Some Rule-of-Law Anxieties about Strict Liability in Private Law (2014)

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Some Rule-of-Law Anxieties about Strict Liability in Private Law

JOHN GARDNER*

1. *Strict liability: why worry?*

In legal parlance, strict liability is liability regardless of fault. 'Fault' here has a technical lawyers' meaning. Unpacking that meaning: strict liability is liability that attaches to someone (call her D) for something she did (call it φing), irrespective of any steps that she took in order not to φ and irrespective of whether she knew or had reason to know that she was φing.[1] Never mind that D did all that it was reasonable for her to do to avoid φing, all that she was personally capable of doing, even all that it was humanly possible to do. Never mind that she could not reasonably, possibly, imaginably have known that she was φing. She is still stuck with her strict liability for having φed. 'Liability' here, in turn, bears its lawyers' meaning. To say that D is liable is to say that another has a normative power to burden her, e.g. by imposing extra duties on her or taking away some of her rights. She is liable *for* φing if her having φed grounds her liability, that

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[1] Including any steps she took to find out whether she was about to φ.

is, if her having φed is (a) a complete (but not necessarily conclusive) reason[2] for her to be liable, and (b) a necessary condition of her being liable. And, to repeat, her liability for φing is *strict* if and only if her having φed grounds the liability irrespective of what she could have known or done about her φing and thereby incurring the liability.

Strict liability plays a significant role in many legal systems, in both criminal law and private law. Its occasional use attracts a weary toleration from legal thinkers, but few stand up for it with enthusiasm, and few argue for its extension. Common anxieties about strict liability fall under two main headings. Some writers worry most about the suboptimal incentives or spurs to action that, in their view, a strict liability rule creates for those who might, or think they might, fall foul of it in the future. Others worry more about how the rule treats the particular person who has already fallen foul of it, the D who has φed. To express the difference in a familiar, if not entirely happy, terminology: some people fret mainly about the supposed *inefficiency* of strict liability, while others fret mainly about the supposed *injustice*. One reason why the terminology is not entirely happy is that it is possible for a rule to be inefficient *at* doing justice.[3] Another reason is that we might object to the way the rule treats D not because it is unjust but because it is (say) cruel or petty. Still, the terminology is revealing enough that we can live with it for now. We will return to inefficiency below. But let's start with injustice.

Injustice challenges to strict liability take more than one form. Here I will focus on those that see the injustice of strict liability as bound up with a failure, on the law's part, to conform to the ideal of the rule of law. These challenges can be contrasted with those that complain of the injustice of attaching liability to

[2] On complete reasons, see Joseph Raz, *Practical Reason and Norms* (London 1975), 22-5. On conclusive reasons, see ibid, 25-8.

[3] For further explanation see John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1 at 21-2.

morally blameless actions. Although strict liability is no-fault liability in a special lawyers' sense of 'fault', it also extends in the process to many who are not at fault in the ordinary moral sense of 'fault', ie many whose actions are morally blameless. Some people think that, whatever consequences the law may attach to them, one's morally blameless actions cannot change one's moral situation for the worse; unwelcome moral consequences cannot descend upon one in the absence of moral culpability. Thus, writes Nagel, 'strict liability may have its legal uses but seems irrational as a moral position.'[4] This view gives rise, in turn, to a simple moral critique of the legal uses of strict liability. Such uses are unjust, some say, because they do not treat us as moral agents. Treating someone as a moral agent means holding him liable for what he does only if he is morally culpable in doing it.

In my view, this line of thought harbours an accumulation of errors. Most importantly, the view of moral agency that Nagel tempts us to endorse (in the end he does not endorse it himself[5]) is wrong. Morally blameless actions often do change their agent's moral situation for the worse. Often their agent is morally bound to repair, to mitigate, to apologize, or to explain.[6] Ironically, we think otherwise only if we are in the thrall of what H.L.A. Hart calls 'a legalistic conception of morality.'[7] We project back onto morality our moral expectations of the law. And one moral expectation we have of the law is that it will live up to the ideal of the rule of law. It was Kant, first and foremost, who lured us

[4] Nagel, 'Moral Luck' in his *Mortal Questions* (Cambridge 1979), 24 at 31.

[5] Ibid, 38.

[6] Explaining includes offering a justification or excuse. Once we recognise being morally bound to offer a justification or excuse as a possible moral consequence of acting, it becomes hard to deny that morally blameless actions are capable of having unwelcome moral consequences for their agents. This is one theme of my essay 'The Mark of Responsibility', the authoritative version of which appears in John Gardner, *Offences and Defences* (Oxford 2007).

[7] Hart, 'Intention and Punishment' in his *Punishment and Responsibility* (Oxford 1968), 113 at 125.

into thinking that morality itself ('the moral law') somehow lives up to this ideal. Not so. We need law, and law that lives up to the ideal of the rule of law, partly in order to help us deal with the fact that morality often does not.[8] Here begins a quite separate kind of 'injustice' objection to strict liability, one that is specific to strict liability's 'legal uses'. It sees the injustice of strict liability as bound up with a failure on the law's part to conform to the ideal of the rule of law. This is the kind of complaint about strict liability on which – to repeat – I will focus here.

