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The Inner Morality of Private Law

Benjamin C. Zipursky*

Abstract: Lon Fuller’s classic *The Morality of Law* is an exploration of the basic principles of a legal system: the law should be publicly promulgated, prospective, clear, and general. So deep are these principles, he argued, that too great a deviation from them would not simply create a *bad* legal system and *bad* law, but would render the products of such a system undeserving of the name “law” at all. In this essay, I argue that Fuller’s basic principles are not in fact desiderata for all of law, observing that much of private law plainly flouts them; it is unwritten, retroactive, inchoate, and often limited to particular cases. Far from undercutting its status as law or its legitimacy, these attributes have sometimes been regarded as giving the common law its special character as a kind of law. Fuller’s principles are fundamental only given a certain conception of how law functions, what gives lawmakers their authority, and what renders citizens vulnerable to the imposition of liability through the courts. This conception does not fit private law, which has a distinctive inner morality. Understanding the inner morality of private law tells us a great deal about the nature of private law and about the different ways in which morality can be part of law.

Keywords: Private law, Torts, Fuller, Jurisprudence, Rule of law, Retroactivity, Governance, Due process, Principle of legality, Notice

Lon Fuller’s classic *The Morality of Law*¹ is an exploration of basic principles of a legal system and of law: the law should be public, prospective, clear, and general. So deep are these principles, he argued, that too great a deviation from them would not simply create a *bad* legal system and *bad* law, but would render such a system undeserving of the name “law” at all. Such values—which he referred to as “the inner morality of law”² or “the internal morality of law”³—are part and parcel of what it is to have law. So goes the centerpiece of Fuller’s argument against the positivist separation of law and morality. Fuller’s argument from the inner morality of law to the falsity of legal positivism of course remains highly

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¹ Lon L. Fuller, *Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969). *The Morality of Law*, first published in 1964, was derived from Fuller’s Storrs Lectures, delivered in 1963 at Yale Law School. All citations in this essay are to the second edition.

² *Ibid.*, 42-43ff.

³ *Ibid.*, 44ff.

controversial. Less controversial, however, is the claim that these Fullerian principles of legality *are* basic desiderata of law, from a normative point of view—that these Fullerian principles are indeed part of something fairly called “the inner morality of law.”

In this essay, I argue that the Fullerian principles are not in fact desiderata for all of law, observing that tort law (like much of private law) plainly flouts the Fullerian principles; it is implicit, retroactive, intrinsically capable of multiple competing interpretations, and often expressly limited to particular fact patterns. Far from undercutting its status as law or its legitimacy, these attributes are typically regarded as giving the common law its special character as a kind of law. The Fullerian principles are fundamental only given a certain conception—roughly, a criminal and regulatory law conception—of how law functions, what gives law-makers their authority, and what renders citizens vulnerable to the imposition of liability through the courts. This conception does not fit private law, which has—if one is to use Fuller’s misleading but evocative phrase—its own inner morality. The erroneous belief that Fullerian principles apply to law as such, rather than to certain areas of public law in particular, has led to a variety of wrongheaded views, both in jurisprudence and in substantive law.

Part I rehearses the central argument of *The Morality of Law*, focusing on Fuller’s claim that certain desiderata are fundamental to being law at all. In Part II, I argue that tort law flouts Fuller’s desiderata quite spectacularly. And I suggest these discrepancies cannot be explained away (as Fuller arguably attempts to do in *The Morality of Law*), but run very deep in tort law in particular and the common law more generally. Part III argues that—far from failing to be law at all—tort law is a large component of law, is acceptable, and is merely one part of a domain of law that is vast and does not comply with the Fullerian principles. That is because the Fullerian principles go hand-in-hand with a limited conception of what law is. The common law, most of private law, and much of public law do not fit within Fuller’s conception. Part IV sketches the implications of this critique for a variety of issues relating to the morality of law and the rule of law.

I. *In Re Rex*

Fuller’s notorious King Rex tried to make law, but because of his very basic failures of form, “he never even succeeded in creating any law at all, good or bad.”⁴ Rex managed to find “eight distinct routes to disaster” and, correspondingly, dramatically failed to achieve eight excellences of a legal system. Paraphrasing, one might say that Fuller lays out eight vice-virtue couplets for legal systems:

1. Adhocness versus Generality: “The first desideratum for subjecting human conduct to the governance of rules is an obvious one: there must be rules.”⁵ Where King Rex sought to decide each case on its own terms, he

⁴ *Ibid.*, 34.

⁵ *Ibid.*, 46.

was operating in a merely ad hoc manner. If there is to be actual law, by contrast, the resolution of what must be done must be determined by general rules, not individual discretion. This is part of what it is to have law.

2. Nonpromulgation versus Promulgation: It is essential that the legal system “publicize, or at least make available to the affected party, the rules he is expected to observe.”⁶
3. Retroactivity versus Prospectivity: Rex’s subjects “needed to know the rules . . . *in advance* so that they could act on them.”⁷ “Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct by rules that will be enacted tomorrow is to talk in blank prose.”⁸
4. Obscurity versus Clarity: Rex failed when “his code became available and it was discovered that it was truly a masterpiece of obscurity.”⁹ “The desideratum of clarity represents one of the most essential ingredients of legality.”¹⁰
5. Contradictoriness versus Consistency: Fuller recognizes that there is no “violation of logic in making a man do something and then punishing him for it.” However, a “man who is habitually punished for doing what he was ordered to do can hardly be expected to respond appropriately to orders given him in the future. If our treatment of him is part of an attempt to build up a system of rules for the governance of conduct, then we shall fail in that attempt.”¹¹
6. Impossibility versus Complyability: One of Rex’s citizens discovered “a passage that seemed apt: ‘To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos.’”¹²
7. Inconstancy versus Constancy: Fuller recognizes among “the principles that make up the internal morality of law” one that “demands that laws should not be changed too frequently,” but he concedes that this demand “seems least suited to formalization in a constitutional restriction.”¹³
8. Incongruence (between official action and declared rule) versus Congruence (between them). “As the bound volumes of Rex’s judgments became available and were subjected to closer study, his subjects were appalled to discover that there existed no discernible relation between those judgments and the code they purported to apply.”¹⁴

⁶ *Ibid.*, 39.

