FICTIONAL DISCOURSE AND THE LAW

Edited by
Hans J. Lind

Fictional Discourse and the Law

Drawing on insights from literary theory and analytical philosophy, this book analyzes the intersection of law and literature from the distinct and unique perspective of fictional discourse.

Pursuing an empirical approach, using examples that range from Victorian literature to the current judicial treatment of rap music, the volume challenges the prevailing fact–fiction dichotomy in legal theory and practice by providing a better understanding of the peculiarities of legal fictionality, while also contributing further material to fictional theory's endeavor to find a transdisciplinary valid criterion for a definition of fictional discourse. Following the basic presumptions of the early law-as-literature movement, past approaches have mainly focused on textuality and narrativity as the common denominators of law and literature, and have largely ignored the topic of fictionality. This volume provides a much needed analysis of this gap.

The book will be of interest to scholars of legal theory, jurisprudence and legal writing, along with scholars and students of literature and the humanities.

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Part I

From narrative to fiction in legal theory and practice


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Chapter 1

Theorizing fictional discourse

Toward a reassessment of the fact–fiction dichotomy in legal theory and practice

Hans J. Lind

I From narrative to fiction in legal theory and practice

At a recent workshop at London's King's College debating the future of the Law and Literature enterprise, where I was invited to present on translation approaches in legal hermeneutics, I was not surprised that, when the movement's history was addressed, rhetorical criticism, hermeneutical criticism and narrative criticism of law were the most important phases of the endeavor recounted. It surely cannot be disputed that rhetoricity, textuality and narrativity were key criteria that served in reconciling literary criticism and law as disciplines, and there are certainly some other aspects to be added.[1] It was also generally agreed that there was still significant room for further exploration: law and the image, law and affect, law and media, and law and performance were some of the propositions, mirroring the suggestions of a recent volume on law and literature and its future perspectives.[2] I regret, however, that an issue dear to me was not mentioned: the question of fictionality within legal discourse. It is well known that there are some obstacles in approaching law from the perspective of its literariness, with literary theory itself – not without reason – having struggled to reach an agreement on the establishment of a sufficient criterion for literature,[3] although, regarding legal literariness, some overlap with issues already comprehensively discussed certainly exists, as textuality and narrativity were long held to also be key constituents of literature. The question of fictionality, on the other hand, controversially debated as a criterion of literariness,[4] seems a more straightforward one when it comes to

legal fictionality. Indeed, in the history of legal theory and practice, a substantial number of authors have already addressed the issue. The discussion on legal fictionality, however, usually stays confined within the disciplinary borders, rarely reaching out to involve literary criticism, or the other proponent in nowadays' debate on fictionality, analytic philosophy. Within its disciplinary confines, there furthermore has been an unfortunate tendency to see fictionality as an issue best eliminated.

It is especially the practice of the so-called "legal fictions", dating back to Roman law, which has been subject to a harsh criticism throughout the ages. "[T]hat a son killed in battle is supposed to live forever for the benefit of his parents; and that […] captives, when freed from bondage, were held to have never been prisoners, and such as died in captivity were supposed to have died in their own country" are Blackstone's examples of fictions already "adopted and encouraged in Roman law".[5] That "[f]ictions permeate archaic procedure" can be further demonstrated by a number of examples: a foreigner could sue under the fiction of citizenship, the purchaser of an insolvent estate could sue on a fiction that he was heir,[6] and a fictitious sale could not only be used to substitute a will, but could also serve in the emancipation of a son *in potestas*, as well as "to enable a woman to get rid of a guardian".[7] And it is the practice of procedural fictions to which our present vocabulary stills owes the names of "John Doe" and "Richard Roe".[8]

In his 1910 publication *The Nature and Sources of the Law*, John Gray does not fail to mention two "absurd" examples:

> The most grotesque of these fictions was that by which, for the purpose of giving a remedy in England for a wrong done in the Mediterranean, it was alleged that the Island of Minorca was at London, in the parish of St. Mary Le Bow in the Ward of Cheap; and yet, perhaps, the palm must be given to that fiction of the United States Federal Courts that all the stockholders in a corporation are citizens of the State which incorporates it.[9]