2. *Guiding and goading*

The ideal of the rule of law is the ideal according to which the law should be capable of guiding those who are subject to it. People should not be ambushed by the law; it should be possible for them reliably to anticipate the legal consequences of their actions and reliably to obtain or to avoid those consequences by following the law. So understood, the ideal sets a wide range of disparate standards for all legal systems to live up to. The ones that mainly concern us here are standards for legal *norms* to live up to. Legal norms should not, according to the ideal of the rule of law, be secret, retroactive, unclear, impossible to conform to, or forever in a state of flux; and particular legal norms (rulings) should be applications of general legal norms (rules). Legal norms that do not live up to these standards, as Lon Fuller famously explained, are not truly capable of being *followed*.[9] That does not stop them from being legal norms (Fuller sometimes got this point wrong[10]), but it does make them deficient *qua* legal norms. One may try to follow them but, however hard one tries, one

[8] For detailed and memorable discussion, see Tony Honoré, 'The Dependence of Morality on Law', *Oxford Journal of Legal Studies* 13 (1993), 1.
[9] Fuller, *The Morality of Law* (rev ed, New Haven 1969), 33-38.
[10] Ibid, eg at 41.

cannot be sure of avoiding their violation, and thereby avoiding the unwelcome legal consequences. If one conforms to them by trying to do so, then that is at least partly a stroke of luck.

Fuller himself argued that strict liability in the law is objectionable on rule of law grounds because it demands the impossible.[11] That was a slip on his part. Only very rarely is it impossible for people to do what it takes to avoid strict liability. If only D had bought less dynamite, which she had the option to do, there would have been no fatal blast; if only D had parked on a different street, which she could easily have done, nobody would have put up a 'no parking' sign in her absence; if only D had emptied the swimming pool for winter a week earlier, as she had seriously considered doing, there would have been no flood; if only D had let her home to a different tenant, and she had plenty of candidates to choose from, it would never have become a crack-den; if only D had sold her customers a different holiday, as she was poised to do, they would not have ended up in that flea-pit. In every case, a happy ending to D's misadventure was perfectly possible when she went into it. Her problem, from the point of view of the rule of law, was not one of impossibility but only of lack of assurance. It was always entirely possible that she would not φ but it was nevertheless, at the crucial time, impossible for her to *make sure* that she would not φ.

Where the law imposes strict liability on D for φing (for blowing people up, for parking in a 'no parking' zone, for flooding a neighbour's land, for permitting one's property to be used for drug dealing, for providing a holiday different from the one contracted for) there is no step D could have taken, at the moment when she φed, to make sure that she wouldn't incur the liability, or even to be sure whether she would incur it. Recall that when the law imposes strict liability on D for φing, it doesn't

[11] Ibid, 75-77.

care which steps D took to avoid φing or even whether there was any way for her to know that φing was what she was doing. And that, it may be thought, puts strict liability radically at odds with the ideal of the rule of law. One cannot follow a rule, in the relevant sense, if the rule provides one with no mechanism by which one can reliably avoid breaking it, or even find out if one is breaking it, when the time to conform to it arrives.

This is essentially H.L.A. Hart's argument against the legal imposition of strict liability. He writes:

> Consider the law not as a system of stimuli but as what might be termed a choosing system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. I do not of course mean that it is a matter of indifference whether we obey the law or break it and pay the penalty. Punishment is different from a mere 'tax on a course of conduct'. What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally [non-strict, fault-based] does is to guide individual's choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.[12]

Hart goes on to divide into three the advantages of eschewing strict liability in favour of some kind of fault-based liability:

> First, we maximize the individual's power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual's choice as one of the operative factors determining whether or not these sanctions shall be applied to him. Thirdly, . . . we provide that, if the sanctions of the criminal law

[12] Hart, 'Legal Responsibility and Excuses' in his *Punishment and Responsibility*, above note 7, at 44.

are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law.[13]

I have argued at length elsewhere that these passages should be read as (successfully) harnessing Hart's objection to strict liability to a wider defence of the ideal of the rule of law.[14] As well as militating against strict liability, the considerations Hart adduces also militate, in broadly Fullerian spirit, against a resort to retroactivity, obscurity, secrecy, impossibility, inconstancy, and so on. We could say that Hart adds 'strict liability' to Fuller's list, as a distinct affront or challenge to the rule of law. Strict liability laws, like secret or retrospective ones, do not guide us towards conformity; they cannot really be *followed*.

3. *From criminal law to private law*

Hart focuses his attention on strict criminal liability, or at any rate on strict liability to be punished. Can his argument equally be extended to private law, for example to the law of torts or breach of contract, where the normal mode of liability is not punitive ('pay[ing] the penalty') but rather reparative or restitutionary?

Clearly the argument applies in both contexts. But the change of context equally clearly makes a difference to how much weight we should attach to the argument in evaluating the relevant legal norms. Litigation in private law, unlike criminal prosecution, is zero-sum. In the criminal court there may of course be a victim of the crime and he may feel aggrieved if he does not 'get justice'. But contrary to the impression given by such familiar complaints, the main task of the criminal court is not corrective. It is not to give to the victim of wrongdoing

[13] Ibid, at 47.

