Private Law and the Rule of Law

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Introduction

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1. Introduction

There is widespread agreement regarding the core elements of the rule of law. Most essential among these are the principles that a right to exercise power arbitrarily cannot be conferred or upheld by law, and that anything that claims the status of law must be able to guide action.[1] Different accounts of the rule of law connect these principles in different ways to a collection of institutional, formal, and procedural requirements—including, for example, that the powers of government be separated, that laws be public, stable and non-retroactive, and that courts be accessible and governed by principles of due process and natural justice—the list of which is itself an object of near consensus.

Beyond this, however, substantial disagreement begins, collecting around four main issues: How much more substantive is the ideal of the rule of law and what is its relation to other ideas and ideals such as freedom and equality? Does the rule of law express a kind of morality or justice of its own or is it of purely instrumental value? Are rule of law considerations categorical or is fidelity to the rule of law one value among many, such that different balances amongst these values may be struck in different circumstances? And, finally: Do the principles of the rule of law constitute conditions of legality or legal validity, or might a law or legal system violate these principles and yet still claim to be a law or a legal system?

Notwithstanding these points of disagreement—and cutting across the differences they represent—there is one further point of consensus, at times only implicit but no less widespread, namely that the rule of law is essentially a public law doctrine. We'll call this the *public law presumption*. This view is pervasive in contemporary work on the rule of law[2] and is expressed in the nineteenth- and twentieth-century accounts of the rule of law that set the context of that scholarship and of the articles in this volume.

[1] As we explain, it is a matter of debate whether this 'cannot' and this 'must' express conceptual claims about the conditions of legality, and so that a law that purports to confer a right to exercise power arbitrarily or that fails to guide action is therefore invalid or at least suspect in respect of its validity.

[2] See n 26.

Present-day discussion of the rule of law arguably gets its start with AV Dicey. On his view, the rule of law is particularly well exemplified by the English constitution owing to the fact that in England citizens' fundamental rights 'are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[3] The rule of law enjoys particular security in polities in which it has the status of a common law constitutional principle for two reasons. First, because in such a legal order the rights and principles the constitution protects (such as *nulla poena sine lege*) are secured by litigation, they are necessarily attached to remedies for their violation. Second, because the rights thereby protected by the constitution are not derived from a particular statute, they cannot be suspended without suspending the legal order itself.

Dicey draws the connection between the rule of law and public law on this view when he first introduces the section of his *Introduction to the Study of the Law of the Constitution* dedicated to the rule or, as he sometimes says, supremacy of law. Dicey glosses '[the] supremacy of law' that is characteristic of the English legal system as 'the security given under the English constitution to the rights of individuals'.[4] The rights whose security Dicey implies is the upshot of the rule of law are those held by individuals against the government, such as freedom of discussion and freedom of assembly. And later as he unpacks the idea, Dicey contrasts the rule of law with 'every system of government based on the exercise of persons in authority of wide, arbitrary, or discretionary powers of constraint'.[5]

In contrast with Dicey, Friedrich Hayek argued that '[w]hether, as in some countries, the main applications of the Rule of Law are laid down in a bill of rights or in a constitutional code, or whether the principle is merely a firmly established tradition, matters little'.[6] What does matter, on Hayek's account, is that the government respect one's right to determine and, subject to consistency with the equality of others, pursue one's own ends. In governing other than by general rules fixed and announced beforehand, a government interferes with this form of individual liberty in two ways. First, it makes life unpredictable and, second, it arrogates to itself the right to determine which ends ought to be pursued by whom. In doing so a government violates what Hayek characterizes as the most important among the 'inalienable rights of the individual, inviolable rights of man'.[7] So a second point of disagreement between Hayek and Dicey concerns the foundation of the rule of law. While for Dicey it is a principle of the common law

[3] AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co 1959) 195.

[4] Dicey, *Introduction* (n 3) 184.

[5] Dicey, *Introduction* (n 3) 188.

[6] FA Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 84. The disagreement between Dicey and Hayek on this point shouldn't be overstated. Dicey's claim was not that the link between right and remedy necessarily secured in a common law constitution was inconsistent with a written constitution or bill of rights. It is rather such documents could be and often were remedially hollow (the important exception being the American Bill of Rights). Dicey, *Introduction* (n 9) 200–1.