⁷ *Ibid.*, 35 (emphasis in original).

⁸ *Ibid.*, 53.

⁹ *Ibid.*, 36.

¹⁰ *Ibid.*, 63.

¹¹ *Ibid.*, 66.

¹² *Ibid.*, 37.

¹³ *Ibid.*, 79.

¹⁴ *Ibid.*, 38.

Fuller's enumeration of these virtues and vices quietly operates on three different levels. On one level, he is arguing that it is not enough for a person or persons with political power to exercise their will—that there are conditions on how (and within what sort of framework) this will is exercised, and that these conditions are, in an important sense, moral conditions. On a second level, he is saying something about what *law is*, such that these are the conditions that must be complied with in order to have it. And on a third, perhaps more down-to-earth, level, he is offering a characterization of principles that seem readily identifiable as aspects of American constitutionalism and thus, in effect, depicting aspects of actual American constitutional law as moral conditions on legality in our system.

I shall not challenge Fuller in any direct way at the first level. Indeed, I agree with Fuller's claim at the first level, and I think it is a point of tremendous importance in jurisprudence. Even if I think he may be mischaracterizing and overstating the conditions in question, I do believe not only that the possibility of law is contingent on compliance with certain kinds of conditions relating to the form of putative laws, but also that those conditions have an important moral tenor. As to the third level, I have significant skepticism; in some of my recent work on constitutional issues pertaining to American tort law, I argue against any broad reading of Fullerian principles of legality into the American Constitution.¹⁵ Nonetheless, the third level is not my primary focus here.

This essay principally concerns the second level—Fuller's effort to draw conclusions about what law is from his observations about the (putative) inner morality of law. Fuller's express characterization of law is quite simple: "The only formula that might be called a definition of law offered in these writings is now thoroughly familiar: *law is the enterprise of subjecting human conduct to the governance of rules.*"¹⁶ Much of the book—including its first and last chapters—is devoted to explaining the respects in which it is essential to laws that the political communities that have them are, in creating laws, aspiring to achieve certain goals, and aspiring to do well in the pursuit of such goals. That is why he begins by discussing the morality of aspiration and ends discussing the substantive aims that law should aspire to reach. The term "enterprise" was chosen with this in mind; like private businesses, legal systems aim to accomplish certain goals. Not only is their success measured in part by whether they reach these goals or to what extent they do; the self-conception of what it is to be involved in the business is to be striving to succeed in this way. Similarly, argued Fuller, part of what it is to understand science is to understand scientists' conception of their own enterprise, to understand the "morality of aspiration" that is part of the "distinctive ethos" of the scientific calling.¹⁷ Law is an enterprise of striving to attain certain goals and realize certain purposes.¹⁸

¹⁵ Benjamin C. Zipursky, "Palsgraf, Punitive Damages, and Preemption," *Harvard Law Review* 125 (2012):1780; "Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law," *DePaul Law Review* 60 (2011): 496-9.

¹⁶ Fuller, *Morality of Law*, 106 (emphasis added).

¹⁷ *Ibid.*, 120-21.

¹⁸ *Ibid.*

Insofar as Fuller conceived of his own jurisprudential theory as a response to that of H.L.A. Hart, a large part of it was devoted to the idea that if a particular system was not using putative law as part of an enterprise with these sorts of (moral) ends, then it was not fully law. This argument is not, of course, the one that has remained most famous in Fuller's work. The latter is the argument that being law involves pursuing those goals by subjecting human conduct to *the governance by rules*, and the claim that there is a morally loaded conception of *governance by rules* built into the concept of law. While not an accident, of course, it is an irony that Fuller's jurisprudential position shares with Hart's not only "positivism," "separationism," and "the concept of law" as foci of its inquiry, but also that the notion of rules—as opposed to commands—lies at its core.

Fuller's image of law is magnetically appealing because it is profoundly anti-hierarchical. Like Hart's, it accepts that a legal system imposes legal duties upon its members, but it rejects the Austinian claim that duty-imposition is constituted by commands or orders. Like Hart, he characterizes the law in a modern municipal legal system like our own as laying down rules that members of the legal community are required to comply with. The duties stem from the mandatory rules of conduct the state has put forth. However, recall that Fuller regards law as an "enterprise" of governance, which is meant to imply that we are all in this together. What is wrong in Rex's state, and what is right in a real legal system, pertains to a kind of mutual communicative link between law-giver and subject. Even if we assume that, at some level, the sovereign says, "Here are the rules I am setting forth, which you must live by," that does not end the story. We must know that if the subjects are indeed required to live by the rules, these rules are able to constitute a kind of *governance*. In setting forth desiderata for law, Fuller meant to capture the features of governance-enterprise that we conceive of as intrinsic to law and, in so doing, to establish these features as aspects of a special relationship that is built into the concept of law. The ultimate critical contention of this essay is that the inadequacy of the Fullerian desiderata actually shows that Fuller's conception of law as an enterprise of governance is untenably narrow.

II. Tort Law and King Rex

The central point of this part is that the common law of torts—at least on its face—fails to satisfy the first six of these desiderata, and in four of those six, drastically fails:

Generality: King Rex supposedly erred by deciding each case on its own merits, but this sort of individualization is often lionized in torts. Of course, there is a doctrine of precedent and, to this extent, tort law is arguably not at all ad hoc, but general. On the other hand, Fuller thinks it is critical to generality that the system of law is governed by rules, and it is far from clear that tort law is best depicted as a law of rules. From Holmes to Cardozo to Dworkin, it seems quite clear that the common law of torts is the domain of standards and principles, not of rules. That distinction is often exaggerated, and even when it is not, is highly problematic. Nonetheless, the principle-of-legality and notice concerns that run so deep in Fuller's parable lead him quite deliberately to embrace a notion of rules and

generality that clashes with the conception of standards and principles that aptly characterizes precedent-based reasoning.