"In a discipline primarily concerned with issues of fact and responsibility, the notion of a legal fiction should seem an anathema, or at the very least, the ill-suited means to promote a just result", a scholarly essay recently stated,[10] mirroring Hans Kelsen's 1919 dictum that "in the realm of science […] a fiction can be nothing but an impermissible, fully useless, and solely harmful lapse".[11] In *Jurisprudence*, Roscoe Pound characterized legal fictions as rudiments of legal past, which were proper at the time, and should even be considered as "the first agency through which the traditional element of a legal system is enabled to grow", but which shall be overcome in a mature system of law.[12] John Gray, while assuming that some types of fictions do serve a legitimate purpose,[13] follows Henry Maine in the conviction that fictions can quickly exhaust their purpose: [14]

> Fictions are scaffolding, – useful, almost necessary, in construction, – but, after the building is erected, serving only to obscure it.[15]

While Ernst Zitelmann compares legal fictions to the veil of Isis, which was only required for those eyes not yet strong enough to gaze at the truth,[16] in his 1865 treatise on law, Rudolf von Jhering characterized legal fictions as "white lies" and "crutches"[17] that, at a certain stage of the evolution of law, need to be overcome:

> Every fiction should serve the [legal] science as a reminder to rid itself from it, since with every fiction, it admits to an imperfect solution of a problem.[18]

Drawing on Bouvier's understanding of legal fictionality as denial of "plain matters of fact", a scholar in the 1910 *Michigan Law Review* explains:

> In the age of fact, fancy is at a discount. Consequently legal fictions, which required the play of some fancy in their beginning, have fallen not only into disuse but also into disfavor.[19]

Similar attitudes are threaded throughout the history of the discipline, with Jeremy Bentham having arguably formulated the harshest criticism of the "pestilential breath of fiction",[20] an "opiate"[21] and "syphilis" which "runs in every vein, and carries into every part of the system" of English Law.[22] It is not counterfactuality *per se*, but the stain of weakness and illegitimacy that Bentham denounces in this context:

> A fiction of law may be defined a willful falsehood, having for its object the stealing legislative power by and for hands which could not, or durst not, openly claim it.[23]

Within the long history of legal fictionality, Bentham's harsh criticism belongs to the "newer" voices, however, since in Philippe de Renusson's treatise on law, published in 1733, attacks on legal fictionality were already considered to be commonplace.[24]

In light of the above criticism, it must be surprising that legal fictions nevertheless have been and still are ubiquitous, and the reason for this for sure is their well-proven expediency. Blackstone already noted that legal fictions, "though at first […] may startle the student", will inevitably be found "highly beneficial and useful",[25] Jhering listed legal fictions as effective "means of legal economy",[26] and Kuntze even called them the "nourishment" that fueled the constantly growing "organism" of law.[27] For Henry Maine,[28] legal fictions were "invaluable expedients for overcoming the rigidity of law," which do not only aim at securing that rules are "judicially administrable", but furthermore ensure the "acceptability of a decision" within a general public.[29]

Maine's contemporary Oskar Bülow has also commented on legal fictions, now as a "psychological technique" that enhances the vividness of intellectual conception and facilitated the intellectual permeation of abstract messages,[30] and Lon Fuller later lists the function of "keeping the law persuasive".[31] But not only functionalist considerations seem to lie at the root of legal fictionality as a long institutionalized practice. Despite being a critic of contemporary legal fictionality, Jhering refers to legal fictions as "law's rococo style",[32] and in 1840, a writer muses:

> [I]t is always a matter of extreme delight and refreshment to turn to those exquisite fictions which both adorn and simplify our law – mingling utility with sweetness, and tending to the noblest end to which poetry can devote itself […].[33]