[14] See my 'Introduction' in the second edition of Hart's *Punishment and Responsibility* (Oxford 2008), at xxxxiv-xliv.

something that it extracts from the wrongdoer. Burdens imposed on the wrongdoer (years spent in prison, fines levied, etc) are not burdens that the victim would otherwise bear. Conversely, burdens *not* imposed on the wrongdoer (years not spent in prison, fines not levied, etc) are not thereby borne by her victim instead. In the civil courts, when dealing with the aftermath of torts and breaches of contract, things are very different. The main task of the court is corrective. It is to give to the wronged plaintiff something that it extracts from the wronging defendant, reversing so far as possible the wrongful transaction that took place between them. There is normally a burdensome consequence of the wrong to be borne by either the plaintiff or the defendant and the court has to determine, inter alia, which of them is to bear it. If it is not allocated to the defendant (by an award of damages) then it is left with the plaintiff (who must absorb the costs of the wrong that an award of damages would otherwise have covered). This means that not only the defendant but also the plaintiff can be unjustly treated, and moreover in a similar way, by the legal rule under which the defendant's liability is determined. In particular, the more extra protections against liability that we give to the defendant in the name of upholding the rule of law in her case, the more the plaintiff loses the protection that a less defendant-protective regime would allow her. What the defendant gains from there being fault liability, the plaintiff loses; what the defendant loses from there being strict liability, the plaintiff gains.[15]

[15] It may be thought that this fact already militates in favour of fault-based liability (using the negligence standard) because such liability somehow puts the parties on an equal footing in their zero-sum conflict in a way that strict liability would not. See Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass. 1995), 177-83, and Alan Brudner, *The Unity of the Common Law* (Berkeley 1995), 190. I do not agree, and this is not what I am arguing here. My argument here does not enable one to draw any positive conclusions about which standards for liability should be used where in the law. I am

Some writers think that this difference between criminal law and private law may be less substantial than it seems. Contrary to first impressions, they say, the criminal trial is indeed zero-sum. True, burdens not imposed on the wrongdoer (years not spent in prison, fines not levied, etc) are not borne by his victim instead. They are, however, borne by various (usually indefinite) other people who will some day be the victims of crimes. By burdening today's wrongdoer less we are not doing our bit to prevent or deter these future crimes and so are burdening future victims more. Some say, indeed, that a necessary condition of just sentencing (although, most agree, not a sufficient one) is that no extra burdens should be imposed by the court on wrongdoers beyond those that future victims of crime can thereby be spared.[16] If that proposal is sound, should we not conclude that rule-of-law protections accorded to criminal defendants, like those accorded to private law defendants, necessarily come at the cost of protections that are thereby denied to others?

Maybe. But be that as it may, the criminal trial remains importantly different from its private-law counterpart. The burdens created by (as it were) criminal under-sentencing are generally diffuse. For the most part, they are spread thinly across a wider population of victims of later crimes, usually in unassignable proportions. True, loss-spreading among potential plaintiffs is also possible in private law, thanks to the availability

exclusively attending to the question of how the zero-sum feature of private law affects the relative importance of the ideal of the rule of law in evaluating private law standards of liability, whatever they may be.

[16] The latest and probably most philosophically ambitious defence of this view is in Victor Tadros, *The Ends of Harm* (Oxford 2012). However a similar view was defended less ambitiously by Hart in 'Prolegomenon to the Principles of Punishment', chapter 1 of his *Punishment and Responsibility*, above note 7. Hart was in turn moderating the positions of Bentham and Beccaria, who came close to embracing 'no extra burdens' as a sufficient condition of just sentencing (although they might both have favoured a word other than 'just').

and widespread use of insurance. But in private law, defendant-side burdens can also be spread thinly, and often are spread thinly, through liability insurance. Not so in criminal law. In criminal law, making the defendant personally bear the burdens of liability is an aim of the exercise, and liability insurance (or any contract of indemnification) is void.[17] The distinctive technique by which criminal law deters and prevents (and of course often punishes too) is that of the non-spreadable, and more generally non-transferable, burden. So the way in which criminal trials are zero-sum, if indeed they are, still leaves the criminal defendant uniquely exposed and in need of enhanced protection against the possibility of being ambushed by the law.[18] The civil trial remains, in the relevant respect, a more symmetrical one than its criminal counterpart, and hence one in which the defendant-protective standards of the rule of law may well call for more compromise in the name of plaintiff protection.

I am not suggesting an exact symmetry here. Some talk as if, in a tort or breach of contract case, there is either defendant liability or plaintiff liability, so that the question is: liability for whom?[19] But there is no such thing as 'plaintiff liability'.[20] At the end of the trial there is either defendant liability or no liability. This makes a significant difference in many ways. In particular, the standards of the rule of law that we are focusing on here are standards for legal norms to live up to, including legal norms that

[17] *Askey* v *Golden Wine Company Limited* [1948] 2 All ER 35, 38; for nuanced discussion of the limits of this common-law doctrine, see Gray v Thames Trains [2009] UKHL 33, especially in the speech of Lord Hoffman.

[18] A possible *quid pro quo* is that if the law does not provide the relevant protection against ambush, then a contract of insurance covering crimnal penalties should exceptionally be enforceable: *R* v *Northumbrian Water* ex parte *Newcastle and North Tyneside Health Authority* [1998] All ER (D) 733.

[19] Jules Coleman, 'The Morality of Strict Tort Liability' in his *Markets, Morals, and the Law* (Cambridge 1988), 166 at 175.