Promulgation: Here, most obviously, the common law of torts appears to suffer from what Fuller regards as a fatal flaw in Rex's system. The common law is, to a very great extent, unwritten. While our law librarians and the residents of towns supported by the hugely successful WESTLAW and LEXIS might quarrel with me on this point, I think the argument as against what Fuller means by "promulgation" is quite decisive. This is for three reasons. First, and most obviously, the degree of case reporting we enjoy today, and even the degree of case law reporting we have enjoyed for the past one hundred years, vastly exceeds that of prior centuries, and it is incontrovertible that the common law is centuries old. Second, the decided cases found in case reporters do not constitute the law in the same sense that statutes do. While it would be tendentious to suppose that published judicial opinions simply apply the common law (rather than having some part in constituting it), it would be equally tendentious to deny that there is often a sense in which such opinions articulate the common law, or make explicit what is latent or implicit in the common law. Finally, it is quite clear that Fuller means promulgation of the rules to involve their publication in a manner such that it is plausibly a live option that the domain of persons subject to it could look to where it is promulgated and ascertain what rules they are required to follow by doing so. It is highly implausible that a non-lawyer could do so for the common law of torts.

Prospectivity: Part of why tort law is exciting and enticing is that the common law of torts *evolves*. And unlike, for example, the law of constitutional rights, it is entirely uncontroversial that the common law of torts evolves. What this means is nicely illustrated by many classic cases, such as *MacPherson v. Buick*.¹⁹ In *MacPherson*, the New York Court of Appeals proclaimed for the first time that an automobile manufacturer has a duty of care running to the consumer, going beyond its contractual obligations.²⁰ There was no thought in *MacPherson*, however, of letting Buick off the hook because this was the first time such a duty had been announced in the law. Any retroactivity point would have been rejected out of hand. Cardozo made a compelling case that finding a duty was actually the better supported interpretive move to make, given New York's precedents on the topic.²¹ There is nonetheless no question that in a defective wheel case against a vehicle manufacturer, recognizing that there was a duty had no direct precedent in New York law.

In embracing a duty that had not been articulated before, and simultaneously applying it, *MacPherson* was run-of-the-mill. A railroad in the first attractive nuisance case was held accountable,²² as was a psychiatrist in the first

¹⁹ *MacPherson v. Buick*, 217 N.Y. 382 (N.Y. 1916).

²⁰ *Ibid.*

²¹ John C.P. Goldberg & Benjamin C. Zipursky, "The Moral of *MacPherson*," *University of Pennsylvania Law Review* 146 (1998): 1733-847.

²² *Sioux City & P.R. Co. v. Stout*, 84 U.S. 657 (1873). The Supreme Court did not use the phrase "attractive nuisance" in this case, but it did hold that the amusingness of railroad turntables to children would allow a jury to find in favor of a non-licensee child in a negligence claim against the railway company.

duty-to-warn case.²³ And sometimes we have whole new torts: an advertiser in the first invasion of privacy case,²⁴ ordinary townsfolk in the first intentional infliction of emotional distress case,²⁵ and so on. These are not merely examples of cases where there was illegal conduct that then turned out to be actionable by a new category of person. Many are cases where the action itself had never been deemed a proper basis for a tort suit, but, nevertheless, the court did think the action in question was a proper basis for tort liability and therefore permitted the imposition of liability. If retroactivity were viewed as undercutting liability in torts, many of the most celebrated decisions of the twentieth century would have to be abandoned. More significantly, perhaps, many of the most unremarkable, daily rulings, of appellate and trial courts alike would also have to be abandoned as unlawful.

Clarity. As an avowed lover of the common law of torts, and one who has devoted the better part of two decades to uncovering its righthandedness and its potentiality for orderliness, I am certainly not going to say that tort law is fundamentally a mess. And as a teacher of first-year Torts and co-author of a casebook and an introductory treatise on tort law, I am not really content to call tort law “obscure” either. With these major caveats, however, I am willing to say that tort law quite brazenly fails the Fullerian test of “clarity.” To take negligence law, how to determine whether there is *duty*, or *proximate cause*, or *ordinary care*, are hardly “clear.” Indeed, these questions are notorious among law students, professors, lawyers, and judges for their unclarity and vagueness. So, too, are the concept of a *design defect* in products liability, the ideas of *scienter* and *justifiable reliance* in fraud, the *proprietary/governmental distinction* in governmental immunity law, the notion of *wantonness* in punitive damages, the idea of *continuousness* and the idea of *unreasonable interference* in nuisance law, and the idea of *an intent to make harmful or offensive contact* in battery law; the list of concepts that would fail Fuller’s “clarity” test goes on and on.

Tort law’s staggeringly bad report card on the first four of Fuller’s eight areas is more than enough to begin asking what is going on here, especially since there is virtual unanimity that the common law of torts, like the common law more generally, is canonical as part of the law. Although it is perhaps a slightly closer call, I also believe there are strong arguments for failing tort law on Fuller’s fifth and sixth areas—Consistency and Comliability. As to Consistency, consider a case like *Vincent v. Lake Erie Transportation Co.*²⁶ It is very likely that there would have been a right of cargo-owners or passengers to sue the Lake Erie Transportation Company if it had chosen to unmoor itself from Vincent’s pier (and subsequently been wrecked by the storm). *Vincent* reminds us that tort law surely includes some domains where the defendant is “damned if he does and damned if he does not” (more accurately, liable if he does and liable if he does not), seeming to occupy the Inconsistency pole of the Inconsistency-Consistency scale. As to Comliability, recall that the objective standard of negligence law

²³ *Tarasoff v. Regents* 551 P.2d 334 (Cal. 1976).

