Institutional Design and Fuller's »Case Against Freedom«

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This article reviews and critically considers Kenneth I. Winston's revised edition of Fuller's Principles of Social Order. In particular, it examines the methodological contribution to sociological jurisprudence to be gleaned from a reconsideration of Fuller's writings in the light of Winstons's new and expanded introduction to the collection and, most importantly, his discovery and reconstruction of Fuller's previously unpublished series of 1958 lectures here presented in composite as »The Case Against Freedom«

This is a welcome and very accessible addition to the recent body of materials devoted to Lon Fuller's inimitable contribution to legal philosophy. It contains some of Fuller's most influential writings and, (in an appendix), an historically and theoretically illuminating letter to Thomas Reed Powell. The pieces are arranged in three analytical sections: (i) *Eunomics: The Theory of Good Order and Workable Social Arrangements* in which we find the one essay, »Means and Ends« which, Winston suggests, was probably the introductory chapter to a larger work conceived in the early 1950s and which became overwhelmed by the issues which arose from Fuller's contemporaneous work on »The Forms and Limits of Adjudication«; (ii) *The Principles and Forms of Social Order*, where we find this latter piece together with other heavyweight examples of Fuller's sociological jurisprudence: »Two Principles of Human Association«; »Mediation – Its Form and Functions«; »The Implicit Laws of Law Making«; »The Role of Contract in the Ordering Processes of Society Generally«, and »Irrigation and Tyranny«, and (iii), *Legal Philosophy, Legal Education and The Practice of Law*. In this section, following »The Needs of American Legal Philosophy«; »The Lawyer as Architect of Social Structures«; »On Legal Education«, and »Philosophy For the Practising Lawyer«, we come upon a previously unpublished piece from 1958: »The Case Against Freedom«. I think that this piece, two thirds of which is reconstructed from lecture notes and sensitively annotated by Winston, is of great importance to an understanding of Fuller's theory of Eunomics and also to contemporary jurisprudence and political philosophy in general, and we shall return to the substance of it presently.

Winston provides a new, twenty-four page introduction to this revised version which celebrates the renewed interest in Fuller's writings and adverts to the excellent *Rediscovering Fuller* which appeared in 1999 under the auspices of Vitteveen and van der Burg. That book drew together a dozen or so thoughtful and thorough pieces of Fullerian scholarship exploring the themes which are here pre-

sented (all prefaced skilfully and concisely with biographical and contextual information by Winston – some annotated and some slightly abridged) in their original articulations. The first thing we might note, then, is that these two volumes go remarkably well together and (perhaps with James Allen's edited 1999 collection *The Speluncean Case)* constitute something like an almost affordable, endlessly inter-active, mini-Fullerian library.

Method and Morality

Winston takes the opportunity in his introduction to this revised edition to emphasise the essential elements of Fuller's philosophy of law. These are first, the unswerving commitment to the fundamentally moral nature of legality that must be assumed to distinguish its strictures from mere coercive threats, and secondly, the acknowledgment of the pragmatic and continuously transformative efforts of social collectivities to sustain an institutional framework in some way faithful to the demands of legitimacy – demands which lie at the heart of the very concept of law. Ironically, and given Fuller's critical *milieu,* this approach to legal theory can be seen as genuinely and comprehensively realistic, as opposed to problematically »Realist« in the sense of the then hegemonic American Realism. In acknowledging this, however, I hesitate to concede to Winston's assertion that, because of Fuller's »Burkean« appreciation of the importance and functional complexity of institutional activity, he thus avoids starting with »abstract moral principles ... characteristic of traditional natural law« and hence, with this strategy, »... avoids top-down methods of reasoning«. Fuller's jurisprudential orientation certainly does take institutional processes seriously, and gives life to a concept of law within the dialectic of historical and social activity; but it should not be confused with the widespread sociological scam of suggesting that we might substitute the apparent tangibilities and »Pragmatic« common-sensicalities of social activity for ontological concepts in general, and moral ontology in particular. Rather, Fuller was always sensitive to the very real problems which come packaged with what, in terms of a coherent epistemology, must be the first step of jurisprudence (that of framing the *concept of law*) even though he consistently demonstrated his determination to uncover the ubiquity of legality in social processes as opposed to confining its existence to the appellate courtroom. And to show there is no need to invent a crowd-pleasing »third way« to characterise Fuller's genius, we can simply interpret Winston in an orthodox fashion:[1]

