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STRAIGHTFORWARDLY FALSE: THE COLLAPSE OF KRAMER'S POSITIVISM

N.E. SIMMONDS*

> Surely the very essence of the Rule of Law is that in acting upon the citizen ... a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.[1]

THE rule of law, Kramer tells us, is not an inherently moral ideal.[2] Wicked regimes aiming solely at their own profit, and devoid even of a pretence to serve justice and the common good, will nevertheless have good reason[3] to abide by the requirements of the rule of law. Opposing his thesis, I say that wicked regimes will have no good reason for respecting one of the most fundamental requirements of the rule of law: they will have no good reason for confining the use of official violence against citizens to circumstances where a legal rule has been violated. Kramer replies by arguing that, if people are frequently punished even when they have obeyed the law, their incentives to comply with the law will be "markedly sapped".[4] I say that this claim is "straightforwardly false".[5] This constitutes the main issue in dispute between us.

In the first section of this essay I will offer some examples of the reasons a wicked regime will have for departing from the rule of law. I will then address the fundamental issue, by examining Kramer's claim that such departures will tend to "sap" or "weaken" incentives for compliance.[6] Having demonstrated that Kramer is quite wrong about this, I will turn to some further

* Reader in Jurisprudence in the University of Cambridge; Fellow of Corpus Christi College.

[1] Lon Fuller, *The Morality of Law*, revised edition (New Haven 1969), pp. 209–210.

[2] Kramer, "On the Moral Status of the Rule of Law", above p. 65.

[3] Throughout this essay I follow Kramer in his focus upon interest-dependent prudential reasons; I also assume for present purposes the soundness of the conventional contrast between moral and prudential reasons.

[4] Matthew H. Kramer, *In Defense of Legal Positivism* (Oxford 1999), p. 69.

[5] N.E. Simmonds, *Central Issues in Jurisprudence*, second edition (London 2002), p. 231.

[6] In my original discussion of Kramer I describe him as claiming that incentives for compliance will be "undermined" by departures from the rule of law. Kramer objects to my use of the word "undermine" in preference to his favoured terms ("sap" and "weaken"), feeling that it misrepresents his position by suggesting a complete removal or negation of incentives. I consider this objection to be wholly groundless, since undermining (an activity carried out by "sappers"!) can consist in the removal of part of a foundation as well as the removal of the totality, and the substance of Kramer's argument embodies both possibilities. Nevertheless I will respect Kramer's preferred terminology in what follows.

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weaknesses in his theory that are highlighted by his present essay. I will argue that the essay offers a set of claims that can be reconciled with the thesis of Kramer's earlier book only by construing that thesis in a way that renders it trivial. Finally, I will endeavour to clarify my view of the necessary relationship between liberty and the rule of law, and to respond to Kramer's suggestion that no such relationship exists.

When I say that Kramer's claim concerning incentives is straightforwardly false, I do not mean that it is *obviously* false. Indeed, we may at first consider it to be obviously true, for it is very easy to fall into the line of reasoning that leads Kramer into error. If I am punished for breaking the law, but will also be punished if I obey the law, my punishment-based incentive to comply seems to have been reduced or even extinguished. A prudential judgment, in such circumstances, will be (as Kramer notes) a comparative one, and the upshot will depend upon the respective probabilities of the two punishments, and their relative severity. Or so it may seem.

A moment's reflection, however, should be enough to alert us to a problem in this superficially plausible way of reasoning. For it appears to assume a situation where there is one punishment that is conditional upon my violation of the law, and another punishment[7] that is conditional upon my compliance. In such circumstances it will of course be true that my incentives for compliance will be "sapped". What I hope to demonstrate, however, is that this misdescribes the relevant situation. Wicked regimes will not generally have good reason to impose punishments that are *conditional* upon compliance; but they will have good reason to use violence against people regardless of whether those people have complied with the existing legal requirements. Such reasons for deploying official violence will not characteristically be counterbalanced by any good reasons for complying with the rule of law.

Reasons for violence

I will begin by setting out a few of the very numerous reasons why a wicked regime might wish to depart from the rule of law. This is a desirable preliminary if we are to gain a proper understanding of the fundamental issue, but it is also made necessary by some of Kramer's criticisms of my original discussion.

[7] Some readers may consider it odd to speak of "punishment" where no legal prohibition has been violated. I am, however, simply following Kramer's own usage (a usage which strikes me as entirely sensible given the particular context of this discussion). When no published prospective rule has been violated, I will sometimes speak of "punishment", and sometimes simply of "violence" or "brutality".

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In the chapter of mine that Kramer is discussing,[8] I employ the example of a religious fundamentalist regime which seeks to suppress atheism. The regime enacts certain prohibitions bearing upon specific atheistic practices, but also employs violence against those who are believed to be atheists regardless of whether they have violated such a prohibition. Kramer objects that I have offered no reason why the regime should not simply enact a general prohibition on atheistic activities (thereby, as he sees it, complying with the rule of law) in addition to the more specific bans on particular forms of atheistic practice. Such a general ban, he says, "will more directly and perspicuously convey to potential atheists the message that their proclivities will not be tolerated".[9]

My argument (it should be remembered) is that a wicked regime will have good reason to publish rules and enforce them but will have no good reason for confining its use of violence to circumstances where a published and prospective prohibition has been violated: it will have no good reason to treat those who have complied with the law as therefore immune from the use of official violence. Consequently, it does not really matter what general or specific prohibitions are enacted: the regime will have no good reason for treating its own deployment of force as restricted by the published rules. No regime, be it good or bad, can anticipate all of the multifarious ways in which the conduct of citizens may subvert or obstruct the regime's attainment of its objectives. Activities that are consciously directed towards such obstructive effects, or that will foreseeably have those effects, may however be deterred even when the activities have not been specifically anticipated and prohibited. Appropriate deterrence may be achieved by ensuring that activities contrary to the governing regime's interests are punished regardless of whether they violate any existing prospective prohibition. Citizens contemplating some proposed course of conduct will thereby be encouraged to consider the likely impact of that conduct upon the governing regime's interests and concerns, or (more accurately) the regime's probable perception of that impact. The prospect of being punished, should the regime believe its interests and objectives to have been threatened by the conduct in

[8] *Central Issues in Jurisprudence*, chap. 7. In the second edition of my book I should perhaps have made clearer the fact that I no longer place reliance upon one argument from the first edition of my book, an argument that Kramer discusses in his present essay as the "First Strand" of my retort. The argument is not wholly unsound, but it raises complexities that I now see to be unnecessary in the light of my later argument (which Kramer describes as the "Second Strand"). At the time of writing the second edition of my book, I considered wholly withdrawing the earlier argument; but I felt that there was a little more to say, and so I let it stand alongside my later argument, noting only that there were grounds on which Kramer could reject it. I now see that my failure wholly to suppress the argument was an error which has led to avoidable confusion.

[9] Kramer, "On the Moral Status of the Rule of Law", p. 83.

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question, will deter citizens from engaging in conduct that may prejudice the regime's interests; it will also have a chilling effect upon attempts to devise new and therefore non-prohibited ways of subverting the regime's agenda.

Suppose that a general prohibition on "atheistic activity" is indeed enacted, in addition to the narrower prohibitions of more specific atheistic practices. If the rule established in law by the general enactment is a genuine rule, there must be a distinction between acts which comply with it and acts which do not. In so far as the rule is prospective and intelligible, these limits must be ascertainable in advance of the occasions for compliance with the rule. Hence it is always possible that unanticipated forms of conduct will emerge having a tendency to undermine the goals of the evil regime, or serving to foster and encourage elements hostile to that regime, but not captured by the relevant rules. It may be that cultural symbols such as forms of dress come to be employed to indicate one's sympathies for an oppressed group or prohibited activity. Perhaps wearing a baseball cap and carrying a bottle of Coca-Cola is seen as expressing sympathy for American liberalism, and therefore a lack of sympathy for the goals of our religious fundamentalists. The appearance of baseball caps in the streets of the city might in this way be a visible indicator that atheists and their sympathisers are still present in good numbers within the community of the religious. While in itself this might provide the regime with some useful information on the numbers and identities of dissidents, it could also provide encouragement to the regime's opponents within its borders and abroad, and could come to constitute a dangerous focal point around which opponents of the regime could identify each other, and so organise themselves. The wearing of baseball caps could in this way encourage atheists and present a threat to the survival of the theocratic regime.

Yet the wearing of a baseball cap could not in itself be said to be an "atheistic activity". A prohibition on the display of such cultural symbols is, of course, possible; but, in so far as such a prohibition meets the requirements of the rule of law, it must have ascertainable limits, and those limits create the possibility of new vehicles for the symbolic expression of allegiance being developed beyond the bounds of existing prohibitions. Subtle semiotic connections and cultural bonds might enable new forms of expression to develop and mutate with surprising ease. Such forms of expression could be threatening to the regime even if they could not plausibly be described as an expression of sympathy for atheism or American liberalism. Consider, for example, the

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demeanour that repressive regimes may expect and encourage amongst citizens in public space: regimes emphasising militaristic discipline may dislike and feel threatened by those who adopt a conspicuously relaxed or slouching posture, while austerely Puritan regimes may dislike a style of walking that is sufficiently fluid and rhythmic to be suggestive of dancing. Even a non-ideological but nakedly exploitative regime may dislike and feel threatened by the ordinary citizen who looks officials in the eye, and does not adopt a demeanour of cowed subservience.