²⁴ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

²⁵ *Nickerson v. Hodges*, 84 So. 37 (La. 1920).

²⁶ 124 N.W. 221 (1910).

proudly, if notoriously, holds persons liable all the while admitting their diminished capacity to conform their conduct to the standard of care,²⁷ just as it proudly tells manufacturers they are liable for the injuries inflicted by their defective products, even if they could not reasonably have been expected to know the product was defective when they sold it.²⁸ If these are not grounds for F's in Consistency and Complyability (respectively), one must still admit that they look very similar to the handiwork of Rex, which Fuller so sharply denigrates. While tort law appears to score well on Continuity (because of its profound respect for precedent) and on Congruity (because judges both declare and apply the law), A's in Phys. Ed. and Art cannot save a report card otherwise full of F's.²⁹

III. Law and the Enterprise of Governance: Too Narrow a Vision

Fuller's allegory of King Rex leads us to envision subjects who ask questions like the following:

1. How can you expect us to do what we are supposed to do when you do not even have any rules?
2. How can you expect us to do what we are supposed to do when you do not actually make public and explicit what the rules are?
3. How can you expect us to do what we are supposed to do when you only tell us what the rules are after you say we have broken them?
4. How can you expect us to do what we are supposed to do when the set of rules, insofar as they are made public at all, are so terribly unclear, and almost infinitely nuanced?
5. How can you expect us to do what we are supposed to do when you say there is a duty to do some things and also that there is a duty not to do the very same things?
6. How can you expect us to do what we are supposed to do when you tell us to do things that it is impossible for us to do?
7. How can you expect us to do what we are supposed to do when the rules are constantly changing?

²⁷ *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

²⁸ *Restatement (Second) of Torts* § 402A.

²⁹ There are junctures in *The Morality of Law* at which Fuller seems to recognize the tension between tort law and the desiderata he sets forth. See, e.g., Fuller, *Morality of Law*, 64 (on "due care") and 75 (on strict liability). None of his responses are sustained. A larger question, which I defer to another day, is whether his magisterial article, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 353-409, offers a framework for understanding common law adjudication that would address some of the concerns raised here.

8. How can we expect us to do what we are supposed to do when the persons supposedly applying the rules are not really paying attention to what the rules say?

Each of these is, in a sense, not simply a practical objection but also a moral complaint. Fuller's principal jurisprudential claim is that it is part of the very idea of law that *the one generating the norms of what-one-is-supposed-to-do and adjudicating claims of whether persons have done what they were supposed to do* has put those norms into a form that anticipates such complaints and is therefore designed to be relatively invulnerable to them. Law, on his view, is a special kind of institutional form for generating real and enforceable norms in a way that satisfies these concerns.

The idea at the root of Fuller's brilliant argument is that real law is a kind of governance that works by treating subjects as capable of altering their conduct because they grasp that there is a rule with which they are expected to comply. As Stephen Darwall has recently emphasized³⁰ (drawing from Kant and early modern natural law theorists), the concept of right action has built into it a notion of a freedom to choose action for oneself because it was right. It appears that Fuller thought something parallel applied to real compliance with the law. A "bond of reciprocity,"³¹ not "coercion or force,"³² is what grounds a "citizen's duty to observe the rules."³³

In the American constitutional tradition, it is far more comfortable to grasp Fuller's perspective through the lens of constitutional scrutiny of the process for imposing punishments or sanctions on individuals. The Due Process Clause of the Fourteenth Amendment³⁴ (along with other parts of the Constitution, such as the Ex Post Facto Clause³⁵) has, famously, been interpreted to house the very same principle-of-legality concerns as those which Fuller raised. In the constitutional setting, the scrutiny arrives in the context of determining whether the state is acting properly by imposing a sanction for violation of a legal rule. If there really were no rules, or the rules had not been announced, or had been announced after the conduct in question, or had been too vague or unclear, the courts would declare the governmental sanction-imposition as so improper (or improper in such a critical way) as to count as unlawful (and, in some sense, *ultra vires*). Due process not only requires certain processes within adjudication, it also requires having given the persons subject to the law a fair opportunity to conform his or her conduct to it.³⁶ Significant principle-of-legality flaws are inconsistent with such an opportunity, and therefore, lead to the conclusion that there are Due Process Clause violations stemming from such principle-of-legality flaws.³⁷

³⁰ Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

³¹ Fuller, *Morality of Law*, 40.

³² *Ibid.*, 108.

³³ *Ibid.*, 40.

³⁴ U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of the law . . .").

³⁵ U.S. Const. art. I, §9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

³⁶ Fuller, *Morality of Law*, 105.

³⁷ *Ibid.*, 105-6.

The same desiderata, stemming from the principle of legality, inhere in both the Fullerian notion of authentic governance and the Due Process Clause notion of a fair opportunity to comply as a prerequisite to the imposition of a sanction for non-compliance. And, frankly, it is these same desiderata that are typically associated with the notion of the rule of law. And I believe a simple and important jurisprudential model lies at the base of the Due Process values, the Fullerian notion of law, and a very common conception of the rule of law.

Law, on this view, is a system of governance that works by consolidating authority in the state, which issues enforceable rules of conduct and has the power to enforce those rules of conduct by sanctioning those who fail to comply with them. It is essential to what law is that it be norms that count as genuinely duty-imposing whose non-compliance permits state sanction only because the norms positively are (or could be) objects of the awareness of those who are required to comply with them. Fuller milks the robust intuition that failure to satisfy his desiderata is a problem for legitimacy; he literally treats such failures as failures to be genuine law at all. In this way, Fuller's argument states essentially that a sufficient failure to satisfy rule-of-law values will disqualify a system from counting as law at all. That is, of course, his principal reason for asserting he has put forward a natural law argument.