> The sociological insight on which Fuller depends is that the authoritative principles necessary for a critical assessment of conventional practices are not derived from an external source but from a deeper understanding of the practices themselves. In particular, the resources for moral criticism and justification emerge ineluctably in any society, because moral conformity is itself a reflective practice, generating criteria for its own assessment.

1. Kenneth I. Winston (Ed.) *The Principles of Social Order- Selected Essays of Lon Fuller* (Hart Publishing, Oxford, 2002): {Henceforth, PSO.} p.5.

Indeed, let us, with Fuller, and, as Winston points out,[2] with Hart who makes this point in *Law, Liberty and Morality,* and with Ronald Dworkin in *Taking Rights Seriously,* be content to accept that the essence of legality is to be found in »deeper understandings« of real institutional processes and distinguished from mere habit or naked coercion by *»criteria«* which, let us charitably admit, emerge »ineluctably« from the practice of moral reflection. This is, we might say, »getting real« about the place and primacy of theory and moral judgment in legal philosophy and Winston is right to hammer home Fuller's appreciation and formulation of the jurisprudential problem. But a »deeper understanding« of social practices suggests a host of theoretical candidates for what might count as »deep«, and, in substantial terms, the moral criteria emerging from these avenues of reflection might take many forms. Let us, by way of example, consider the general orientation of Marxist or Feminist analysis. Both offer to expose the »genuine« or deep motivation behind our most powerful and enduring normative routines and economic institutions. These approaches, unlike Fuller's, begin with an assumption that hegemonic sectional interests (i.e, in these examples respectively, capital and patriarchy) condition and sustain (Marx would have said »reproduce«) the character of normative institutions by presenting the sectional view of rational and proper societal organisation as a universal view. Notoriously, these forms of ideological critique do not so much avoid »top down« or abstract' moralising, as refuse to engage with it on its own philosophical terms, preferring instead merely to assert the historical or existential authenticity and inevitability of the interest perspective which informs their critique. But what is theoretically assumed to be the *real* interest perspective of the constituency in question (»the proletariat« or »women«), that is, the normative blueprint of practical rationality which forms the template of critique against which present institutional practices are compared and condemned, must necessarily be an idealised conception. One might want to argue that the ethical assumptions at the heart of these examples of institutional critique are not »top down« in the very plausible sense that they are somehow »democratic« or »underdog« perspectives. This might be so, but they are most certainly abstract and moral, and in this regard they must face the same tribunal of epistemological scrutiny which awaits all normative-practical assumptions embedded in the varied ontologies of sociological critique.

Fuller's striving for a »deeper understanding« does not, of course, look to a particular constituency of interest to provide his »reflective moral criteria«; nor does he opt for one of the universalist (»top-down«?) conceptions already on offer: perhaps the doctrine of the Virtuous Mean, Utilitarianism, Reflective Equilibrium or a completely mathematicised calculus of Rational Choice or Game Theory. But we can say that he leans towards a universalist notion of just and civilised humanity revealed in the phenomenon of legality, and he famously points us towards an »inner morality« of law. This is both insightful and attractive in that it makes us think expansively about not only the regulatory and co-ordinatory techniques required to sustain practical striving for The Good, but about just what conception of The Good is pre-supposed

2. Ibid. fn.6

in our acceptance of the good sense of open legal procedures. The question of just how far this immanent critique might get us without some independent and substantive commitment is examined in scrupulous detail in *Rediscovering Fuller*. This last issue invites a digression (which I will resist at present) from the more general methodological point I raise here, but the answer, I suspect, is »not far enough«. The interesting dimensions of the naturalist/positivist debate could, however, in a more perfect world, start here with the largely unresolved moral-philosophical problems of concept formation relating to normative organisation in general. But Fuller's undoubted clarity and comprehensive appreciation of the essentially sociological subject matter of legal science is not an epistemological miracle which absolves us from these *a priori* labours, and Fuller was far from claiming or even imagining this to be the case.