[20] I am disregarding the possibility of a counterclaim in which the plaintiff is cast as defendant. I am also ignoring any possible liability to pay legal costs.

impose liabilities. If there is no norm imposing liability, it cannot either meet or fail to meet the relevant rule-of-law standards. In respect of norms imposing liability, the plaintiff's rule of law interests are usually aligned with those of the defendant: both want legal norms that are open, clear, prospective and otherwise tolerably free from the potential to ambush the unwitting. That is a public good from which both sides stand to benefit. So the complaint from aggrieved plaintiffs that we are imagining, when we think about the civil trial, is not strictly speaking that the defendant's rule-of-law gain is their *rule-of-law* loss. Rather it is that the defendant's rule-of-law gain is their loss *in other ways*; most obviously, it deprives them of a remedy for wrongdoing that the law would otherwise grant. And that consideration does militate in favour of less stringent adherence to rule-of-law standards in respect of private law norms than would be acceptable in respect of criminal law norms. Rigid adherence to the Hartian stance on strict liability (as to the related Fullerian stance on unclarity, inconstancy, retrospectivity, secrecy, etc) can make an otherwise symmetrical private law dispute unjustly asymmetrical. The standards that the ideal of the rule of law sets for legal norms to live up to therefore need to be less stringently or more flexibly applied to the norms of private law, or at any rate to those that make up the law relating to the treatment in court of torts and of breaches of contract.

This is not startling news. In the common law world we tolerate a radically indeterminate body of law governing the tort of negligence – a body of law that, were it transplanted into the criminal law, would constitute a grave departure from the most elementary requirements of the rule of law. One reason to have any law, as I mentioned in section 1, is to help us cope with the various ways in which morality can trip us up. Law cannot do this where its purported norm only says: morality applies here; just do the right thing. That is not the rule of law. That is not

even a legal norm. That is a legal vacuum.[21] Many propositions of the law governing the tort of negligence come surprisingly close to such legal vacuity. They pass the buck back to ordinary moral reasoning in its rawest form. They invite us to think and act reasonably, meaning just as we should quite apart from the law.

In view of the relatively rudimentary level of attention to Fullerian rule-of-law standards in this ever more dominant part of the law of torts, it is perhaps slightly comic to be fretting, on Hartian rule-of-law grounds, about some relatively contained pockets of strict liability in the residue. Motes and beams come to mind. That is not, of course, a reason to think that strict liability in the law of torts, or anywhere else in private law, is nothing to worry about, or nothing to worry about so far as the rule of law is concerned. My point is only that, for reasons I have sketched out, we should and do expect less stringent compliance with the relevant rule-of-law standards for legal norms in private law than in criminal law. A Hartian rule-of-law critique of strict liability in private law should make much the same allowances that a Fullerian rule-of-law critique of the law of negligence, on the ground of its indeterminacy, would have to make for the more symmetrical setting of the private law trial.

4. Commanding and commending

Stephen Smith offers a reorientated 'rule of law' objection to strict liability, one that is perhaps designed to have more force in private law settings than the Hartian objection.[22] He presents it as an objection under the 'clarity' heading, and to that extent

[21] For what seems to me to be the decisive argument, see Joseph Raz, 'Incorporation by Law' in his *Between Authority and Interpretation* (Oxford 2009).

[22] Smith, 'Strict Duties and the Rule of Law', this volume.

remains faithful to the Fullerian account of the rule of law. The main thing that makes Smith's objection different from Hart's is that it is not (in the terms I introduced cautiously in section 1) an injustice objection. It is an inefficiency objection. It focuses on the suboptimal spurs to action that, in Smith's view, a strict liability rule creates for those who might, or think they might, fall foul of it, rather than on how the rule treats those who have already fallen foul of it. In one way this focus is not surprising. The ideal of the rule of law is primarily an ideal for legal efficiency, demanding of the law that it be good at guiding action.[23] The injustices that can come of failure to conform to the rule of law, such as those on which Hart is dwelling, are in a way derivative. They are consequential unjust impositions *ex post* upon people to whom the law did not (as it were) efficiently address itself *ex ante*. Possibly Smith thinks that some such unjust impositions flow from the inefficiencies with which he is primarily concerned; but his emphasis throughout is on the inefficiencies themselves, not on the injustices.

In keeping with this shift in emphasis from the *ex post* to the *ex ante*, Smith tells us that he is not objecting to strict liability as such. He is objecting to strict liability only when it is strict liability for the supposed breach of a 'strict duty'.[24] That is his name for a supposed duty not to φ that D may supposedly breach irrespective of any steps that she took in order not to φ and irrespective of whether she knew or had reason to know that she was φing. This change of focus from the liability to the duty makes less difference than some may think. Strict liability is normally contrasted with fault-based liability, and fault-based

[23] Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law* (Oxford 1979), 210 at 226. This sounds odd to a contemporary theorist of private law only because we have unwisely allowed economists to monopolise the language of efficiency. Conformity to the rule of law does not of course make the law economically efficient. It only makes it legally efficient.

[24] 'Strict Duties and the Rule of Law', above note 22, [1].

liability, by its nature, can only be liability for one's own actions and omissions (including, of course, one's actions and omissions of contributing to the actions and omissions of another). To make the contrast with fault-based liability a contrast of like with like, strict liability too must be thought of as a species of liability for one's own actions and omissions. I defined it accordingly at the start of this essay: 'strict liability is [a type of] liability that attaches to someone (call her D) for something she did (call it φing)'. This means that an employer's vicarious liability for the tort of an employee, understood as arising irrespective of the employer's own contributions to the tort, does not qualify as strict.[25] Likewise an insurer's contractual liability to indemnify the torts of the insured, or of a third party, does not qualify as strict, for it does not depend on the insurer's having played a part in the commission of the tort. On the other hand, an insurer's legal liability for *breach* of the same insurance contract by *non-payment* of a sum validly claimed could be a strict liability. For now there is an action or omission by the insurer – not paying out on a valid claim – which serves as the ground of the liability.

