

OXFORD JURISPRUDENCE DISCUSSION GROUP

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“STRAW MEN AND STRANGE PREOCCUPATIONS”

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I. John Finnis on Dec 3, 2009

- A. Partiality
- B. Implausible faith in crude consequentialism
- C. What Stewart said
- D. Empirical observations and more sophisticated consequentialist doctrines

II. Less-to-Lose Effect

- A. Background: denial of the inherently moral character of the rule of law
 - 1. Prudential considerations in favor of adherence to the rule of law: clear guidance, incentives for compliance, coordination
 - 2. Simmonds claims that incentives can be bolstered by randomly imposed extra-legal detriments
 - 3. Less-to-lose effect: proportionate as well as absolute difference between expected level of state-imposed detriments for law-flouters and expected level of state-imposed detriments for law-abiders
- B. Subsequent change of focus by Simmonds to non-random extra-legal detriments, and consequent shift of focus by me away from the less-to-lose effect
- C. Upshot: useful clarification of empirical point of contention (note the research of Harvard psychologists in the 1980s)

III. Straw Man: The Threshold Thesis

- A. Simmonds’s formulations: “[W]icked self-interested rulers have good reason to comply with the rule of law to a degree that will qualify the resulting system of governance as a legal system but will fall well short of the level of compliance that morally motivated rulers would have good reason to pursue.” “[A] wicked regime may, in certain not uncommon circumstances, have good self-interested reasons for complying with the eight precepts *up to a point*, though a point well short of the level of compliance that a benevolent regime would have good reason to pursue” (emphasis in original).

- B. Simmonds apparently attributes the threshold thesis to me because I don't endorse the following thesis: "[W]icked self-interested rulers have good reasons for complying with the rule of law to the same extent as morally motivated regimes." Let me designate this thesis as the "equal-levels-of-compliance thesis," and let me designate the question to which it is an affirmative answer as the "equal-levels-of-compliance question."
- C. When I decline to endorse the equal-levels-of-compliance thesis, I am not answering the equal-levels-of-compliance question negatively. Rather, I am rejecting the question altogether as absurd. (I devote several pages to rejecting that question in the article to which Simmonds is supposedly responding. Simmonds says not a word about those pages.) Simmonds mistakenly attributes to me a negative answer and thence infers that I am espousing the threshold thesis.
- D. The example of the act-type of journeying to Cambridge.
- E. The threshold thesis is false and is utterly misconceived if propounded by any supporter of legal positivism. What it strongly resembles, indeed, is the position which I attribute to Simmonds.
- F. When attributing the threshold thesis to me, Simmonds includes no genuine quotation. His only quotation is a figment of his imagination.

IV. Underenforcement versus overenforcement

- A. Simmonds writes as follows: "[N]ot all departures from [Lon Fuller's] eight precepts are on a par, and their lack of commensurability means that 'departure from the eight precepts' cannot be measured on some simple quantitative scale. Once we see this point, we begin to appreciate that the use of violence against citizens who have broken no law is a particularly serious and, in the context of benevolent regimes, a particularly unusual departure from legality. Yet it is this form of departure above all that would characterize governance within a wicked regime, as Kramer concedes. This is not at all comparable to the type of shortfall from the rule of law that might be found on a significant scale within a benevolent regime, or within any regime that we would regard as a non-marginal instance of law" (underlining added).
- B. I especially agree with the underlined portion — which is partly why I regard the equal-levels-of-compliance question as absurd.
- C. There is nothing in this passage, as excerpted here, with which I disagree. However, Simmonds purports to be expounding "our semantic intuitions" concerning what counts as a legal system. In fact, his claims here are controversial substantive moral claims (with which I agree). The people on public housing estates who have to live with the consequences of lawlessness that ensue from liberal-democratic squeamishness about monitoring and imprisonment would undoubtedly disagree with Simmonds's moral claims.

D. In context, the passage is claiming that extra-legal detriments detract from the classifiability of a scheme of governance as the rule of law more than does the non-enforcement of legal requirements. *Pro tanto*, Simmonds is begging the question by taking for granted that such a classification is a moral classification.

V. Fuller's principles of legality versus the ideal of justice

A. In the course of attacking the relevance of the threshold thesis, Simmonds advances the following argument: "Immanuel Kant observes that a merchant who acts for purely self-interested reasons may behave in accordance with the requirements of justice up to a point. The convergence between the merchant's self-interest and the requirements of justice would, however, only be provisional. The permanent possibility exists that, at some point, justice may require the merchant to act against his own self-interest. Now, the fact that one might have good self-interested reasons for complying with justice *up to a point* does not give us any reason to conclude that justice is not really a moral ideal but only a matter of efficacy in the pursuit of a variety of goals" (emphasis in original).

B. Even if I leave aside the fact that the threshold thesis is a figment of Simmonds's imagination (with his imaginary quotation), the comparison between Fuller's principles and the ideal of justice reveals their disanalogousness. Whereas every regime is always morally obligated to adhere to requirements of justice, all regimes — especially evil regimes — are quite often not morally obligated and sometimes not morally permitted to adhere to Fuller's principles.

VI. Simmonds on freedom and the rule of law: See my paper "Freedom and the Rule of Law", which is available on the UCL Laws Faculty Web site and on a few other Web sites. Delivered as the Meador Lecture on Freedom at the University of Alabama in March 2009, it will be published later this year in the *University of Alabama Law Review*.