If the common law of torts law fails to satisfy these conditions then either: (A) the common law of torts is not genuinely a form of law, or (B) Fuller's account of the nature of law is false. I, of course, choose option B, and, indeed, regard it as an aspect of nondogmatic theorizing that one would regard A as an unacceptable (or, at least, terribly costly) option in a framework of reflective equilibrium.

It is easiest to set forth my reasons for explaining what is wrong with Fuller's account by tracing a path of thinking in a pair of due process problems linking tort law and constitutional law. One pertains to *Vosburg v. Putney*,³⁸ in which a defendant who acted in a mildly tortious manner by kicking his classmate in the shin was subjected to a judgment against him for a massive compensatory damages award, because of the real but unforeseeable damage his kick caused to the plaintiff. It is a good question whether tort law is fair in imposing such liability, but virtually no one views this as a due process question. And yet if, without any prior notice, the state were to impose a financial penalty of this order on someone for mildly kicking another, there would surely be a strong argument that the lack of notice constituted a due process problem. A principal difference, of course, is that tort liability is not exactly a sanction, but a holding of a defendant responsible to a plaintiff for injuring him. The state is not penalizing the defendant having broken a rule; it is empowering the plaintiff to obtain redress because the defendant wrongfully injured him.

For any number of reasons, this is not a wholly satisfactory explanation. One is that the state is still centrally involved, since the court that empowers the plaintiff is obviously a state actor; another is that the notion of a *wrongful* injury is pivotal to the imposition of liability, and this would seem to import the notion of a duty and therefore a rule of conduct; a third is that the surprise factor exists regardless

³⁸ *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

of whether it is liability imposition or penalty imposition, and the surprise factor seems to lie at or near the core of the due process/notice concern. And finally, of course, we really need an explanation of why the penalty/redress and public/private distinctions should make any difference. We shall return to these problems below.

A second problem involves void-for-vagueness doctrine. A criminal statute or public ordinance prohibiting loitering, for example, will typically be struck down as too vague to provide notice.³⁹ But the law of nuisance within tort law, for example, hinges on the idea of an “unreasonable interference with the use and enjoyment of property” and delegates to a factfinder the job of applying such a standard. Why is vagueness a problem in one, but not the other? Why do we not really even apply vagueness scrutiny, under the Due Process Clause, to tort actions? Sometimes the nuisance plaintiff is seeking an injunction, which is of course different from a fine, but why is that relevant? And often, the nuisance plaintiff is seeking money damages—much more than any fine would be for loitering. Again, the obvious answer is that the state is not penalizing the defendant for breaking a rule, but empowering a plaintiff to demand either money or change in conduct. And again, one wants to know just why this should matter.

The key to the due process analysis in both pairs of cases above is to ask, in each of the four cases above, why a court would be justified in taking the position that the conduct of the defendant rendered him properly vulnerable to the state’s deprivation of his property or liberty. In both of the non-tort cases, the answer is that the state (as we are hypothesizing it) had laid down a rule of conduct, which it had authority to lay down, and in laying it down, had also laid down a range of sanctions applicable to those who fail to comply. Criminal or civil penalties for violation of ordinances are legitimate (within certain boundaries) because the state has the power to lay them down as coercive norms with enforcement powers attached, for the securing of a variety of public benefits for the citizenry as a whole. Due process norms inform what conditions those rules must satisfy, because a set of rule-of-law values demands that the state power be exercised in such a way that citizens have an opportunity to comply or not-comply, as a matter of individual choice. I have elsewhere referred to liability so conceived as “non-compliance sanctions,”⁴⁰ for it is essential to what they are that the defendant’s vulnerability to such sanctions stems from his or her failure to comply with an authoritative legal norm placed there by the state.

In *Vosburg*, the conduct of the defendant that rendered him vulnerable to the state’s deprivation of his property was the wronging of Vosburg by Putney. It was not the breaking of a legal rule placed there by the state. Law first enters the picture, in this case, as a power-conferring rule applied by the court. A person who has been wronged by another shall have the power to demand redress of the wrongdoer. The dimensions of the defendant’s vulnerability are correlative to the dimensions of the plaintiff’s right of redress. And the plaintiff’s right of redress is linked, via a doctrine of remedies that is itself rooted in notions of private right

³⁹ *Kolender v. Lawson*, 461 U.S. 352 (1983).

⁴⁰ See Zipursky, “Palsgraf, Punitive Damages, and Preemption,” 1777-84.

and full and fair compensation, to the idea of being made whole.⁴¹ For these reasons, the defendant is vulnerable to a claim by the plaintiff for make-whole damages.

Similarly, in a nuisance case, the defendant's vulnerability to the state's deprivation of his liberty (or property) stemmed from his wronging of the plaintiff, and more clearly, of his violation of the plaintiff's right, not from his breaking of a legal rule placed there by the state. Law again enters as a rule conferring power on the property-owner plaintiff to demand that his property right be respected (in seeking an injunction) or that he be compensated for its violation. It is the property right of freedom from unreasonable interference whose boundaries are vague, not any rule of conduct articulated by the state in a legal code of prohibitions.

The paragraphs above are not supposed to give my readers instant comfort. Whether the distinctions drawn are sufficient to warrant a different analysis of legitimacy (let alone whether the distinctions can be drawn at all) certainly remains a difficult question. Nonetheless, it is worth remembering that, at least in American law, something like this is almost surely correct as a matter of the constitutional understanding of the relative merits of due process claims above. There is simply no question that the legal system today, and also when the relevant provisions of the U.S. Constitution were ratified, treated these common law cases starkly differently than criminal cases would be treated, and that as a matter of thinking about due process, the common law tort actions would be deemed unproblematic.

