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Commentary on Wein

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Commentary on Sheldon Wein's "Legal Reasoning when the Supreme Court is Corrupt"

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1. INTRODUCTION

Legal reasoning is a complex enterprise with a variety of institutional constraints. Understanding how such reasoning can carry on when one of those institutions is corrupt is an interesting and important issue. Professor Wein's examination of legal reasoning in the Argentine legal system during periods of high court corruption makes use of the notion of a shared cooperative activity (SCA) to help us better understand how legal reasoning (at least to some extent) can continue to function in these contexts. What is at issue is, among other things, the conditions for the possibility of the rule of law. This is interesting and important for both descriptive/predictive reasons and for normative reasons. A better understanding of the practices that make the rule of law possible will lead to a better understanding of how to preserve the rule of law or to institute it in the first place. An understanding of what is required for the rule of law also makes it possible to mount evaluations of practices that may or may not preserve the rule of law.

Professor Wein favours a positivist account of SCAs and their contribution to the rule of law, and Lon Fuller's (1969) work on procedural natural law is interpreted as providing formal constraints on a legal system. While I agree that work on SCAs can make a contribution both to the specific cases he engages (corruption in the Argentine high court) and issues in the rule of law more generally, I am not yet persuaded that a fully positivist account will be sufficient for explaining preservation or breakdown in the rule of law. The rest of my comments will raise questions about a fully positivist account by exploring (all too briefly) a possible role for procedural naturalism in understanding the rule of law.

2. A QUICK DEFENSE OF PROCEDURAL NATURAL LAW

What distinguishes natural law approaches from positivist approaches to understanding law is that naturalists think that moral standing, in some sense or other, has an effect on what counts as law. Positivists insist on the conceptual distinctness of law and morality. What distinguishes classical (for example, Thomistic) natural law from a Fuller-style

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procedural natural law is that the procedural naturalist asserts that the morality that influences what counts as law (or the morality that is “internal” to the law, as Fuller put it) is to be found in the procedural norms governing how laws are made, enforced, or changed. That laws be knowable is a central procedural constraint, generally requiring that laws be appropriately promulgated. Consider the following examples:

C1: a morally unobjectionable substantive change is made to the tax code, and news of the change is promulgated through all the standard sources.

C2: a morally unobjectionable substantive change is made to the tax code, but it is not promulgated. It is kept a secret.

Under the conditions specified by C1, prosecution of someone violating the change to tax law would not generally be objectionable. However, prosecution of an individual in violation of the code under circumstances specified by C2 does seem morally objectionable. There is something morally problematic with sanctioning someone for not abiding by a norm they had no way of knowing they were expected to abide by. The promulgation requirement is a procedural constraint, and the violation of that constraint could turn an action that otherwise would be morally acceptable (a substantively defensible change in the tax code) into something that is morally problematic. Fuller’s view is that, in general, the violations of this sort of procedural constraint are a kind of immorality that disqualifies something from being lawful. For the purpose of this commentary, I will defend a slightly weaker version of Fuller’s thesis: violation of certain procedural constraints constitute an immorality that disqualifies an act from being in accordance with the rule of law.¹

Contrasting cases having the form of C1 and C2 are easy to multiply, but they are insufficient for establishing the view that there is a kind of procedural morality built into the rule of law. One objection to this approach is that the procedural constraints can all be satisfied, and a law can still be immoral. Let us consider another case.

C3: the highway traffic act and the criminal code are amended by duly elected officials, and the new law makes it a capital offence to run a stop sign. The promulgation requirement and all other procedural requirements are (by hypothesis) satisfied.

To prosecute someone under the circumstances specified by C3 seems immoral to most, yet this immorality cannot be the result of procedural constraints that are being violated because, by hypothesis, no such constraints are violated. So it is possible to satisfying these procedural constraints and make immoral laws. This might seem like enough to preserve the positivist separation thesis between law and morals since it is possible to say that a rule that is immoral (even wildly immoral) can still be a law (or part of the rule of

¹ I make the distinction between (a) abiding by a set of procedural constraints PC is necessary for something to count as law in some sense or other and (b) abiding by PC is necessary for being in accordance with the rule of law. In this way, if someone is tempted by a theory of law that is focused on power to the extent that rule of law considerations need not be satisfied for something to be a law, then the argument I have given in the text still goes through since it is focused on the rule of law.

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law). I will now argue that this would be to miss Fuller's point about the *procedural* nature of the morality that is internal to the rule of law.

Let us consider another case.

C4: the highway traffic act and the criminal code are amended, and the new law makes it a capital offense to run a stop sign. The changes are made in secret. (The promulgation requirement is abjectly violated.)