Must D's φing always be a breach of duty if D is to be strictly liable, in law, on the ground of it? Clearly not. The plainest counterexample is the one that Hart foregrounds when he speaks of a 'tax on a course of conduct',[26] and that Fuller describes, in similar vein, as 'a kind of surcharge on the act'.[27] An import tax is levied on actions of importing and a sales tax on actions of selling. In each case the action is the ground of the liability to pay tax, and that liability is typically strict. Reasonable ignorance or reasonable effort may be defences to a further liability (eg a

[25] Compare Lord Nicholls in *Majrowski* v *Guy's Hospital* [2006] UKHL 34: 'Vicarious liability is a common law principle of strict, no-fault liability.' This strikes me as a category mistake. If it were fault liability it could not possibly be vicarious. Therefore it makes no sense to classify it as 'no-fault' either.

[26] In the passage quoted at note 12 above.

[27] *The Morality of Law*, above note 9, 75.

liability to pay administrative penalties) for non-reporting of a taxable import or sale, but the liability to pay the tax itself is typically unaffected by such considerations. As Fuller explains, it is possible to think of some strict liabilities in private law on this model. Strict tort liability for an ultra-hazardous activity such as blasting, for example, can be understood as 'impos[ing] on [the] blasting operations a kind of tax in the form of a rule that [the operator] must respond for any damage that results from these operations, whether or not they can be attributed to any negligence on his part.'[28] And when the strict liability is so understood, Fuller goes on to say, then what is required of the law under the rule of law 'is not that it cease commanding [actions that one cannot be sure of avoiding], but that it define as clearly as possible the kind of activity that carries a special surcharge of legal responsibility.'[29]

These remarks help us to see what Smith means when he claims not to be objecting to strict liability as such. He is leaving open the possibility that what we think of as strict tort liability might turn out to meet the requirements of the rule of law when understood on Fuller's tax model. His thesis is only that it does not meet the requirements of the rule of law when understood on the *tort* model, ie as liability for a wrong, a breach of duty.

Smith's objection to the existence of such a duty, however, is not Fuller's. It is not that a strict liability rule (understood on the tort model) commands something that it should not command, but that it commends something that it should not *commend*. Or rather, in Smith's turn of phrase, that the law, so understood, 'it appears to recommend actions that it does not want to recommend.'[30] Smith has something like the following in mind:

[28] Ibid.

[29] Ibid. I have substituted the square-bracketed words here for Fuller's words 'the impossible' to reflect the point, in section 2 above, that Fuller confuses the impossibility of making sure that one will φ with the impossibility of φing.

[30] 'Strict Duties and the Rule of Law', above note 22, [2].

When the law of trespass is held to impose a strict duty not to enter another's land without permission, those who fear falling foul of the law may go to ridiculous lengths not to trespass, for example by never going anywhere, or by neglecting other duties in order to avoid a trespass even when the other duties are much more important. The law clearly does not seek this kind of overkill by its users, which is on any view totally unreasonable; yet the law does give people a reason to engage in it. A duty not to enter another's land without permission gives one a reason to destroy all one's opportunities to enter another's land without permission, in the same way that a duty to destroy a wasp's nest in the attic gives one a reason to blow up the whole house. The law is not being sufficiently clear in this case, thinks Smith, because it is 'sending mixed messages'.[31] It is giving people a reason to go to lengths to which, as the law well knows, it would be unreasonable for them to go. If the law only wanted them to go to reasonable lengths not to enter another's land without permission, that is what it would tell them to do. It would tell them to take reasonable steps not to φ, and then the duty, by definition, would no longer be a strict one.

This argument itself contains an element of overkill. All laws give one reasons to do things that it would be unreasonable for one to do. Many cowardly people hide behind the law to do totally unreasonable things. They evasively cite 'legal reasons'. They make it sound as if they have a legal duty not to allow nut-eating at school, ice-skating in the park, or advice-giving on the phone. In fact they have no such duty. They only have a duty to take reasonable steps to avoid injuries or losses of one kind or another, under the law of tortious negligence. The problem is that this also gives them a reason to take unreasonable steps, since one way to avoid failing to take reasonable steps is to take every imaginable step, including daft ones like banning everyone from

[31] Ibid.

the school or the park or the phone. This shows that the problem of 'mixed messages' to which Smith is addressing himself is not specific to strict legal duties. It applies to all legal duties.

So Smith still needs to show some way in which strict duties are especially or distinctively prone to induce overkill. The way he tries to show this is by showing that what appear to be strict duties to φ in the law are in fact duties to go to every possible length not to φ. They do not only give one a reason to engage in crazy overkill but positively *require* it of one. If there is a duty, then 'go to all lengths not to φ' is the content of the duty.

I have argued elsewhere that the law is not telling anyone to 'go to all lengths not to φ' when it gives them a strict duty not to φ.[32] Far from telling them to go to all lengths not to φ, it is telling them that in the law's eyes it does not matter what lengths they go to. They can go to no lengths at all if they like, so long as they do not φ. And that is because, as I explained above, strict liability is liability that attaches to D for φing, irrespective of any steps that she takes not to φ. Smith resists this line of thought. He has some minor skirmishes with my previous writings along the way. He rejects my view, for example, that going to great lengths to do something is not always, or even reliably, the best way to do it. But his main resistance has deeper roots. For when Smith is faced with my affirmative view that the only thing a strict duty not to φ tells D to do is *not to φ*—ie that the law means exactly what it says—he does not regard that as even a candidate interpretation. He says that the law here 'cannot mean what it appears to mean.'[33] It can only mean that D has a duty to take *some set of steps towards* not φing. And if that is all it can mean, then in the name of the rule of law ('clarity') that is what it should say. It should not say to D: do not φ. It should say: take steps not to φ. Then we can openly discuss whether it should be

[32] Gardner 'Obligations and Outcomes in the Law of Torts', in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Oxford 2001), 111 at 111-6.
[33] 'Strict Duties and the Rule of Law', above note 22, [13].

saying 'all possible steps', or only 'all reasonable steps', or perhaps 'all the steps that D thinks reasonable', or whatever.