Very subtle postures and responses may in this way convey an eloquent testimony of the citizen's lack of support for the regime; and the regime will have a strong incentive to discourage all such expressions of dissent. The reasons for such discouragement are quite independent of the regime's particular aims and objectives (whether wickedly prudential or ideological) for they spring from the regime's need to retain power. Visible dissent provides evidence that the regime does not enjoy universal popular support; such expressions of dissent also provide encouragement to dissenters by indicating that they are not alone, and may even be sufficiently numerous to have some prospect of successfully overthrowing the regime; and (most important of all) such expressions of dissent enable dissenters to identify each other, thereby facilitating the co-ordination of revolutionary or subversive activity.

A repressive regime that sought effectively to address such subtle but very real concerns within the rule of law might endeavour to do so by means of relatively specific prohibitions; but it would thereby find itself committed to a long series of enactments, seeking to address the constantly evolving forms of symbolic expression and subversive demeanour. This would not only make heavy demands upon legislative time, and divert energies from other projects, but might also expose the regime to ridicule. For, in so visibly being concerned to stamp out expressions of disaffection, the regime would appear to be seriously worried by the oppositional elements within its territory; at the same time, the steady flow of changing enactments would make the regime's efforts at repression look ineffective.[10]

It might of course be possible for a wicked regime to avoid at least some of these problems by enacting a legislative provision drafted in very general terms: a law might be enacted, for example, prohibiting "any acts that might be construed by anyone as expressive of lack of support for the regime, or support for its

[10] Rapidly changing laws would also violate one of the precepts of the rule of law acknowledged by Kramer.

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enemies'' (or something like that).[11] It is important to note that my thesis does not require me to deny the *possibility* of such a provision. What Kramer asserts, and I deny, is that a wicked regime will have good reason to observe the rule of law, such observance involving two aspects that are relevant at this point: the publication of rules, and the limitation of official violence to circumstances where a rule has been violated. It is therefore sufficient for me to show that a law of the kind envisaged would be no more effective than a disposition, on the part of the government, to retaliate against all those who in any way threaten its grip on power or obstruct its pursuit of its objectives; or, if such a law would make a positive contribution to the regime's goals (including its goal of retaining power), the government would nevertheless have no good reason to confine its use of violence to situations where the rule had been breached. In certain (relatively rare) circumstances, for example, a government might find it easy to disseminate amongst the public a knowledge of current legislation, but difficult to establish widespread public knowledge of the government's overall punitive policy and disposition. In such contexts, the enactment of a statute prohibiting dissent in very widely defined terms might have a useful role. Even in relation to such a situation, however, Kramer would still need to establish that the government would have good reason to confine its use of violence to instances of conduct falling within the statutory prohibition; and on this issue, his argument depends wholly upon his claim about the sapping of incentives, to which we will turn in a moment.

Whether or not it chose to enact some general catch-all provision, a wicked regime would have no good reason for eschewing what is by far the simplest option: to let the Party's thugs beat up anyone who is suspected of oppositional sympathies. A system of spies and infomers might ensure that the thugs were tolerably well-informed about such matters, with the careful cross-checking of reports being employed to identify and discourage false accusations (particularly by members of oppositional groups falsely representing themselves to be loyal government supporters). By instilling into the populace a deep fear of official brutality one would give all citizens a strong incentive for suppressing any desire to express oppositional sympathies, and ample reason to simulate enthusiastic support for the governing regime. Whereas observance

[11] As laws become more general and "catch-all" in character, an obvious question arises as to whether they really create followable rules in such a way as to comply with the requirements of the rule of law acknowledged by Kramer. I can afford to set this issue on one side, however.

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of the rule of law would encourage dissidents to explore the interstices of liberty left by the rules, the use of illegal violence would greatly reduce or wholly remove dissident cultural symbols from the streets; and all of this might be done without any governmental acknowledgement of concern for the expression of dissent: "We members of the government are untroubled by the wearing of baseball caps, but are not surprised that our most loyal supporters are thrown into a rage when they see such symbols of imperialism on the streets of our glorious capital!"

While accepting that it makes no difference to the soundness or otherwise of my arguments, Kramer objects to my example of religious fundamentalists, on the ground that his thesis concerns regimes driven by self-interest rather than fanatical and misguided moral or religious views. To simplify matters, therefore, I have tried to concentrate upon an objective that a regime of religious fundamentalists will share with all other wicked regimes: the aim of staying in power. Let us now think a little further about that aim.

One of the most important weapons in the armoury of a wicked regime is its ability to structure social interaction in such a way that it becomes very difficult for individuals opposed to the regime to identify other like-minded persons. This is best done by ensuring that everyone has a strong prudential interest in the expression of support for the regime: dissenters and critics will be punished. Spies and informers will assist in maintaining the pervasive nature of the threat, and in robbing potential dissenters of any sense of secure domains within which opposition may safely be voiced. Furthermore, the extensive use of *agents provocateurs* may encourage even those who are opponents of the regime to serve as informers on other opponents: for when you voice your (genuine) loathing for the government, how am I to know that you are not an agent of the government, testing my willingness to inform on such dissidents?

Dissenting individuals will obviously find it harder to identify their like-minded fellows if everyone is compelled by fear regularly to express their enthusiasm for the current regime. One way in which this might be done would be to enact a law requiring the giving of Nazi-style salutes in certain (frequent) circumstances. Another way would be to make it clear, by action rather than words, that people who do not seem genuinely enthusiastic about the Party (and therefore fail to evince their support by the giving of heart-felt salutes) are likely to suffer violence at the hands of Party thugs. Which course would be adopted by a well-advised and thoroughly wicked regime? The legislative course would almost certainly be counter-productive. For, if the legal prohibition is to be

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clear and followable, it must define what is to count as a salute, what are the appropriate circumstances for giving a salute, and so forth. Such definitions will almost certainly create the possibility of performing ironic or mocking forms of salute that would nevertheless count as complying with the legal requirement. A salute with the arm raised rather limply, or a quiet smile accompanying the stiffly raised arm, might actually serve to proclaim one's opposition, and so assist dissenting individuals to identify their like-minded potential allies. Where Party thugs hold sway, by contrast, all but the most heroic people will be concerned to do everything they can to convince the regime of their loyalty: your slightly unenthusiastic salute may be combined with other items of information about you to convince the regime that you are due for a beating.

When brought into the context of such scenarios, Kramer's insistence that the regime will be well advised to adhere to the rule of law because that is the best way of conveying its intentions to the populace begins to seem almost childlike in its simplicity and unworldliness. How is the air of unreality that pervades Kramer's argument to be explained?

At one point in his essay, Kramer accuses me of obfuscation when I say that much of the debate on this subject "revolves around rival assertions regarding the probable or possible behaviour of wicked regimes. Would they have good reasons for establishing and respecting the institutions of law?"[12] Kramer objects that only my second sentence accurately captures the issue in debate, while the first sentence adverts to a purely empirical issue. In writing the two sentences in question, I naturally assumed that readers would observe the interpretative principle that requires each sentence to be read in its context, which includes the immediately following sentence. Judged by that mundane interpretative principle, I think that the relevant passage makes it perfectly clear that this is a debate about what reasons evil regimes have for acting in certain ways, and not a question about how they actually will or may act. At the same time, I find it surprising that Kramer appears to think that these questions can be so entirely disconnected. It was because I never imagined that anyone could seriously take such a view that I wrote the supposedly "obfuscatory" passage to which he objects. If evil regimes have good reason to observe the rule of law, we would expect them to recognise and be guided by those reasons, at least to some extent. If this appears not to be the case, we should at the very least be

[12] *Central Issues in Jurisprudence*, p. 226.

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put upon inquiry. Empirical inquiry can in this way alert us to possibilities that we have overlooked, or errors in our own reasoning. We will see in the next section that Kramer is guilty of at least one serious error of reasoning that might have been avoided in this way.

Given the charge of obfuscation, I must emphasise that my present discussion is not concerned with what evil regimes *probably will* do, or *have in fact* done in the past: it is concerned with what they *have good reason* to do, given their evil aims. At the same time I regard a knowledge of the actual history of evil regimes as widening our appreciation of possibilities, and sometimes as confirming the results of our armchair reflections.

The regime would, of course, need to keep its bully-boys under control and prevent them from deploying their well-exercised muscles against the regime itself. But this could be achieved by techniques similar to those employed to ensure that soundly-based information is being garnered: there would be checks upon checks, and each individual thug would be located within a strategic context that made it difficult to develop with other thugs any co-operative arrangement aimed at subverting the regime.