Of course, courts reviewing such questions would undoubtedly speak to the historical pedigree of the common law in defending the due process bona fides of such tort actions. This would be relevant not only to the interpretation of the meaning of "due process," but, more fundamentally, to the idea that defendant should not, when all is said and done, be able to complain of lack of notice. It is worth exploring preliminarily whether a functional perspective on the fair notice concerns underlying due process norms would lead to a calmer, and less negative assessment of common law tort actions like the two considered above.

As I have argued in greater detail elsewhere, there are several features of tort law that protect a defendant in a number of ways.⁴² First, although the wrong that generates liability need not be the breach of a rule that has been stated by legislators or regulators, it must be a wrong according to a body of decided case law interpreted under a precedent-driven and historically rooted approach. Second, and relatedly, the notions of wrongfulness and rights upon which courts must draw in articulating the bases of liability in torts are deeply embedded in custom and accepted social norms, even if not locked into such customs and norms in any one-to-one way. Third, the defendant does not normally bear liability to anyone but the person who has been wronged. Fourth, the person who has been wronged

⁴¹ John C.P. Goldberg, "Two Conceptions of Tort Damages: Fair v. Full Compensation," *DePaul Law Review* 55 (2006): 435-68.

⁴² Zipursky, "*Palsgraf*, Punitive Damages, and Preemption," 1780; Benjamin C. Zipursky, "*Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law," 496-99.

must genuinely have been injured by the defendant. Fifth, the remedy available to the plaintiff must be linked to, or anchored in, the injury to the plaintiff. Sixth, the court must have personal jurisdiction over the plaintiff, and a variety of other procedural conditions (including an opportunity to be heard) for a private claim must be satisfied. Seventh, a variety of defenses can be asserted over the plaintiff, some related to timeliness, some to immunity, and some related to the conduct of the plaintiff herself. Eighth, at least in the American system, the right of redress is conditioned on a finding by a jury of peers and reviewed by a judge and an appellate system. Finally, unless there was a demonstration of the intentionality or willfulness of the wrong, these are typically vulnerabilities for which a (potential) defendant is typically entitled to obtain liability insurance in advance.

At least the first four of these conditions are simply not applicable to claims brought for violation of a statute or regulation. In this sense, it might be better to say that the due process protections are different, not lesser. In one sense, the articulation of different due process protections in tort law might help to answer our earlier question for Fuller's desiderata, too; norms of generality, promulgation, prospectivity, and clarity need not be satisfied, because there are other protections in tort law. In other words, the failure of tort law to conform to Fullerian desiderata does not show that tort lacks an "inner morality"; perhaps the inner morality of tort law is of a different kind than that found, for example, in criminal law or civil regulations or ordinances. A defendant can only be held liable in tort to someone whom he or she injured, via an act that was wrong as to the plaintiff according to authoritatively recognized relational norms of conduct, and the remedy must be anchored in an injury to the plaintiff.

As just suggested, it may well be that, while tort law lacks the inner moral structure described by Fuller, it has its own inner moral structure. For now, however, it is valuable to note that this dialectical move seems oddly beside the point. For our question is not "How could tort law be so bad and unfair?" Our question is "why is tort law a form of law even though it fails to satisfy Fuller's conditions for really being law?" To the extent that Fuller himself addresses tort law in his book (like Hart, recognizing the soft edges of negligence law), he tends to address why we should not be morally troubled by those features, not whether they undercut his analytical claims. Let us turn to addressing how the absence of Fullerian desiderata in the common law of torts illuminates what is wrong with Fuller's depiction of the internal morality of law.

The answer is that tort law is not well described as an "enterprise of subjecting human conduct to the governance of rules." Indeed, let us look again at the whole vision of laying down rules with which subjects are required to comply (and with respect to which non-compliance will typically trigger some kind of legal sanction). That is Fuller's articulated vision of what law is. Like Hart (ironically), Fuller was attracted to the construction of a positive vision of normativity far less hierarchical than Austin's (and, of course, he thought such an understanding carried with it far more by way of normative commitments than either Austin or Hart did). Fuller envisioned more of a conversation between state and citizens, with the state (which, after all, is constituted by citizens) communicating the rules of conduct, the subjects grasping what the rules are and choosing to act

accordingly, and the state expecting compliance, but meting out sanctions for non-compliance.

But tort law is not like this at all. The state's principal action, relevant to tort cases, is not the sanctioning of the lawbreakers for the breaking of the rules it announced, nor is it the promulgation of rules of conduct. It is the empowerment of certain individuals to do things, including to demand redress or to demand compliance with their rights. Perhaps we will still want to call law an "enterprise," but—at least as far as tort law goes, it is not aptly labeled as an enterprise of "governance." The guidance of individuals to engage in some conduct or not another may not principally come from a legislator, or even from someone making law at all. The norms of primary conduct themselves may be, in an important sense, non-legal. Law adds to this that we are entitled to force people to do certain things like perform a contract, or transfer property, or compensate us for an injury inflicted. This is not governance but empowerment. Sometimes, of course, a government will choose to empower in order better to govern. But not always.