The theoretical heyday of the treatment of legal fictions stretched from the beginning of the 19th century to the first third of the 20th century, with Victorian literature[34] having led to a knowledge of "those especially pampered children of the Law"[35] among the more general public. Early on, scholars debated the issue within a more theoretical framework, such as Bentham, Maine, Gray, Pound and Fuller in the English-speaking world, and Demelius, Jhering, Tourtoulon, Bülow, Vaihinger, Kelsen, Lecocq, Mallachow and Münzer on the European continent.[36] Arguably, also the law and literature enterprise of the late 20th century has contributed its part, leading to a renewed interested in the topic since the 1980s, adding to corporate personhood as the most prominent legal fiction a number of "newer" types. While "ejectment",[37] the "fiction of survival"[38] and "constructive possession"[39] had a long tradition of use,[40] and were not only generally agreed to be fictions, but were also rarely confused with facts, newer fictions are said to operate more covertly.[41] Often there is a certain overlap with legal conceptualizations, idealizations and illusions, as the concept of the "legal person",[42] the idealization of "reasonable man"[43] or the illusion of an "original public meaning" in constitutional law[44] illustrates. Also, not only do judges use the device, but so do legislators, as a number of provisions in US tax law well demonstrate.[45]

II The basis of the fact–fiction dichotomy

Within the long treatment of legal fictionality, a clear hierarchy has been established. That fiction feigns as real what is unreal ("*fictio fingit vera esse ea, quae vera non sunt*")[46] is a definition of legal fictionality most scholars agree on, and the traditional understanding of the relation between fact and fiction is clearly hierarchical, since fiction has also long been said to yield to truth: "*fictio cedit veritati*".[47] Such hierarchy must even be strengthened when the sole possibility of factuality is postulated to unconditionally triumph over

fiction: "*fictio cessat ubi veritas locum habere potest*" – fiction yields where truth can have a place.[48]

The passages quoted above, however, also demonstrate a common denominator in the treatment of legal fictionality: legal fictions are presumed to be untrue and thus irreducibly tied to the criterion of truth, rendering a classical understanding of counterfactuality the key criterion: *fictio est contra veritatem, sed pro veritate habetur*.[49] Correspondingly, Baldus de Ubaldis stated for the field of law:

> [F]iction is an assumption contrary to truth in a matter known with certainty; and it is to be noted that wherever something can be said properly to be asserted, or properly to exist, there is truth; and where something cannot be said properly to be asserted, or properly to exist, there is fiction.[50]

The latter premise is mirrored in many definitions of legal fiction, both old and new. In England, in his characterization of legal fiction as "willful falsehood" and "a false assertion of the privileged kind, which, though acknowledged to be false, is at the same time, argued from and acted upon, as if true",[51] Bentham can recur on a commonplace definition of legal fictionality, for example as propagated by Henry Finch, who in his 1613/1625 treatise[52] understands legal fiction as a "construction […] when the law construes a thing otherwise than it is in truth".[53] On the continent, Renusson invokes the postglossators' definition,[54] and De Tourtoulon can state in the same tradition that, regarding legal fictions, "non-existence" is considered equal to "existence" – and that it is in fact the "equality between the true and the false which gives the fiction its particular character".[55]

Legal dictionaries have subsequently perpetuated this view. The third edition of *Ballantine's Law Dictionary* still defines "legal fiction" as "a contrived condition or situation", and centers on counterfactuality as the key criterion:

> A [legal] fiction is a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible.[56]

The 2012 *Wolters Kluwer Bouvier Law Dictionary Desk Edition* reads:

> FICTION OF LAW. The assumption that a certain thing is true, and which gives to a person or thing, a quality which is not natural to it, and establishes, consequently, a certain disposition, which, without the fiction, would be repugnant to reason and to truth. It is an order of things which does not exist, but which the law prescribes or authorizes; it differs from presumption, because it establishes as true, something which is false. […]. A factual assumption […] which is not based on reality.

Even the most current edition[57] of *Black's Law Dictionary* characterizes a "fiction of law" as a "rule of law which assumes as true, and will not allow to be disproved, something which is false".

