Taking Legal Fictionalism SERIOUSLY

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OVERVIEW

1. Motivating Legal Fictionalism
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2. Three Grades of Legal Fictionalism
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2. Three Grades of Legal Fictionalism

3. Rehabilitating Legal Formalism
1. Motivating Legal Fictionalism
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• Fictionalism in ontology – Field
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• Fictionalism in ontology – Field

• Legal norms PLUS legal things, i.e. entities, states of affairs, events.
1. Motivating Legal Fictionalism

FAMILY LAW ACT 1975 (Cth)

21 Creation of Court

(1) A Court, to be known as the Family Court of Australia, is created by this Act.

(2) The Court is a superior court of record.

(3) The Court consists of:
   (a) a Chief Judge, who shall be called the Chief Justice of the Court;
   (b) a Deputy Chief Judge, who shall be called the Deputy Chief Justice of the Court; and
   (c) Judge Administrators, Senior Judges and other Judges, not exceeding, in total, such number as is prescribed.
1. Motivating Legal Fictionalism

The Genealogy of Wuthering Heights

Mr Earnshaw died 1777
Mrs Earnshaw died 1773
Mr Linton died 1780
Mrs Linton died 1780

Frances
married c.1777
C. 1760–c. 1778
Hindley Earnshaw
married 1783
1757–1784
Catherine Earnshaw
married 1784
1765–1784
Edgar Linton
married 1784
1762–1801
Isabella Linton
1765–1797
Heathcliff
1764–1802

Hareton Earnshaw
married 1803
born 1778
Cathy Linton
married 1801
born 1784
Linton Heathcliff
1784–1801
1. Motivating Legal Fictionalism

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• Legal norms PLUS legal things, i.e. entities, states of affairs, events.

• From a fictionalist ontology to uniform legal fictionalism, i.e. incorporating primitive normative “facts”.
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• Fictional internal/external point of view
2. Three Grades of Legal Fictionalism
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- **Weak Legal Fictionalism** – Legal reasoning performs an ideological function of advertising ways the state validates itself (Spector)
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• **Strong Legal Fictionalism** – Respect for the integrity of a fictional discourse of law yields reasons for deciding independent of moral & political reasons
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• **Strong Legal Fictionalism** – Respect for the integrity of a fictional discourse of law yields reasons for deciding independent of moral & political reasons

• **Moderate Legal Fictionalism** – A fictional *basic norm* validates a hierarchy of legal norms (Kelsen)
2. Three Grades of Legal Fictionalism

Dworkin’s chain novel analogy
2. Three Grades of Legal Fictionalism

Fiction fan discourse analogy

INTEGRITY

FIT
3. Rehabilitating Legal Formalism
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- Legal Formalism $=_{\text{loose def}}$ The theory that legal systems always entail a pre-existent and transcendent legal domain that is transparent to reason and from which unique “right answers” to all legal controversies can be deduced.
3. Rehabilitating Legal Formalism

- Not that there really is a single right answer, yet the pretence derives a single answer from reasons independent of moral and political predilections.
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• Evidence of indeterminacy assumes a concept of law (c.f. Leiter’s American Legal Realism).
3. Rehabilitating Legal Formalism

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• Evidence of indeterminacy assumes a concept of law (c.f. Leiter’s American Legal Realism).

• Law aint really law; deduction aint really deduction.
Conclusion

• Good reason to carry on? Rule of Law?

• Present focus on legal discourse yielding independent reasons

• A novel approach, reconciling claims of legal formalism with indeterminacy arguments of legal realism
Thank you.

For a copy of the paper:

thelegalphilosophyproject.wordpress.com/2013/08/12/taking-legal-fictionalism-seriously

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