This explains why, when I first told you what a 'strict duty' is according to Smith, I told you that it is a *supposed* duty not to φ that D may *supposedly* breach irrespective of any steps that she took in order not to φ and irrespective of whether she knew or had reason to know that she was φing. All of this is only 'supposed' because, according to Smith, the duty cannot really be like this. Its content must be different from what we suppose.

Smith's refusal to even entertain my simple 'do not φ' interpretation of the duty seems to come most immediately of his unargued assumption that the meaning of a proposition of law can only be its meaning '[f]rom a rule of law perspective'.[34] In other words the content of the so-called 'strict duty' must be read in such a way as to satisfy Fuller's demand for followability, and hence cannot be read as a strict 'do not φ' duty. The law must be interpreted as guidance, and 'strict duties guide citizens to take more than reasonable care.'[35] For reasons that I gave in section 3, this manoeuvre jumps the gun. In private law there are plaintiff-side considerations that compete systematically with Fullerian rule-of-law standards for legal norms, and this fact should lead us to contemplate interpretations of some private law norms which leave them scoring pretty badly on the Fullerian scale.

Can we *only* interpret the law that governs the tort of negligence, for example, in such a way that it is as determinate as it would need to be to satisfy the tough standards that Fuller sets, the ones that we rightly insist upon in the criminal law? To do that we would need to dismiss almost every modern case on the tort of negligence, at least since *Donoghue v Stevenson*. It cannot be that in order to judge whether and to what extent a body of

[34] Ibid, [9].
35 Ibid, [11].

legal norms meets the relevant standards of the rule of law we can only ever begin by interpreting the body of norms so that it already meets them. That would mean that there is no law that fails to meet the standards of the rule of law. And this view, with which Fuller flirted and to which Dworkin later became wedded,[36] has long been exposed as incoherent. There cannot be standards for somebody or something to meet such that, by its nature, that same somebody or something always meets them. That is at odds with the very idea of a standard.[37]

Smith's resistance to the simple 'do not φ' interpretation of strict duties, then, rests partly on a Dworkinian mistake. Yet there seems to lurk in Smith's paper a second, deeper, cause of resistance to the simple 'do not φ' interpretation. Smith shares my view that legal duties must be morally intelligible, meaning presentable and imaginable as moral duties. 'When we try to explain legal duties,' he writes, 'our explanation should show how they could plausibly be presented as reflecting moral duties.'[38] Apparently, however, Smith does not think that moral duties can be strict duties of the 'do not φ' kind. At any rate, that seems to be the implication of the following passage:

> [T]he rule of law objection [to strict duties is] that strict duties are not what they appear to be: that is to say, they are not actually duties. Both in law and morality to say that you have a duty to do X means that ought to plan your actions so that you do X.[39]

I think that this is false of both legal and moral duties. Smith explains why he thinks it is true of legal duties: for him they must, as we saw, be interpreted as already rule-of-law compliant.

[36] For a notable statement, see Dworkin, 'Hart's Postscript and the Character of Political Philosophy', *Oxford Journal of Legal Studies* 24 (2004), 1 at 25.
[37] See further Timothy Macklem and John Gardner, 'Provocation and Pluralism' in Gardner, *Offences and Defences*, above note 6.
[38] Strict Duties and the Rule of Law', above note 22, [12].
[39] Ibid, [17].

But he says nothing to explain why he thinks it is true of moral duties. The only hint he gives is in the very words just quoted. He says that his 'rule of law objection' is an objection to taking literally a supposed moral injunction ('strictly') not to do X. This suggests to me that Smith thinks that morality conforms to the requirements of the rule of law. I have already explained why I think this assumption is mistaken. The fact that moral norms are often inadequate as guides—that morality constantly ambushes us and sabotages even our well-laid plans—is one reason why we need to have law, and to live under the rule of law. Morality is rife with luck. In particular it includes many strict duties: duties not to φ, where φing is something that one cannot be sure not to do or even to know one is doing. When we φ, even totally innocently, we often owe apologies, accounts, and repairs.

The puzzle is why the same should not be true in the law. Hart gives an answer. He draws attention to one tension between strict liability and the requirements of the rule of law. Does Smith's argument draw attention to another tension between strict liability and the requirements of the rule of law? Inasmuch as Smith's answer depends on an insistence that strict duties cannot possibly be what they seem, the answer is clearly no. One cannot show a rule-of-law problem with strict duties, or with the strict liabilities that are grounded in their breach, by denying that such duties are conceptually possible. If they are conceptually impossible, the question of their desirability does not arise.

5. Prophylaxis and pricing

None of this goes to show that strict liability in private law is unobjectionable from the point of view of the rule of law. Smith's argument fails. But Hart's argument succeeds. It reveals genuine rule-of-law problems with strict liability, which I called assurance problems. All I added to Hart's argument was a caveat to the effect that, in the private law context, we may sometimes have to swallow our rule-of-law scruples and tolerate some

assurance problems that we would not tolerate in criminal law, because in private law we have to think of extra assurance for the defendant in a zero-sum way, as extra hazard for the plaintiff.

