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Property and the Rule of Law

Lisa M. Austin

This paper offers a new framework for thinking about the relationship between the common law of property and the rule of law. The standard way of framing this relationship is within the terms of the form/substance debate within the literature on the rule of law—does the rule of law only include formal and procedural aspects or does it also encompass and support substantive rights such as private property rights and civil liberties? Jeremy Waldron and Richard Epstein have recently defended each of these positions, respectively. By focusing on the nature of common law reasoning, I wish to question the form/substance dichotomy that frames this debate and show that the formal aspects of the rule of law are in fact principles widely adopted within the practice of common law reasoning and, as such, play a large role in shaping the substantive content of common law property rights. In other words, once property rights are understood as the result of a practice of reasoning that routinely invokes rule of law principles, the standard form/substance dichotomy is untenable. In short, there is no “substance” in the common law of property that is not already informed by “form.” Understanding this has implications beyond the relationship between property law and the rule of law for it indicates an important defect in contemporary property theory more generally. My claim is that property theory has focused too much on the concept of, and justifications for, ownership and ignored the role that rule of law principles have played in shaping substantive property doctrine. Theories of ownership risk going astray if they seek to account for property doctrine without first appreciating the way that form influences substance. Moreover, theories of legal reasoning and justification risk going astray if they do not appreciate the role that rule of law principles play in providing important standards of legal justification and instead mistake these elements for either principles of political morality or references to broad policy considerations.

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Introduction

This paper is about the relationship between the substance of property law doctrines and the formal principles of the rule of law in the common law of property. It might instead be called “What Happened to Law in Property Law?” for one of its central claim is that property theory has focused too much on the concept of, and justifications for, ownership and ignored the important role that a certain set of legal ideas—the rule of law—plays in shaping substantive property doctrine. By the rule of law I mean the eight principles of legality outlined by Lon Fuller in *The Morality of Law*: generality, publicity, nonretroactivity, clarity, noncontradiction, possibility of compliance, stability, and congruence between official action and declared rule.¹ Although Fuller himself controversially considered these to be part of the “internal morality” of the law, I make no such claim here. Instead, I simply accept these principles as describing a number of core elements of the rule of law, a position that even Fuller’s critics endorse.² The point of this paper is to highlight the pervasiveness of these principles in common law reasoning and their role in shaping substantive common law doctrine in the area of property law.³

That there is a relationship between property and the rule of law is old news, albeit highly contested. Traditionally twinned with contract, property has been seen by some liberals as an essential element of individual liberty and, in this guise, demarcates a constraint on governmental authority—including the authority of legislatures to regulate in a manner that

2. See, e.g., Joseph Raz, *The Rule of Law and Its Virtue* 93 LAW QUARTERLY REVIEW 195 (1977). He casts the rule of law as principles that go to the effectiveness of the law, and not to the question of what is law but offers a very similar list to Fuller’s. This is also Hart’s view: H.L.A. Hart, *The Concept of Law* 202 (1961).
3. I am indebted to the work of Ernest J. Weinrib in his paper *Private Law and Public Right*, 61 U.T.L.J. 191 (2011). Weinrib makes this point in relation to Kant’s understanding of the demands of “public right” and how it can modify private rights where public right includes ideas such as publicity and systematicity. In contrast, this paper is an attempt to think about these ideas outside of a Kantian framework.
change these common law liberties. The most prominent recent champion of this view is Richard Epstein. In his new book *Design for Liberty: Private Property, Public Administration, and the Rule of Law*, he argues that it is only the rights of ownership, along with contract, that can secure individuals against the arbitrary exercises of authority that are one of the central concerns of the rule of law.\(^4\) Let me call this the “substantivist” view, for it contrasts strongly with what I will call the “formalist” view of the demands of the rule of law. This position, recently championed by Jeremy Waldron in his Hamlyn lectures, emphasizes that the rule of law places many formal demands on legal norms—that they be general, public, certain, etc.—but does not demand any particular substance for those norms.\(^5\) As many others have argued, to think otherwise is to confuse the rule of law with the rule of “good law,” or a vision of law as connected to ideals of substantive justice.\(^6\) For a formalist, the substantive norms of private ownership might indeed be consistent with the rule of law but so might many legislative reforms that change the classic liberal picture of private ordering. Where one stands on this debate, whether one thinks that there is some intrinsic relationship between property and the Rule of law or denies it, therefore turns on whether one sees the rule of law as embracing substantive norms or as instead remaining merely formal in its expression.

Instead of taking sides, this paper rejects the terms of this debate. There is a different, and in my view better, way of understanding the relation between form and substance. The key is to switch from thinking about law in terms of static norms, or even in terms of norms protected through particular institutional arrangements, and instead think of law as a product of a *process*...
of reasoning—common law reasoning. My claim here is that many principles routinely adverted to in common law reasoning are in fact specific expressions of the formal aspects of the rule of law, as captured by Lon Fuller’s principles of legality. More strongly, the principles of legality are what constitute it as a distinctively legal form of reasoning, for they produce important standards of what it means to succeed as law and therefore as a legal justification for a particular decision. Because these formal principles are routinely adverted to in common law reasoning that produces substantive doctrine, I argue that they help to shape that substantive doctrine. In short, there is no “substance” in the common law of property that is not already informed by “form.”