[7] Hayek, *Road* (n 6) 84.

constitution, for Hayek the rule of law is a moral constraint on the exercise of political authority.[8]

These are disagreements within the framework of the public law presumption. Echoing the contrast Dicey drew between government under the rule of law and arbitrary power, and drawing the connection to public law even more clearly, Hayek claims that:

> [n]othing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of all the great principles known as the Rule of Law. Stripped of all technicalities, this means the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[9]

Linking it essentially to public law in another way, Hayek elsewhere tracks the history of the development of the rule of law by tracing the development of the principle of the separation of powers and the subjection of executive authority to law.[10]

A third influential account of the general nature and foundation of the rule of law is found in Lon Fuller's argument that the principles of legality often thought to form the core of the rule of law—generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of compliance, stability, and congruence between official action and declared rule—constitute the 'inner morality' of the law.[11] For Fuller, Hayek's 'inalienable rights of the individual, inviolable rights of man', by contrast, form part of what he calls an external morality: a set of independent substantive moral principles to which a legal system may or may not in practice conform.

[8] This is not to suggest that for Dicey the principle of rule of law is just a matter of positive law, but rather that on his account it can be said to be a characteristic of a legal system just to the extent that it has a matter of common law established a set of individual rights and secured their protection and the remedies for their violation in a particular way.

[9] Hayek, *Road* (n 6) 72.

[10] See 'The Origins of the Rule of Law' in *The Constitution of Liberty* (Routledge & Kegan Paul 1960) ch 11.

[11] Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 33–94. We put the characterization of Fuller's account of the inner morality of law as an account of the rule of law slightly cautiously because in fact he does not explicitly say that the principles of legality collectively comprise the rule of law. Indeed, the phrase 'rule of law' does not come up during the discussion of the principles of legality. It does appear in the 'Reply to Critics' added to the Revised Edition, where Fuller identifies it principally with the last of the eight principles: 'Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) 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' (Fuller, *Morality* 209–10). In an earlier paper, Fuller suggested that sense might be made of the variety of claims made on behalf of the rule of law if we emphasized in particular one aspect 'of the process by which a state of anarchy or despotism is converted into something we can call the "rule of law"', namely 'the process by which the party affected by a decision is granted a formally defined participation in that decision'. He gave two examples: establishing recognized voting procedures, and establishing a formal system of contracts. Lon Fuller, 'Adjudication and the Rule of Law' *Proceedings of the American Society of International Law* (1960) 1, 2.

This 'inner morality' of a legal system conditions the way in which a government should undertake what Fuller calls 'the enterprise of subjecting human conduct to the governance of rules'.[12] That he understands the form of this governance principally in public law terms is implicit in the very structure of the famous allegory with which Fuller introduces the principles of legality. Fuller asks us to imagine the inept rule of a king named Rex, who tries but fails to make law eight times, each failure being a failure to respect a different principle of legality. All are failures on the part of the King Rex to successfully legislate or administer the laws of his realm.[13]

Fuller's argument was partially responding to what he saw as the failure of legal positivism's ability to account for the nature of law. For Fuller, law can fail *as law* if the law fails to comply with the (for him moral) principles of legality even if it passes the positivist tests for legal validity. Owing to his claim that these principles are moral, Fuller classifies his view as falling in the natural law tradition, though in a qualified way.[14]

The now-classic positivist response to Fuller's rule-of-law argument is Joseph Raz's claim that the rule of law is like the sharp edge of a knife: an inherent virtue that makes the tool effective as a tool. The virtue of the rule of law 'is the virtue of efficiency; the virtue of the instrument as an instrument'.[15] Raz summarizes what he calls the literal sense of the rule of law as having two aspects: '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it', glossing the second as holding that 'the law must be capable of being obeyed'.[16] An implicit connection to public law here is expressed by the centrality of the concept of obedience. This places criminal and hence public law at the paradigmatic centre of the rule of law. As Hart noted, we might say that the legal rules, for example, that define the ways in which contracts or wills are made may be, or may fail to be, 'complied' with. But compliance is not a kind of obedience.[17] The connection of this conception of the rule of law to public law is made explicit in the list of principles that Raz claims may be derived from it, all of which are directed toward legislation, the structure of government, and the administration of justice.[18]

Now, all of this is not to say that private law plays no role in the rule of law for Dicey, Hayek, Fuller, or Raz. On Dicey's account, one of the principal elements of the rule of law is the idea of legal equality, which requires that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to

[12] Fuller, *Morality* (n 11) 106. [13] Fuller, *Morality* (n 11) 33–41.

[14] The qualification is that the principles of legality are not substantive principles of conduct. Fuller characterized them instead as procedural, though 'formal' might have been the better term for at least some. See Fuller, *Morality* (n 11) 96–106.

[15] Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (2nd edn, Oxford University Press 2009) 210, 226.

[16] Raz, 'Rule' (n 15) 213.

[17] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 28.