This is clear in a passage salvaged by Winston from correspondence. Here we get an insight into Fuller's frustration with the obfuscations and cross-purposes which had arisen from the »Realist« insensitivity to the epistemological exigencies of a morally critical legal science. When taken to task by Thomas Reed Powell for his failure to be sufficiently specific in his criticisms of the American Realists in this regard, and particularly of their endorsement of what amounted to an Austinian – *cum* – Logical Empiricist separation of »the Is and the Ought« in legal science, Fuller responded by naming names: »Bingham, Frank, Llewellyn and Cook with Holmes and Gray as forerunners«.[3] Powell had written, »I would need proof that the Realists have assumed that a rigorous separation is possible and that one may study law »in isolation from its ethical context«. Fuller then calls attention to an article[4] in the Harvard Law Review:[5]

> Of the rigorous temporary severance of Is and Ought I know of no passage in Llewellyn's writings in which there is recognition that this severance involves any difficulties whatsoever. Cook has asserted repeatedly that the legal scientist studies judicial behaviour as the physicist studies the behaviour of atoms. I am not aware that he has ever recognised any limitations on the aptness of this analogy, except to say that *after* the legal scientist has found out how *his* atoms were behaving, he might try to talk them into behaving some other way.

The Case Against Freedom

In 1958 Fuller delivered the *Edward Douglas White Lectures on Citizenship* at Louisiana State University under the title of »Freedom and the Nature of Man«. These three lectures survive in parts: the first as the full written text, the second a mixture of text and short phrases, and the third a few hand written notes which Winston, drawing on a phrase which appears in Fuller's introductory remarks,[6] presents to us under the provocative

3. Ibid p.332

4. Karl N. Llewellyn. »Some Realism About Realism- Responding to Dean Pound« HLR 44 No 8 (1931):1255
5. PSO: p.333
6. Fuller says, »As an advocate arguing against freedom I should have to make two contradictory arguments: (1) freedom is a meaningless goal of social policy, (2) freedom is a meaningful goal, but a mistaken one ... Instead of taking the posture of devil's advocate, I decided to assume the role of a

title of »The Case Against Freedom«. These lectures were to serve as the basis for a book on the concept of freedom which, for various reasons and in the face of strong diversions was never completed. But the ideas contained and hinted at in these papers appear to present a shift in theoretical emphasis from the traditional bone of contention between, on the one hand, the positivist insistence that law aims at order, and, on the other, the »natural law« (or legal idealist) tenet that law must *necessarily* aim at justice, to the contemporary sounding notion that »institutional design« is intimately concerned with the promotion of freedom. Winston says,[7]

> Fuller appears to abandon the idea that justice is the inherent, general aim of legal institutions; instead he conceives of them as diverse vehicles of freedom ... Fuller conceives of freedom as effective agency, that is the capacity to realise one's choices in the world. The forms of legal order are the central ingredients of that capacity. Accordingly, in all the Eunomical essays (which were written from this period into the late 1960s), Fuller's principal focus is the nature of citizens' participation in the decisions that affect their lives.

What is refreshing about reading this newly excavated piece from Fuller apart from, once again, the clarity, is the simplicity and courage to re-examine the theoretical sacred cow: in this case the idea that freedom is first, a comprehensible and unproblematic notion, and secondly, that it is *intrinsically* valuable. Fuller challenges not only J.S. Mill but Hayek in their defence of *negative* freedom, that is, in their eulogies to freedom as mere »absence of constraint«, and asks why we ever managed to swallow such a creaky and obviously incomplete account of what is supposed to be our most prized moral possession. Of Mill's *Essay On Liberty*, Fuller says,[8]

> With each re-reading I found my doubts increasing – doubts not merely to the adequacy of the analysis, but doubts as to integrity. After a short introduction *The Essay* states that its object »is to assert one very simple principle ... {T}hat principle is, that the sole end for which mankind are warranted ... in interfering with the liberty of action of any of their number, is *self-protection*.« The individual's »own good, either physical or moral, is not a sufficient warrant« for interfering with his liberty. [(You)] can interfere with a man's liberty, if he is going to hurt you, but not if he is about to hurt himself.]