This position has a number of important implications. With respect to the relationship between property and the rule of law, I will argue that the way in which form and substance are bound up together calls into question the general conclusions of both rule of law substantivists and rule of law formalists. Unlike the formalists, I argue that property law is indeed intrinsically bound up with legality; unlike substantivists I argue that private ownership is neither necessary nor in need of protection from legislative incursions for rule of law reasons.

More generally, I argue that appreciating the role played by the principles of legality in shaping substantive doctrine calls into question the methodology of much of contemporary property theory. Whether such scholarship aims to provide a conceptual account of the nature of ownership or the best justification of it, claims about being the best “fit” with the case law is a prominent methodological feature. However, my claim is that many important doctrinal elements of the common law of property are responses to the demands of common law reasoning—and the concerns of legality—rather than simply reflective of a particular idea of ownership. What this means is that many of the doctrinal details of property law have less to do with an idea of “ownership” and more to do with the influence of the principles of legality on common law
reasoning. Theories of ownership therefore risk going astray if they seek to account for the case law without appreciating the way that form influences substance.

Although I defend here a kind of formalism, as I will outline below the argument starts with a realist impulse. One of the great insights of the realists was an insistence that law is a social practice that cannot be fully accounted for through a focus on the rules of appellate courts. The view I adopt here is that law is a social practice of reasoning, even one that must take into account the way in which law will work on the ground, in communities and in individual lives. However, the practice of reasoning aspires to be legal reasoning and, I argue, what makes reasoning legal is its conformity with the principles of legality. That is, legality is what constitutes reasoning as distinctively legal. This does not mean that such reasoning is not porous to a variety of other influences, many of which have been helpfully illuminated by the realists and their progeny. It simply means that it is time to recover the legal dimensions of the practice.

Finally, I want to briefly comment on a notable absence in this paper. Although I discuss property law, I do not directly engage in the various accounts of the nature of, and justification for, ownership that exist in the academic literature. My position is that one can remain agnostic regarding these debates and still account for many central doctrinal features of property law by focusing on the role of legality. This might sound less thrilling than engaging with central themes in political morality, but in fact I see it as consistent with value pluralism—consistent because of what it leaves out rather than because of what it includes. In law, like in many relationships, sometimes what is not said is just as important as what is said.

The argument of the paper proceeds as follows. In order to see the constitutive role that legality plays in the common law of property, I first argue that we need to see the overlooked
role that it plays within common law reasoning. This is the task of the first section of this paper. After this, I look at several different types of doctrinal areas in the law of property. Drawing at least partially upon J. W. Harris’ taxonomy regarding property institutions (but not endorsing his particular account of ownership), I look at aspects of property doctrine dealing with control powers, title conditions, and liability rules. My aim is to show how the principles of legality are both a pervasive component of property law and how they help to shape the substantive doctrine across a variety of contexts. Finally, I end by outlining some of the implications that this reframing of the form/substance debate has in relation to theories of legal reasoning, including the work of Ronald Dworkin and Richard Posner.

**Legality and the Common Law**

**(a) Form and Substance**

There are many different accounts of the rule of law, but there is widespread agreement that it at least encompasses Lon Fuller’s eight principles of legality-- generality, publicity, nonretroactivity, clarity, noncontradiction, possibility of compliance, stability, and congruence between official action and declared rule. Waldron proposes that these principles be understood in terms of the *formal* properties of law, as contrasted with law’s procedural demands or its substantive content: norms must take certain forms if they are to be legal and this includes the

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7 J. W. HARRIS, PROPERTY & JUSTICE (1996). He actually talks about this in terms of “trespassory rules” and the “ownership spectrum”. The former is just an example of what I am calling more generally liability rules pertaining to property. The latter includes “use-privileges” and “control-powers” and in some cases “powers of transmission” (at 5). It is later that he states that “title conditions of some kind, as well as trespassory rules and ownership interests, are a necessary feature of a property institution” (at 40).

8 FULLER, *supra* note 1.
formal properties of generality, clarity, etc. These formal aspects are usually understood to encompass two general features of law: 1) that law enables individuals to plan their activities, either in light of potential legal liability or in light of the exercise of legal powers, and 2) that law constrains the arbitrary exercise of state power (whether by judges or other officials). Despite this general agreement, there is considerable disagreement regarding whether these principles are, as Fuller claimed, part of the “inner morality” or law, an expression of law’s “virtues,” or the principles of planning inherent in the legal enterprise. Deep disagreement also surrounds the question of whether the rule of law is confined to these formal concerns or encompasses more substantive content such as political and civil rights, or human rights more generally.