[18] For example, 'All laws should be open, prospective and clear', 'The independence of the judiciary must be guaranteed', and 'The principles of natural justice must be observed', respectively. Raz, 'Rule' (n 15) 214, 216, 217.

the jurisdiction of the ordinary tribunals'.[19] Commitment in practice to legal equality understood this way is revealed in the principal institutional mechanism through which, on Dicey's telling, a government is held accountable to the ideal of the rule of law, namely by way of subjection to civil suit by those wronged by actions undertaken by officials 'in their official character but in excess of their lawful authority'.[20] For his part, Hayek argues that a polity that properly respects the rule of law is one that leaves matters of distribution to the private order.[21] It follows on his account that the rule of law is made possible through a system of private law structured by rules that are general and clear enough to allow persons to plan their activities and undertakings and to prevent their being used by officials to advance one particular set of interests or vision of the good over another.[22] As for Fuller, though he introduces the principles of legality by way of a story of a ruler's failed attempts to make law, in his discussion of those principles he draws on private law. For example, in his discussion of retroactivity, he argues that the same principle against retroactivity bears on private and on criminal law but requires something different in each setting.[23] And, finally, in his discussion of the principle that law should be relatively stable, Raz says that

> though the rule of law concerns primarily private citizens as subject to duties and government agencies in the exercise of their powers . . . [i]t is also concerned with the exercise of private powers. Power conferring rules are designed to guide behaviour and should conform to the doctrine of the rule of law if they are capable of doing so effectively.[24]

Notwithstanding these important qualifications, however, a collective effect of these influential formulations of the rule of law, standing as they do in a long philosophical tradition that shares it,[25] is the implicit acceptance of the idea that at its heart the rule of law is an ideal concerning the manner in which a government exercises authority, and the institutional structures through which it may do so consistently with that ideal.[26]

[19] Dicey, *Introduction* (n 3) 193.

[20] Dicey, *Introduction* (n 3) 193.

[21] Hayek, *Road* (n 6) 72–8.

[22] On this idea see TRS Allan's contribution to this volume.

[23] Fuller, *Morality* (n 11) 51–62. Consider too the examples in the passages from 'Adjudication and the Rule of Law' discussed in n 11. For argument that for Fuller the rule of law was equally expressed in private and public law see TRS Allan's and David Dyzenhaus's contributions to this volume.

[24] Raz, 'Rule' (n 15) 215; see also Lisa M Austin's contribution to this volume, 'The Power of the Rule of Law'.

[25] Toward the end of his broad survey of treatments of the rule of law Brian Z Tamanaha says that '[t]he broadest understanding of the rule of law, a thread that has run for over 2000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law.' Tamanaha, *On the Rule of Law* (Cambridge University Press 2004) 114.

[26] This acceptance is not without exception. For example Martin Krygier recently argued that '[w]hether or not the rule of law has claim in a society is a matter found in the extent and quality of its reach and effects there: in interactions between citizens and the state, of course, but of equal or more importance, between citizens themselves.' Martin Krygier,'Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?' in James E Fleming (ed), *Getting to the Rule of Law* (NYU Press 2011) 64, 89. But for the most part the public law presumption holds. For example, in an often-cited survey, Paul Craig sorts accounts of the rule of law according to whether they express formal or substantive conceptions of the ideal, but each on his reckoning holds that the rule of law is 'a central principle of constitutional governance'. Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467, 487. More recently, Timothy Endicott argued that '[a]

The goal of this book is to explore the idea that the perception of the rule of law as an essentially public law doctrine is in fact a *mis*perception. We invited contributors to consider the idea that we should think of the rule of law as an important set of ideas about the nature of law generally and of the conditions under which any relationship—between citizens as well as between citizens and the state—becomes subject to law. This, we suggested, invites two complementary lines of enquiry.

First, one might ask whether our understanding of the rule of law is enriched by considering how and to what degree it is realized in private law. For example, if there is one idea or set of ideas common to its application in private and public law, then the classic formulations of the rule of law will turn out to be too narrow. What are the implications of the private law expression of the rule of law on our understanding of the more general principles of the rule of law? Second, one might ask whether our understanding of the private law is enriched by adding the principles of the rule of law to the traditional list of core private law concepts, such as ownership and promises. Are the principles of the rule of law expressed in the substantive and procedural doctrines of private law? Does the rule of law limit the sort of arrangements private law can uphold and constrain the ends to which its doctrines may be put?

While most contributors engaged both questions, we have sorted them according to which question they emphasized, as follows.