Kramer frequently mentions the role that observance of the rule of law may have in co-ordinating the activities of officials. In this way, he directs our attention to those respects in which all the members of the regime have shared interests and goals. Even those with shared interests at one level, however, may have divergent interests at another. For example, individuals may all stand to profit from the maintenance of the regime (and so have shared interests) while being locked in conflict over the division of the spoils; or individuals may be united in their support for the Party's objectives, but may construe those objectives in slightly different ways, or may wish to emphasise slightly different aspects of the Party's overall agenda. In relation to such conflicting interests, observance of the rule of law will help to determine the forms of strategic behaviour that are available to various individual members of the governing regime. A regime's choice between observance and non-observance of the rule of law will therefore serve to structure the strategic opportunities enjoyed by individual members of the regime.

The reasons for departure from the rule of law examined up to this point have concerned the relationship between the governing regime and the governed population. Once we consider the relationship between various individual members of the governing regime (and between individual members and the regime as a

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collectivity) a whole new crop of reasons for violence comes to light.

Suppose, for example, that our regime observes the rule of law, and that this observance takes the form of rules being enacted by a legislature and then being interpreted and enforced by the courts. A rule prohibiting "atheistic activity", for example, must be construed by the courts, and their interpretation must be given consistent effect if the rule of law is to be observed. There is an obvious risk here that judges may use their role within the institutions of law to extract large personal gains; or they may use their role to shape the Party's agenda in ways that would not be favoured by the non-judicial members of the regime. Such exploitation of the judicial role might take one of two forms: judges might directly interpret the laws in a manner favourable to themselves and their cherished projects; or they might extract from the government personal gains (in the form of higher salaries or other privileges) or political concessions as the price for judicial co-operation in an interpretation of the law compatible with the regime's objectives. In deciding whether to enact general rules for judicial enforcement, or to rely upon the violence of the regime's thugs, therefore, a wicked regime will have to rely upon an assessment of which groups of officials or supporters occupy the strategically most powerful bargaining position for the extraction of personal or policy gains.

Even if the judges are entirely well-disposed towards the objectives of the current regime, and are not concerned to extract any large personal or political gains from their role as authoritative interpreters of legislation, the non-judicial governing members of the regime may well fear the consequences of placing power in the hands of the judges by allowing them to determine the precise meaning and effect of (for example) a prohibition on atheism. Judges educated in a specific legal tradition may be particularly likely to arrive at interpretative conclusions that conflict with the expectations of those who enacted the rule. In any case, the government may fear becoming bogged down in legal technicalities that may render the prohibition less rather than more effective. For all of these reasons, reliance upon Party thugs may seem preferable to reliance upon the judges.[13]

I have now, I think, offered a number of examples from the very various reasons that might lead evil regimes to depart from the rule of law. Reliance upon forms of official violence outside of

[13] I am, of course, not suggesting that these are the only options: one could dismiss the existing judges and replace them, for example. My point is simply that considerations of this sort will often serve to strengthen a more general case for reliance upon Party thugs rather than judges.

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the rule of law will, no doubt, sometimes have a down-side; but such negative features must be balanced against the possible benefits. Even where a down-side exists, there is no good reason to assume that the balance of advantage, when judged from the self-interested viewpoint of a wicked regime, will typically favour the rule of law. Kramer is led to a different conclusion by errors of reasoning that I will now identify.

The fundamental issue

Kramer insists that "if people often undergo punishment even when they have conformed closely to the prevailing legal norms ... the inducements for them to abide by those norms will be markedly sapped".[14] It is this claim that I say is straightforwardly false. Let us see if I am right.

Remember that we are considering the situation of a citizen within the context of a regime that publishes rules and enforces them by official sanctions, but also employs brutality quite independently of the published rules. Kramer suggests that, in considering the prudential incentives to obey the law, such a citizen faces a comparative judgment. On the one hand is the probability that he will be punished if he breaks the law; on the other hand is the probability that he will be punished[15] if he obeys the law. If the former probability is 90% and the latter probability is 5%, the citizen still has a powerful incentive to obey the law; but if the former probability is 90% and the latter is 50%, the citizen's incentives to obey "will have waned considerably".[16] If the latter probability goes up to 90%, punishment-based incentives for compliance will have been wholly negated.

Kramer's reasoning may at first seem to be obviously correct. In fact, it rests on an error. For the question faced by the citizen in such a context will involve a comparison between two probabilities only if the two punishments are *alternatives*. But the punishments will be alternatives only in the most bizarre circumstances: namely, those where there is a punishment conditional upon non-compliance, and another punishment conditional upon compliance. Yet none of the forms of departure from the rule of law that an evil regime would have reason to adopt would involve punishing people *because* they have obeyed the law, or *conditionally upon* such compliance. The beatings by thugs typically (and with good reason) employed by such regimes are carried out regardless of whether the

[14] *In Defense of Legal Positivism*, p. 69.
[15] See note 7 above.
[16] Kramer, "On the Moral Status of the Rule of Law", p. 86. Like Kramer, I here ignore variation in the gravity of punishment.

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law has been obeyed or not: they are not reserved for the law-abiding. My original argument was that evil regimes have no reason for treating the law-abiding as *immune* from official violence; at no point did I make the absurd suggestion that evil regimes might sensibly choose to establish punishments that are *conditional upon* compliance.

The citizen within an evil regime who assesses his punishment-based incentives for compliance with the law will not, therefore, face a situation that requires the comparison of probabilities in the way envisaged by Kramer. It will not be the case that he faces (say) a 90% chance of punishment if he breaks the law, and a 50% chance of punishment if he obeys it. Rather, he will face a 90% chance of punishment if he breaks the law, in addition to a 50% chance of punishment that will be suffered in any event, regardless of whether he obeys or not.

I believed that I had explained this point sufficiently clearly in my original discussion. If someone of Kramer's intelligence can so thoroughly fail to grasp the argument, I was evidently less clear than I had imagined, and I am therefore grateful to him for providing this opportunity for clarification. At the risk of boring the reader who got the point long ago, therefore, let me illustrate it further by means of some narrative description rather than abstract analysis.

Let us suppose that Joe is not a supporter of the current regime, but nor is he a hero. From time to time he expresses mild scepticism about the regime, but he has never gone so far as to voice his real views, confining himself rather to the type of mild grumbling about the government that is common amongst most citizens of even very benign regimes. Nevertheless, spies and informers in his work-place, and in his domestic environment, have reported these remarks to the authorities. Sometimes his remarks have been reported to the government by citizens far more actively opposed to the regime than he is himself. Such informing dissidents have been seeking to cast around themselves a smoke screen by creating an impression of loyalty to the powers that be. The fact that Joe's scepticism and dissent is very genuine and persistent, but also relatively mild, has provided them with a good opportunity for such a smoke screen. Accusations levelled at Joe will be convincingly sincere, because they will tally with other information that the regime is likely to have collected; similar accusations levelled at those who are in fact Party supporters might well fail to convince, and so would backfire upon the informers. At the same time, because Joe's dissent is always mild, the dissident informers will know that Joe's punishment will be relatively light, and they

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are therefore prepared to contemplate the causing of harm to a kindred spirit in furtherance of their greater political objectives.

Joe may be well aware that, while he has always managed to avoid full-blooded expression of his hatred of the regime, he cannot fake real enthusiasm for it, nor can he wholly suppress his tendency to grumble. He accepts, therefore, that from time to time he is likely to receive a beating at the hands of Party thugs. The thugs have every reason to give Joe such beatings, for they will discourage him from pepping up the venom of his articulated grumbles, and might even encourage him to try and bring an end to such beatings by becoming a useful and reliable informer. The beatings will also, of course, serve as a warning to others.

In consequence of these facts, Joe faces, let us say, a 50% chance of being beaten in the next year. He is now confronted with a law requiring him and all other citizens to display a Party flag on the anniversary of the sacred revolution. He faces a 90% chance of being punished if he does not display the flag. Now, has the 50% chance of a beating "sapped" his incentive to comply with the law requiring a flag to be displayed? To imagine that it has so sapped his incentive is to misconceive the situation: it is to think of Joe's situation as one wherein he faces a 50% chance of a punishment if he obeys the law, and a 90% chance of punishment if he breaks it. This is a mistake, however. The true situation is that Joe faces a 50% chance of a beating by thugs *whether or not he obeys the law*, and a 90% chance of punishment *in addition to his beating* if he breaks the law. Hence it would not matter if the chance of a beating was 90% rather than 50%: Joe's incentive for compliance with the law would still be unaffected. As I explained in my original discussion of this matter, the fact that you will punish me if I break the rules gives me a good reason for compliance even if you frequently beat me independently, for "the beating in consequence of breaking the rules will be an additional beating that I could have avoided by compliance".[17]

It should not be imagined that this argument is in any way affected by Joe's ability or inability to reduce or eliminate the risk of a beating. Perhaps, with resolute effort, Joe may learn to suppress his feelings entirely, and so come to be perceived as a loyal supporter of the Party. Whatever the impact that this has upon his chances of a beating, however, his incentive to comply with the law will remain unaffected.