This way of presenting what is at stake assumes that we are already at the stage where a zero-sum conflict exists, where plaintiff and defendant are locked together in the grim embrace of pending or imminent litigation. A merit of Smith's argument is that it draws our attention back to the earlier *ex ante* point at which there is still, for the potential defendant, a question of whether to risk becoming part of such a grim embrace.

Those writing about strict liability sometimes write as if the only relevant question of what to do facing the potential defendant *ex* ante is the question of whether to φ, where φing is the breach of duty that grounds the strict liability. But for the most part strict liability for φing exists, in the private law of all legal systems known to me, only where the φing takes place in the course of some specified activity or relationship – call it ψing. And in general, in such legal systems, ψing is an activity or relationship that one cannot but know one is engaged in, and moreover that one could (with enough effort) avoid getting into. So for the most part the law does provide an assurance of no liability to potential defendants at an earlier time, via a prophylactic measure, if they are willing to take the trouble to use it. Want to avoid strict liability for injuring people with your blasting operations? Fine: just don't go into the blasting business. Want to avoid strict liability for flooding your neighbour's land? Fine: just don't transport water onto your land. Want to avoid strict liability for breaches of contract? Fine: just don't enter into contracts that impose strict duties on you; undertake contractual duties only when they are of a 'best endeavours' variety. More generally, want to avoid strict liability for φing in the course of your ψing? Fine: just don't start ψing.

The law in these cases makes the strict liability a predictable cost, we might want to say, of doing certain avoidable kinds of business, or in Fullerian terms 'a kind of tax in the form of a rule

that [the ψer] must respond for any damage that results from [φing in the course of ψing].'[40] Don't want to bear the cost of φing? Fine: just stay out of the ψing business. This kind of prophylactic assurance device, in my view as in Fuller's, is capable of going a long way to meeting the assurance requirements of the rule of law, and in the process tends to mitigate, although maybe not eliminate, the Fuller-Hart rule of law anxieties we might otherwise experience about the use of strict liability in private law contexts. Moreover, the device does so without significantly shifting the risks of the regulated activities in question onto potential plaintiffs. By hypothesis, those who help themselves to the relevant prophylactic assurance devices do not embark on the regulated activities in question, and so do not impose the risks of those activities on any potential plaintiff. They might still be sued, of course—anyone at all can be sued for anything at all—and dispute might still arise in such a suit over whether their activity was, in spite of appearances, the regulated one. So the prophylactic assurance device does still create an obstacle for future plaintiffs. Nothing can save us altogether from the zero-sum quality of litigation in private law. But the addition of a prophylactic assurance device generally gives rise to less complex and speculative probative challenges than arise from the addition of a requirement to prove fault. And it also does more to guide plaintiffs into choosing different (more suitable) defendants to sue. So as a measure to bring greater rule-of-law conformity into private law without hobbling plaintiffs, the use of prophylactic assurance devices has some advantages over the use of fault standards. If fault liability in private law is nevertheless (at least sometimes) morally preferable to activity-specific strict liability, that can only be on other grounds. It is not because of the assurance demands of the rule of law.

[40] Fuller, *The Morality of Law*, above note 9, 75.

Or at least not directly. Maybe indirectly, in the following way. Where ψing is a very specialised activity, giving rise to a small pocket of strict liability in a sea of potential liabilities that are otherwise fault-based, it is relatively easy to steer clear of strict liability for ψing. There are plenty of other ways left to make a living, get around, engage in social activities, etc. As ψing gets less specific and the associated pockets of strict liability grow, the force of the argument that one could have ruled them out at an earlier stage by simply not ψing diminishes. It is one thing to say: If you want to steer clear of strict liability, don't go into the blasting business. It is quite another to say: If you want to steer clear of strict liability, don't go into business at all. It is one thing to say: If you want to steer clear of strict liability, don't say anything about other people in the newspapers. It is quite another to say: If you want to steer clear of strict liability, don't say anything about other people. Activity-specific strict liability helps to satisfy the rule-of-law demand for assurance because and to the extent that it is genuinely specific. A regime of otherwise fault-based liabilities in private law is presupposed.

Since activity-specific strict liability, when it satisfies these conditions, makes certain liabilities in private law a predictable cost of doing certain kinds of business, it is tempting to read it as not regulating the action of φing at all (the killing by blasting, the flooding by importing water onto your land, the failure to deliver on the contractually specified date, etc). It is tempting to read it as only regulating, on the one hand, the wider activity of ψing (blasting, importing water onto your land, contracting) and, on the other hand, the legal liabilities that ensue when someone suffers harm or loss by one's ψing. On this view, when one is strictly liable in law, it is not really for one's wrongdoing. There is not really a tort or a breach of contract; those are just the lawyer's perhaps outmoded or fantastical *façons de parler*. There is no prior duty, breach of which grounds the liability. Nobody is suggesting, obviously, that one has a duty not to ψ, a duty that one breached by ψing. Rather, there is a freestanding liability

that belongs to all ψers when certain harms or losses materialize from their ψing. In some ways, then, theirs is akin to the indemnity liability of an insurer, or the vicarious liability of an employer. It is a liability attached to their activities (employing, insuring) rather than their actions. In particular, there is no suggestion that they, as employers or insurers, have themselves done anything wrong. On this view the law attaches, as Fuller puts it, 'a special [kind of] liability to *entry* upon a certain *line* of conduct'.[41]

I do not doubt—in fact I have conceded already[42]—that it is possible to interpret some tort liabilities in this way, even though in doing so one awkwardly puts paid to the idea that tort liability is liability for torts, that is, for actions that the law holds to be wrongful. The question before us, however, is not whether the interpretation is (awkwardly) possible but whether one is forced to it as soon as one thinks of strict tort liability a cost of doing certain types of business. It seems to me that one is not.

