learn.

knowledge to the principal, then? Scott spends most of his article<sup>154</sup> on this question, which has become the model for many similar forms of imputed states of mind, 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>155</sup> and (2) more basically, as grounded in a "principle of substitution, or legal identification," between principal and agent.<sup>156</sup>

This far more fictional-seeming conception of constructive knowledge was easy, as Scott recognized, to extend to larger principal-agent-style relationships, like corporations.<sup>157</sup> And it 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>158</sup>
- 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 mental state, for purposes of establishing the criminal liability of that

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<sup>154</sup> Scott devotes 18 out of 42 pages to this topic, far more space than he spends on any other form of constructive notice. Scott, *supra* note \_\_\_, at 864-82.

<sup>155</sup> Scott, *supra* note \_\_\_, at 858.

<sup>156</sup> Scott, *supra* note \_\_\_, at 871 ("[I]t would seem that the theory of legal identification,—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 this doctrine in all classes of agency.").

<sup>157</sup> See Scott, *supra* note \_\_\_, at 890-91 (discussing this extension). Corporate personality may be the earliest legal fiction that we still recognize in a similar form, and that was treated as such by medieval European commentators. See OLIVIER, *supra* note \_\_\_, at 17 (discussing treatment of corporate personality by canonists). As a number of commentators have noted, it also has significant analogies to the notion of legislative intent. See, e.g., Patricia S. Abril & Ann Morales Olazabal, *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). Max Radin famously criticized legislative intent as a fiction in Radin, *supra* note \_\_\_, 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>158</sup> See Abril & Olazabal, *supra* note \_\_\_, at 113 ("If a rogue employee commits a crime unbeknownst to and without the direct or indirect encouragement of his superiors, and . . . benefits the employer, the employer may be liable for the employee's actions.").

individual,<sup>159</sup> and a defendant to a conspiracy charge need not have knowledge of “all the details” or participants in the conspiracy to be convicted.<sup>160</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>161</sup>
- In 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 one employee had such knowledge.<sup>162</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 establish the scienter required for the corporation’s liability.<sup>163</sup>

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<sup>159</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>160</sup> See *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

<sup>161</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946); see also *United States v. Alvarez*, 755 F.3d 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) (noting that at least one court has held that “a defendant could be vicariously liable for crimes that were committed before he even joined the conspiracy”) (citing *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir. 1991)).

<sup>162</sup> *United States v. Bank of New England*, 821 F.3d 844 (1st Cir. 1987); Abril & Olazabal, *supra* note \_\_\_, at 86 (describing this approach). See also 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 211-12, 227.

<sup>163</sup> *City of Monroe Employees Ret. Syst. v. Bridgestone Corp.*, 387 F.3d 468 (6th Cir. 2004) (taking this approach); Abril & Olazabal, *supra* note \_\_\_, at 153-54 (“When a major corporate event . . . is 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.”).

Some other, slightly more exotic, extensions of the same 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>164</sup>
- For Fourth Amendment purposes, the knowledge supplying probable cause to search or arrest that is held by one member of a police force may be deemed to be held also by those other members who actually carried out the search or arrest.<sup>165</sup>

Clearly, some of these variants depart further from the basic principal-agent scenario than others. The most straightforward extensions seem to be those imputing knowledge or a mental state from an employee to an individual employer or from one criminal co-venturer to another.<sup>166</sup> When knowledge or a state of mind is imputed to a collective rather than an individual, the doctrine involves not only a kind of thought transference but also a personification of something that does not possess a state of mind in the same sense that an individual does. Not surprisingly, commentary and controversy have tended to focus more on these scenarios than on the others.<sup>167</sup> The final two examples above seem even more anomalous, for

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<sup>164</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>165</sup> See Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1086 (2007) (describing the typical operation of what Stern calls the “constructive-knowledge rule” as follows: “several 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”) (citing and discussing *United States v. Gillette*, 245 F.3d 1032 (8th Cir. 2001); *United States v. Bernard*, 623 F.3d 552 (9th Cir. 1980)).