Most scholars have equally centered on the question of classical counterfactuality, among them Lon Fuller, perhaps the best-known theorist of legal fictionality of the early 20th century in the English-speaking world. In his first 1930 essay on legal fictionality, Fuller defines legal fictions as "either a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement having utility".[58] Consequently, Fuller can maintain that "[a] statement must be false before it can be a fiction".[59] Just how long such understanding has been perpetuated is shown by a 2015 essay, where it is stated: "Fictions are, by definition, false, and thus a legal fiction is a legal falsehood."[60]

There were (and are), of course, notable exceptions to the rule. Some scholars claim that the question of legal fictionality does not or should not involve matters of fact, or that the true–false dichotomy is at least misleading when assessing legal fictionality. Within the earlier scholarship, Demelius,[61] Lecocq,[62] Somlò[63] and Kelsen[64] are most noteworthy here; of the newer scholarship, Ross (1969),[65] Samek (1981),[66] Campbell (1983),[67] Birks (1986), [68] Soifer (1986)[69] and, most recently, Petroski,[70] Stern[71] and Lind[72] in Del Mar's 2015 volume,[73] as well as Marmor, Petroski, Stern and Lind in Part 5 of this volume. Alf Ross has categorically rejected a definition based on the criterion of counterfactualty[74] and has proposed an alternate treatment of legal fictionality based on speech act theory instead.[75] Robert Samek has suggested that fictions "have their own reality" – and that instead of contrasting fiction with truth, we should "concentrate on what the two have in common".[76] Kenneth Campbell has renewed the focus on the preservative function of legal fictions,[77] seeing "a tension between two classifications of fact"[78] as constitutive for legal fictionality. Aviam Soifer has pointed to the fact that, in a "post-realist world", "legal fictions are not some small, awkward patch but rather the whole seemless cloth of law".[79] A more recent essay claims that legal fictions are in fact true, at least in the "the linguistic jural systems within which they originate and are used", understanding an "intersystemic conflict" as constitutive of legal fictionality.[80] While Karen Petroski, in light of discourse analysis, has further developed Fuller's notion of an interdependence of fictionality and the development and boundaries of the legal vocabulary by reopening the inquiry into "what makes a legal 'fact'", and subsequently into "the relationship of such 'facts' to other aspects of legal discourse", thereby shifting the focus more to the aspect of linguistic "communities of convention and practice",[81] Simon Stern has analyzed legal fictionality in terms of narrative and imaginative engagement, building on Ross's insight that certain legal fictions "differ from literary fictions in possessing no appeal to imagination".[82] In "Literary and Legal Fictions,"[83] Stern maintains that legal fiction should be identified with a distinct narrative structure, and that contrary both to literary fictionality and legal fictionality in general,[84] in terms of its constraint[85] "generative potential", legal fictions in particular are "singularly immune to the logic of

plot".[86] In Chapter 5.1 of this volume, Stern in fact theorizes that legal fictions achieve "in legal thought, what metafiction achieves in the literary realm". Andrei Marmor also questions if truth can be the adequate criterion for fictionality (Chapter 5.4 of this volume). Using David Lewis's idea of prefixed contexts, Marmor claims that legal and literary discourse were, in fact, not distinct in terms of fictionality, but only in terms of authority. Both in a 2011 essay[87] and in Chapter 5.2 of this book, I propose a different point of departure for a general definition of fictionality, based on institutional practices. I theorize (pp. 200, 219–23) that the characteristics of a legal fiction lie in the particularity that, within an institutionalized practice of language use, a linguistic convention is openly suspended. Thus explicitly establishing a divergent denotative practice of use, which operates under the overt condition that the superordinate practice remains untouched in terms of authority, such merely relative institution can be meaningfully talked about and referred to without alluding to any notion of counterfactuality – and is applicable both in realist and nominalist systems. That the common focus on the criterion of counterfactuality could already have early been avoided is furthermore shown by those current approaches which define legal fictionality, in the tradition of Henry Maine,[88] not by its form, but by its intended aim instead. By using a solely functional criterion here, the pitfalls of counterfactuality are elegantly evaded.