Apart from positions like that taken by Epstein, which invoke the rule of law as a justification for protecting private ordering (private property and contract) against undue state interference, there is relatively little discussion in private law scholarship about the rule of law. One of the reasons for this is the prevalence of the idea that form and substance can be clearly distinguished. Even Epstein takes the substance of property as one thing and rule of law concerns for “clarity, consistency, simplicity, and prospectivity” as another. What he argues for is a particular relationship between the two: private property (and contract) “reinforce” rule of law concerns and thereby operate to restrain arbitrary state power, in contrast to the arbitrariness that

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10 See Raz, *supra* note 2.


he claims is unleashed by many social programs and the “massive amounts of administrative discretion” that accompany them.\textsuperscript{13}

Those more sympathetic to legislatures, and more prone to endorsing a legislative paradigm as the ultimate paradigm of law, also draw clear distinctions between form and substance. On such a model, the substance of legal norms is provided by the authoritative law-maker and considerations such as the principles of legality provide constraints on how these are enacted by the public law maker (for e.g., not secretly, not retroactively). Perhaps the most extreme version of this legislative paradigm is found in the work of Jeremy Bentham, who famously decried the deficiencies of the common law in relation the ability of legislatures to enact clear, prospective, public laws. Even Fuller frames his influential description of the eight principles of legality—generality, publicity, nonretroactivity, clarity, noncontradiction, possibility of compliance, stability, and congruence between official action and declared rule—in terms of a parable about a monarch (Rex) who passes legislation, rather than judges deciding cases within the common law tradition.\textsuperscript{14} This choice was no doubt meant to show clearly that the failure of a legal system as a legal system did not depend on either a failure of authority or a failure of democratic legitimacy but could instead arise from a failure to adhere to what he called the “internal morality” of the law. Nonetheless, taken at face value it reinforces an idea that the principles of legality are to be divorced from the substantive content of legal norms.

Fuller himself was ambivalent about the relationship between what I am calling form and substance. Although his work on contract law is alive to the influence of formal considerations, he does not connect this to his ideas on the principles of legality.\textsuperscript{15} He acknowledges that the

\textsuperscript{13} EPSTEIN, supra note 4 at 192 and 189.
\textsuperscript{14} FULLER, supra note 1. He does have a few common law examples in his text but this is not his focus.
\textsuperscript{15} See Lon L. Fuller, Consideration and Form 1 COLUM. L. R. 799 (1941).
principles of legality are compatible with a broad range of substantive aims, although he also thinks that some substantive aims are incompatible with legality. More strongly, he asserted that a commitment to legality necessarily involves a “commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.” However, none of this suggests a clear way to bring the principles of legality to bear on disputes regarding the substance of private law norms.

I accept Fuller’s eight principles as describing the core elements of the rule of law. However, in what follows I will shift them away from their legislative framing in the parable about Rex and towards a common law reframing. This reframing will be partial only, as the purpose of this paper is not to provide a theory of the common law or a theory of the rule of law. My point here is simply to show more clearly how the principles of legality operate in the common law. In doing so my aim is to call into question the seeming separation between form and substance with respect to legal norms.

(b) A Common Law Framework for the Principles of Legality

The most important element of the shift from a legislative paradigm of law towards a common law paradigm is to stop trying to make the common law look like a set of enacted norms (e.g., judge-made law, a body of rules). Instead, we need to view it as primarily a social practice of reasoning. Gerald Postema has argued that for classical common lawyers,

16 FULLER, supra note 1 at 153; he gives racial discriminatory laws in South Africa as an example at 160.
17 Id., at 162.
Law was regarded not as a structured set of authoritatively posited, explicit norms, but as rules and ways implicit in a body of practices and patterns of practical thinking all ‘handed down by tradition, use, [and] experience’ (Blackstone 1765:i.17). These rules were the product of a process of a common practice of deliberative reasoning, and constituted the basic raw materials used in it. Common law was ‘reasonable usage’ (Hedley 1610:175), observed and confirmed in a public process of reasoning in which practical problems of daily social life were addressed. ‘Custom’ and ‘reason’ were the twin foci of this conception of law. These two notions were complementary, mutually enhancing and supporting, and mutually qualifying.18

Several elements of this classical common law position are important for the following discussion of legality. First, on this view common law judgments do not reflect law that is enacted and applied but rather reflect the result of a practice of interpretation of existing social practices and ways of thinking. Second, community practices are integral to this understanding of law in a number of ways, including: providing evidence of implicit norms and providing a way to confirm the reasonableness of the law that was meant to address social life. Third, the common law is not primarily about subjecting individuals to rules—as Fuller argues about law in general—or a method of dispute resolution—as Eisenburg argues.19 Instead, it reflects a more complex idea of the relationship between law and social order. Because we are outside the legislative paradigm, there is no political authority seeking to impose order through law (legislation) and so the idea of subjecting individuals to rules is too simple. But so is the idea that this is really about dispute resolution that then generates a body of law that fairness dictates must be consistent and coherent. The classical common law view is that the law is constitutive of social order but also that social order is constitutive of law.

None of this is meant to defend the classical common law view as a theory of law or even as a mode of law. However, it is meant to reorient thinking about the common law in a manner

18 Gerald J. Postema, Philosophy of the Common Law, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588 590 (Jules Coleman and Scott Shapiro, eds. 2002); For a more historical account of the process of reasoning in relation to the law of contracts, see S.WADDAMS, PRINCIPLE AND POLICY IN THE LAW OF CONTRACTS (2011).
that permits some of its traditional features to come into focus in a manner that I will argue is helpful for understanding the role of legality. I suggest that we provisionally view the principles of legality as a set of considerations that are pervasive within common law reasoning and, because of their role in this process of reasoning, help to shape the very substance of the resulting common law doctrine. In this sense they may be formal principles but their formality must be understood in relation to a practice of reasoning rather than in relation to specific norms, which then permits us to see the ways in which they help to generate substantive norms. However, we also need to understand the constitutive role that social practices play within common law reasoning in order to uncover the manifold ways in which advertence to these practices do not simply provide a source of content to the law but are integral to meeting the demands of legality within the common law paradigm. In what follows I will first outline the general principles of legality and suggest some of the ways we might think about them from within a common law paradigm. In the subsequent section I will outline a number of substantive doctrinal areas from the law of property where legality plays a constitutive role.