Tort law is an interesting example—arguably a hybrid—because the empowerment is for redress of wrongs, and here there is more than a superficial similarity to the state—via a prosecutor—seeking to punish a wrong. Because our legal system recognizes that *being a defendant whom others seek to hold accountable for having committed a wrong* is a significant kind of setback—criminal or civil—it does indeed treat both kinds of liability as warranting significant protections. The protections are in some ways more stringent in criminal law because, in part, the setbacks—involving liberty invasions and sometimes death—are typically more significant. However, "accountability for having committed a wrong" does not mean just one thing. In criminal law, we tend to understand the accountability as linked simply to the fact that the rule was broken: if you violate this rule, you will receive a punishment; you are accountable for having acted in a manner that the law has prohibited. In tort law, by contrast, the accountability is always accountability to someone for having injured him or her. The responsibility to pay the plaintiff because of having wrongfully injured him or her is correlative to the right to demand payment from the one who wrongfully injured one. The defendant is liable for having committed a wrong in both cases, but "liability" is an ambiguous cover term. In one, it is an aspect of a system of governance by rules; part of the rules being efficacious rules is that they are attached to a sanction. In the other, liability is an aspect of a system of private empowerment of persons. Torts push near to the edge, because the wrongs that trigger empowerment are also understood as breaches of duty, and the breaches of duty are themselves understandable as violations of rules of primary conduct. Liability in tort does not turn on violation of legal rules, except in the (very important) sense that the norms of primary conduct whose violation generate tort actions are authoritatively recognized by courts of law as sufficient to generate determinations that a defendant has wronged a plaintiff and (relatedly) breached a duty to the plaintiff. More generally, tort law is not plausibly understood as an enterprise of subjecting human conduct to a system of governance in anything like the sense Fuller had in mind.

IV. The Inner Morality of Private Law and the Rule of Law

The argument sketched above aims to make two points:

1. Fuller's putative desiderata for law are not in fact desiderata for law (because otherwise, tort law, which is definitely law, would not count as law because of its failure to satisfy these desiderata).
2. Because Fuller's contention that law is the enterprise of subjecting human conduct to governance depends on the claim that he is correct about the desiderata for law, and that claim has been undermined, Fuller's argument in favor of his "enterprise" conception of law is unsound.

An important line of thought (if not officially an argument) of this essay is that tort law has its own set of features that might be deemed to constitute its own "inner morality." These are structural attributes that run parallel to, but are different from, the principle-of-legality virtues so ably articulated by Fuller. This observation allowed us to see the linkage between Fuller's claim about the desiderata of law and his conception of what law is, and similarly allowed us to see why his conception of law is too narrow. In what remains, I will suggest some possible implications about the morality of law, both public and private.

Readers will have noticed a slide in the essay between "tort law" and "private law"; while most of the arguments are expressly based on observations about the nature of tort law, some of the broader statements, and the title of the essay itself, refers to "private law," not just tort law. A strong argument can be made, I believe, that the considerations regarding generality, promulgation, retroactivity, and clarity apply a fortiori to contracts and equity, for example. Conversely, the precedential, standing, rights-connected, injury-anchoring, custom-rooted, and jurisdictional features noted in the common law of torts are demonstrably attributes of these areas, too. It would of course require more work to establish this, but I shall assume for the remainder of the essay that both the negative and the affirmative claims I have made about the inner morality of tort law will apply to contracts and equity: i.e., that they do not conform to Fuller's desiderata, and that, like tort law, they enjoy a set of structural features that constitute a parallel sort of "inner morality."

Having assumed my way to a large part of my conclusion, I shall now say how troubled I am by this conclusion, even as applied to torts. The problem is in the phrase "the inner morality," or the phrase "the internal morality," which Fuller utilizes interchangeably. A large part of Fuller's project in *The Morality of Law* cannot be understood without recognizing his categories of "the external morality of law" and the "internal morality of law." To be sure, his King Rex argument was, in part, aimed to show that there was an internal morality of law, specifiable without reference to the particular goals pursued by the political community through law. Fuller was happy to have shown that there was a natural law argument to be made about what might be considered the constitutional essentials of a legal system. But Fuller had a larger goal, going back to the Hart/Fuller debate in

the pages of the *Harvard Law Review*.⁴³ Once one understood that law is itself a kind of enterprise of subjecting human conduct to governance, and that this enterprise itself has an internal morality and thus could only take certain forms, one could ask the question of whether there are moral conditions on what kinds of goals could be aimed at by such an enterprise. *The Morality of Law*, like “Positivism and Fidelity to Law,” argues that the internal morality of law does substantially constrain the external morality of law. This contention is a very significant part of Fuller’s critique of legal positivism. In the end, for Fuller, the phrase “the morality of law” is not merely meant to suggest that law has internal and external moral aspects. It is meant to suggest that law is, by its very nature, a thing of genuine moral value, *both* in its internal form and in its external aspirations.

It is far from clear that the structure of Fuller’s broader anti-positivistic argument carries over to private law (which is not to say that positivism works for private law). One problem, as we have seen, is that Fuller’s depiction of law as a certain kind of enterprise of rule governance does not really capture private law. Private law is better understood as an enterprise of *empowerment* than of *governance*. But there is a second problem, which runs equally deep: private law is not so clearly teleological as Fuller understands law to be. Let us consider a run-of-the-mill tort case brought in a trial court; a plaintiff obtains a judgment against the defendant for \$400,000 in a medical malpractice case. The law that empowers courts to do such things is not, in the first instance, law aimed at achieving certain goals. It is fundamentally rights-based, in the sense that the ground for empowering a plaintiff like this to demand compensation from the defendant is not the social benefit of such transfer payments, but rather the individual entitlement to make such a demand—the right to redress. Of course, when politicians, citizens, judges, and lawyers contemplate revising or eliminating tort law, they will (rightly) consider the social benefits and detriments of making such changes. The claim that *tort law is rightly depicted as aiming to realize such benefits*, does not, however, follow from such observations, and I have elsewhere argued extensively that this claim is false.⁴⁴

The most tempting conclusion to draw from these observations is that the internal/external distinction regarding aspects of the morality of law is not really attributable to tort law. Insofar as tort law is moral, one might argue, it is simply the morality of tort law, not its external or internal morality. Regardless of whether one adopts this wholly anti-Fullerian line of thought (and, as the title of this essay indicates, I am not ready to do so), one should recognize that it is incomplete and misleading to suppose that the morality of tort law lies principally in attributes of its form *or* in its capacity to facilitate the achievement of worthwhile ends. In this respect, one can perceive Fuller’s great book as a natural

⁴³ H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 593-629; Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71 (1958): 630-72.