2. The Private Law Contribution to the Rule of Law

The rule of law, even in its canonical public law formulations, expresses an important set of ideas about the nature of law and legal order. By bringing an explicit focus on private law to rule-of-law debates, many of the chapters in this volume show that our understanding of legal order is at best incomplete and arguably also distorted if we only think about the rule of law in its public law guise.

One theme running through many chapters in this volume is the centrality of non-arbitrariness to our understanding of the rule of law and the ways in which private law relations can help enrich our understanding of this. In 'Fidelity in Law's Commonwealth', Gerald Postema argues that the rule of law 'promises protection and recourse against the arbitrary exercise of power through the distinctive offices

community attains the ideal of the rule of law when the life of the community is governed by law. So the rule of law can be opposed to anarchy, in which the life of the community is not governed. The rule of law can also be opposed to *arbitrary* government.' Timothy AO Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1, 2. Thus on Endicott's telling the rule of law is essentially connected to governance. So it is, as well, on Andrei Marmor's account, according to which 'the essence of the ideal of the rule of law is that people ought to be governed by law. This general ideal has at least two components. First, it requires that governments, namely, *de facto* political authorities, should rule, that is, guide their subjects' conduct, by law. Second, it requires that the law by which governments purport to rule should be such that it can actually guide human conduct.' Andrei Marmor, 'The Rule of Law and its Limits' (2004) 23 *Law and Philosophy* 1, 2. Examples could be easily multiplied.

and institutions of law'.[27] An exercise of power is arbitrary in the sense relevant to the rule of law when 'the agent answers only to his or her own *arbitrium*'.[28] This does not mean unreasoned or unpredictable, but unaccountable, 'exercised at the pleasure of its agent'.[29] This, Postema argues, is the core idea of the rule of law throughout history, and it also provides a coherent ideal that can unite the various elements traditionally associated with the rule of law.

Postema uses this understanding to argue for two important corrections to common treatments of the rule of law. First, he argues that in addition to observance of the principles of legality, the rule of law is only concretely realized within a polity where 'members of that polity embrace and practise a distinctive ethos'.[30] The core of his chapter is a defence of what he calls the 'fidelity thesis', which claims that the law rules in a polity only when its members embrace that ethos. Non-arbitrariness is linked, on Postema's account, to accountability and the fidelity thesis is, centrally, an account of mutual accountability whereby the responsibilities of accountability 'are owed *by all* who enjoy law's benefits *to all* who are subject to law's burdens'.[31] Second, Postema argues that the rule of law must attend to the social dimensions of power. This includes addressing power arbitrarily exercised by 'private' entities, understanding that the transactional lawyer may be more important than the courts for many, and that the legal norms that guide individuals must be understood in relation to their uptake by agents situated within a horizon of shared social understandings.

Whatever, on the best account, the rule of law *is*, William Lucy argues in 'The Rule of Law and Private Law', it is not arbitrary power. But what is meant by this is ambiguous. Lucy distinguishes among four different circumstances in which power can be said to be exercised arbitrarily. The first is when power is exercised 'without warrant and legitimacy'.[32] The second is when it is 'exercised without warrant by those who usually or sometimes have warrant to exercise power'.[33] The third is when power is exercised inconsistently. The fourth is when power is exercised unreasonably. Lucy argues that, while not all instances of arbitrariness involve the breach of rule-of-law principles and not all rule-of-law principles are directly connected to non-arbitrariness, adherence to the generally accepted rule-of-law principles, such as are articulated by Fuller, Hart, and Raz, protects members of a polity from subjection to arbitrary power in one or more of these senses.

Reflection on the senses of arbitrariness against which the rule of law protects us, Lucy argues, can help to decentre the primacy of the public law framing of the rule of law. His principal claim is that the doctrines that comprise the laws of property, tort, contract, and trusts promote just those values upheld by the rule of law but do so in the context of relations between individuals and not just in terms of relations

[27] Gerald J Postema, 'Fidelity in Law's Commonwealth' this volume ch 1, 17.
[28] Postema, 'Fidelity in Law's Commonwealth' (n 27) 18.
[29] Postema, 'Fidelity in Law's Commonwealth' (n 27) 18.
[30] Postema, 'Fidelity in Law's Commonwealth' (n 27) 20.
[31] Postema, 'Fidelity in Law's Commonwealth' (n 27) 21.
[32] William Lucy, 'The Rule of Law and Private Law' this volume ch 2, 46.
[33] Lucy, 'The Rule of Law and Private Law' (n 32) 46.

between individuals and the state. According to Hart, Raz, and Fuller, these rule-of-law values are freedom from interference, autonomy, and dignity. To these Lucy adds a fourth, freedom as non-domination. On Lucy's account, then, one way a polity manifests its commitment to the rule of law is by securing a regime of private law. An account of the rule of law cast exclusively in terms of constraints on government action is, to that extent, incomplete.