The first principle of legality is that law consists of general principles for, as Fuller argued, “to subject human conduct to the control of rules, there must be rules.” This might be taken as another reason to find the common law defective. The common law has always emphasized the particular case over general principles, resulting in a body of law that, while having a number of “rules” (the rule against perpetuities, for example), is seriously distorted if characterized as a body of rules. Even if one can describe a holding in a case in a rule-like manner, in the common law tradition this is a provisional interpretation that is always open to

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20 Robert Gibbs has suggested to me that these principles can be considered as different expressions of the idea of reason. I find this an attractive proposition but do not explore the idea here. I go so far as to suggest that these are principles that are constitutive of a social practice of reasoning and that this is a better way of thinking about them than as either moral principles (Fuller), or virtues that make the law more effective as a means (Raz).
21 Supra note 1, at 49.
revision in light of the facts and reasons of the case, in light of new contexts that test the ideas, and in light of new interpretations of different lines of cases and areas of case law. Even if we shift away from “rules” to “principles”, it often requires considerable interpretation to discern the general principles thought to be running through the cases. Moreover, even once something like a principle is announced as the way to understand a line of cases, this principle is itself subject to potential reinterpretation in light of subsequent cases. Moreover, even once something like a principle is announced as the way to understand a line of cases, this principle is itself subject to potential reinterpretation in light of subsequent cases.22 Indeed, one of the very striking aspects of common law decisions is the way in which courts are quite willing to reinterpret past statements of principle while quite unwilling to say that a past case was wrongly decided on the facts.23

But this does not mean that the common law does not recognize the importance of generality; it just means that we have to recognize that the form it takes within the common law is not the same as it takes within the legislative paradigm. In fact, one could argue that common law reasoning is driven by a concern for generality, a concern that underlies the very idea of common law precedent and the manner in which it constrains subsequent decisions.24 Part of that dynamic is the task of maintaining the idea that individual cases are not ad hoc decisions but have general legal force. “Like cases should be decided alike” leads courts to both seek analogies between cases as well as to interpret lines of cases as revealing general principles as a more complex form of stating the way in which the cases are alike. Moreover, even when courts say

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22 This is why Levi, in his classic text on legal reasoning, argued that the common law does not proceed in either an inductive or a deductive basis but is circular: EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (rev. ed. 1962). Because “circular” is often used more generally as a term indicating a logical fallacy, perhaps a better description would be that it is an iterative process that constantly moves back and forth between facts and principle. 23 Even the idea of stare decisis is not part of the classical common law paradigm but emerged in the eighteenth century. See A.W.B. Simpson, The Common Law and Legal Theory, in OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson, ed.1973). 24 There are a number of important issues with respect to how we understanding the different ideas of binding and persuasive precedents that are beyond the scope of this discussion.
that a past statement of principle is wrong, they do so by offering a new interpretation of past cases that purports to offer a better articulation of their generality.

Common law decisions are also full of references to the possible consequences of making a particular determination. Neil MacCormick indicates how this might also be seen, at least in some cases, to follow from a concern for generality rather than some more general idea of “policy.” He argues that the requirement of the at least implicit universalizability of propositions of law can lead courts to quite legitimately look to the consequences of particular decisions; to consider whether something can be universalized is to look at the consequences of what it would mean for a decision to be a rule for everyone else.25

The second principle of legality is publicity. Fuller discusses this in term of promulgation—the formal requirements by which legislation is made public.26 Applied to the common law, this looks like a requirement that court cases be published, or perhaps a requirement of what judges call “open courts”. Against the legislative paradigm of published statutes, the common law looks inadequate in terms of publicity. Nonetheless, if we take the common law on its own terms we can see that a concern for publicity is in fact deeply embedded in a number of considerations, including the role of custom. Postema points to the many complex ways in which the validity of classical common law jurisprudence “was thought to rest on the fact that it was congruent with the customs that were second nature to the people.”27 One way to understand this congruence between law and the social life of a community is as a manifestation of the “defining feature” of law that it seeks “to provide wholesale normative guidance.”28

26 Supra note 1, at 49ff.
27 Supra note 13.
28 Id., at 616.
other words, publicly promulgated legislation and common law doctrine that displays a deep congruence with general social norms are simply two different expressions of the need for law to be publicly accessible.

However, there are many more ways in which the common law displays its concern for publicity. In particular, there is a concern to ensure that the factors that trigger legal consequences are “public” in the sense of knowable. As I will describe in more detail in the following section, there are a number of common law property doctrines that ensure that individuals know whether something is owned, what its boundaries are, and even who the owner is. In other words, the common law is deeply committed to the idea that ownership be “public.” However, the idea of publicity requirements affecting common law doctrine in this kind of substantive manner is not confined to property law. For example, in the area of the tort of invasion of privacy the idea of a “reasonable expectation” of privacy plays a large role in the case law, even where this case law diverges in important respects.29 Instead of viewing this as the articulation of a particular concept of privacy, we can understand it in terms of the requirements of publicity combined with the requirements of clarity and possibility of compliance: I should not be liable for invading your privacy unless I have a clear way of ascertaining what is private. In general, then, we can say that the common law recognizes that the factors that trigger legal liability—that something is already owned, that something is considered private—need to be publicly ascertainable.