[17] *Central Issues in Jurisprudence*, p. 232. This passage is quoted but not grasped by Kramer, for he persistently fails to notice that the beating consequent upon failure to comply with the published rules will be *an additional* beating. His confusion is evident at p. 88 (penultimate sentence) where he speaks of Joe suffering "that" beating if he complies, the word "that" referring back to the beating Joe will receive if he does not comply.

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As I explain in my original discussion, the only situation where Kramer's argument has any apparent force is where a citizen has to choose between two ways of pursuing some activity which is objectionable to the government, but where one mode of pursuit is prohibited and the other is not. If both forms of activity are equally likely to incur punishment, the citizen has no incentive to adopt the rule-conforming mode rather than the rule-violating mode. However (as I explain in my original discussion), by the same token the citizen has an equal incentive to abstain from *both* forms of activity. As I say there, "I can see no reason why an evil regime would be troubled by this situation; indeed, such a situation would in all probability be highly desirable from the viewpoint of such a regime. Consequently, I can see no force in Kramer's argument".[18]

In one respect, I somewhat understated the position in my earlier piece. For, if Joe breaks the flag-display law, the authorities may well revise their opinion that he is an unthreatening and half-hearted critic of the regime: he may be seen as somewhat more heroic, and therefore potentially more threatening. His beatings are likely to grow more frequent or more severe in consequence. In this way, official violence outside the bounds of the rule of law may actually stiffen incentives to comply with the law.

In general, however, policies adopted by the regime can alter incentives for compliance (either by weakening or strengthening them) only if they differentially affect those who have obeyed the published rules and those who have broken them. A wicked regime will maintain incentives for compliance by trying to ensure that those who break the published rules suffer punishment as a result. But they will also (for various reasons, some of which we have illustrated) deploy violence against citizens regardless of whether they have violated the published rules or complied with them. In being thus unrelated to the citizen's compliance or non-compliance with published rules, such extra-legal violence will have no effect upon incentives.

Legality for some but not others?

It is, of course, the *relative* severity of punishment (relative, that is, to the situation of those who have obeyed the law) that is important in determining the strength or weakness of incentives for compliance. One may therefore strengthen such incentives by improving the position of the obedient, as well as by worsening the position of the disobedient. Incentives for compliance with the

[18] Simmonds, *loc. cit.*

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published rules can therefore take the form of benefits that are consequent upon compliance, or disbenefits that are consequent upon non-compliance. One possible benefit that a governing regime can confer is immunity from the use of official violence beyond the scope of the published rules. Suppose, then, that the regime promises all meticulously law-abiding citizens that, in future, they will enjoy such immunity from extra-legal official violence. An assurance of this sort promises to confer upon the consistently law-abiding a considerable benefit. The assurance will affect incentives for compliance, however, only if no similar assurance is extended to those who have not meticulously complied with the law. We might envisage a situation, for example, where those who have broken the law are exposed (indefinitely or for a set period after their offence) to official violence outside the framework of published rules, while those who have, on every occasion, complied with the law suffer no similar exposure. An arrangement of this kind would stiffen incentives for compliance with the law very considerably; for, in addition to the fine, imprisonment or flogging that is consequent upon violation of the published rules, lawbreakers would now face an uncertain future of exposure to official beatings, an exposure which might have been avoided by compliance with the rules. Is this an example of the rule of law serving to stiffen incentives for compliance?

A proposal to extend the rule of law only to those who consistently obey the law may well be thought to fall a long way short of adequate compliance with the rule of law; but we would be unwise to assume on that ground alone that Kramer might not seek to invoke such examples. For (as we will see in a moment) Kramer now seems to have watered down the thesis developed in his book. In that book, he appeared to undertake to demonstrate that a wicked regime would have good reason for complying with the rule of law to the same extent as a benevolent regime.[19] In his present essay, however, he emphasises that wicked regimes may deviate from the rule of law to a greater extent than would benevolent regimes. This shift threatens to reduce his position to triviality, but it also opens up a space within which situations of the type now described might be envisaged and invoked.

It might in any case be suggested that, since the example envisages a situation where exposure to official violence can be avoided by meticulous compliance with the published rules, the exposure is a punishment administered *in consequence* of violation of a published rule, and so in compliance with the rule of law.

[19] *In Defense of Legal Positivism*, p. 238.

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Such an analysis emphasises the sense in which the proposed penal policy is structurally identical to a straightforward increase in the severity of punishment for breach of the published rules, which would of course stiffen incentives for compliance. However, to increase the relative severity of punishment by conferring the protections of the rule of law upon the obedient would purchase stiffened incentives at a very high price. For the use of the rule of law as a bonus for the obedient involves forgoing, in relation to all those who obey the published rules, the many advantages that can flow to the regime from the use of extra-legal brutality in preference to published prospective rules (some examples of these advantages having been set out earlier in the present essay). Incentives may be stiffened, but only at an extravagant and easily avoidable cost. The same benefits might be achieved at a far lower cost, simply by stepping up the level of punishment prescribed for law-breaking: twenty lashes could be replaced by fifty lashes, for example.

False accusations and underinclusiveness

At one point in his latest essay, Kramer suggests that a regime that departs substantially from the rule of law will be "significantly under-inclusive ... in its punitive measures against uncompliant people". This will be "because of the relatively low level of co-ordination among its officials and because of the relatively abundant opportunities for corruption on their part".[20]

Throughout the illustrative examples that I have offered in the present essay, I have sought to make it clear that the organisation of the regime's internal workings can be very sophisticated. This is in fact what we would expect, particularly within a regime dedicated to self-interested prudential goals. For a regime that is collectively "on the make" will inevitably be aware of the possibility that its individual officials may use their position as an opportunity for making personal gains even at some cost to the shared interests of the members of the regime as a whole. Elaborate systems of monitoring and cross-checking are likely to be in place to eliminate or constrain such opportunities for individual corruption. I know nothing about the workings of the Mafia, but pulp fiction and the outpourings of Hollywood would lead one to believe that the organisation is not noted for its inefficiency in pursuing and punishing those who betray or threaten it. Hit-men may well have regular opportunities to accept bribes from their intended victims, in return for sparing the victim's life; but the

[20] "On the Moral Status of the Rule of Law" p. 88.

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bosses who direct the hit-men will be aware of such opportunities, and will be careful to seek confirmation that the job has been done. The same system of cross-checking and confirmation is likely to apply all the way up the management ladder.

Something similar is true of the co-ordination of official conduct. It is of course true that, within regimes committed to the rule of law, that very commitment provides the basis for the co-ordination of official conduct; but it does not follow from this that commitment to the rule of law is the only, or even the best, way in which official conduct may be co-ordinated. A wicked regime that finds good reasons to depart from the rule of law can (in relation to those departures) co-ordinate its internal workings in other ways: it may have suitable procedures, management structures and information gathering systems, without observance of the rule of law in relation to the populace.

Kramer also suggests that departures from the rule of law will lead to false accusations against the regime's devout supporters. This will, he suggests, lead to those devout supporters becoming alienated from the regime. While they might still co-operate with the regime out of fear, they will no longer be inclined to co-operate "in an enthusiastic manner bred of sympathy".[21]

It is somewhat surprising that Kramer regards sympathy as a more powerful motivating factor than fear. In the illustrative examples I have employed, I have endeavoured to suggest some of the ways in which a wicked regime can ensure that fear pervades social relationships to such an extent that ordinary and unheroic people are compelled to act in a manner that seems to evince real enthusiam for the regime, and is in that sense indistinguishable from the behaviour of a truly enthusiastic supporter. Indeed, there are good reasons for thinking that most people are unwilling to make substantial personal sacrifices on behalf of altruistic or impersonal projects, however well-disposed they may feel towards such projects. We might well expect them to find well-grounded fear a more compelling and unwavering motivator.

Even if Kramer is correct in his heart-warming assumption that sympathy motivates more powerfully than fear, I see no basis for thinking that departures from the rule of law of the type that I contemplate in my argument will encourage false accusations and the consequent beating of loyal supporters. My thesis is that a wicked regime will have no good reason for treating those who have obeyed the existing laws as immune from official beatings: but the possibility or prevalence of false accusations and beatings

[21] "On the Moral Status of the Rule of Law" p. 81.

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depends upon the procedures used by the regime to collect information and determine the occasions on which beatings will be ordered. These two issues are separable. We can envisage a regime that punishes only for violation of published prospective rules, yet is remarkably poor at gathering accurate information.[22] Equally, we can envisage regimes that are meticulous in their gathering, monitoring, and utilisation of information, but do not restrict their use of violence to circumstances where a published prospective rule has been violated.

