

Rediscovering Fuller: Essays on Implicit Law and Institutional Design

Willem J. Witteveen and Wibren van der Burg (Eds.)
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This is an excellent publication which will invigorate and widen studies of Lon Fuller's contributions to legal philosophy. It emerges from Witteveen and Van der Burg's efforts at the Schoordijk Institute for Jurisprudence and Comparative Law at Tilberg, initially through courses designed for Ph.D programmes, via a small symposium, and finally a conference in 1997 at which the draft papers which comprise this volume were presented.

The book contains some accomplished pieces from some accomplished and, in many cases, well-known scholars, including a preface written by Philip Selznick. Witteveen's introductory essay maps out the terrain of the book and offers brief synopses of the various contributions which are grouped into five sections. In sections I and II Kenneth I. Winston, David Dyzenhaus, Paul Cliteur and Frederick Schauer take us "Beyond The Hart-Fuller Debate", whilst Pauline Westerman, Wibren van der Burg and David Luban on "Moralities of Law" get to grips with the ontological nuances created by Fuller's insistence on the ultimately 'purposive' nature of law and its essential ethical 'inner' structure. Kenneth Winston's contribution in section I,

"Three Models for the Study of Law", makes an early link between law and the cognitive interest in the development of democratic institutions with a skilful, Fuller-inspired comparative analysis of the hidden moral and political agendas of the ostensibly positivist and 'descriptive' perspectives of Austin and Herbert Hart. In sections III and IV we find excellent discussions of what, in my view, are the most general and innovative of Fuller's sociological and political ideas: Peter Teachout and Gerald Postema write on the notion of "Implicit law", and Roderick A MacDonal, Witteveen himself, John W.F. Allison, Marc Hertogh and Karol Soltan reflect upon the methodological implications of this theme in "The Art of Institutional design". Together, the idea of implicit law and the ethical and practical problems of both conceptualising and implementing law as institutional design, gave rise to Fuller's ambitious vision of the establishment of a comprehensive (and complex) synthesis of anthropology, legal studies, ethics, and scientific governance in the form of a discipline which, perhaps alluding to classical sources, he referred to as 'eunomics'. Soltan's attempt to outline the contours of

this moral-sociological vision and appeal for a careful reconsideration of it is entitled, accurately but not pessimistically, “A Social Science that Does Not Exist”. In struggling to come to terms with the sheer scope of the notion of ‘eunomics’ in Soltan’s essay, one can perhaps see why. But, as we will presently note below in respect of Postema and Teachout, there might, heuristically speaking, be more accessible analogical and intuitive approaches to grasping and articulating Fuller’s ‘big idea’.

The fifth and final section entitled “Law’s Dialogue”, contains pieces by Francis J. Mootz III and Joseph Vining on Fuller’s ethical language and rhetoric. Here too the irrepressible James Allan (on whose work I have commented before, and who by now will perhaps suspect that I am entirely bereft of a sense of humour) offers us another super-spoof which, in my wretched naivety, (and I hope to his delight) had me charging to this section to examine exclusive publication ‘for the first time’ of the referee’s reports on Fuller’s alleged early and unsuccessful submission of the manuscript of *The Case of the Speluncean Explorers* to a less prestigious journal than the one which eventually accepted it.

The theme of implicit law (culture?) and institutional design (democratic and active civil society) is important and fascinating – not only as a foundational theme connecting the essays in this book, but to understanding Fuller’s ideas generally. Most impressive, and, I suspect, what will prove to be one of the most fruitful themes of the book, is the idea that we might better understand the value and function of law when we understand its limitations. This aphorism from Spinoza (Winston tells us) is

said to have concentrated Fuller’s mind on the problem of theorising the relationship between on the one hand, customary institutional arrangements – those arrangements and strategies of co-ordination which remain ‘implicit’ – and on the other, the more formal manifestations of legal phenomena; the latter, much to his regret, forming the focus for the great majority of the efforts and resources of modern legal science. In the two essays in section III Gerald Postema in his piece, ‘Implicit Law’, casts his consummately critical eye over Fuller’s perhaps over-enthusiastic ‘convergence thesis’ in this regard, and challenges and refocuses the original idea; Peter Teachout, imaginatively and provocatively, in an essay entitled, “‘Uncreated Conscience’: The Civilising Force of Fuller’s Jurisprudence.” makes the connection between Fuller’s concerns and those found in Matthew Arnold’s 19th century essay, *Culture and Anarchy*. Teachout’s piece, I think, deserves special mention even in the midst of contributions which are genuinely and uniformly of an extremely high standard, and perhaps through some brief reflection on it we might catch a glimpse of the unity of the collection as a whole.

Teachout speaks of Fuller’s anxieties concerning the intellectual situation in the 1930s where the ascendancy of mechanistic methodologies of legal science appeared to be severing the link – an ethical and cultural link – between legality and civil society. Fuller’s anxieties were compounded by his own lucid realisation that there was no simple way back to previous metaphysicalities or naturalist dogmas. Matthew Arnold is cast in the same light. What the latter found disturbing some 70 years earlier (apart from

a smouldering social anomia and an intransigent class and political factionalism) was the 'arrogance of a new generation of theorists' who in 'Jacobin' fashion exhibited and propounded:

~~"...the violent indignation with the past, abstract systems of renovation applied wholesale, a new doctrine drawn up in black and white for elaborating down to the very smallest details a rational society for the future" (p.230)~~

Prompted by Teachout's piece, on re-reading Arnold it is easy to see why his writings might be hastily – and erroneously – dismissed as expressing a rather aloof discomfiture with the vulgarity of mass 'political' society. But Arnold's aim is to point out the important truth that the quality of democracy (of which, in 1869 in England, Arnold found little to commend) of law, of culture itself, is founded not on boasts of prosperity and slogans about 'freedom', 'equality', or even 'justice', but on the delicate blend of the Hebraistic respect for constancy, discipline and order, vitalised by the Hellenic 'curiosity' and free play of intelligent institutions. Teachout says of Arnold's view of his (utilitarian?) contemporaries:

The new theorists seemed to lack any awareness of the sort of acquisition inherited culture represented. The difficulty was knowing what to offer in place of ideas they were promoting. Going back to the earlier God-centred view of the world was no longer possible. But where else could one go? ... Arnold's answer was 'culture'.

Teachout's thesis is that Fuller's response to his own situation was "...as ingenious and simple in its own way as Arnold's: it was the common law."(p.231) The message is that

Fuller's aspirations for the project of 'eunomics' is philosophical, but not coldly theoretical. Arnold counselled 'sweetness and light', by which, like Keats – and for the same reasons – he meant beauty (as truth) and a critical and inquiring intelligence brought to bear on our affairs. Fuller, I suspect, was more of a 'muddler through' and perhaps closer to advocating what Teachout, quoting Bickel, might call a 'good practical wisdom' allowing us to chart our way between "...our principles and the complex, murky, and often resistant reality on which these principles operate." (p.233)

Whatever the validity of these analogies between Arnold and Fuller; and between the idea of 'eunomics', 'culture', and the murky methods and resistant realities of the business of the common law, Teachout's observations capture something which those of us who have enjoyed reading Fuller perhaps as a respite have suspected all along: that there is something extraordinarily important and insightful in his selection of facts and fiction which will require, one day, some careful, rigorous and systematic re-articulation. This collection of diligent essays, as well as constituting an important tribute to Fuller, is perhaps a spur to those required labours. Witteveen, van der Burg and their small army of contributors have done a great job here, and the continuation of the Tilburg project presents an exciting prospect.

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