The third principle of legality is the general proposition that laws should not have a retroactive effect. This is another principle against which the common law looks deficient. As Schauer points out, when a common law rule is changed by a court, “not only is the rule changed

in a particular case, but the changed rule is applied to the parties in that very case, even if they had planned their activities on the basis of the old rule.” However, it is not clear that this is a failing of the common law or the inevitable feature of judicial decision making that needs to be minimized but can never be eliminated. Even Fuller recognized that when a judge decides a case whose legal outcome depends upon either the resolution of some doubt in relation to the law or the overruling of a mistaken precedent, she makes a retrospective decision. He argued that retroactive laws are sometimes necessary, especially if they remedy some other defect in the law. This would equally apply to cases involving the interpretation of statutes or constitutional texts. Furthermore, Fuller did not mean that this principle implied that law should generally respect an individual’s reliance interest—the idea that people can rely upon the existing state of law in planning their affairs: “If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.”

What is important for the purposes of this discussion is that the concern regarding retroactivity adds another dimension to debates regarding the proper role of the courts in changing the common law. It is widely accepted that the common law must be adapted to changing circumstances but that these changes should be incremental. This position is most often justified in terms of institutional legitimacy (courts are not elected, and therefore should not change the law except incrementally). However, changes in the common law can also have significant retroactive effects because the legal effects of a common law decision take place

30 Frederick Schauer, Thinking Like a Lawyer 114 (2009).
31 Supra note 1, at 57.
32 Id. at 53.
33 Id. at 60 (in particular responding to arguments regarding tax laws).
34 Fuller himself also pointed to institutional competency – that courts are not equipped to resolve polycentric disputes. See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).
immediately. Legislatures can pass legislation with prospective effect and provide delays in its implementation but these tools are unavailable to common law courts.\textsuperscript{35} This is not a story of democratic legitimacy but of the types of legal tools and practices available to particular legal institutions that might share the very same concern for a particular principle of legality. The incremental change that characterizes the common law is therefore also evidence of the common law’s fidelity to non-retroactivity.

Property doctrine is remarkably slow to change and the idea of non-retroactivity indicates at least one important reason why this is so that is independent of our evaluation of the normative justifiability of the doctrine in question. One of the significant aspects of property law is the role of third parties. For example, a right of possession is held as against the world and not in relation to a specific person with whom one is interacting. In many cases changes to property law will have far-reaching implications that are not always as present when dealing with changes to other areas of law. For example, courts have been reluctant to recognize property interests in bodily tissue, partly for the reason that to do so would disrupt existing research practices that are premised on the idea of non-ownership.\textsuperscript{36} In other words, courts are concerned about the significant retroactive effect of recognizing ownership rights in relation to tissue. However, for the purposes of this more general discussion it is important to note that this principle can also point to an important legal reason why courts are sometimes willing to track community practices. If the effect of a legal decision is to change or clarify the law in order to make it more consistent with existing community practices then the significance of its potential retroactive

\textsuperscript{35} Indeed, many legislative reforms to property law take this form. For example, in Ontario the \textit{Conveyancing and Law of Property Act} provides: “Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person is void and of no effect.” R.S.O. 1990, c. C.34, s. 22 (Can.).

\textsuperscript{36} \textit{Moore v. Regents of University of California}, 793 P.2d 479 (Cal. 1990).
effect is quite different than when there are no such community practices. Where such practices exist, a change in the law does not have a practical retroactive effect on actual relations—the decision instead remedies what has become a legal formality interfering with community practices. For example, although courts have been reluctant to recognize property interests in bodily tissue, many courts have readily recognized property-like protection for personality rights which some courts have explicitly linked to a recognition of existing commercial reality and practices for professional athletes and celebrities. In such cases the recognition of property rights does not disrupt existing practices but reflects them more accurately than the previous state of the law.

The fourth principle of legality is that the law should be clear. Again, if we think about this principle from within a legislative paradigm then the common law looks deficient. Bentham’s well-known attacks on the common law took aim at is uncertainty and inconsistency as among its chief defects. However, this overlooks the particular contours that a concern for clarity takes on within common law decision making. In the subsequent section I will argue that certainty figures prominently in the conditions for exercising certain legal powers to create legal relations. However, apart from those contexts, the common law is also concerned with certainty in relation to its own role in delineating legal obligations. Courts are often concerned to avoid subjecting individuals to vague and uncertain liability and will refuse to extend the law if concerned that any resulting principle lacks sufficient clarity. At other times this concern for clarity is evidenced by the court making reference to community practices. Fuller himself argued that “sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived

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38 See the discussion of R. v. Stewart, [1988] 1 S.C.R. 963 (Can.), below. There are many other examples.
outside legislative halls.”39 Therefore when the courts incorporate community practices into the common law they are not necessarily incorporating a substantive notion of fairness (whether understood in terms of substantive justice or general policy) but may instead be seeking clarity (legality).