In contrast, however, the majority of scholars still seem to adhere explicitly or tacitly to the basic presumptions of the classical dichotomy when dealing with legal fictions – as shown in a 2014 essay, which openly shares Bentham's conviction that "legal fictions propagate so many untruths in the practice of law" and consequently characterizes legal fictions as "practical – but untrue".[89] Some recent scholarship distinguishes "classical" from "new legal fictions", which supposedly are "not acknowledged to be false, or in some cases […] are not in fact demonstrably false", and which are held to contain types that "do not have a clear measure of truth or falsity".[90] Baker, in a lecture published in 2001, differentiates "factual fictions" from fictions where "the evidence was partly fictionalized", though proof itself was provided by "real eye-witnesses", and from "linguistic fictions" (e.g. statutory fictions, where a "rule of law […] seems to conflict with reality").[91] Not only are some of the examples Baker cites claimed to be "not exactly false",[92] but Baker also correctly subsumes that the "line between a fiction and the expansion of a legal concept or term of art may be a fine one"[93] – and thus reiterates Fuller's and Jhering's remarks on a possible relativity of what is factual and what is fictional.[94] Even within this newer scholarship, however, there is a clear tendency to mark non-counterfactual fictions wrongfully labelled as "fictions". Accordingly, Knauer subsumes that a large part of these newer forms should not be called fictions, but should instead be labelled legal "mistakes" or "lies"[95] – the former to be the case with "empirical legal errors", the latter with "discredited legal regimes" and "statutory schemes".[96] Baker categorically excludes statutory fictions from the label of "fiction", since "[r]ules of law cannot be false in the

factual sense", and claims that such deeming provisions though they "are often said to be fictions[,] [t]hey are not really so."[97] In a Kelsenian notion, Baker also adds, that, in general, legal metaphors should not be confused with reality – and that a contradiction to reality is not possible in this domain.[98] Accordingly, the basic premise of this scholarship is still the referential axiom: "Before we can speak of fictions, we must be able to identify the truth",[99] an essay on new types of fiction concludes. Comparably, in Campbell's essay, the fact–fiction dichotomy continues to be upheld, since it is presumed that legal fiction "arises from the content of the rule being false when regarded as a question of fact according to non-legal classifications".[100]

Other scholars have propagated a mixed approach, openly or covertly blending a formalistic definition with a functionalistic one. Although Harmon in a 1990 essay (that also reiterates well the history of legal fictionality) acknowledges that there is little agreement on what a legal fiction is, when it comes to statements that are not strictly counterfactual, she, in practice, nevertheless implicitly propagates a notion of reasonable correspondence as criterion,[101] while at the same time focusing on Maine's criterion of utility. In the context of counterfactual fictions, Harmon even deviates from Fuller's view on linguistic relativity with respect to legal fictionality: "Without limitations set on the use of false statements, we run the risk of linguistic anarchy", the essay reads, and continues: "There is only so much falsity we can bear."[102] MacLean in his 1999 essay manages to avoid the question of truth by adopting Jhering's[103] formal understanding of dogmatic fictions as the "operation" to "extend to B a rule of law which applies to A by saying 'B shall be deemed to be A'".[104] He, at the same time, however, assumes legal fictions to have a particular relation "both to words and things", insofar as "they can only be known by means of the former, and stand in contradistinction to the latter".[105] Such mixed, and sometimes even methodically inconsistent approaches were present as early as the turn of the last century, as Miller's 1910 categorization, which fuses functionalist and counterfactual notions, demonstrates:

> A legal fiction is probably best defined as "a legal assumption of an innocent and beneficial character, made to advance the interest of justice". […] Generally fictions may be classed as of three kinds: first – positive, when a fact which does not exist is assumed; second – negative, when a fact which does exist is ignored; third – by relation, when the act of one person is taken as that of another; or when an act at one time is treated as if performed at a different time or place; or when an act in relation to a certain thing is treated as if in relation to another thing.[106]

In fact, Jhering in his 1865 approach already explicitly mixes criteria of form and function when stating that a legal fiction's "characteristics" were to be found in "the form in which it conveys, and its reason for doing so".[107] Further, when Fuller treats the "death" of a fiction, it becomes

evident that, in his definition, both falsity and functionality are necessary criteria for legal fictionality: A legal fiction ceases to be a fiction, first when it becomes "true" due to a change in language conventions (e.g. semantical extension),[108] and second, if it "becomes dangerous and loses its utility",[109] rendering a change in its merely perceived truth value (as a question of utility) equal to a change in its actual truth value (as a question of referential adequacy).