Prosecuting someone under the conditions specified by C4 is morally worse than prosecuting someone under the conditions specified by C3. Prosecution under both C3 and C4 is morally objectionable, but C4 is *morally* worse. It is bad enough that the punishment is wildly disproportionate to the offence (both C3 and C4), but at least in C3 you knew about the punishment and, in principle, it could be avoided; this is not so in C4, which makes it that much worse. To argue that moral procedural constraints can be satisfied and yet we can end up with immoral laws is not enough to undercut the point that there is a procedural morality internal to the rule of law. That procedural constraints are not enough to guarantee that laws come out moral might make them look like formal constraints that sometimes yield moral laws and sometimes do not. However, contrasting C3 and C4 makes the promulgation requirement look like more than a "formal" constraint. Violation of this requirement in C4 takes an already immoral scenario (C3) and makes it *morally* worse.² I am suggesting that the test for whether a procedural constraint is moral is not whether the resulting substantive laws are moral. That is not to recognize the procedural nature of these constraints. C1 and C2 show that violation of a procedural constraint can turn what would be a morally acceptable law into something immoral; C3 and C4 show that violation of a procedural constraint can turn something substantively immoral and make it *morally* worse. In both cases, violation of procedural constraints contributes to immorality.

Why should we see violation of promulgation (and therefore knowability and predictability) as making a bad situation morally worse than it would otherwise be? There are different ways of defending this point. It might be argued that a rule of law system treats its subjects as rational beings, and violating the knowability requirement makes it impossible to grasp the law and deliberate about the law in one's reasoning about how to act. In short, such a violation bypasses or even undercuts our rationality. Kantians would surely have a problem with this. Many Aristotelians would as well. Some Utilitarians would likely raise concerns, and for those that do, they might argue that bypassing rationality in this manner would not promote overall utility.

² The morality being invoked in making these assessments need not be one that is provably binding on all rational beings. It may be what Ronald Dworkin (1986) has called the political morality of the community in question. While Dworkin focuses on how judges make use of the principles of political morality in substantive legal decisions, the point being made here is that principles of political morality may inform procedural constraints. (Whether Dworkin's position is plausible with respect to judicial decisions on substantive matters is a topic beyond the scope of this paper.)

3. SCAs AND PROCEDURAL NATURAL LAW

Imagine two competing SCAs. The first is a supreme court in cahoots with corrupt leaders who do not want to be confined by constitutional constraints. The second SCA is made up of lower court judges who want to continue to abide by the rule of law traditions that have been established over a significant period of time. To a point, the lower court judges can do their best to interpret the law according to past practice and make it look like they are abiding by higher court edicts. To a point. This can only go so far. If the law starts to become unpredictable because the verdicts of lower court judges opportunely but unpredictably cite whatever higher court verdicts suit them, and higher court verdicts seem to fly in the face of what the lower courts have done, then people will not know what to expect, and the rule of law breaks down. (So far, everything stated in this paragraph is something Professor Wein can agree with.) I want to suggest that the sort of procedural constraints discussed by Fuller constrain the extent to which lower court judges can successfully proceed in the face of a corrupt high court. (Wein, I think, would agree with that, but he would see these constraints as formal or not essentially moral.) These constraints are in service of the knowability or predictability of the law. While I think SCAs could be used to help explain this, it looks like they might introduce morality back into an understanding of the law. Consider the three characteristics of SCAs mentioned by Wein: mutual responsiveness, commitment to the joint activity, and commitment to mutual support. For an SCA (or collection of interacting SCAs) to bring about or preserve the rule of law, the knowability or predictability of the law has to be maintained. While I can imagine SCAs where widespread knowability or predictability of the SCA is not part of its goals (organized crime gangs, terrorist groups, etc...), I cannot imagine an SCA that (a) maintains the rule of law and (b) is largely unpredictable to those interacting with it. Part of the *joint activity* of SCAs committed to maintaining the rule of law is commitment to the knowability or predictability of the law. There would also have to be forms of *mutual support* and *responsiveness* to insure robust predictability. (I think Wein would agree with most if not all of the last two sentences.) However, if knowability or predictability is a procedural, *moral* constraint on the rule of law, then understanding the type of SCA that can maintain the rule of law reintroduces morality back into an account of the law. Of course, it is perfectly possible for a rule of law system (in accordance with moral procedural constraints) to be substantively immoral, but that does not undercut the point about procedural morality belonging to the rule of law. A fully positivist account—one that makes the rule of law substantively *and procedurally* distinct from moral considerations—would have to go beyond showing that procedural constraints can be satisfied by a system that is substantively immoral. It would have to show that violations of procedural constraints that undercut the rule of law are not violations of moral constraints. This would mean that violations of such procedural constraints do not contribute to the immorality of an act (and it would have to do this without reintroducing moral assessment into the story). Without such a demonstration, it is not clear that SCAs have been accounted for in a fully positivist manner. I take H.L.A. Hart (1994) to be the sort of positivist being addressed.

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4. CONCLUSION

If a fully positivist account of SCAs can be given, so be it. There may well be ways of answering the kinds of concerns I have raised. However, even if a fully positivist account cannot be given, it does not follow that SCAs will not be helpful. My goal has not been to challenge the usefulness of SCAs; if anything, I have suggested that they could be augmented with other considerations.

[Link to reply](#)

[Link to paper](#)

REFERENCE

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