<sup>166</sup> On the latter point, see also 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>167</sup> See, e.g., William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000) (describing the debate and proposing a resolution); Hagemann & Grimstein, *supra* note \_\_\_\_; Stern, *Constructive, supra* note \_\_\_\_.

different reasons: in strict products liability, because the knowledge is not only being imputed to a non-human entity but by definition could not have been known to anyone, human or not, at the time it is deemed to have been possessed; in the probable cause scenario, because of the perverse incentives stifling actual information-sharing that the doctrine seems to supply. The acceptability of these two scenarios despite these bizarre features suggests 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 so acceptable? At one time, commentators had no hesitation in describing constructive notice doctrines as “fictions,”<sup>168</sup> but this label is seldom applied to these areas of law any longer. They appear now to be considered, in many forms, just ordinary legal principles.

The standard justifications for these principles, when offered, 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>169</sup> This explanation tends to work less well 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>170</sup> or to hold culpable actors—be they individuals or groups, such as corporations—responsible for the social effects of their actions.<sup>171</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 socially beneficial result would follow from imposing a legal duty on a person to inform him- or herself

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<sup>168</sup> See, e.g., VEPA P. SARATHI, V.K. VARADACHARI’S LEGAL FICTIONS 30, 33, 83 (1979; 2d ed., 2012).

<sup>169</sup> See *supra* notes \_\_\_ and accompanying text.

<sup>170</sup> See Scott, *supra* note \_\_\_, at 858.

<sup>171</sup> See, e.g., Harold 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 attained.”); Robinson, *supra* note \_\_\_, at 619 (describing responsibility as justification for imputed criminal liability); Wertheimer, *supra* note \_\_\_, 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).

about the matters in question, the law is justified in treating that person as having so informed him- or herself, regardless of the facts.<sup>172</sup>

No one normative rationale, however, seems to fit each of the examples listed above equally well.<sup>173</sup> And some—notably the imputation of knowledge among police officers for probable cause purposes—appear to lack any good normative 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>174</sup> An evidentiary rationale can be generated for the other variations on the constructive-knowledge theme as well. In each case, we endorse imputing the contents of someone’s mind to a different actor because it would be too difficult or uncertain to confirm the presence or absence of those contents in the mind of the actor to whom they are imputed. It does not really matter, in the core principal-agent scenario, whether the principal actually knew precisely what the agent did, in every detail; determining whether the principal did know this is gratuitous given the principal’s legal relationship to the agent.<sup>175</sup> Similarly, co-conspirators might share intentions and knowledge to different degrees; determining the precise extent to which these mental states were shared would consume as much time as, if not more time than, proving objective elements of the crimes in question, with no assurance of a clear conclusion.<sup>176</sup>

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<sup>172</sup> See, e.g., Scott, *supra* note \_\_\_, at 860; Robinson, *supra* note \_\_\_, at 626, 658-59 (discussing deterrence rationale for doctrines of vicarious criminal liability).

<sup>173</sup> See, e.g., Hagemann & Grinstein, *supra* note \_\_\_ (criticizing aggregation of mental states within corporation 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* notes \_\_\_ and accompanying text [ignorance of the law].

<sup>174</sup> Cf. Stern, *Constructive*, *supra* note \_\_\_, 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>175</sup> Cf. William N. Eskridge, Jr., “Fetch Some Soupmeat,” 16 *CARDOZO L. REV.* 2209 (1995).

<sup>176</sup> See, e.g., Robinson, *supra* note \_\_\_, at 620 n.13 (“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



The evidentiary perspective also helps to explain why we no longer consider at least the more basic forms of these 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 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, 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—not one depending on the presentation of evidence in the traditional sense, but also not one that displaces or conflicts with the establishment of factual premises for a legal conclusion.

To clarify this point further, the next part turns to a legal principle that, at first glance, seems closely related to constructive knowledge doctrines and is sometimes discussed alongside them.<sup>177</sup> This principle, however, unlike the doctrines discussed just above, is still often described as involving a fiction.

### 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 is turned into a fiction, deeming the criminal defendant to know the law (and thereby precluding assertions to the contrary). While the legitimacy of equating the bar with this imputation of knowledge to the defendant is not unproblematic, the equation has long been and continues to be made.<sup>178</sup>

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proof, and proof of mental elements is more difficult than proof of objective elements.”).

<sup>177</sup> See, e.g., Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J. L. & JURISPRUDENCE 189, 212 (1995) (discussing *ignorantia* maxim as variety of strict liability).