The fifth principle of legality is that the law should not be contradictory. This is a fairly narrow articulation and perhaps warranted if the focus is on Fuller’s initial concern regarding how legal systems fail. However, if we instead think in terms of the “aspirational” aspect of Fuller’s principles, then we could broaden it to encompass Dworkin’s notion of “fit,” or the observation by many others that one of the persistent features of law is its striving towards coherence.40 The idea, other things being equal, is that the law should be consistent rather than inconsistent. This issue of consistency arises in the common law in a number of ways. For example, there are a number of property doctrines that involve maintaining a defensible line between the law of property and the law of contracts, sometimes with mixed results—landlord tenant law and the law of servitudes for example.41 This idea of consistency in legal interpretation is so familiar from so many different debates that it does not require elaboration except to also point out that its relative importance turns on how one situates this idea in relation to the other principles of legality—a task that I do not take up here.

39 Supra note 1 at 64. See also Henry E. Smith, Modularity and Morality in the Law of Torts 4 J. TORT L. (2011).
40 For a formalist articulation of this idea, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).
41 For example, the common law of landlord tenant struggles to incorporate both the idea that a lease is a conveyance of an estate as well as a contract in a manner that does not undermine either. See Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., [1971] S.C.R. 562 (Can.). The law of restrictive covenants struggles to articulate the way in which covenants can bind successors in title in a manner that does not undermine basic contract doctrines such as privity of contract. See Durham Condominium Corporation No. 123 v. Amberwood Investments Limited et al., [2002] 58 O.R. (3d) 481 (Can.), Rhone v. Stephens, [1994] 2 All E.R. 65 (U.K.H.L.).
The sixth principle of legality is that law should not require the impossible. As Fuller argued, laws must be kept “within the citizen’s capacity for obedience”.\textsuperscript{42} For Fuller, this accounts for the pervasive way in which legal liability is limited to situations of intent or fault.\textsuperscript{43} However, this principle of the possibility of compliance intersects with the principles of clarity and publicity in numerous ways across many areas of common law doctrine. For example, as I will argue below, in property law this generates doctrines aimed at ensuring that third parties know when they might be subject to obligations because of another’s status as owner. The common law’s concern for congruence with social practice, already discussed above, is another aspect of this.

The seventh principle of legality is that the law should remain constant through time. The law should not change frequently as people have to be able to orient actions to law.\textsuperscript{44} Fuller argues that this principle is similar to the one regarding retroactive laws. “Both follow from what may be called legislative inconstancy.”\textsuperscript{45} He goes on to argue in this context that:

The evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect. But sometimes an action taken in reliance on the previous law can be undone, provided some warning is given of the impending change and the change itself does not become effective so swiftly that an insufficient time is left for adjustment to the new state of the law.\textsuperscript{46}

Like the principle of retroactivity, this provides a different way of looking at the role of the courts in changing the common law. The law must remain stable and sudden changes, because of the way in which they disrupt existing interests, are best left to the legislature. This is not

\textsuperscript{42} Supra note 1, at 73.
\textsuperscript{43} Id. at 72. Fuller is clear that this needs to be balanced against the dangers inherent in subjective determinations of individual limitations.
\textsuperscript{44} Id. at 39.
\textsuperscript{45} Id. at 80.
\textsuperscript{46} Id.
because of the issue of democratic legitimacy. Quite independently of such a concern, courts might refrain from changes in the law because they cannot provide warning that the change is coming in the near future, and they cannot make its effect entirely prospective. This principle also provides another reason for the common law’s advertence to existing social practices—this can help a common law court determine whether it should change the law (to keep it congruent with such practices) or not change the law (to avoid undue disruption of such practices). In this way, these formal (legality) considerations operate independently of considerations regarding the general normative desirability of the content of the law in question—and do so even though these considerations may have the effect of further entrenching a particular doctrine and thereby further entrenching the idea that it is a deeply held community value. If I am correct about the pervasiveness of legality considerations in common law reasoning regarding property law then this indicates a reason for suspicion regarding claims that the law strongly supports an idea of freedom as evidenced in property law. Perhaps all the law supports is fidelity to more formal values such as stability and non-retroactivity.

The eighth, and final, principle of legality is the requirement of congruity between official action and declared rule. Fuller argued that congruence between official action and the law is “the most complex” of the principles of legality and can be undermined in various ways: “mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.”\footnote{Id. at 81.} Although he pointed to a number of procedural protections that ensure fidelity to the law, as well as problems that can arise in relation to statutory interpretation, he also noted the ways in which judge-made law can lead to departures:
All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.\footnote{Id. at 82.}

The common law concern to maintain a close integration between doctrine and social practice can also be viewed through the lens of this eighth principle of congruence. As Simmonds has argued, law that is difficult to comply with can lead to problems of congruence:

Suppose that the rules place various demands on citizens all of which are individually satisfiable, and the totality of which are jointly satisfiable in the sense that they do not directly conflict, let alone contradict one another; yet the rules do not add up to an intelligible and viable way of life which is compatible with the various projects that humans wish to pursue (enjoying some degree of material comfort, establishing close personal relations, pursuing work that may be of a potentially satisfying nature). Although technically possible to comply with, such rules would almost certainly encounter extensive non-compliance. Either vast resources would need to be expended upon relentless enforcement, or a substantial gap would develop between the law in the books, and the law as actually enforced.\footnote{Supra note 12, at 163.}

Although Simmonds puts this in fairly abstract terms of the congruence of legal doctrine with “an intelligible and viable way of life” we can see this concern reflected in the place that the common law routinely gives to considerations regarding the congruence of legal doctrine with actual social practice.

