Reply to my Commentator - Wein

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Reply to my Commentator

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I am grateful to Marcello Guarini for his very insightful commentary. He questions whether those neo-Hartian accounts of legal systems which make use of the idea that existence conditions for law involve officials being engaged in a shared cooperative activity can remain fully legal positivist in nature. He thinks—and he backs his thoughts up with interesting and compelling examples—that such accounts will inevitably have a tendency to slip toward being some form of procedural natural law. Thus an account of legal systems as shared cooperative activities supplemented with some of Lon Fuller’s insights about certain structural or procedural aspects of legal systems seems a promising route for uniting the many insights the Hart-Fuller debate produced. It is a clever idea and I share Guarini’s hope that contemporary legal positivists and procedural natural law theorists will each make use of insights provided by those in the other camp. Indeed, it would please both Guarini and me if procedural natural law theorists would take up the project of developing an account of legal systems qua shared cooperative activities. (Though legal positivists were the first to jump on this bandwagon, they certainly do not own it!)

Human societies survive (and dominate other life forms on this planet) because we humans have been particularly adept at coordinating our behaviour by using a variety of devices. Dominant among these are tradition, superstition, myths, religion, morality, and law. Each has its advantages, and without them we likely would not have survived as long as we have. But each has its disadvantages and we should all remember that each of these devices has been used to cause great harm and much suffering. Social theorists have too often focused on what the content of such devices should be and too rarely thought about when it is most appropriate to use each device.

As Guarini notes, the real question is whether those who seek to develop an account of legal systems as shared cooperative activities—a plan for the distribution of coercively-enforced permissions, obligations, and powers in a—will be able to characterize legal systems in a way that does not involve an essential overlap between the operation of the system and those moral values which procedural natural law theorists have highlighted. At this early point, no one knows how things will turn out. Perhaps an entirely positivist account of shared cooperative activities can be developed. But if not—if our understanding of the rule of law is somehow conceptually connected to morality—we could adopt procedural natural law. Whatever the outcome, we should remember that we always could decide to develop new categories and not divide the conceptual space in


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the ways we have. That decision, when we confront it, will be a difficult one. Perhaps we should not be so sentimental in our attachment to law and morality (and the other devices I mentioned) and instead seek to develop social constructs that will serve us better.

Link to commentary

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