<sup>178</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 (1918-19) (“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.’”) (quoting JOHN AUSTIN, 1 JURISPRUDENCE 497 (3d ed., 1869)).

This fiction is of very long standing, perhaps even longer than the doctrines discussed in the previous section.<sup>179</sup> Unlike principal-agent constructive notice, this fiction does not involve mindreading or 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.

Also like the 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. It appears that exceptions have always been recognized,<sup>180</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, the law had not yet been made public).<sup>181</sup> Over the course of the twentieth century, U.S. courts have permitted an ignorance-of-the-law defense in an increasing number of additional situations.<sup>182</sup>

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The only justification needed for the substantive rule barring the defense, Smith argued, is the impossibility of judging a defendant’s claim to ignorance. J. Smith, *supra*, at 25.

<sup>179</sup> By some accounts, the imputation of knowledge of the law to criminal defendants, regardless of their actual states of knowledge, dates back to Roman law. *See, e.g.*, Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77-78 (1908); Vera Bolgar, *The Present Function of the Maxim Ignorantia Juris Non Excusat—A Comparative Study*, 53 IOWA L. REV. 626, 627 (1967). Other commentators date it 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). For some reason, Professor Smith has identified it as a “new legal fiction.” P. Smith, *supra* note \_\_\_, at 1460. Regardless of its exact age, the principle has long been widely applied in Anglo-American law. *See, e.g.*, Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 35 (1939); Bruce Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392 (1986); Davies, *supra* note \_\_\_, at 344 n.9; Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012).

<sup>180</sup> Some have argued that the principle has always been honored in the breach. *See, e.g.*, Bolgar, *supra* note \_\_\_, at 640 (“[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>181</sup> *See, e.g.*, Hall & Seligman, *supra* note \_\_\_, at 657.

<sup>182</sup> For a discussion of one notable context in which these exceptions have emerged, *see* Davies, *supra* note \_\_\_ (discussing and criticizing the trend). *See also, e.g.*, *Murdock v. United States*, 290 U.S. 389 (1933); *Cheek v. United States*, 498 U.S. 192 (1991); *Ratzlaf v. United States*, 510 U.S. 135 (1994). For commentary, *see* Hall & Seligman, *supra* note \_\_\_, at 642 (“There are now a number of exceptions to the rule, and their creation and shaping is largely a product of American judicial decision since the beginning

As the irregular application of the rule suggests, the accompanying fiction has been subjected to extensive analysis; it is probably the most extensively criticized of all the 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. Prosecutors would have no straightforward way to rebut a defendant's assertion of ignorance.<sup>183</sup> Since some assumptions need to be made to prove 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>184</sup> proposes that withholding the defense will encourage the populace to take steps to know and comply with the law. If courts adhere to the rule, this argument goes, then widespread knowledge that criminal defendants are deemed to know the law will encourage potential lawbreakers to inform themselves about the law, knowing that they will not be able to use their ignorance as a defense should they break the law and be prosecuted.<sup>185</sup>

Both rationales have been criticized. The most consistent line of

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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 (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 (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 LEGAL COMMENT. 635, 639 (1999).

<sup>183</sup> See, e.g., Perkins, *supra* note \_\_\_, at 41, 44; Bolgar, *supra* note \_\_\_, at 627-28; John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 67 (1997); Davies, *supra* note \_\_\_, at 353 n.53.

<sup>184</sup> Parry, *supra* note \_\_\_, at 67; Davies, *supra* note \_\_\_, at 354.

<sup>185</sup> See also Bolgar, *supra* note \_\_\_, 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.”).

criticism, like the standard critiques of legislative omniscience, fastens on the inaccuracy of the fiction as a description of defendants' actual states of knowledge. Given this inaccuracy, critics contend, the imputation of legal knowledge to the defendant is unsupported as an evidentiary presumption (so the evidentiary rationale is weak);<sup>186</sup> moreover, the rule does not seem to have been effective in encouraging lawful behavior (weakening the normative rationale).<sup>187</sup> This double-barreled criticism seems to underlie many of the exceptions American courts have permitted. It has become only more forceful over time: as criminal laws have multiplied, the discrepancy between the knowledge that the fiction imputes to a criminal defendant and the defendant's actual knowledge of the law becomes greater,<sup>188</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>189</sup>