These are central claims in TRS Allan's contribution to this volume, as announced in its title, 'The Rule of Law as the Rule of Private Law', though for Allan the connection between the rule of law and private law is perhaps even deeper than it is for Lucy. '[P]rivate law', Allan argues, '*is* precisely the operation of the rule of law—the provision and enforcement of standards of legality in the context of civil society.'[34] And, again as for Lucy, for Allan it is the idea that the rule of law protects us from arbitrary exercises of power that provides the link to private law. Drawing on Hayek's account, Allan argues that the rule of law is not just about protection against the abuses of law, or the securing of predictability, but also involves securing a sphere of freedom as independence where individuals can pursue their own ends free from conscription into the public ends of the state or the ends of others. Allan goes even further, arguing that the demands of non-arbitrariness also imply a deep connection between the rule of law and both equality and justice. This places a robust sphere of private law at the heart of our understanding of the rule of law, and shows how the rule of law can limit the ends that the state can seek.

On Allan's account, then, there is a deep connection between the rule of law and the concept of law: it follows from the right understanding of what the rule of law requires, on his view, that the positivist separation of law and morality is cast into doubt. In 'Liberty and Legal Form', David Dyzenhaus draws the same link, borne as it is in Allan's view by reflection on the way the rule of law bears on private law. Dyzenhaus argues that the rule of law 'governs public and private law in the same way' and that 'its government ensures that the law has a moral quality to it, since law, in being (as it must) legal, constitutes a politically valuable condition of liberty—civil liberty'.[35] While Hayek's account of the rule of law serves as Allan's starting point, central to Dyzenhaus's argument is a defence of Fuller's understanding of the reciprocal and interactional dimensions of law as well as the republican understanding of liberty as non-domination, according to which law is both a necessary and sufficient condition of liberty. And, in contrast with Postema's account of both fidelity and the horizontal dimensions of the rule of law, for Dyzenhaus the role of the courts, and the institution of adjudication, is central.

Despite this connection between the rule of law and private law, Dyzenhaus denies that private law is *required* by the rule of law. In making this claim, Dyzenhaus also contests the view, held by Kantian corrective justice theorists, that the immanent morality of private law is fundamentally different from that of

[34] TRS Allan, 'The Rule of Law as the Rule of Private Law' this volume ch 3, 86 (emphasis added).
[35] David Dyzenhaus, 'Liberty and Legal Form' this volume ch 4, 92.

public law. Fuller's account of the immanent morality of law, Dyzenhaus argues, does not require us to make any such distinction and is in this sense superior to the Kantian position that distinguishes between private and public right.

In 'Unseating Unilateralism', Evan Fox-Decent argues that Hobbes offers us an account of legality that illuminates the shared fundamental organizing principles of private and public law. Unlike Dyzenhaus, who disputes the claim that private and public law exhibit different internal moralities, Fox-Decent claims that they may indeed express different forms of justice but they nonetheless 'co-habit the same overarching normative structure, with neither enjoying normative priority over the other'.[36] This normative structure is the prohibition on unilateralism, that is, the principle that 'no private party is ever entitled to dictate terms or enforce justice claims unilaterally against another'.[37]

The prohibition on unilateralism has two aspects for Hobbes, each of which has been taken up in subsequent rule-of-law literature. The first is its emphasis on the agency-enabling role that law and rule-of-law principles play in providing a public framework for interaction. As Fox-Decent points out, we can see this concern expressed in different ways in both Raz and Fuller. The second is the way in which rule-of-law principles (for Hobbes, 'equity') constrain the interpretation of statutes. According to Fox-Decent, Hobbes's views are echoed in Dicey's common law constitutionalism.

Zipursky takes a very different position regarding the relationship between the canonical expressions of the rule of law and the organizing principles underpinning private law in 'Torts and the Rule of Law'. He argues that tort law fails in relation to Fuller's principles of legality, such as generality, promulgation, non-retroactivity, and clarity, but that this is not a failure of tort law but should instead force us to revise our understanding of the rule of law.

According to Zipursky, Fuller's focus on legal systems and forms of governance threatens to overshadow other roles the law plays, to which the rule of law applies in distinctive ways. Tort law, the focus of his article, is not a form of governance but rather a system that empowers individuals to make enforceable demands of others as redress for wrongful injury. Looked at in this way, we can see that tort law's departures from Fuller's principles of legality are not necessarily departures from the rule of law.