Conversely, not all scholars that categorically uphold truth-oriented definitions postulate counterfactuality as criterion, but already accept the possibility of counterfactuality as sufficient instead – and by this effectively void the classical distinction between presumptions and fictions, which reads: *Nam fingit esse, quod vere non est, quae sane fictio esso non potest nostro in casu, in quo no est certum*.[110] Following *New Hampshire Strafford Bank v. Cornell* and *Hibbert v. Smith*, both *Ballantine's* and *Black's Law Dictionary* (2nd edition) define legal fiction as "an assumption or supposition of law that something which is or may be false is true." That the requirement of falsity has been loosened here[111] should, however, not be overestimated. Since a number of legal fictions served the purpose of facilitating a decision in cases where proof is impossible[112] or was excluded for reasons of justice or equity, the above non-parsimonious definitions rather reflect a practical demand, instead of providing evidence for a theoretical reassessment of fictionality as such. Responding to the latter need, a loosened criterion of counterfactuality was already in use during the 19th century, as a 1858 *Imperial Dictionary* entry demonstrates: "A 'Fiction in Law' is an assumption of a thing made for the purpose of justice, though the same thing could not be proven and may be literally untrue."[113]

III Truth and fiction reconsidered

With the above definitions either including the criterion of truth, or its opposition, falsity, and usually understanding truth as correspondence, it might seem that law's treatment of the issue dissociates not only from what fictional theory has elaborated during the 20th century, but also from science's and philosophy's discoveries – especially in the fields of epistemology and the philosophy of language. Bentham, as propagated by Ogden, had long held that every complex discourse in language was in a way fictional, as it is irreducibly bound to concepts (understood as fictitious entities which have no direct correspondence in the real world).[114] Bentham elaborates:

> By ficticious entities are here meant, not any of those which will be presented by the name of fabulous, i.e. imaginary persons […] but such as quality – property (in the sense in which it is nearly synonymous to quality) […] Incorrect as it would be if the entities in question were considered as being, in point of reality, upon a footing with real entities as

> above distinguished, the supposition of a sort of verbal reality, so to speak, as belonging to these ficticious entities is a supposition without which the matter of language could never have been formed, nor between man and man any converse carried on other than such as hath place between brute and brute.[115]

Although the problem of qualities in particular, and of abstractions in general, dates back to Greek antiquity, and has been revisited on a regular basis during the centuries, the claim it culminated in, was, in its radicalism, left for the 20th century to be fully grasped. Already with both philosophy and the sciences questioning the idea of truth as correspondence, either in the old understanding of an adequacy of intellect and reality (*veritas adaequatio intellectus ad rem/veritas adaequatio rei et intellectus*), or in the newer form of an adequacy of propositions of language and reality, a number of different perspectives on the issue of truth and its criteria have emerged. Lon Fuller must at first appear contradictory in his statements on legal fictionality, when he, on the one hand, insists on a definition of fiction as "untrue", while, on the other, assumes that legal fictionality is bound to the current conventions of language use, and thus what qualifies as fiction is in a certain way relative:

> [T]he inaccuracy of a statement must be judged with reference to the standards of language usage.[116]

Corresponding well to the latter, on the occasion of the "action of trover", where "the defendant is alleged to have found a chattel he may really have taken by force", Fuller writes:

> These statements are felt as fictions. Is this because there is any inherent reason why the words used could not acquire a special sense which would make them true? Could not "finding" mean, in a legal sense, taking? […]. Neither of these things are impossible. But the fact simply is, that these possible changings have not occurred. Since they have not, these statements remain fictions.[117]

Fuller's contradiction is, however, only ostensible, and can be explained by a novel understanding of truth, which leads Fuller to acknowledge that what is fact or fiction is rather a result of a conventionalized practice – and thus could be subject to change over time. Accordingly, Fuller concludes:

> A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality. This is a process that is going on all the time […] Of course this process is not confined to the law – it takes place in the whole of our language.[118]

As for many of his contemporaries, Fuller's dawning understanding of a constructedness not only of language but also of reality is, however, paired with moderate realist tendencies, upholding the belief that finding an approximation to reality in our representations of the world was possible.[119] Correspondingly, instead of abandoning the idea of adequacy, Fuller formulates:

> No statement is an entirely adequate expression of reality, but we reserve the label "false" for those statements involving an inadequacy that is outstanding or unusual. The truth of a statement is, then, a question of degree.[120]