So far, the arguments concerning this fiction seem to parallel some of those made about fictions of legislative omniscience. But the debates have not ended here. Although he does not use the "fiction" term, in a 1997 article Professor Kahan advanced an alternative account of the imputation

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<sup>186</sup> See, e.g., Keedy, *supra* note \_\_\_, at 78 ("Under modern conditions . . . , it would hardly be seriously maintained that [the law is certain and capable of being ascertained]."); Hall & Seligman, *supra* note \_\_\_, 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. . . ."); Bolgar, *supra* note \_\_\_, at 638 ("[L]aw might or ought to be knowable by all who are bound to obey it, but that any actual system is knowable, is ridiculously and notoriously false.").

<sup>187</sup> It is unfair, the 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 \_\_\_, at 1392 (arguing for "a mistake of law defense for laws that criminalize ordinary behavior"); 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>188</sup> See, e.g., Grace, *supra* note \_\_\_, at 1395-96 ("[I]n modern times, this presumption is largely fictional."); Pilcher, *supra* note \_\_\_, 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.'"); Davies, *supra* note \_\_\_, at 350 n.38; Wayne 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.").

<sup>189</sup> Some have predicted that, as a result, courts will eventually abandon the bar on the defense. See Yochum, 1999, *supra* note \_\_\_, at 673.

as a motivated departure from accurate description.<sup>190</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. Citizens would be likely to inform themselves of the law if they were to be held liable when they were negligent in informing themselves; holding them strictly liable regardless of their efforts to inform themselves does not provide the right incentive.<sup>191</sup> According to Professor Kahan, the rule is best explained as a device of “prudent obfuscation” judges use to veil their need for “flexibility to adapt the law to innovative forms of crime *ex post*,” a flexibility that, if avowed, might make decisions seem standardless.<sup>192</sup> This explanation resembles the classic conception of legal fictions described above, according to which they allow judges to adjust law to new circumstances.<sup>193</sup> But it is difficult to understand Professor Kahan’s argument as a defense of the classic understanding of legal fictions, since he clearly considers the imputation of legal knowledge to criminal defendants to be descriptively inaccurate; 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).

The persistence of this fiction might be difficult to explain, but it illustrates the tenacity of assumptions of omniscience in legal justification. And it demonstrates that continuing to analyze fictions of omniscience using the classic understanding of legal fictions is unlikely to lead either to their final disavowal or to a conclusive justification of them as knowing falsehoods. Perhaps here, as with the practices discussed in Part I, something more is at work than just judicial mystification or ignorance.

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<sup>190</sup> Kahan, *supra* note \_\_\_\_.

<sup>191</sup> Kahan, *supra* note \_\_\_\_, at 133-36, 140.

<sup>192</sup> Kahan, *supra* note \_\_\_\_, at 139, 140-41 (“[T]he doctrine attempts to discourage legal knowledge (prudent obfuscation) so that individuals will be more inclined to behave morally (legal moralism).”).

<sup>193</sup> See *supra* notes \_\_\_\_ 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 vagueness in criminal law, and it is not clear that his argument is necessarily limited to criminal law.

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

1. Scope and Function

Patent law in the United States and elsewhere<sup>194</sup> makes extensive use of a construct known as the “person having ordinary skill in the art,” or PHOSITA.<sup>195</sup> This term refers to the perspective from 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 with respect to 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>196</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>197</sup> as well as assessment of whether the patent

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<sup>194</sup> See, e.g., Richard Weiner, *Nonobviousness: Foreign Approaches*, in *NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY* 413 (John Witherspoon ed., 1980); see also *infra* note \_\_\_\_.

<sup>195</sup> This abbreviation was coined by Cyril A. Soans, *Some Absurd Presumptions in Patent Law*, 10 *IDEA* 433, 438 (1966), and adopted by the Federal Circuit in *Kimberly-Clark Co. 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. 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>196</sup> 35 U.S.C. § 103(A) (requiring that the “nonobviousness” of an invention be assessed from the perspective of “a person having ordinary skill in the art to which said subject matter [of the patent application] pertains”). Similar standards appear in the patent law of Canada and the European Union. See Patent Act (Canada), R.S.C., 1985, c. P-4, s. 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.”); Eur. Patent Conv., Art. 56 (“[A]n 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>197</sup> An invention is novel if it is not anticipated by the prior art, which includes existing 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

application's description "enables" the invention,<sup>198</sup> to mention just a few central examples. Obviousness, however, is by many accounts the most important inquiry based on the construct.<sup>199</sup> It is also the context in which the PHOSITA construct's nature and application is perhaps most challenging and illuminating for the topic of this Article.