Tort law constrains individual power in two principal ways. First, it protects plaintiffs from private power and domination in providing them a means of redress for wrongful injury. Second, it protects defendants through constraining the ways in which plaintiffs can use the power of the state in seeking redress, and it is here that we see tort instantiate rule-of-law principles that are distinct from though in ways analogous to the desiderata enumerated by Fuller. So, for example, the law of tort arguably fails the requirement of generality because (among other reasons)

[36] Evan Fox-Decent, 'Unseating Unilateralism' this volume ch 5, 117.

[37] Fox-Decent, 'Unseating Unilateralism' (n 36) 117. Note that Fox-Decent's account of unilateralism is broadly congruent with Postema's understanding of the kind of arbitrariness against which the rule of law is set.

'good fortune—the fact that misconduct that could easily cause injury happens not to do so—completely immunizes a tortious actor, so there is a gross disparity in the liability of those to behave identically'.[38] But once we recall that the point of tort 'is not to constrain conduct as such, but to protect against right-invasions'[39] we realize this shouldn't cause rule-of-law worries. Instead we can see that tort respects the rule of law by imposing the requirements that the plaintiff must have actually suffered some injury and that the defendant's conduct must have been wrongful in relation to her. These requirements collectively ensure that '[i]ndividuals who face the prospect of tort liability for their actions do not face [civil] actions for redress by everyone'[40] and thus serve to protect potential civil defendants in the way that traditional rule-of-law requirements protect potential criminal defendants.

In 'Private Law Pluralism and the Rule of Law', Hanoch Dagan addresses (among other things) the rule-of-law principle that the law must be able to guide conduct, and its relationship to determinacy in the law. As a contemporary defender of Legal Realism, Dagan's focus is on the indeterminacy debate that has animated the formalism v realism debate in its various iterations. For Dagan, it is not doctrinal landscape of black-letter law that renders law determinate but the 'broader social practice of law', including lawyers' understandings and the prevalent social understandings of the character of various private law institutions.[41] Unlike a number of the contributors to this volume who defend the main divisions of private law—property, tort, contract, and unjust enrichment—as involving core moral organizing principles, Dagan is a 'structural pluralist' who argues that each of these broad categories collects a heterogeneous group of relatively discrete smaller legal categories guided each by its own distinctive animating principle. Not only is this compatible with the rule of law, Dagan argues that it has a number of advantages over 'monist' conceptions of law because smaller discrete categories of the law that are more internally coherent than the broad categories to which they belong can be more determinate in practice. Moreover, having multiple private law institutions to choose amongst in ordering one's relationships can dilute concerns about the power of judges or legislatures, and thus structural pluralism can equally well account for the constraining function of the rule of law.

Unlike a number of other contributors to this volume, Dagan defends a perfectionist account of the law that, for him, is broadly Razian. The state has an obligation to promote human flourishing and 'to empower people to make choices among viable alternatives, and thus be the authors of their own lives'.[42] For him, such an account of autonomy is also better facilitated through multiple diverse private law institutions that express different values (or balances of values) among which individuals can freely navigate. This combination of perfectionism, pluralism, and realism, Dagan argues, operates in a manner that is not at odds with the

[38] Benjamin Zipursky, 'Torts and the Rule of Law' this volume ch 6, 144.
[39] Zipursky, 'Torts and the Rule of Law' (n 38) 150.
[40] Zipursky, 'Torts and the Rule of Law' (n 38) 151.
[41] Hanoch Dagan, 'Private Law Pluralism and the Rule of Law' this volume ch 7, 174.
[42] Dagan, 'Private Law Pluralism and the Rule of Law' (n 41) 159.

rule of law and might actually promote its values better than monist formalist accounts.

3. The Rule-of-Law Contribution to Private Law

Just as a focus on the private law can help us understand the nature of the rule of law, a focus on the rule of law can provide a source of insight and critique in relation to various aspects of the private law. Previous essays have already suggested, in a variety of ways, that since the rule of law applies to private law, it provides a set of norms against which to evaluate aspects of the private law. The following essays take up this theme. In doing so, they also provide general insights into the rule of law.

In 'Strict Duties and the Rule of Law', Stephen Smith argues that strict duties in private law run afoul of the rule of law. Smith focuses on strict legal *duties* rather than the more familiar category of strict liability since such liability is generally thought to follow upon the breach of a strict legal duty. For example, the duty not to trespass is a strict duty since even if I could not have reasonably known that I was trespassing, I breach the duty simply by entering another's land without her permission. He argues that such duties are incompatible with the rule of law because they provide individuals with too much guidance (rather than, as is the more common shortcoming, too little). They provide too much guidance because they instruct individuals to take more than reasonable care to avoid particular outcomes and the law cannot intend that individuals take 'unreasonable' care. This sends a mixed message, where the law cannot possibly mean what it appears to mean. And this is a problem for the rule of law.