In a similar fashion, in *La fiction juridique* (1935), Dekkers defines legal fiction in terms of category misplacement – and thus of language.[121] Dekkers's criterion of unsuitability is, however, not merely a question of ad-rem adequacy, but instead highlights the question of functional inappropriateness of category reasoning and practice. By doing so, both Dekkers's and Fuller's moderate constructivist positions, however, already point towards a more radical constructivism. Such is no coincidence. Fuller follows German philosopher Hans Vaihinger in his treatment of fictionality, whose monograph *Philosophy of the As If* (Berlin, 1911) was introduced into the current debate in 1924 via an English translation by Charles Kay Ogden, unsurprisingly also the author of *Bentham's Theory of Fictions*.[122] Vaihinger uses the topic of legal fictionality to elaborate a functionalistic theory of knowledge in general, which shares many of the pragmatists' convictions. In *The Philosophy of the As If*, it is maintained that all our concepts and theories are "false", if truth is understood as adequacy. In order to successfully cope with the world, our concepts and theories can, however, be made more "useful", with truth correctly understood to be nothing but "the most expedient error".[123] Though still having considerable realist rudiments,[124] which also extend to Fuller's treatment of the issue, Vaihinger's claims can already be read as a prefiguration of an up-to-date understanding of truth as viability, as currently propagated by Ernst von Glasersfeld.[125] Other contemporary legal authors also seem to have understood the precarious status of truth both outside and within the legal discourse, an example being de Tourtoulon, who states in his 1908 treatise on law:[126]

> In order to understand, man needs intellectual stability, and stability cannot be achieved but at the expense of truth. The truth is a perpetual oscillation; its mobility, its variety is disconcerting. We cannot grasp it, without falsifying it.[127]

Despite the legal debate around Vaihinger, to which Fuller contributed in his third essay (1931) on legal fictionality,[128] a closer examination of the legal discussion in the first part of the 20th century also shows that a certain conservatism prevented newer ideas from other disciplines from entering the broad

legal discussion – and it also seems that the Benthamism perpetuated by Ogden played its part in delaying innovation. In his 1933 review of Ogden's monograph, Felix Cohen elaborates:

> Unfortunately, however, the traditional English insularity in law and philosophy circumscribes the scope of Mr. Ogden's efforts. The discussion of functionalism and operationalism in philosophy is carried on with complete disregard of the work of Rudolf Carnap, Charles S. Peirce, John Dewey, and C. I. Lewis, and with only the most perfunctory reference to Ludwig Wittgenstein.[129]

The renewed treatment of legal fictions seems not to have increased significantly in complexity in the last two decades of the 20th century and the first decade of the 21st century either,[130] despite the critical re-readings of Bentham[131] noticed also by legal scholars,[132] and the rapid development of the discussion of fictional discourse in both analytic philosophy and literary theory. As long as literary and philosophical definitions of fictions were tied to simple notions of truth, the definition of fiction in both disciplines necessarily mirrored the above accounts of fictionality in law – and the changes in understandings of truth were necessarily represented both in legal and in fictional theory. Sheppard's account of fictionality shows this common aspect of both disciplines, parsimoniously defining "fiction" as "[a]nything pretended or invented but presented as true".[133] Correspondingly, his dictionary entry does not fail to mention that such understanding is not limited to the field of law, but considered transdisciplinarily valid, mirroring Bentham's understanding of "poetry and truth" as a "natural opposition", with the poet characterized as "always in need of something false", performing the act of pretence that "his foundations [were] laid in truth": [134]

> Fiction, in the law, is essentially as it is in literature, an invention or artifice presented as if it might be true, though with the intention by its inventor or creator that those who rely on it treat it simultaneously as if it were true while knowing that it is not.[135]

