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IN MEMORIAM: THE INTELLECTUAL LEGACY OF LON FULLER*

ALFRED S. KONEFSKY, ELIZABETH B. MENSCH AND JOHN HENRY SCHLEGEL**

In law, as in culture generally, symbols often capture a time and place far better than even the most perceptive essay by the best of historians. Just as Woodstock dramatized the experience of being young at a particular time, so the publication in 1947 of Lon Fuller's casebook, *Basic Contract Law* represented the post-war intellectual climate in the law schools far better than could any but the longest, most tiring of essays. As the author of *Law in Quest of Itself*, Fuller had established himself as a prominent, perhaps sensible, critic of American Legal Realism. Therefore, his choice some seven years later to break radically with tradition and begin a contracts casebook not with formation and consideration, but with remedies, was a powerful message that he had accepted, if only in part, the realists' critique of the late nineteenth and early twentieth century doctrinal universe. By asking at the outset, if not quite "whose interest legal rules serve," at least "what's at stake here," Fuller set in motion the process of unmasking the ideological implications of contract law. And by emphasizing in his answer to that question the importance of reliance and not expectation, he implicitly lent credence to a more social, communitarian world view, as an alternative to an existence governed simply and invisibly by market values. In this important way Fuller's book came to signify the digestion of realism in the academy. We were all realists then.

With the publication of this fourth edition of Fuller's casebook that symbol is gone. Where once was *Hawkins v. McGee* is now the ancient question about formation and consideration—"What promises should we enforce?"—as if the question of enforcing

* Lon L. Fuller and Melvin Aaron Eisenberg, *Basic Contract Law* (4th Edition) St. Paul, Minn.: West Publishing Co. 1981, lxiii, 1076, 3 appendices, index.

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promises were as unproblematic as getting up in the morning. As symbols go, we suspect this one, this return to a tory past, will not have the force of its predecessor. First, at least one other major casebook, Knapp's, has made this change before. Second, if one needs a metaphor for the contemporary suppression of the question of whose interest legal rules serve and how legal doctrine both accomplishes and masks that task of serving, the publication of Posner's *Economic Analysis of Law* a few years ago is adequate, for its blind assumption that "of course law serves the market and it better do it well" readily captures the neoconceptualist, market orientation of much current contract law scholarship.

Yet the passing of Fuller's idea should not go unnoticed. Whether in fact we were all realists then need not be answered now. What is important is that some were. Some came to understand that law was not the pretty play of colored shadows on plain white walls. Eisenberg's decision to begin with formation rather than remedies reveals a subtle acceptance of the recent neo-formalist shadows as reality. We can be influenced without understanding where we are being led. That is what separated Lon Fuller from most law teachers—most of the time he knew where he was going.