Fuller goes on:[9]

> Some seventy pages later we read: »I fully admit that the mischief which a person does to himself may seriously affect [others]«. Why –one asks – did seventy pages have to intervene before the *one very simple principle* to which *The Essay* is dedicated received this rather obvious qualification?

Fuller's preoccupations with interaction and social order should provide a clue to the gist of the argument contained in the »The Case Against Freedom«; it is that we must become more dialectically agile in our understanding of the interplay between, on the one hand, freedom to participate within social con-

judge – a judge who wishes conscientiously and fully to state the arguments of the litigant against whom he is deciding – for I assure you that my decision will ultimately be that freedom is both a meaningful and a valid standard for the ordering of human relations. (PSO p.316)

7. Ibid. p.315

8. Ibid. p.317

9. Ibid.

straints, and, on the other, the power which this system of constraints offers to exercise various liberties. He makes the point that the words »freedom and liberty« are derived from terms which originally had connotations similar to those which now attach to the word *enfranchised.* He says:[10]

> If in the intervening centuries there has been a gradual shift in meaning, so that to be free now means primarily to be *unfettered*, I believe this is due to an increasing – and I believe, dangerous – tendency to take for granted the facilities offered by an organised and functioning society, and to take for granted the forms of participation that society accords to us. We can say, I believe, that the original meaning of freedom was an *affirmative* one.

This is of considerable relevance to contemporary political and legal philosophy which, one hopes, is slowly emerging from its overdependence on liberal (Rawlsian) and postmodern liberal conceptions of the intrinsic worth of what we should now always refer to as *negative* freedom. This, of course, suggests that we might have to consider the value of freedom as inhering in its indispensability as a *means* to ends which are genuinely of intrinsic value, and of its intimate connection with the *virtue of responsibility*. John Gardner, who now occupies the position formerly filled by Dworkin and Herbert Hart, seems to have much sympathy with this approach to understanding law and freedom in this way[11], as do Beyleveld and Brownsword who draw upon Kierkergaard, Fromm and Becker in this regard.[12] We might also note that Fuller's insights here unearthed for the first time are timely in that they coincide and resonate with the recent publication of Nigel Simmonds' similarly revised edition of his *Central Issues in Jurisprudence*[13]. Simmonds speaks of a clear dichotomy of perspective which turns upon what Hegel called »the pivot and centre of the difference between antiquity and modern times« – »the right of subjective freedom«.[14] In his introduction, Simmonds says this allows us to construct a useful dichotomy. He contrasts Aristotle's conception of *Politics* with contemporary liberal attitudes to law and governance which (quite independently of our discussion of Winston's discovery) suggests a result that, as we shall see, illuminates Fuller. Of the Aristotelian conception, Simmonds says:[15]

> One tradition of political philosophy, drawing its inspiration from Aristotle's *Politics* ... regards as fundamental the question of what counts as an excellent, valuable life for a human being. Having arrived at such a conception of excellence, a philosopher within this tradition will then describe the social and political institutions capable of fostering such excellent lives. The family, the forms of economic production, and the forms of governance will all be viewed from this perspective.

A rival tradition, Simmonds says, giving centrality to »subjective freedom«, emphasises »... the importance of each individual decid-

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10. Ibid. p.323
11. John Gardner, »The Mark of Responsibility« (Inaugural Lecture, forthcoming in Oxford Journal of Legal Studies, Spring 2003)
12. Deryck Beyleveld, and Roger Brownsword *Human Dignity in Bioethics and Biolaw* (Oxford University Press, Oxford, 2001)
13. Nigel.E.Simmonds *Central Issues in Jurisprudence* (2nd Edn., Sweet and Maxwell, London, 2002)
14. Ibid p.6
15. Ibid.p.6

ing for him or herself upon what counts as a good or excellent life.«[16] But crucially, this emphasis on subjective and individual freedom breeds a heavy dependence on that which it appears to abhor, namely, coercive constraint:[17]