In the obviousness context, the PHOSITA has two key characteristics: first, it is an entirely hypothetical, not a real, perspective, and second, it has "omniscient" knowledge of the pertinent prior art. The PHOSITA has famously been described as a "ghost[]"<sup>200</sup> and a "doppelganger,"<sup>201</sup> and the Federal Circuit and Supreme Court have repeatedly emphasized its difference from the perspectives of actual inventors, patent applicants, examiners, and judges.<sup>202</sup> The PHOSITA, that is, is a kind of fictional character 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 piece of prior art] 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 piece of prior art]. He would then

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of the [patent] applicant's assertions" regarding the benefit and operability of the invention described. Sean Seymore, *Patently Impossible*, 64 VAND. L. REV. 1491, 1493 (2011).

<sup>198</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(1).

<sup>199</sup> See, e.g., 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. . . ."); 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").

<sup>200</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").

<sup>201</sup> Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1187 (2002).

<sup>202</sup> See, e.g., *In re Kleinman*, 484 F.2d 1389, 1392 (C.C.P.A. 1973); *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 454 (Fed. Cir. 1985); *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 666-67 (Fed Cir. 2000).

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>203</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 that is posited for inquiries into obviousness: this PHOSITA is “presumed to know” all the “prior art references”—that is, all available information about inventions existing at the time of conceiving the claimed invention, regardless of their fame or accessibility.<sup>204</sup> These two characteristics place the PHOSITA surprisingly close to at least some fictions of legislative omniscience. The PHOSITA is an avowedly unreal construct, not just because it does not correspond to any actual human being, but also because it has knowledge of 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 regarded as not only defensible but indispensable, by both courts and commentators. Serious calls for eliminating the construct entirely from patent law are rare. 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—only the best way to

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<sup>203</sup> In re Winslow, 365 F.2d 1017, 1017 (C.C.P.A. 1966), cited in Dan L. Burk, *Do Patents Have Gender?*, 19 AM. U. J. GENDER SOC. & POL’Y 881, 890-91 (2011). This vignette captures the standard features of the PHOSITA in the nonobviousness analysis: this person knows all of the pertinent prior art, and is therefore omniscient. The person also is 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 this successful patent applicant does or can know about the prior art.

<sup>204</sup> See, e.g., In re Rouffet, 149 F.2d 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 \_\_\_, 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, *The Neglected Dimension of Patent Law’s PHOSITA Standard*, 23 HARV. J.L. & TECH. 227, 235 & n.39 (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) (charging inventor with “a knowledge of all preexisting devices”); Eaton v. Evans, 16 U.S. (3 Wheat.) 454, 454-55 (1818)).



conceive of it and use it.<sup>205</sup> Commentary on the construct is nevertheless illuminating for purposes of understanding the subject of this Article.

## 2. Justifications for the Construct

Although the paradoxical features of the PHOSITA might seem to make the perspective difficult for a decisionmaker to assume, courts appear willing to assume a PHOSITA or PHOSITA-like perspective to assess an increasingly wide variety of questions. Commentators also endorse it; rather than a problem, they widely view the construct as a pet concept that is both useful and important.

Typically, the PHOSITA's two features are justified differently. The fictionality or hypothetical nature of the construct is usually described as necessary to prevent hindsight bias, the risk that an invention will be considered obvious once it exists, regardless of how obvious it might have been to the inventor's contemporaries.<sup>206</sup> Forcing decisionmakers to displace themselves from their real-life vantage points in space and time is understood to force them to assume some distance from their own assumptions—to engage in metacognition. This understanding of the PHOSITA's function may explain the tendency among commentators to sharpen and specify the PHOSITA's characteristics, making it more "lifelike," for example, by adding limitations on the prior art to which the PHOSITA would have access<sup>207</sup> or by endowing the PHOSITA with

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<sup>205</sup> The Supreme Court's 2007 decision in *KSR Int'l, Inc. v. Teleflex, Inc.*, 550 U.S. 398 (2007), clarified that the PHOSITA should be understood as able to combine the "teachings" of scattered pieces of prior art 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] just 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." *KSR*, 550 U.S. 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 also generally* Peter Lee, *Patent Law and the Two Cultures*, 120 *YALE L.J.* 2, 52-55 (2010) (discussing *KSR* in context of Supreme Court's recent patent jurisprudence).