**Legality and Substantive Doctrine**

In the previous section I argued that many features of common law reasoning display a concern for the principles of legality, the pervasiveness of which becomes clearer as we free these principles from the legislative paradigm through which they are often expressed. The problem
with the legislative paradigm is that it encourages the view that the substantive content of legal norms is separate from the form these norms take. Once we view the formal principles of legality as principles that are constitutive features of common law reasoning then we can instead see their pervasive influence on the substantive doctrine, calling into question any easy division between form and substance.

In this section I outline in more detail the way in which the formal principles of legality have a substantive effect on specific areas of property doctrine. In making this claim I wish to remain agnostic in relation to other important debates in property law regarding the extent to which the common law of property reflects a coherent idea of ownership. By seeking to bracket these questions, however, I do not mean to suggest that the principles of legality that I focus on are the whole story. I do mean to suggest that they are an important part of the story and that debates about the nature of ownership should their effect into account. In the conclusion of this paper I will suggest what some of the implications of doing so might be. The point of this section is not to fully disentangle ideas of ownership and ideas of legality but simply to point to out that, although the principles of legality are formal principles, once we see that they play an important and pervasive role in common law reasoning we can also see that they contribute to substantive doctrine.

(a) Control Powers

J.W. Harris argues that “[a]ll ownership interests comprise some use-privileges and some control-powers” which are protected by trespassory rules.\(^{50}\) Leaving aside the question of

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\(^{50}\) J.W. HARRIS, PROPERTY AND JUSTICE, 5 (1996). At some points in the book he also includes title conditions.
whether this accurately describes the essential components of property as an institution, drawing a distinction between ownership interests—which include control-powers—and liability rules is helpful. Property law is replete with legal doctrines that specify control powers rather than liability rules. Indeed, this distinction maps onto Hart’s discussion of the difference between laws that “impose duties or obligations” and laws that “provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of law.”

Hart included within these power-conferring laws those pertaining to contracts and wills although his primary interest was on laws that confer power of a public rather than private nature. Nonetheless, property law doctrines that determine powers of alienability such as what kinds of estates can be conferred (for e.g., life estate, conditional estate, leasehold) or what kinds of obligations can be created that “run with the land” (servitudes) are very much about control powers rather than liability rules. It is the exercise of these powers, interestingly enough, that are responsible for the types of cases of “split” ownership that lead to difficulties in determining in some contexts whether one particular person is “the” owner. However, my focus on these powers is to point out that they raise legality concerns in a manner that is distinct from doctrines that are more centrally about either title conditions or liability rules.

There are a number of ways in which the law permits owners to place conditions on the transfer of estates or when creating legal obligations with owners of neighbouring parcels of land.

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52 Id. at 28.
53 This would also describe the “right to manage” as discussed by Honoré, which is the “right to decide how and by whom the thing owned shall be used” and which depends “on a cluster of power” including the power of licencing (at 116). This idea of control powers would at least partially include “right to the capital” which Honoré describes as “the power to alienate the things” as well as “the liberty to consume, waste or destroy the whole or part of it” (at 118). A.M. Honoré, Ownership, in Oxford Essays in Jurisprudence 107 (A.G. Guest ed., 1961).
54 Id. at 111.
such as through the creation of a restrictive covenant. Courts can strike out these conditions on the grounds that they are too uncertain, constitute an unreasonable restraint on alienation, or are against public policy. One way to view these grounds for invalidity is to see them all as different aspects of public policy marshalled by the courts to limit the exercise of private power. My argument here is that these doctrines are best understood as examples of the effects of the principles of legality rather than other substantive concerns. That is, what these doctrines show is that the courts will void conditions that fail to conform to the principles of legality in some basic manner.

For example, a condition subsequent is void for uncertainty if the court cannot “see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.” As argued in the previous section, that law should be certain is a principle of legality. Of course, there is the question of why the courts endorse this particular test for certainty and whether this suggests other values at stake as well. This might be the case but there are further legality concerns that support this test quite independently of more substantive considerations related to either the nature of ownership or general public interest. The key difference between a condition precedent, which is not subject to the same strict test for uncertainty, and a condition subsequent lies in whether the estate has already vested. A vested estate means that ownership has in fact been transferred and gives rise to reliance interests that are quite different from those at issue when someone merely expects to be given something in the future. Taking away something that someone already has (and here “has”

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55 See Bruce Ziff, Principles of Property Law, at 228ff (4th ed. 2006). He points to two categories of public policy. The first are policies that relate to property, such as efficiency considerations. The second are broader social policy considerations.

in the formal legal sense of being its owner) engages the concerns of stability and non-retroactivity to a much stronger degree.

A condition may also be found void if it imposes an unreasonable restraint on alienation, the idea being that such a restraint is “repugnant” to the idea of a fee simple. This can be understood in terms of the value of consistency in the law. The common law takes the idea of alienability to be central to what it means to have a fee simple absolute. This does not have to be taken to reflect a judicial endorsement of the nature of ownership in general for there is a source in the positive law routinely cited for this proposition: the Statute of Quia Emptores 1290, which abolished the practice of subinfeudation but made substitution possible. It is this substitution (that another individual can be substituted for you as the holder of the property interest) that results in the possibility of free alienability. To legally transfer a fee simple but with a condition that results in a substantial restraint on alienability is to do something contradictory if the legal nature of a fee simple is partially constituted by its alienability.