> Within the Aristotelian type of theory, law occupies an important but not necessarily pre-eminent place. By contrast, law assumes *absolute centrality* within the later type of theory that emphasises »the right of subjective freedom«. For individuals can be provided with the opportunity of pursuing their own conception of a good life only if they possess clearly demarcated domains of liberty within which they are free from interference; and it is the law that must demarcate such domains of liberty. In this way, political debate in such a community is dominated by essentially juridical notions such as »rights«, justice« and »equality« (rather than by non-juridical notions such as »well being« or » the common good«). [my emphasis]

The relevance and importance of Fuller's thinking in this regard emerges when we consider that his project of Eunomics is not only opposed to the narrow, legalistic preoccupations of legal science concerned with the analysis and prediction of appellate court reasoning, it is also opposed to the value-neutral pretensions of legal science, and the endorsement of naively negative conceptions of freedom which encourage highly formalised and abstract litigious structures. The ultimate irony and, at once, the vindication of Fuller, of course, would be to show that »*after* the legal scientist has found out how *his* atoms were behaving«, and is attempting »to talk them into behaving some other way ...« that this »other way« alludes to some *non*-subjective conception of The Good.

Means, Ends and Institutional Design

This returns us rather conveniently to what is precisely at issue in the attempt to characterise the foundational orientation of Fuller's philosophy and method to moral reason, namely, how we are to understand the relationship between Means and Ends. The essay which bears this title, the first in this revised volume, is lucid, imaginative and, as a contribution to the philosophy of social science, deserves as much attention as Weber's reflections on the problems of method which introduced social theory to the device of the Ideal Type and to the project of orientating ourselves to the phenomenon of social action through the idea of *verstehen*. Fuller appears to be largely in agreement with Weber on the initial methodological obstacle: Weber argued that the infinitely complex flux of history, the infinite ambiguity and ambivalence of conscious subjectivity and the multiple and amorphous intermingling of actual institutions were simply not susceptible to systematic explanation. However, aspects of social action might be illuminated and rendered artificially discrete and our cognitive interest in them satisfied as far as possible by ideal-logical modelling of practical activity on the basis of uncontentious assumptions about the rationality of means employed to delimited and intelligible reconstructions of various ends. The key to understanding social life lies in an understanding of the practical core of social action, and this seems readily

16. Ibid.
17. Ibid. p.7

to translate into the examination of institutional expression of norms (means) and the values (ends) which motivate action.

Embracing value-phenomena in this way does not, in Weber's opinion, mean judging the validity of values; it simply means offering an historically accurate account of the way values shape the historical and social landscape, and, given an awareness of the objective and material *context* of action, allows us to understand why certain institutions prevail or why certain individuals act as they do. The Ideal type, for Weber, remains, however, »value-neutral«. Despite this advance in our thinking from the confusions of psychologisms and naturalistic abstractions, the question that has been asked of Weber (and I have been a longstanding and zealous inquisitor in this regard) is, how is it possible without caprice in the selection of elements, to construct a defensible model of the end or goals of a complex institution – say of law, or of the family or of education. Fuller however, has a different (and, I suggest, more illuminating) take on the problem, and on the rather too comfortable distinction made between means and ends both in our attempts to *understand and explain* society and history, and in our attempts to *shape it* to our needs and aspirations.

Fuller has several objections to orthodox thinking in this regard. Among them are the ideas that we might »arrange human ends in a hierarchical order« and design social policy as »a schedule of ends in the order of their urgency«.[18] This view is compounded by the tendency to assume that our ends or ethical objectives might be accurately rendered as our »«value preferences« and might be given some technical expression in some utility calculus. This view is oblivious to the fact that:[19]

> No abstractly conceived end ever remains the same after it has been given flesh and blood through some specific form of social implementation ... an end takes its »character and color«[20] from the means by which it is realised.