Admittedly, I failed to make it clear in my original discussion that a regime may depart from the rule of law (in the manner envisaged by my argument) while retaining sophisticated procedures for getting and utilising information. I took this to be more or less obvious. Kramer may well have been misled here by the terminology that I employed in my original discussion, and that I now realise to have been potentially misleading. For I there spoke of evil regimes as punishing in an "unregulated" manner. I was using the word "unregulated" in the sense of "not governed by rules"; and I was thinking of rules governing the conduct of potential victims of punishment, not of rules governing the regime's structure of management, assuming that the context of the discussion made this sufficiently clear. Some of my other observations may also have contributed to an erroneous impression in this regard. I wanted to emphasise that the predictability or unpredictability (from the citizen's viewpoint) of official violence would not affect the basic unsoundness of Kramer's argument concerning the "sapping" of incentives for compliance, and I therefore discussed (as one of two possible scenarios) a situation where official violence was "random". Unfortunately this discussion may have added to the impression that my argument concerned wild and chaotic violence, rather than carefully measured violence that is not restricted to the enforcement of published prospective rules.

Discernible patterns

My emphasis upon the sophistication of management structures within an evil regime may, however, be thought to leave my argument open to another of Kramer's lines of attack. For he

[22] Indeed, this may be true of those modern liberal regimes that fail to gather accurate information about persons resident within their territory because they wish to avoid the accusation that they constitute a "police state". Those who assume in this way that the collection of information by government is somehow incompatible with liberalism might like to remember that the most eloquent defence of police state techniques for evidence gathering is to be found in one of the classic texts of liberal political theory. See J.G. Fichte, *Foundations of Natural Right*, edited by F. Neuhouser, translated by M. Baur (Cambridge 2000), pp. 254–263.

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suggests at one point that punishments which are not "unpredictably capricious and continually shifting" might give rise to "clear and established patterns that are discernible by citizens who acquaint themselves with the regime's punitive measures", and he suggests that this would be sufficient to constitute "governance through the rule of law".

Let me make it clear, therefore, that the sophisticated management structures and information-gathering techniques that I have described above need not give rise to "clear and established patterns" governing the circumstances in which official violence may be deployed. In the first place, the procedures may simply aim at filtering out certain possibilities from the range of options available to low-level officials in their choice of punitive measures. The concern may be, for example, to ensure that a proposed victim of official violence is not a loyal supporter of the regime. Known dissidents may simply be left to the capricious whims of the regime's "enforcers", in the confident knowledge that those enforcers are unlikely to view the situation as one calling for an exchange of Christmas gifts.

Quite apart from such minimal filtering forms of management control, there is no reason why official deliberations on the use of violence in individual cases should follow "clear and established patterns" in any relevant sense. Citizens might come to realise that various factors are regarded by the regime as relevant to the ordering of punitive measures, but the way in which such considerations will be balanced out in an individual case will be far less predictable. Furthermore, the overall political situation of the regime will have an important bearing upon such decisions, but a bearing that is far from clear-cut. Perhaps there is a currently urgent need to reassure a major foreign investor of the regime's stability (for example): but will this be construed by the regime as an argument for fewer beatings of dissidents or for more beatings? Like other political or management decisions, decisions on the use of violence may be carefully measured and controlled while being responsive to the unique combination of features that characterises each political situation. Such management decisions can be reasoned and soundly-based in prudential considerations without following discernible patterns of a kind that might serve as rules to guide the citizen's conduct.

Deviations

Most lawyers take the phrase "the rule of law" to refer to a guiding ideal and critical standard for legal systems. In this sense, a regime may constitute a legal system and yet fall short of full

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compliance with "the rule of law". In his opening sentence, Kramer tells us that he is using the phrase "the rule of law" to refer to "nothing more and nothing less than the state of affairs that obtains when a legal system exists and functions".[23] So it might seem that he is *not* discussing the moral status of a familiar guiding ideal for legal systems, but is instead focussing on the question of whether any moral consequences must of necessity flow from the sheer existence of a legal system. These two inquiries might well strike us as quite distinct, and our uncertainty as to which one of them is being addressed by Kramer will then only be increased when we are told that a regime may depart quite substantially from the rule of law "without depriving it of its general character as a regime of law".[24] If the rule of law is simply "the state of affairs that obtains when a legal system exists and functions", how can a legal system exist while failing to satisfy the requirements of the rule of law?

Kramer's reply would be, of course, that the basic precepts of legality may be satisfied to varying degrees. To qualify as a legal system, a regime must satisfy each of the requirements "to a substantial degree";[25] but a regime may satisfy the requirements of the rule of law to the degree that is adequate for it to count as a legal system, while nevertheless falling well short of perfect compliance. Hence legal systems may "depart quite substantially from the rule of law" without ceasing to be legal systems.

There is room here for a certain ambiguity in Kramer's main thesis. In claiming that "the rule of law is not an inherently moral ideal", is Kramer disputing the moral status of the idea represented by the basic precepts of legality, from which all systems will fall short to a greater or lesser extent? Or is he simply arguing that wicked officials would have good reason to comply with those precepts to an extent sufficient to qualify their regimes as "legal systems"?

Only on the first interpretation would Kramer's thesis be a significant and interesting claim. The disagreement between Kramer and myself arose out of our respective discussions of the work of Lon Fuller, and nothing in Fuller's work would commit him to a denial of Kramer's thesis on the second interpretation. The fact that Kramer takes his thesis to be inconsistent with Fuller's theory is therefore a powerful argument in favour of the first interpretation of that thesis.

[23] "On the Moral Status of the Rule of Law" p. 65.
[24] "On the Moral Status of the Rule of Law" pp. 83–84.
[25] "On the Moral Status of the Rule of Law" p. 65.

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To make this point a little clearer, we might distinguish between two different types of concepts, which I will call "class concepts" and "archetypal concepts". The concept of a "bachelor" is an example of a class concept. The concept is defined by a set of criteria, all entities that satisfy those criteria are bachelors, and only entities that satisfy those criteria are bachelors. Moreover, while all bachelors may not be equal, all bachelors are equally bachelors.

The concept of a "triangle" is an example of what I shall call an "archetypal" concept. Triangles are defined by a mathematical definition, but the requirements of the definition will not be fully satisfied by all actual instances of triangles. Indeed, there may be no real-world exemplars of the mathematical archetype. The actual instances of triangles that one comes across in the real world constitute triangles in virtue of the degree to which they approximate to the ideal "triangle" of mathematical definition. So triangles do not constitute triangles by satisfying a set of criteria, but by approximating to an ideal archetype; and not all triangles are equally triangles: they are triangles to the degree to which they approach the ideal. The triangle I roughly sketch on my pad is only just a triangle, while the diagram of a triangle in the mathematics textbook is much more of a triangle, though still not perfect.

Fuller thinks of the concept of "law" as an archetypal concept (my term, not his) rather than a class concept. His argument in *The Morality of Law*[26] can be analysed as consisting of two steps. In the first step, he argues that the concept of law is an archetypal concept. That is to say, we understand particular regimes as instances of "law" or "legal systems" by the way in which they approximate to a certain archetype: the idea of total compliance with the eight principles or "desiderata" of the rule of law. All legal systems will fall short of this archetype to a greater or lesser extent.[27] In the second step, he argues that the archetype in question (the desiderata, when taken collectively) is recognisable as a moral ideal.

To attack Fuller, one needs to attack one of these two steps. One must show *either* that the concept of "law" is not an

[26] Lon Fuller, *The Morality of Law*.

[27] In *The Morality of Law*, Lon Fuller seems to take the view that perfect compliance with the eight "principles" of the rule of law is impossible in the circumstances of the real world. Thus, he tells us that the idea of perfect compliance with the eight principles "is not actually a useful target for guiding the impulse towards legality", and (at another point) that "the utopia of legality cannot be viewed as a situation in which each desideratum of the law's special morality is realised to perfection." (Fuller, *The Morality of Law*, pp. 41, 45). An Aristotelian in this respect as in so many others, Fuller presumably thinks that we need the never-fully-articulable wisdom of the *phronimos* if we are to see what the rule of law requires in particular sets of circumstances.

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archetypal concept, *or* that the archetype in question does not represent (to borrow Kramer's phrase) "an inherently moral ideal". A simple demonstration that wicked regimes may nevertheless qualify as "legal systems" would challenge neither step. Indeed it would not be inconsistent with Fuller's thesis at all: Fuller would simply add that such wicked regimes count as legal systems only in virtue of the degree to which they resemble the archetype.

The natural way to interpret Kramer's thesis is as a challenge to Fuller's second step. That is to say, in seeking to show that "the rule of law is not an inherently moral ideal", Kramer is (on this interpretation) arguing that the archetype is not a moral ideal. His challenge is to the moral status of "the rule of law" understood as a guiding ideal and critical standard for legal systems; and his challenge consists in the demonstration that compliance with the precepts of the rule of law is as serviceable for evil as for good. That is to say, wicked regimes motivated by purely prudential motives will have good reason for complying with the requirements of the rule of law.