⁴⁴ See, esp., Benjamin C. Zipursky, “Civil Recourse not Corrective Justice,” *Georgetown Law Journal* 91 (2003): 695-796; Benjamin C. Zipursky, “Pragmatic Conceptualism,” *Legal Theory* 6 (2000): 457-85.

stepping stone to Dworkin's more robust anti-positivism, an anti-positivism that was first developed through the exploration of adjudication of private law cases⁴⁵ and that has always rejected both formal and instrumental models of the morality of law.

A central point of this essay is that an important cluster of rule-of-law values—generality, promulgation, prospectivity, and clarity—may apply to a domain of law, rather than to all of law or the concept of law itself. The prior section conceded a slippage between tort law and private law; now, I want to notice a parallel slippage on the public side. In the pages above, I generally explained the applicability of Fuller's idea by reference to criminal and regulatory law, but have nonetheless described his conception as more oriented to public law than private law. Public law is a far broader category than the criminal and regulatory domain, however; it includes, for example, constitutional law and administrative law. Do Fuller's desiderata apply to constitutional law?

The short answer to this question is that the Fullerian argument for the importance of his principle-of-legality desiderata turns on features of public law that are largely absent in (at least American) constitutional law, and so the Fullerian desiderata are not fundamental in constitutional law.⁴⁶ What makes Fuller's Rex allegory so compelling, as argued above, is the idea that law is a particular kind of enterprise of subjecting persons to governance by rules—ones in which the subject is placed in a position to be aware of the rules and it is therefore not unfair to expect compliance of him or her (or it). Much of constitutional law, like much of private law, is about empowerment of (this time) public entities and branches of government, and is not about duty-imposing rules at all. Other parts of constitutional law—arguably, bills of rights—can be viewed as duty-imposing rules that simultaneously mark certain government conduct as *ultra vires*. But here, the one “subject” to the rule of conduct (if it is that) is not a private citizen who risks vulnerability to sanction and has a basic entitlement to notice. It is the state itself, and—with few exceptions—non-compliance does not generate a sanction, but a nullification. And even without principle-of-legality virtues surrounding the bases of their actual constitutional obligations, states and the executive and legislative

⁴⁵ Ronald Dworkin, “The Model of Rules I,” in Dworkin, *Taking Rights Seriously*, 2d ed. (Cambridge, MA: Harvard University Press, 1978); See also, Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

⁴⁶ Fuller did address a version of this question in *Morality of Law*, 102-05. There, after recognizing that the “internal morality of law . . . lends itself awkwardly to formulation in a written constitution” he comments that the eight desiderata “do not lend themselves to anything like separate and categorical statement” and “[t]hus an inadvertent departure from one desideratum may require a compensating departure from another . . .” (ibid., 104) and he characterized the internal morality of law as one of aspiration rather than of duty. Yet Fuller never actually explained which desiderata would be capable of compensating for the “departures” of American constitutional law from many of his desiderata, even on a softer version of compliance with desiderata. In the text on 104-5 in which he applauds judicial review, and appears to be trying to defend the prior statement, he actually does something entirely different: he utilizes a pre-legislative, natural law conception of the internal morality of law to resolve an otherwise difficult constitutional problem. In effect, *constituting* an aspect of the internal morality of law is thus substituting for *complying* with it. The point here is not to criticize Fuller's text, but simply to point out that, even though Fuller recognized the challenge his own framework might present for American constitutional law, he did not in fact develop any clear response to his own challenge.

branches of the federal government face nothing like the threat to liberty that Rex's subjects face. No doubt clarity, promulgation, prospectivity, and generality have significant instrumental value even in this setting. But what is gone is the basic grounds for taking them to be fundamental to lawfulness at all—the reciprocal bond between citizen and lawmaker that forms a precondition of the citizen being subject to the laws promulgated by the lawmaker. If this (concededly hurried) argument is sound, it suggests that one of the central jurisprudential arguments offered by Justice Antonin Scalia and other originalists for supposedly rule-oriented versus standards-oriented interpretive methodologies is not warranted by rule-of-law values.⁴⁷

Finally, now, to an observation about private law and the rule of law. Quite apart from its role in high end jurisprudential debates, “the rule of law” is a phrase used frequently today in the realm of global political and economic discourse. Indeed, a country's ability to display itself as enjoying a high level of rule-of-law values is something that the World Bank and a variety of public and private organizations deem critical to the country's political stability, and to the promise of its economy. Until recently, I thought about the connection between rule-of-law values and political and economic stability in Fullerian terms: King Rex's reign of arbitrary sanctioning would not last long, and non-continuity presents massive economic problems.

No doubt, there is much to the prior perspective, but the work of this essay suggests an entirely different way to think about the importance of rule-of-law values to political and economic stability. If we expand our conception of rule-of-law values beyond Fullerian principle-of-legality virtues, and begin looking at the inner morality of private law, we see something different. Consider the value of a court system that treats individuals as equally empowered to enforce contracts, to hold others accountable, to demand freedom from certain basic kinds of mistreatment and to demand redress if one does not experience that freedom.⁴⁸ Consider a country in which people understand that their basic rights and duties to one another are legally enforceable, but where their normal, legally untutored conduct does not fall too far from the domains of these legal rights and duties because there is a nexus between social norms of conduct and the domain of private law. If these, too, are rule-of-law virtues, we can surely understand why the rule of law is a bulwark of a healthy realm of commerce in any modern society. Where accountability through institutionalized courts tracks, and reinforces, pervasive social norms of mutual expectation and mutual accountability, private law provides a critical substratum for the life of commerce and the commerce of life.

⁴⁷ Antonin Scalia, “The Rule of Law as a Law of Rules,” *University of Chicago Law Review* 56 (1986): 1175-88.

⁴⁸ Since his first book, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999), Arthur Ripstein has depicted tort law in particular and private law in general as a scheme of authority that constitutes a form of equal recognition of citizens by the state.