Smith considers, and rejects, three possible responses: that strict duties support justified liabilities, that strict duties are not enforced, and that strict duties are substantively justified. Instead, Smith argues, the solution is to see these not as duties at all but as 'liabilities that arise without wrongdoing'.[43] We can therefore have strict legal liabilities, but not strict legal duties.

In 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', John Gardner argues that some rule-of-law concerns might have more purchase in relation to criminal law than they do in relation to private law. In particular, Gardner argues against the claim that strict tort liability is objectionable on rule-of-law grounds, owing to the fact that one cannot follow a rule if one cannot find out if one is breaking it, or have a way of avoiding breaking it. Hart objected to strict criminal liability along these lines. Gardner argues that the objection does not apply to strict tort liability, and in making his case responds to Stephen Smith's arguments in his contribution to this volume.

Unlike criminal liability, with tort liability *both* the plaintiff and the defendant are affected by the legal rule: 'What the defendant gains from there being fault

[43] Stephen A Smith, 'Strict Duties and the Rule of Law' this volume ch 8, 189.

liability, the plaintiff loses; what the defendant loses from there being strict liability, the plaintiff gains.'[44] Plaintiffs and defendants share the same rule-of-law interest in having legal norms that conform to the principles of legality. Gardner argues that the plaintiff's complaint regarding strict liability is that the defendant's rule-of-law gain (from fault-based liability) is a loss to the plaintiff in some other way than a loss in rule-of-law values. It follows, then, that rule-of-law values can be more flexibly applied to the norms of private law. Gardner also adopts Fuller's understanding of strict liability as a kind of tax on some activities. So, for example, although liability associated with injuring people from blasting operations is strict, liability can be avoided by not engaging in the blasting business. This mitigates the rule-of-law concerns, at least in the context of what Gardner calls activity-specific strict liability. And it also shows, Gardner argues, that Smith is wrong to say that we can only understand strict liability as arising on the basis of a duty that cannot be understood to require what it seems to require of those subject to it.

In 'Property, Equity, and the Rule of Law', Henry Smith provides a rule-of-law defence of the role of equity in moderating the formality of private law. Smith argues that we should understand private law as a hybrid of formal law and equity, where equity offers a limited 'safety valve' that protects against the opportunistic exploitation of law's formality. In doing so, equity actually strengthens both the formal law and the rule of law.

According to Smith, with Legal Realism, equity slipped its bounds and became a preference for contextualized standards and discretion, in opposition to traditional formalism within private law and to the liberal notion of the rule of law'.[45] Traditional rule-of-law values, like generality, stability, and notice, are congruent with the features of private law that manage information costs. However, this formality can be exploited, both in relation to the private law and in relation to the rule of law more generally. In protecting against opportunistic evasion, Smith argues, equity has us look to the purpose of law outside the formal system, employing the language of morality and good faith, mediated through custom. This provides 'a reason to move one step toward thicker versions of the rule of law that incorporate morality and legitimacy'.[46]

In 'Equity and the Rule of Law', Dennis Klimchuk argues that at least those doctrines of the law of equity that can be understood to be equitable in Aristotle's sense uphold rather than undermine the rule of law. A doctrine is equitable in Aristotle's sense, according to Klimchuk, if it prevents someone from being, in Aristotle's words, a 'stickler in a bad way' by exploiting the generality of legal rules. (This is nearly the idea Smith describes in language of opportunism.) The law of equity responds to the stickler by imposing constraints on the exercise of her strict (historically common law) rights. Klimchuk considers four examples of equitable doctrines that, on his reconstruction, work this way: equitable estoppel, *laches*, the fiduciary obligations imposed on company directors, and trusts.

[44] John Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' this volume ch 9, 211.

[45] Henry E Smith, 'Property, Equity and the Rule of Law' this volume ch 10, 235.

[46] Smith, 'Property, Equity and the Rule of Law' (n 45) 226.

The doctrines through which these second-order constraints on the exercise of rights are imposed uphold the rule of law, Klimchuk argues, in a way analogous to the doctrines that serve to mark the point at which public office-holders abuse their powers. One who acts within but in abuse of her rights, in both contexts, acts arbitrarily in just the sense, on Klimchuk's account, against which the rule of law is set (a sense akin to but not quite identical with some of those identified by Postema and Lucy).