What precisely would Kramer have to establish to sustain his thesis when it is construed along these lines? It would clearly be unreasonable to ask him to show that a wicked regime would have good reason for complying fully or perfectly with the principles of the rule of law: for, as Fuller would have readily conceded, even the most benign regimes must fall well short of *that* standard. At the same time, Kramer would set himself too low a standard if he sought only to demonstrate that wicked regimes might with good reason comply with rule of law requirements to an extent sufficient to render the label "legal system" applicable to them. For Fuller says nothing that is incompatible with that claim. If Kramer wishes to show that law is an intrinsically neutral instrument, as serviceable for bad purposes as for good, he should aim to demonstrate that wicked officials will have good reason to comply with rule of law requirements to just as great an extent as would the officials in a benevolent legal system. In a passage on p. 238 of his book, he appears to say just that (we will see in a moment that the passage contains a key ambiguity); and it was this test that I took for granted when I developed my original criticisms of Kramer's thesis.

At times Kramer's choice of words has a tendency to suppress or conceal the distinction between Fuller's two steps, and the two different ways in which Kramer's own thesis might be construed. A good example is to be found on p. 62 of his book *In Defense of Legal Positivism*. He there tells us that "When a regime has satisfied the Fullerian conditions for the existence of a legal system,

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it has gone as far as is reasonably possible toward providing everyone with a fair opportunity to conform to applicable mandates and prescriptions".[28] This proposition is correct only if we construe the phrase "satisfied the Fullerian conditions for the existence of a legal system" as referring to a very high degree of compliance with the eight principles. But a regime can count as a legal system for Fuller while falling a long way short of that standard. Indeed Fuller tells us little or nothing about the standard of compliance that must be satisfied by a regime if it is to count as a legal system. He rightly regards this as in itself a trivial and uninteresting question that merits consideration only in so far as our conceptual intuitions about what does or does not count as a legal system can point us to the archetype that in his view informs and underlies those intuitions. Once we have grasped the archetype, we see that qualifying as a legal system is a matter of degree, and not a matter of a boundary that can fruitfully become a subject of intellectual contestation.

A similar ambiguity is to be found in the passage (mentioned above) from p. 238 of his book, where Kramer, writing of wicked officials, offers the following claim:

> [T]here will be strong reasons for those officials to endow their regime with the essential characteristics of law ... to just as great an extent as would be undertaken by the officials in a benevolent legal system.[29]

This passage could be construed in two different ways. On one interpretation, Kramer is saying that a wicked regime will have good reason to comply with the rule of law to the same extent as a benevolent regime. On another interpretation (let us call it the "threshold" view) Kramer is saying that a wicked regime will have reason for complying with the requirements of the rule of law up to the point where the regime qualifies as a clear (non-marginal) instance of a legal system: the regime will, in other words, reach some notional threshold for constituting a clear instance of a legal system, and will cross that threshold as decisively as would a benevolent regime. Even though the benevolent regime may approximate more closely to the ideal of full compliance with the rule of law, the benevolent and wicked regimes will be equal in regard to their threshold-crossing. Just as all bachelors are equally bachelors, all threshold-crossing regimes are equally threshold-crossing regimes: the fact that, beyond the threshold, the regimes

[28] *In Defense of Legal Positivism*, p. 62.
[29] *In Defense of Legal Positivism*, p. 238.

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differ in their degree of compliance with the rule of law is (on this interpretation) treated as irrelevant.

The natural way to construe Kramer's claim is the first interpretation. Kramer is, at this point in his book, responding to Finnis's well-known argument that the concept of law must be understood by reference to "focal" instances of law.[30] Focal instances of law are not necessarily the statistically most frequent instances. As Kramer acknowledges, the contrast between focal and non-focal instances is a distinction "between the fully developed or flourishing and the shallow or derivative".[31] In this respect, there is a strong resemblance (albeit one falling short of complete identity) between Finnis's notion of "focal instances" and what I have described as Fuller's notion of the "archetype". Finnis's focal instances seem to be real-world instantiations of law, while Fuller's archetype is an intellectual pattern or ideal that is only imperfectly instantiated in actual institutions; but both theories involve the notion of particulars constituting instantiations of the concept by approximation to an (empirical or noetic) exemplar. If we construe Kramer's claim in a way that would make it appropriate to its context (criticism of Finnis and Fuller), we must adopt the first interpretation.

The threshold interpretation, by contrast, not only creates a substantial mismatch between Kramer's arguments and the actual theses defended by those whom he attacks, but also sits uneasily with the opening passage of his present essay, as well as with his decision to present the thesis of the essay as one concerning "the rule of law", rather than simply concerning "law". For his opening paragraph tells us that a social formation will count as an instance of law when it exhibits a substantial degree of compliance with Fuller's eight precepts. He therefore accepts that particulars count as instances of the concept in this case by resemblance or approximation, which is inherently a matter of degree. Once we have agreed, however, that instances of law count as such instances by approximating to the ideal of Fuller's eight precepts, nothing is lost if we dispense with the notion of a domain of equal threshold-crossers. Since the criterion for legal status is a matter of approximation to the Fullerian ideal, the "threshold" is really but a shadow cast by our application of that criterion: it plays, as it were, no working part in our thinking, but is merely epiphenomenal. The notion of a conceptual domain within which all instances are equally threshold-crossing instances can therefore be seen to be a superfluity, which seeks to preserve the structure of

[30] John Finnis, *Natural Law and Natural Rights* (Oxford 1980), chap. 1.
[31] *In Defense of Legal Positivism*, p. 236.

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a class concept within a context where it is inappropriate. The very features in virtue of which regimes cross the threshold are features that those regimes exhibit to varying degrees. One can certainly say that, having all crossed the threshold, they are all equally threshold-crossers: but this is merely to play a childish game with words.

In his latest essay, Kramer emphasises that a wicked regime may be guilty of substantial departures from the requirements of the rule of law, and insists that he has always acknowledged the scope for such departures:

> I have never maintained that no deviations or hardly any deviations at all from rule-of-law principles will be serviceable for the entrenching of an evil regime's power and the fulfilment of its objectives.[32]

I believe this statement to be consistent with the claims put forward in Kramer's book on legal positivism. In that book, Kramer says that evil regimes would have reasons for adhering to the rule of law "quite consistently",[33] "quite perseveringly",[34] and with a "hearty respect".[35] These formulations clearly leave room for a qualification of the type that Kramer now emphasises. Such a qualification is justifiable in so far as all regimes, be they good or bad, will inevitably fall short of compliance with the rule of law to some extent. But the reference to an "evil regime" in the present statement is potentially troubling: for if we construe the passage from p. 238 in a way that would render it relevant to the context of debate, and that would protect Kramer's thesis from charges of triviality, Kramer has undertaken to show that wicked regimes have good reason for complying with the rule of law to the same extent as benevolent regimes, and cannot afford to make any special allowance for departures by wicked regimes.

We now find Kramer making further claims which may deepen our impression that he is either confused, or genuinely does intend to defend only the trivial "threshold" view. At one point he tells us that "A repressive and exploitative regime will frequently fall even further short than a liberal-democratic regime in the degree of its conformity with most of the precepts of legality".[36] A little further on we find him saying that "heinous incarnations of the rule of law are very likely marked by aberrations that would not occur—or would not occur on the same scale—under a liberal-democratic

[32] "On the Moral Status of the Rule of Law" p. 83.
[33] *In Defense of Legal Positivism*, p. 3.
[34] *In Defense of Legal Positivism*, p. 67.
[35] *In Defense of Legal Positivism*, p. 11.
[36] "On the Moral Status of the Rule of Law" p. 74.

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scheme of governance".[37] Admittedly these assertions are framed as claims about what wicked regimes *will frequently* do, rather than as claims about what they *have good reason* for doing: but Kramer's basis for prediction here seems to be grounded in his thesis about good reasons rather than in any independent considerations. More troubling still are Kramer's remarks to the effect that the compliance of wicked officials with rule of law requirements "will be sufficient to endow their system of governance with the character of a legal system"; and that "the status of their system of governance as a legal system is quite compatible with the fact that the wicked officials are not punctiliously unswerving in their adherence to Fullerian principles".[38] For the "status" or "character" of the regime as a legal system is not really in question here. Fuller was not arguing that wicked regimes cannot constitute legal systems, but that the question of whether something constitutes a legal system is a question of degree, turning on the extent to which the regime approximates to the archetype of compliance with the eight precepts. In spite of his occasional slips, I had thought that Kramer understood this point. Now I am not so sure.

