

Book Review

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

Recommended Citation

Book Review, 28 Md. L. Rev. 426 (1968)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol28/iss4/9>

This Book Review is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Book Review

Legal Fictions. By Lon L. Fuller. Stanford University Press, Stanford: 1967. Pp. 142, including index. \$4.50.

At a time when the English language is being "ized," "wised" and "typed" into an advanced state of decay, the Stanford University Press has performed a commendable service in making Professor Fuller's essay on legal fictions available in convenient and permanent form.¹ Among the virtues of this modest book is a reminder that language is the instrument of thought and, accordingly, that sloppy language is the accomplice of sloppy thought. The thought is usually as precise as its expression, and no delicate idea or subtle reasoning can be expressed in undifferentiated grunts or lumpish suffixes, no matter how widely these may be deployed on the common tongue. Professor Fuller has the sensitivity to language that bespeaks a touch of the poet. The value of this capacity for precise expression to one who wishes to be a sound and creative legal thinker is immeasurable.

Fuller defines a fiction as "(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."² So defined, the fiction sounds pretty black. But for any lawyer a moment's reflection reveals that a legal fiction is not a device calculated to deceive, nor even to obscure the result produced by its employment. Legal fictions are too transparent to stand as falsehoods. They are used by a lawyer or a judge more to satisfy his own attachment to continuity and regularity than to conceal his objectives from third persons. Legal fictions, together with kindred analogies, presumptions and metaphors, are the means by which "a new situation is made 'thinkable' by converting it into familiar terms."³ Rather than an object of scorn or apology, the legal fiction is acknowledged as an instrument of non-convulsive change.

The genius of the Fuller treatment is that it is not an effort to isolate the fiction as a form or device of legal reasoning; rather, it is a demonstration that the fiction is an important element or process of all thought. The fiction is regarded not as a singular phenomenon of legal thought or even of thought generally, but as a point of insight into the mental process by which man renders comprehensible the presences and interrelations that make up the physical world.

One of the influences upon Professor Fuller's effort was the work of the German philosopher Hans Vaihinger, especially his *Philosophy of As If*⁴ — an exposition of the idea that there are propositions that can work *as if* true though they are false and known to be false. Vaihinger started his investigations with the inquiry: "How does it come about that with consciously false ideas, we yet reach results

1. This work first appeared as Fuller, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 877 (1930-1931).

2. L. FULLER, LEGAL FICTIONS 9 (1967).

3. *Id.* at 72.

4. H. VAHINGER, DIE PHILOSOPHIE DES ALS OB (1911).

which are right?"⁵ His interest was principally in the physical sciences and with such notions as the "number" minus five or the assumption, once entertained, that space is filled with a mysterious substance called "ether." These are ideas for which there are no counterparts in reality, yet they have been useful, even essential, to further thought producing correct and useful conclusions. In the same fashion the legal fiction addresses itself to a perplexing set of circumstances and solicits connivance in a small pretense. The driver of a family car is treated *as if* he is an agent of the owner; the owner of a railway turntable is treated *as if* he has invited small children onto his property. No one is misled or deceived as to the fact situation described. The pretense is recognized as a route from the problem situation to the correct or necessary conclusion.

Professor Fuller reaches a bit further: "For the true mystery of the fiction consists not in the fact that we can reach right results with wrong ideas, but in the fact that the human mind, in dealing with reality, is able to go so far beyond its capacity for analyzing its own processes."⁶ In his hands the fiction is a point of departure for analysis of the processes by which the mind imposes order on the wildly discrete and varied sensory perceptions that, in a rough sense, constitute "reality." Central to this analysis is a recognition that thought is a different process than perception, and that thought involves more than facsimile reproduction of external stimuli. Thought is a process of alteration, that is, of reducing reality to a form the mind can absorb: "*First*, there is the process of simplification and organization, and *second*, there is the process of converting new experiences into familiar terms."⁷ Simplification and organization require a framework, which is supplied in the human mind by the "conceptual apparatus for classifying the external world" fashioned continuously from infancy by the collaboration of perception, language and (for want of a better word) reason. The fiction — the treatment of a new experience "as if" — is one of the means by which the new experience is made a part of the mental framework and thus rendered manageable and useful. "As if" reasoning may be expedient and temporary. It may be a construction "feeling the way" toward some principle" when the principle itself is not yet fully comprehended. This is the way of the human mind. It cannot disregard new experiences nor can it deal with them independently of all other experiences. "As if" reasoning is the bridge by which a new experience is fitted into the conceptual apparatus and, reciprocally, by which the wisdom of the conceptual apparatus is applied to the new experience.

Professor Fuller observes that while Vaihinger's efforts are not a complete answer for all the ills besetting legal thinking, "I am firmly convinced that a study of Vaihinger will make one a *better* legal thinker."⁸ The same can be said for Professor Fuller's *Legal Fictions*. The need for *better* legal thinkers is critical. Advances in the physical

5. L. FULLER, *LEGAL FICTIONS* 124 (1967).

6. *Id.*

7. *Id.* at 106.

8. *Id.* at 97 n.6.

and biological sciences have put mankind into a forced march to a hazardous future, and the legal profession⁹ is sleeping on its responsibilities. New experiences are thrust upon a troubled and bewildered citizenry in geometric progression, but the profession that should lead in the difficult process of reconciling new experience with the existing conceptual apparatus declines to lift its eyes above immediate and narrow concerns.

An important first step for one who has an interest in becoming a creative, even innovative, legal thinker is to put aside simple-minded notions about the nature of truth, ideas and thought:

If we discard the picture theory of truth and recognize that the world of ideas is intended not as a counterfeit of external reality but as an instrument which enables us to orient ourselves in this world of reality, we shall see that science has two tasks: (1) to determine the successions and interrelations of the events of the external world, and (2) to organize the concepts through which we express and make understandable these successions and interrelations into a form as neat, adequate, useful, and innocuous as possible.¹⁰

"As if" thinking is an important technique of organizing concepts and making them understandable, and it is indispensable to the absorption of new experiences with a minimum of disruption. There is little question that the legal profession has the capacity for creative organization of concepts. One need look only at the imaginative mutation of such instrumentalities as bond, lease, trust, warehouse receipt and others to appreciate the profession's gift for reconstruction of concepts as new social and economic practices make new demands. A second look reveals how large a measure of "as if" thinking is employed in this process of adaptation. If the profession is indeed falling short in performance of its creative function, it may be because it is not attentive enough to the "successions and interrelations of the events of the external world" or because it has grown neglectful of the processes by which it does its best work.

In a short introduction Professor Fuller disclaims any major contribution to the philosophy of mind. In one sense the disclaimer is appropriate. The book offers no dramatic new insight into the processes of thought. The analysis turns on forms and uses of the legal fiction recognizable to any well-trained lawyer. What the book does do is assist the reader to an appreciation of certain familiar thought patterns as entirely creditable procedures for the reconciliation of human differences. If we can begin to use affirmatively and creatively what we use instinctively, and sometimes apologetically, we will be on the way to being better legal thinkers.

*Lewis D. Asper**

9. "Legal profession" is used in its most comprehensive sense. The statement is addressed not only to lawyers and judges but also to government officials, law teachers and law students.

10. L. FULLER, *LEGAL FICTIONS* 105 (1967).

* Professor of Law, University of Maryland School of Law. A.B., 1943, University of Minnesota; LL.B., 1951, Columbia University.