<sup>206</sup> *See, e.g.*, Tresansky, *supra* note \_\_\_\_, at 887.

<sup>207</sup> 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); Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 *DUKE L.J.* 919, 959-63 (2011) (making similar recommendation in novelty context).

ordinary economic incentives and motives.<sup>208</sup>

This justification does not directly apply, however, to the imputation of “omniscience”<sup>209</sup> to the PHOSITA. This feature of the PHOSITA has been more gingerly defended and more widely questioned. The main rationale for the PHOSITA’s omniscience is the familiar one that assuming omniscience avoids “difficult issues of proof related to the inventor’s actual knowledge.”<sup>210</sup> In addition, however, the characteristic seems justified 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 intention was not obvious to the actual inventor. To determine whether this is the case, a decisionmaker must necessarily consider the information that might have been available to potential competitor-inventors, not just the information actually known to the inventor. Both the PHOSITA’s hypothetical status and its omniscience help courts answer the pertinent question.

As noted, the PHOSITA’s omniscience has been treated more skeptically than its fictionality. The chief reason for this skepticism will also, 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>211</sup> This critique, however, is not nearly as overwhelming as the analogous critique of legislative omniscience; overall, both features of the PHOSITA—its fictionality and its omniscience—are widely accepted.

The parallels between the PHOSITA and assumptions of legislative omniscience are striking. Both involve a posited perspective that is deemed

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<sup>208</sup> Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1598-99 (2011). Professors Abramowicz and Duffy also argue that courts should allow the PHOSITA perspective to be that of a corporate entity. *Id.* at 1615-16, 1655.

<sup>209</sup> Darrow, *supra* note \_\_\_, at 235 nn.39 & 40.

<sup>210</sup> Darrow, *supra* note \_\_\_, at 235.

<sup>211</sup> See, e.g., Abramowicz & Duffy, *supra* note \_\_\_, 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 actual or average researcher.”); Mark Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1500 (2001) (explaining inaccessibility of much prior art); Daralyn J. Durie & Mark A. Lemley, *A Realistic Approach to the Obviousness of Inventions*, 50 WM. & MARY L. REV. 989, 991-92, 1017 (2008) (arguing that PHOSITA perspective should be applied based “on what the PHOSITA and the marketplace actually know and believe”).

to have a special generative relationship to the legally significant text being construed. 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 technical community. The discontinuities between the PHOSITA and the other fictions considered in this Article are also, however, worth pausing over for a moment. The PHOSITA is far more elaborated—more theorized—than either assumptions of legislative omniscience or the various doctrines of constructive notice. And it appears far more firmly accepted than either the assumption of legislative omniscience or the criminal defendant’s imputed legal knowledge. The divergences noted in those areas between what commentators are saying and what courts are doing are largely absent here. In Part IV I consider the implications of these patterns to suggest a reconceptualization of the work that assumptions of legislative omniscience do 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 virtually unanimously disapprove of assumptions of legislative omniscience, describing them as descriptively inaccurate fictions that, because of their inaccuracy, undermine judicial legitimacy. Standard accounts of legal fictions, however, do not tell us much about exactly why these assumptions are problematic. In fact, the assumptions singled out by commentators do not really seem to fit into 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, however, has advanced far beyond early twentieth-century models, and these advances suggest a variety of ways of building out our understanding of legal fictions. This understanding should, 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 utilities, other than truth in factual reference (or “descriptive accuracy”), that such propositions have for writers and especially readers. Part III then showed how propositions similar to the so-called fictions of legislative omniscience are accepted, by courts and commentators, in other areas of law, namely in doctrines of constructive notice and in the various guises of the PHOSITA in patent law. Unlike assumptions of legislative omniscience, these propositions are not generally considered threats to the legitimacy of judicial decisionmaking.