Kramer accepts that social formations count as instances of law when they substantially approximate to the model of compliance with Fuller's eight precepts. He appears now to be saying that wicked regimes will approximate to that ideal less closely than will benevolent regimes. This concedes that wicked regimes are likely to differ from benevolent regimes in, amongst other things, the extent to which they exhibit the characteristic features of law. Kramer's positivism appears therefore to consist in a rather whimsical, but otherwise uninteresting, postscript to this concession. For it amounts to saying that, although wicked and benevolent regimes differ in the extent to which they exhibit the features constitutive of legality, they nevertheless attain the relevant threshold, and are therefore co-equal in their threshold-crossing. This is exactly like saying that Jack and Jill got an equal result in their exams when, although Jack got a third and Jill got a First, they both passed and therefore equally exhibit the quality of "having passed". In both the case of law and the case of the exam, the criteria in terms of which one passes or fails were satisfied to varying degrees.[39]

[37] "On the Moral Status of the Rule of Law" p. 75.
[38] "On the Moral Status of the Rule of Law" p. 74.
[39] In suggesting that Kramer's thesis (on the threshold reading) is trivial, I am of course not conceding that (on that reading) it is *true*. Given the triviality of the thesis, its truth or falsehood does not greatly concern me. Nevertheless, I feel that it would be hard to argue that a regime that extensively employs violence against law-abiding citizens is a clear and non-marginal instance of what Kramer calls "the rule of law". Kramer's adamant insistence upon his "sapping of incentives" argument presumably reflects his awareness of this fact.

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If we assume that, in his book, Kramer was genuinely engaging with Fuller's argument, we must construe his present essay as a significant weakening of the book's thesis. For that seemed to be, not the claim that wicked officials have good reason to comply with the rule of law up to a point that is sufficient to qualify their systems of governance as legal systems, but the claim that wicked officials have good reason to comply with the rule of law to the same extent as benevolent officials in benevolent regimes. Indeed, Kramer needs to defend the thesis in the form in which it was presented in his book if he is to present the rule of law as equally serviceable for evil as for good. The qualifications he now seems to be writing into his thesis actually amount to saying that the rule of law is more serviceable for good than for evil. I am, of course, happy to agree with that claim.

Liberty and the rule of law

I believe that I have now made out a compelling case for rejecting Kramer's legal positivism. In particular, we can now see that a wicked regime will have no reason for abiding by the requirements of the rule of law. If the establishment and maintenance of institutions that respect and are guided by those requirements is to be viewed as rational, therefore, it must be understood in terms of impersonal moral or political values, rather than in terms of instrumental considerations that are as serviceable for evil as for good. We can therefore ask what those values might be. In the chapter that Kramer attacks, I argue that the relevant value is liberty. In the closing part of his essay, Kramer mounts an assault upon that claim.

We should notice first of all that there are at least two different ways in which we might seek to connect the rule of law with liberty. We might seek to establish a very strong connection, by arguing that observance of the rule of law necessarily entails a degree of protection for liberty. Or we might seek to establish a weaker connection by arguing that, although observance of the rule of law does not itself entail the protection of liberty, the rule of law is nevertheless highly serviceable for the protection of liberty, whilst not being highly serviceable for the advancement of other goals, such as a wicked governing regime's purely self-interested goals. What I argue for is a version of the stronger thesis; but, even if I was wrong about this, the weaker thesis would remain as a possibility.

Suppose that neither the weak nor the strong thesis could be sustained. Nothing would follow from that to invalidate my arguments earlier in this essay, or to sustain Kramer's central thesis

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concerning the rule of law. We would simply be left with a question mark concerning the value of the rule of law. Perhaps it has no value at all, but is simply a traditional attachment that will not withstand intellectual scrutiny. Or perhaps it should be understood in terms of values other than liberty, equality being one possible contender. Or perhaps the intellectual confusion that surrounds most of our principal political values prevents us from forming a clear understanding of the rule of law.

Nevertheless, my arguments concerning the connection between liberty and the rule of law are perfectly defensible, as can easily be seen if we pay attention to some distinctions that Kramer overlooks.

At one point in his discussion, Kramer appears to believe that he has detected an inconsistency between my remarks regarding the rights that may be enjoyed under the rule of law and some of my other writings. He says that, in the context of the present debate, I speak of rights "quite loosely", while elsewhere I have written on the same issues more expertly. Kramer's point is that my current "loose" usage enables me to refer to both Hohfeldian liberties and Hohfeldian claim-rights as rights or entitlements, while overlooking the fact that liberties will not invariably be accompanied by claim-rights against all types of interference. Hence, I am able to suppress the fact that (within a regime respecting the rule of law) I may be acting within the scope of my legal entitlements (*i.e.*, liberties) while nevertheless being exposed to interference for which I will have no legal redress (*damnum absque injuria*).

In my principal discussion of the nature of rights[40] I defend Hohfeld's analysis of rights against his numerous modern critics. I do not, however, think that it is fruitful or helpful to regard Hohfeld's analysis as a set of prescriptions for ordinary usage. Ordinary ways of speaking about rights, independently of Hohfeld's analysis, are perfectly acceptable provided that they are understood as shorthand references that must be cashed out in terms of the analysis itself. In my discussion of the rule of law, my references to rights and entitlements are not sloppy departures from a rigorous analysis that I have deployed elsewhere, but shorthand references fully capable of being amplified in terms of that analysis.

My references to "rights" should therefore be understood as references to Hohfeldian claim-rights and Hohfeldian liberties. While Kramer is correct to observe that Hohfeldian liberties are not of necessity accompanied by claim-rights against *all* types of

[40] Simmonds, "Rights at the Cutting Edge" in Kramer, Simmonds and Steiner, *A Debate Over Rights*, (Oxford 1998). I add some important further refinements to my analysis in *Central Issues in Jurisprudence*, second edition, chap. 8.

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interference (indeed, the prevalence of *damnum absque injuria* within modern legal systems is a prominent theme of my earlier essay on rights[41]) they *are* of necessity accompanied by *some* claim-rights against interference, typically those which make up the protective perimeter[42] provided by the laws against assault and trespass. For Hohfeldian liberties are entities that exist only within the realm of jural relations, and persons who enjoy no protections whatever against interference would not be party to any jural relations. This is one reason why Hohfeld's choice of the term "privilege" is actually superior to the term "liberty", which is preferred by Kramer and most other modern theorists: Hohfeld's term makes it clear that a legal liberty (or privilege) is not the mere absence of legal regulation. As I put it in my earlier essay, "Hohfeldian liberty is not a residual pocket of dry land left by the incoming tide of legal regulation".[43]

In the present context we are perhaps not particularly interested in whether those subject to the law can be said to be party to Hohfeldian "jural relations", and such lack of interest may be thought to undercut my basis for saying that legal liberties must enjoy some protective perimeter of claim-rights. It should be noted, however, that Kramer could not, consistently with the rest of his argument, deny that citizens will enjoy some protections against interference from others. Kramer maintains that a wicked regime has good reason to refrain from the use of force against those who have complied with the law, because any such use of force will "sap" incentives for compliance. Now it would be very odd for him to maintain that a governing regime has good reason to treat law-abiding citizens as immune from the coercive interference of officials, but has no good reason to grant them certain protections (in the form of claim-rights against interference, or in the form of criminal prohibitions) against similar interferences from private citizens. For there is a far stronger case for thinking that the latter (private) interferences will be capable of "sapping" incentives for compliance with the law than there is for anticipating such an effect from the former (public) interferences. This is because the performance of the citizens' legal duties might expose them to the risk of violence from other citizens who object to the performance of the duty: citizens annoyed by the performance of the duty of

[41] Simmonds, "Rights at the Cutting Edge", pp. 187–195.
[42] H.L.A. Hart, *Essays on Bentham* (Oxford 1982), chap. 7.
[43] Simmonds, "Rights at the Cutting Edge", p. 167. The (sound) thesis that liberties must *always* be protected by *some* claim-rights should not be confused with the erroneous claim made by Joseph Raz, to the effect that assertions of entitlement are always invocations of a duty not to interfere, and never simple assertions of the absence of a duty to act. For a brief refutation of Raz's claim, see *Central Issues in Jurisprudence*, p. 290.

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early morning bell-ringing, for example; or opponents of the regime who seek to obstruct the regime's pursuit of its objectives by penalising any compliance with the regime's dictats. The violence in such cases need not take the form of direct interference with the performance of the duty, but may rather involve a threat of reprisals in some other context. The violence would nevertheless be conditional upon compliance with the duty, and therefore would weaken incentives for compliance (whereas the official violence envisaged in my analysis of wicked regimes is not so conditional).

Governments stand to benefit from the citizen's exercise of liberties, as well as from the performance of his duties. Such liberties enable markets to operate, producing wealth (to be extracted in the form of taxes) and generating prices (to be employed in the government's cost/benefit monitoring of its own policies). Specific and carefully controlled official violence could be conducted without any substantial market distortions, but a wholesale failure to protect citizens from the coercive interference of other citizens is a very different matter. For these reasons, even a wicked regime will have good reason to grant citizens a perimeter of legal protections against interference.