It is often suggested that one must choose between the following two ways of looking at any given tort liability. Either one thinks of it as a liability for a wrongful action of φing (the 'old' moralistic way of thinking about tort law) or one thinks of it as a mechanism for attaching a cost to the activity of ψing (the 'new' regulatory way of thinking about tort law). But these are not rival ways of thinking about the liability. They are fully compatible. Only an economist or accountant, or someone who should be an economist or accountant, would take it for granted that the cost of doing business we are talking about, when we describe strict liability as a cost of doing business, is the economic cost, meaning the price in pounds or dollars that the strictly liable ψer ends up paying. The cost that I had in mind, by contrast, was the fact of the strict tort liability itself, ie the fact that φing

[41] Ibid.
[42] Above, text at note **Error! Bookmark not defined.**.

(whatever one did to avoid it and whether one knew of it or not) will now be a wrong, and a wrong recognised by law and actionable in law, because it will have been done in the course of ψing. The cost of doing business that we should be thinking of first, when we think about tort liability in the 'new' way as a mechanism for attaching costs to ψing, is the very fact of being subject to extra tort liability in the 'old' way, ie being at risk of committing wrongs of φing that would not qualify as wrongs were one not engaged in ψing. Any economic costs are mere consequences of that. They come and go according to the skill of one's lawyers, the scope of one's insurance policies, and the resources and resilience those who launch proceedings against one. The tort liability, however, remains, and the non-awkward way to interpret it is as a liability for a tort of φing-while-ψing, and to think of potential liability for committing that tort as one of the costs of ψing. This is what Fuller gestures towards when he speaks of a 'special surcharge *of legal responsibility*'[43] – pointing not to the tax on ψing alone, but also to the distinctively tort-law ground for its falling due, namely that D tortiously φed in the course of ψing

Different elements of this tort of φing-while-ψing come into the foreground depending on one's investigative preoccupations. If one is interested in how people might plan for their future liabilities, then one naturally focuses on the ψing element. If one is interested in the ground of the liability in tort, however, one naturally focuses on the φing element—the action, not the activity. The activity, ψing, is a necessary condition of liability but not, in itself, a ground of it (because not, in itself, a complete reason for it). It is perfectly understandable that many lawyers, immersed from the first day of their professional education in the ideology of the rule of law, are tempted to shift the focus of their analysis from the *ex hypothesi* unassurable φing element (killing,

[43] Fuller, *The Morality of Law*, above note 9, 75.

flooding, failure to deliver on the specified date, etc.) to the *ex hypothesi* assurable ψing element (blasting, importing water onto land, contracting). It is also understandable that, in forging such a ψing-focused analysis, lawyers often find common cause with, or take comfort in the work of, micro-economists, who are immersed from the first day of *their* professional education in the stunted psychology of the self-interested 'rational' chooser who is out to maximise economic returns for himself. The economistic ideology agrees with the legalistic ideology in focusing attention on the ψing element as opposed to the φing element. In emphasising the importance of the φing element, the action by D that grounds the liability, I am not suggesting that we can dispense with these specialised professional ideologies. The bewildering conditions of modern life unfortunately demand ever-greater bureaucratization, an ever-more pervasive parcelling up of rational labour into distinct professions, offices, and disciplines. The occupants of such distinct professions, offices, and disciplines cannot but interpret the world so that it can be marshalled and rationalized according to the defining ideology of their role. Sometimes they are led to think and talk as if the ideals built into that ideology are the most important ideals for humanity, or society, or civilization. Sometimes they are led to think and talk, wishfully, as if the world of their work, or the world as a whole, already conforms to the ideals that they, as professionals, set for it. Most often they are led to focus professional attention on the data that do conform to those ideals, and to hold them up as some kind of vindication for their professional worldview.

This is well-known syndrome among lawyers, who naturally enough long to convince themselves and others of the nobility of what is often a murky and desolate professional life, raking and

ploughing an endless 'field of pain and death'.[44] In this exercise of esteem-building, not only is the moral ideal of the rule of law casually endowed with too much importance as compared with the rest of morality; not only is the law often paraded too uncritically as already conforming to the ideal; but also the organising categories of the law, and the relationships among them, are distorted by the urge to foreground those that conform to the ideal, and to background those that do not.[45] In the literature of the law of torts, especially but not only among those writers who self-identify as belonging to the new world of tort law as 'regulation', this syndrome is greatly in evidence in the premature rejection, marginalization, or reconstruction of strict liability, and in particular in the refusal to acknowledge (or even entertain) the existence of the strict duties, duties not to φ, the breach of which constitutes the tort.

[44] The famous phrase is Robert Cover's, from his 'Violence and the Word', *Yale Law Journal* 95 (1986), 1601 at 1601.

[45] To see all three esteem-building engines whirring simultaneously without interruption, see Ronald Dworkin, *Law's Empire* (Cambridge Mass 1986).