Do these observations demonstrate that assumptions of legislative omniscience are defensible, contrary to the scholarly consensus? Not exactly. Certain aspects of these assumptions may be far less troubling than virtually all commentators have assumed; other aspects, however, need further analysis. The remaining paragraphs of this Article will draw on the material presented in earlier Parts to explain this conclusion.

An important 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 and encompasses the fictional discourse world but also allows for assertions about matters of fact that can be evaluated for their truth and descriptive accuracy. This kind of clarification is a basic component of philosophical analysis of fiction and fictionalizing. Part III.A showed how commentators on the *ignorantia maxim*, without using precisely the same terminology, seem to have arrived at a similar conclusion.<sup>212</sup> Understanding assumptions of legislative omniscience can benefit from a similar treatment. References to these assumptions (sometimes characterizing the assumptions as fictions) occur from within two frames of reference, two discourse worlds: the world of judicial discourse, and the world of scholarly discourse.

Since the core of the scholarly critique of these assumptions concerns their operation within the first of these worlds, that of judicial discourse, most of the rest of this Part will address that frame of reference. But it is also important to consider how the assertions function within the second discourse world, that of scholarly discourse. Assertions about assumptions of legislative omniscience from this frame of reference are like transfictive 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, namely, descriptive accuracy. Scholarly assertions about these particular assumptions are not like the “theoretical fictions” identified by *Vaihinger*, *Fuller*, and other writers on legal fictions, because these scholarly assertions about assumptions of legislative

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<sup>212</sup> See *supra* notes \_\_\_ and accompanying text [Kahan discussion].

omniscience are used not to justify doctrine, but to criticize it, or more precisely to propose a faulty justification for it. They are more like assertions about fictional characters that find fault with the characters for not being real people. It is, nevertheless, primarily due to the commentary that we recognize the assumptions of legislative omniscience as fictions (and indeed, they are fictions), although within that commentary, the observation that the assumptions are fictions has not so far done much helpful explanatory or evaluative work, for the reasons presented above.<sup>213</sup>

The scholarly commentary focuses, of course, on the propriety of judges' assertions about legislative omniscience. Judges' assertions need to be analyzed differently from scholars', since judges make their assertions from within a different discourse world. 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, what rules it consists of.

Although they make such assertions frequently, judges do not usually identify them as fictions, and they do not often explicitly impute "omniscience" to the legislature. Rather, they deem the legislature to be aware of or to know certain specific information.<sup>214</sup> However, within the

<sup>213</sup> In addition to collapsing the scholarly and judicial discourse worlds, 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 \_\_\_\_, MS at 55 (asking, in arguing against the rule against redundancies, "Does the average citizen not repeat herself for emphasis or to 'cover all the bases' . . .?").

<sup>214</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!)	7,945
(presum! /s legis! /s awar!)	4,945
(presum! /s legis! /s omnisc!)	7
(assum! /s legis! /s know!)	2,265
(assum! /s legis! /s awar!)	13
(assum! /s legis! /s omnisc!)	15
(deem! /s legis! /s know!)	1,025
(deem! /s legis! /s awar!)	818
(deem! /s legis! /s omnisc!)	1

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 be assertions imputing something like omniscience—a superhuman state of knowledge—to the legislature.<sup>215</sup> As explained above, this characterization of the legislature 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 that component 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 certainly not that of accurate description or empirical truthfulness. But the deemings might be useful for other purposes. The classic theory of legal fictions holds that such fictions 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 different sense in which fictions can be useful: fictions that involve imputing mental states to characters are useful, to readers, in exercising and confirming their abilities to impute mental states to others as well as to engage in metacognition, reflecting on and analyzing the sources and limits of their own beliefs and predictions. Such imputations and analysis are not foolproof (we are neither telepathic nor omniscient), but they are indispensable to our everyday lives—and also to legal behavior and discourse.

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(fict! /s legisl! /s know!)	293
(fict! /s legisl! /s awar!)	22
(fict! /s legisl! /s omnisc!)	3

<sup>215</sup> As a further typical example of this kind of deeming, see *Liberty Loan Corp. of Illinois v. Federal Nat. Mortg. Ass’n*, 142 Ill. App. 3d 838, 839 (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 *In Kozak v. Ret. Bd. of Firemen’s Annuity & Benefit Fund of Chicago*, 95 Ill. 2d 211, 218 (1983) (“We must presume that in adopting that amendment the legislature was aware of judicial decisions concerning prior and existing law and legislation.”)).