The situation, therefore, is as follows. Simply in consisting of followable rules, the law must recognise certain areas of optional (non-obligatory) conduct, however narrowly circumscribed those areas may be: for the law's demands cannot be *limitless* while also being possible to comply with. Even if my daily round is entirely absorbed by the performance of legal duties, I must enjoy certain options about how I perform those duties (*e.g.*, should I wear a hat whilst doing so?) if the duties are to be performable at all. Such domains of optional conduct[44] are likely to enjoy a protective perimeter either in the form of claim-rights against certain forms of interference, or in the form of criminal prohibitions on such forms of interference (or both). These very minimal theses are, as we shall see in a moment, quite sufficient to sustain my general thesis concerning the distinctive moral value of the rule of law.

Kramer is perfectly correct that my shorthand references to rights tend to obscure the possibility of *damnum absque injuria*, and so might create the impression that legal entitlements are domains of liberty invulnerable to any kind of interference. However, while the point is correct, we might well wonder how extensive its importance can be. Forms of *damnum absque injuria* are certainly

[44] Hohfeldian liberties to perform an action consist simply in the absence of a duty not to perform the action. Bilateral Hohfeldian liberties consist of a liberty to perform a certain action combined with a liberty not to perform it. Domains of optional conduct are constituted by bilateral Hohfeldian liberties. When such domains are effectively protected against violent or coercive interference, we may speak of them as domains of liberty.

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pervasive and infinitely variable: my neighbour may reduce the quality of my life by his irritating whistling, or by the wearing of silly hats, yet I will have no remedy against him in law. While reducing my well-being, however, these instances of *damnum absque injuria* do not reduce my liberty. Nor would the *threat* to whistle or wear a silly hat (very unusual circumstances apart) reduce my liberty. Kramer chooses the example of a neighbour preventing me from growing a particular shrub by robbing my garden of the light that the shrub requires. The example is carefully chosen, precisely because it constitutes a reduction in the repertoire of actions available to me (I cannot grow the shrub without sunlight); but, for that same reason, it is untypical of most forms of *damnum absque injuria*.

Of course, Kramer is also perfectly correct when he points out that the repertoire of actions normatively or factually available to me may be more extensive in New Monia[45] than it is under the rule of law. The truth of this claim is one that I willingly concede. Kramer draws from the claim a questionable conclusion, however. His conclusion is that there is no reason for thinking that the rule of law has an intrinsic connection with liberty.

On the face of it, the argument seems to follow straightforwardly: if the range of actions available to me might conceivably be less extensive under the rule of law than within a regime not characterised by the rule of law, it seems to follow that any connections between the rule of law and liberty must be empirical and contingent rather than necessary. Our suspicions about this argument might be aroused, however, if we reflect that exactly the same argument might be deployed to suggest that there is no necessary connection between slavery and unfreedom, or between being *sui iuris* and being free. For it may well be that the slave owner will rarely prescribe or proscribe the slave's conduct, while the free man may find himself subject to onerous duties and exposed to frequent interference. So have we simply been making a stupid mistake in assuming that slavery is a form of unfreedom? Or is our view grounded in the contingent fact that slave owners generally will interfere quite extensively with the choice of actions available to their slaves? Should we therefore conclude that slavery is not *inherently* incompatible with freedom?

These questions highlight the obvious fact that "freedom" (or "liberty") has many meanings, or perhaps many dimensions. As Amartya Sen puts it, "The concept of freedom includes within its

[45] New Monia is an imaginary society that is benevolent but does not observe the rule of law. See *Central Issues in Jurisprudence*, pp. 244–247.

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capacious body a diversity of concerns".[46] Nevertheless, it is not unreasonable to look for what Bernard Williams describes as a central schema or matrix that indicates the core of these concerns, and that is elaborated in somewhat different ways within particular cultures and historical periods. Williams' own suggestion is that the matrix of liberty might be the idea of not being in somebody else's power.[47]

The slave might conceivably have an extensive range of options available to him, yet we nevertheless feel that he is unfree. Why? Presumably, because of the conditions under which he enjoys that extensive range of options. For the options are available to him only conditionally upon the will of his master. The slave's lack of freedom consists, not simply in the restrictions on the range of actions available to him, but more essentially in his subject condition: he is fully dependent upon his master's will.

Now consider the situation of the citizen who lives under the rule of law. Perhaps the duties imposed upon him and his fellows are very numerous indeed. Perhaps the interstices between these duties leave him with very few options. Yet, in so far as the rule of law is a reality, his duties will have limits, and the interstices between them will therefore be a reality. The existence of these legal liberties (Hohfeldian privileges) will not be dependent upon the will of any other citizen,[48] but upon the law. Even if the citizen is so unfortunate as to live within a system that confers extensive powers upon "evil officials wielding dominance over hapless citizens",[49] the powers will have limits, and the limits will not themselves be dependent upon the will or benevolent disposition of anyone else, but upon the law.

We now begin to appreciate that there are, as it were, two different dimensions to freedom: one concerning the range of options available to us without interference, and the other concerning the degree to which that range of options is itself dependent upon the will of another. In claiming that the rule of law is intrinsically linked to liberty, we rely upon the same concept of liberty that is invoked in treating slavery as intrinsically violative of liberty.

In the present debate, both Kramer and I have taken the rule of law to be, in its core, a formal idea concerned with the published,

[46] Amartya Sen, *Rationality and Freedom* (Cambridge, Mass. 2002), p. 9.
[47] Bernard Williams, "Liberalism and Loss" in *The Legacy of Isaiah Berlin*, edited by Ronald Dworkin, Mark Lilla, and Robert B. Silvers (New York 2001), p. 92.
[48] Might they be dependent upon the will of a sovereign law-maker? One has to remember that rules must be prospective, and must not be subject to constant changes. Consequently, the law may at any time conflict with the present will of the sovereign law-maker.
[49] "On the Moral Status of the Rule of Law" p. 96.

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prospective nature of rules, the congruence between rules and official action, and so forth. Unsurprisingly, therefore, the connection between liberty and the rule of law is not concerned with the law's *content* so much as its form. The content of the law may vary considerably, and its variable content will determine the *extent* of the options available to me, and the protections that I enjoy against interference. What is *intrinsic* to the rule of law is the way in which these options are determined. They are not, as in New Monia, to be determined by a series of wholly particular decisions, sensitive to the aggrieved feelings and sensibilities of all the parties: they are to be determined by general rules.

In consisting of followable rules, the law must allow me to retain certain optional areas of conduct. My point is simply that *when* the law leaves me with such options, it renders the existence of those options secure and independent of the will of others. Similarly, *when* the law grants me certain protections against interference (a "protective perimeter" of claim-rights, for example) the existence of those protections is secure and independent of the will of others. To describe this security and independence as a form or dimension of liberty may well depart from Kramer's own account[50] of that very contested concept; but, if that is so, we should say "so much the worse for Kramer's account". It should not be imagined that, in claiming that the rule of law intrinsically protects liberty, it is necessary for me to invoke some aberrant account of liberty that departs from our settled political understandings. In fact, the dimension of liberty that plays the principal role in my argument is one that directly embodies our concern not to be under the power of another; and, as we have seen, this concern has been considered by some to constitute liberty's essential core. If we take for granted the governance of a legal order, and focus our attention upon the potential injustice or oppressiveness of its rules, any significant talk of liberty may seem primarily to reflect a concern with the range of options that are available to us. However, when the nature and intrinsic significance of the law itself is in question, a monocular focus upon these latter aspects of liberty is bound to mislead.

Conclusion

Jurisprudence is a subject where much of what needs to be said has already been said. Yet to understand what has been said, we need to draw upon levels of shared understanding and experience that make human beings mutually intelligible, and give them the

[50] See Kramer, *The Quality of Freedom* (Oxford 2003).

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capacity to learn one from another. The task of sympathetically reading and teaching what has already been said about law and justice should be central to the scholar's enterprise, for it sustains the intellectual foundations of civility upon which we all depend, and rehearses their embodiment of our common humanity. Inevitably, of course, we will bring something of our own to every re-telling of an ancient tale.

There is, however, no end to the proliferation of error; and such error plays a vital role in the recovery and vivid appreciation of the truth. In adding his voice to the large chorus of those who now take legal positivism to be unassailably victorious over its rivals, Kramer has provided us with a useful opportunity to puncture one particular bubble of misconceptions.

Kramer's positivism centres on the claim that wicked regimes will have good reason for adhering "quite consistently" to the rule of law. This is in fact the opposite of the truth. Wicked regimes are likely to have powerful reasons for departing very substantially from what is perhaps the most central aspect of the rule of law: the requirement that official violence should be used only against those who have broken the law. Wicked regimes will have good reason to publish and enforce rules; but will have no good reason for restricting their brutality to those who have violated the rules so published. Energetic it may be, but Kramer's insistence to the contrary nevertheless rests upon a number of errors of reasoning that I have endeavoured to point out. Respect for the rule of law is grounded in moral reasons, not in prudential ones. The rule of law is not an instrumentality of power: it is an inherently moral ideal.[51]

[51] I would like to thank June Chappell and Amanda Perreau-Saussine for their valuable comments on an earlier version of this essay.

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