Even if this simplistic severance between means and ends were to be accepted, we often, says Fuller, conveniently overestimate our capacities to achieve these ends, and simultaneously assume the »infinite pliability of social arrangements«: [21]

> Curiously, though the technicians capable of devising the apt means for social ends are never identified, it seems to be assumed that their competence is unlimited. There are signs by which we know a good carpenter, one of them being his knowledge of the limitations of the materials with which he works.

But Fuller's initial point in this sequence of reasoning about means and ends is something which should arrest our linear trajectory in thinking about practical reasoning both in modelling institutions and in our understanding of the architectural task of social policy. He says,[22]

> We should not conceive of an institution as a kind of conduit directing human energies toward some single destination . Nor can the figure be rescued by

18. PSO p.70

19. Ibid. p.69
20. This is a reference to remarks in Mill's *On Liberty.*
21. Ibid.
22. Ibid p.68,69

> imagining a multipurpose pipeline discharging its diverse contents through different outlets. Instead we have to see an institution as an active thing, projecting itself into a field of interacting forces, reshaping those forces in diverse ways and in varying degrees. A social institiution makes of human life itself something that it would not otherwise have been. We cannot therefore ask of it simply, Is its end good and does it serve that end well?

The following remarks help to concretise this insight:[23]

> ... human aims and impulses do not arrange themselves in a neat row of desired »end states.« Instead they move in circles of interaction. We eat to live and we live to eat. We love that we may be loved, and we want to be loved that we may love freely. The pattern of our private desires reflects itself in the pattern of our social institutions. We keep up with public affairs so that we may vote intelligently, and we believe in democracy partly because it gives us an incentive to keep informed. We take legal measures to insure the impartiality of jurors, and we defend the jury system because it tends to inculcate a habit and taste for impartiality.

Here Fuller simply returns to the theme which we now know became a serious preoccupation in the piece which Winston has unearthed and named, »The Case Against [we now should say, *negative*] Freedom«: that of showing that the ideas of institutional design based on the undialectical distinction between means and ends, hierarchical conceptions of social ends or, what amounts to the same thing, schedules of personal value preferences. Fuller says in approaching the conclusion of this third section of the essay on Means and Ends:

> Our best institutions are, I believe, pregnant with beneficial side effects. It is chiefly for this reason that I have so vigorously objected to the view that institutions are mere inert conduits directing human energies ... toward certain desirable end-states. Our institutions are part of the pattern of our lives. The task of perfecting them furnishes an outlet for the most vigorous of moral impulses.

But, he goes on,

> In a tacitly assumed hierarchy of ends, freedom is accorded a high position – perhaps the highest position– this ranking being assigned to it, not because of any assumed structural relation with any other ends, but because of an attributed intrinsic value.

Fuller ends his brief discussion of freedom here with the remark that this conception of the intrinsic worth of freedom unrelated to an understanding of the structural exigencies of social ordering – other than to concede the need for the »necessary evils« of some constraint – can only »... encourage and appear to legitimate what may be called the salesmanship of value preferences«.[24]

Thus we now know exactly why Fuller produced his »Case Against Freedom« and, rather than being, as Winston suggests, a shift in theoretical emphasis, we can see just how integrally relevant the analysis of freedom is to his institutional theory. Perhaps we are some way from a firm understanding of the substantive picture of the anti-Positivist, anti-Realist standpoint of the Fullerian critique. We do know it lies in a conception of human nature which is essentially Aristotelian, at least insofar as it requires us to contemplate what could be meant by human

23. p.68

24. p.74

flourishing *before* considering the problematic issues raised by implementing the means by which we might help rather than hinder its realisation. And we might, from this point of departure be a little closer to imagining the possibility of a synthesis that must lie beyond the great divide of the realm of The Good and the demands of Subjective Right.

More power to the Fuller revival, and more power to Winston's elbow, for he has performed a valuable service in putting this revised edition together and in carefully and imaginatively guiding us through it, the better to appreciate the richness and depth of Fuller's incomparable style of thought. The book, handsomely designed and finished in the paperback version, contains a complete bibliography of Fuller's writings compiled by Kenneth I. Winston and Stanley Paulson, and an efficient subject/author index.

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Författarupplysningar

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