Within the judicial discourse world, 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, after all, not necessarily have before doing research or receiving it from the communications of parties or clerks. Considered in this light, the judge imputing unrealistic knowledge to the legislature can be seen to be not making an unfair demand, but 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 have, and attributing that ideal state to the legislature as the “narrator” or utterer of the body of statutory law.<sup>216</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: the legal aspiration to approach as nearly as possible to accurate mental-state imputation and to complete and impartial access to and use of all pertinent information.<sup>217</sup> In this regard, imputations of “omniscience” to the legislature can be understood relatively simply as reaffirmations of these goals, reassertions of them as the master rules of the legal game, and invitations to all engaged in the legal game to keep taking the legislature’s pronouncements seriously, as well as aspiring toward omniscience themselves, as they keep playing by those rules.

Although it proceeds in unfamiliar terms, this explanation of the role played by assertions of legislative omniscience is consistent with the empirical and political values embraced in even the most recent commentary on statutory interpretation. Aspirations to perfectly accurate mental-state imputation and full command of the legal corpus can never be fully met, to be sure, but empiricists aspire to a similar fully informed perspective. They just propose a different path toward those goals. Indeed, the ideals expressed in references to omniscience are arguably the key “rule of law” principles that Professors Gluck and Bressman propose as a

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<sup>216</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,” P. Smith, *supra* note \_\_\_, at 1478. Professor Smith is ultimately unwilling to endorse this as a complete defense of legal fictions: “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>217</sup> *Cf.* Nourse, *supra* note \_\_\_, 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.”)

potential justification for many of the canons they consider to be based on inaccurate characterizations of the legislature.<sup>218</sup> (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; this argument, however, assumes that legislatures are the primary or only audience for judicial opinions.)<sup>219</sup>

The account just provided suggests a value—a rhetorical, expressive value rather than one related to truth or accuracy—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 into something that can have a mental state—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>220</sup> This Article, however, has not sought to canvass these parallels; doing so is a job for another study. Nevertheless, the material presented in Part II points toward some of the observations we could make and some of the questions we should ask in such 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>221</sup> But does it make sense for us to think of

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<sup>218</sup> See *supra* note \_\_\_\_.

<sup>219</sup> See *supra* note \_\_\_\_.

<sup>220</sup> See *supra* note \_\_\_\_ [Radin and Cohen]. The logic of the preceding paragraphs might suggest that the parallels confirm the utility of such personifications. There are, however, important differences between imputations of unrealistic knowledge and personifications of groups; most basically, the personification of groups does not seem directly linked to openly avowed aims of the legal system, such as accurate mental-state imputation and command of the legal corpus, in the same way that assumptions of omniscience do. 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>221</sup> See *supra* notes \_\_\_\_ and accompanying discussion [triangles]. Interestingly, the popular response to the practice of personifying collectives tends to be far more skeptical than the response of many commentators and judges. See, e.g., Dave Schmidt, *Letter to the Editor*, CHI. TRIB., Mar. 30, 2011, at 6 (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 nonfictitious, real people) be unable to do the same thing? . . . What you propose is an insult to the real, living, breathing persons who make up this country at the expense of entities who only exist via the fiction of legal ‘personhood’ under state corporate law.”); David Post, *What’s Wrong with the Hobby Lobby Decision*, WASH. POST, July 9, 2014 (“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.”)



reading the mind of a human group, or to aspire to do so, within the legal discourse world? If we say that we can do so, are we confirming any basic aspirations of our legal system? Might it make more sense to develop another concept, another set of terms not identical to those we use to talk about human beings, for explaining why we hold these groups responsible for some of their group 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 as a group is the capacity to perform legal acts, a legally ideal “mental state,”<sup>222</sup> while it might not make as much sense to do the same for groups assembled for other purposes.

#### CONCLUSION

Assumptions of legislative omniscience are routinely condemned by commentators 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; these imputations of omniscience assert, as a legal ideal, the possibility of completely accurate detection of mental states and full command of the legal corpus. 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

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(discussing *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_ (2014)).

<sup>222</sup> *But see* Nourse, *supra* note \_\_\_, at 1148-49 (describing purposivist view of Congress as “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.’”).

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 judicial legitimacy.

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