In 'The Power of the Rule of Law', Lisa Austin argues that the relationship between property and the rule of law is more complex than traditional accounts, such as Hayek's, suggest. According to Austin, private ownership does not protect a sphere of individual liberty from state interference so much as it provides individuals with legal powers to secure legal consequences not otherwise possible. Law must be able to guide, but not so that individuals can plan their activities in order to avoid legal sanctions; law guides so that individuals can follow the instructions necessary to exercise their property powers. These powers, and the guidance that make their exercise possible (and not merely effective), enlarge the scope of individual liberty through making future-oriented planning possible in a number of ways.

Although Austin argues that there is a constitutive relationship between property, when understood in terms of legal powers, and the rule of law, when understood in terms of its guidance function, there is another sense in which property and the rule of law are in potential tension. As many other contributors argue, a central meaning of the rule of law is that it constrains the arbitrary exercise of power. However, private ownership involves the conferral of private legal powers that look like they can be exercised arbitrarily. According to Austin, whether property powers express individual liberty or become the instruments of private domination depends on context; considerations of equality—both juridical equality and substantive equality—are central to any such contextual analysis.

In 'Boilerplate: A Threat to the Rule of Law?', Margaret Jane Radin suggests that the use of fine print (boilerplate) to delete basic background rights may undermine the rule of law when the deletions are used against wide swaths of the public, especially when they result in loss of the right of redress. She argues that the rule of law requires that some rights are 'permanently in the care of the polity' and non-waivable by individuals.[47] She focuses in particular on the waiver of remedies, arguing that '[t]hose in a position to deploy mass-market boilerplate deleting recipients' remedies against them are using and reinforcing their power over recipients by doing so.'[48] This is both arbitrary and contrary to the idea of equality before the law, and furthermore subversive of democratic rights, when and to the extent that rights erased by boilerplate have been secured through democratic processes.

Radin concludes, against both Legal Realist arguments that aim to collapse private law into public law and public choice theory arguments that aim to collapse

[47] Margaret Jane Radin, 'Boilerplate: A Threat to the Rule of Law?' this volume ch 13, 291.
[48] Radin, 'Boilerplate: A Threat to the Rule of Law?' (n 47) 297.

the public into the private, that 'some semblance of a public/private distinction' must be maintained, 'simply because some rules must remain in the care of the polity'.[49] According to Radin, the privatization of legal infrastructure 'becomes a scheme of arbitrary power'[50] and is not consistent with the ideals of the liberal state or the rule of law. Public law is necessary for a system of private ordering.

Like Radin, Arthur Ripstein, in 'The Rule of Law and Time's Arrow', argues that the rule of law demands a public legal system for there to be private rights. This is not just a claim about the need for effective enforcement, but is meant to be constitutive: a legal system makes rights determinate, not just secure. In order to have determinative rights, Ripstein argues, there must be a procedure for resolving disputes and the passage of time figures as an aspect of such procedure. In this way he argues both that limitation periods express an idea of the rule of law and that this account is superior to other familiar justifications, including accounts of rights 'fading', concerns about stale evidence, and claims about legal certainty.

Limitation periods, by providing closure to disputes, make rights determinate on a system-wide basis. In addition, according to Ripstein, this rationale connects with one of the basic organizing ideas of private law, which is the individual's 'right to his or her own good name'.[51] Individuals have the right to be free of accusations, which in turn requires a time limit for allegations of wrongdoing.

4. Conclusion

As the contributions to this volume show, the rule of law is not essentially a public law doctrine. A variety of themes emerge in these essays, all of them underscoring how reflection upon the rule of law can help us understand the relationship between public and private law in new ways. Many authors emphasize the role that private law plays in securing individuals from the arbitrary exercise of power, both from the state and from other individuals. This insight is sometimes marshalled to defend private law and sometimes marshalled to offer resources for critique. Other authors argue that understanding the ways in which the rule of law is expressed within private law requires a revision to some of the traditional ways of thinking about the rule of law, including our thinking about Fuller's principles of legality and formalist accounts of law. Still others argue that the rule of law can help us to understand what connects public law and private law as examples of law. And, finally, many offer examples of private law concerns that are usefully illuminated through rule-of-law themes, including strict liability, limitation periods, equity, and 'boilerplate'. It is our hope that these essays are just the beginning of a much larger enquiry into the relationship between private law and the rule of law.

[49] Radin, 'Boilerplate: A Threat to the Rule of Law?' (n 47) 301.
[50] Radin, 'Boilerplate: A Threat to the Rule of Law?'(n 47) 300.
[51] Arthur Ripstein, 'The Rule of Law and Time's Arrow' this volume ch 14, 316.