Although the notion of a constitutive tension between belief and disbelief has lately been revived both in analytic philosophy and literary theory,[136] the assumption that literary and legal fictionality could be as easily equated is, however, not an insight to be taken for granted. While in legal discourse, the issue was confined to the question of mere counterfactuality, much of the early and mid-18th-century discussion of literary fiction instead grappled with the distinction between higher (universal) truth and particular truth, reviving the Aristotelian understanding of the higher truthfulness of poetry that is opposed to the contingent and thus inferior status of the mere factual discourse of historiography[137] – and was therefore rather concentrated on the question of

mimesis as verisimilitude, with its essential criterion being probability, not correspondence.[138] That artefacts refer to a "higher" or "universal" truth, while their constituents (entities or propositions) were at the same time false or feigned, since they clearly deviated from the factual world, was not understood as a contradiction here, but rather as an axiomatic presupposition of poetics. The subsequent century, however, led to a number of changes. Harsh oppositions between idealist, realist and later naturalist notions, and the growing awareness of the artificiality of memory[139] were only the onset of a fundamental revision of the nature of poetics that also led to a surprising convergence in the treatment of fictionality in both disciplines. It is no coincidence, therefore, that, when it comes to the issue of fictionality, a convergence of literature and law can be monitored again over the 19th century. The combination of a re-emergent consciousness of the inevitable fictionality of language of certain complexity (Bentham) and the awareness fostered both in philosophy and science that the models and descriptions of the world are far from adequate not only added a further complication but also paved the way for Vaihinger's aforementioned account of legal fictionality.

It is especially the debate on truth in this context that should be illuminating for the question of legal fictionality. While scholars such as Moritz Schlick[140] still propagated some form of correspondence at the turn of the century, Francis Herbert Bradley in his two 1909 essays "Truth and Coherence" and "Coherence and Contradiction" claimed the criterion of truth to be that a proposition does not stand in conflict with other propositions within the "system".[141] Also, Vaihinger's notion of truth as the most expedient error is mirrored in William James's understanding of truth:[142]

> Ideas […] become true just in so far as they help us to get into satisfactory relations with other parts of our experience";[143]

> "The true", to put it very briefly, is only the expedient in the way of our thinking, just as "the right" is only the expedient in the way of our behaving.[144]

Vaihinger accordingly subsumes:

> It is a mistake to assume that an objective truth can be found, or an absolute measure of knowledge or agency; the higher life is based on noble deceits […] As error, fiction and truth are closely related theoretically, so are they practically.[145]

It is well known that theories on truth have diverged much further later. Pierce's notion of truth as general consensus was not only continued by John Dewey,[146] but continues to be present in more recent theories – such as Habermas's discursive understanding of truth as "the potential assent of all others",[147] or the Erlangen School's criterion of "interpersonal verification".[148] As did Francis Herbert Bradley

before him, Otto Neurath revised the neo-Hegelian ideal of truth as coherence in light of modern epistemology, attributing truth with a notion of relativity: Understanding "science as a system of propositions", the decisive criterion for truth is merely whether a proposition can be integrated into the predominant system without contradictions. Falseness is then of relative nature only, and can be remedied by adapting the system as a whole. Neurath formulates:

> Each new proposition will be confronted with the totality of [past] propositions which are in agreement with each other. Correct [true] is called a proposition if it can be integrated. What cannot be integrated will be rejected as incorrect. Instead of rejecting the incorrect proposition [...] the entire propositional system can be modified until the new proposition can be integrated.[149]

Neurath's approach was not only successfully continued by Rescher, who stipulated three necessary criteria for coherence ("comprehensiveness", "consistency" and "cohesiveness"),[150] but is mirrored in Fuller's treatment of legal fictionality.[151] Both Fuller and Neurath also seem to agree on the fact that although truth is nothing but relative to an already established system, a certain conservatism of mind will make Neurath's second possibility (changing the system) less likely.[152]

In a similar manner, Richard Rorty has repeatedly pointed out that truth is a construct, and locates the reason for this within language as a system:

> [T]here is no way to think about either the world or our purposes except by using our language.[153]

> [S]ince vocabularies are made by human beings, so are truths. [154]

Rorty's assessment culminates in a parallelism of the essences of truth and language based on a causality of one for the other: "truth was made rather than found" since "languages are made rather than found".[155] Also, while semantic theories of truth in the tradition of Tarski have occupied a considerable part of the debate, poststructuralist thinkers (from Foucault to Derrida)[156] have fruitfully renewed the interest in a critical assessment of what truth is. Foucault states:

> Each society has its regime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[157]