Another ground for invalidating a condition is on the grounds of public policy. While it would be difficult to argue that all cases involving public policy can be understood as a reflection of formal considerations of legality, I want to at least make the case for the plausibility of this as one way of understanding public policy. As Robins J.A. noted in Canada Trust Co. v Ontario Human Rights Commission, the accepted position is that public policy “should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend

57 Re Rosher, [1884] 26 Ch. D. 801 (U.K.). This has also been defended on policy grounds: Laurin v. Iron Ore Co. of Canada (1977) 19 Nfld & P.E.I.R. 111 (Can.).
on the idiosyncratic inferences of a few judicial minds”. The idea that the harm at issue be “incontestable” speaks to the concern regarding the subjective idiosyncracies of judges. However, the idea that what drives the public policy is the avoidance of “harm to the public” is interesting from the perspective of legality and its relation to the common law. As discussed in the previous section, the common law has always been concerned with social practices in a number of ways that help to uphold legality concerns including the ideas of the followability of the law and the congruence between declared law and actual practice. From this framework, incontestable “harm to the public” looks like a reason to invalidate legal relations because they fail in relation to these concerns.

These doctrines are interesting because, if I’m right, then they indicate that the valid exercise of at least some legal powers rests on conformity to the principles of legality at least at a very basic level. However, they do no necessarily illustrate my claim that we need to get beyond a legislative paradigm in order to see how legality operates in the common law. The story I have just told is quite consistent with a legislative paradigm if we take individuals exercising their control powers to create legal relations to be analogous to legislators enacting law. In both cases, the legal obligations created must conform to the properties dictated by the principles of legality. Nonetheless, once we move away from questions of how courts police the valid individual exercise these powers and move towards questions of how courts define the basic doctrines that confer these powers then legality comes to play a different role.

61 Fuller struggled with how to characterize these principles—he wanted to say that at some point failure to adhere to them meant a failure as law, yet often these were aspirational principles against which we can judge law as better or worse.
For example, control powers in property law also raise concerns regarding retroactivity in a manner that is distinct from liability rules. This can lead common law courts to a particularly severe conservatism that has nothing to do with questions of the all-things-considered desirability of a particular doctrine and has nothing to do with institutional legitimacy in the sense of democratic legitimacy. A relatively recent Ontario Court of Appeal case regarding positive covenants is a good example of this.

In *Durham Condominium*, the Ontario Court of Appeal dealt with the question of whether positive covenants were enforceable against the successor in title to the covenantor. This is an area where there is a long-standing “rule” and this rule is quite clear: positive covenants do not run with the land. The Court was asked to nonetheless revisit this rule and at least adopt an exception that had been recognized within English common law. In refusing to do so, the majority took what looks like a rather curious stance. Charron J., writing for the majority, accepted the conclusions of the Ontario Law Reform Commission that the traditional rationales behind the rule were no longer relevant in the context of modern conveyancing. Despite this acceptance that all-things-considered the rule has no basis, Charron J. declined to change the rule. In doing so, Charron J. cited the following statements from a Supreme Court of Canada case dealing with the sealed contract rule:

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62 *Supra* note 36.
63 *Id.* at para. 17
64 The exception was the “doctrine of benefit and burden” recognized in *Halsall v. Brizell*, [1957] 1 All E.R. 371 (U.K.).
65 *Supra* note 36. These rationales were that positive covenants would “tend to render land inalienable” and that the existence of these covenants is difficult for others to ascertain “because they do not normally have a physical manifestation.” (See para. 37, citing the OLRC *1989 Report on Covenants Affecting Freehold Land* at 21). The OLRC argued that the first rationale does not reflect the fact that in urban areas such covenants can actually enhance alienability by protecting desirable neighbourhood amenities and the second rational does not reflect the fact that with land registries these covenants can be made public. I am not commenting here on whether this is a persuasive account of the rationale behind the rule, just noting that the Ontario Court of Appeal accepted it.
66 *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 (Can.).
Our common law is replete with artificial rules which, although they may appear to have no underlying rationale, promote efficiency or security in commercial transactions. Such rules, in the circumstances where they apply, must be followed to create a legally recognized and enforceable right or obligation. Parties, therefore, structure their relations with these rules in mind and the rules themselves become part of commercial reality. Commercial relations may evolve in such a way that a particular rule may become unjust and cumbersome, and may no longer serve its original purpose. When the hardship which a rule causes becomes so acute and widespread that it outweighs any purpose that it may have once served, it is certainly open to a court to make an incremental change in the law. However, there must be evidence of a change in commercial reality which makes such a change in the common law necessary.

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The abolition of the sealed contract rule would have the unfair result of creating uncertainty for those who had relied on the rule in executing their contracts. To avoid uncertainty and any unfairness to those parties who have structured their commercial relationships in accordance with the sealed contract rule, any change to the law should operate prospectively. Only the Legislature has the power to create a prospective change in the law.67

What is so interesting about these statements is the high threshold announced for changing an apparently meritless rule: the hardship caused must be “acute and widespread” so as to outweigh “any” purpose served by the rule. Even then, it is merely “open” to a court to change the rule and then only when “commercial reality” makes this necessary.

From the perspective of legality, these statements are extremely interesting. As outlined in the previous section, Fuller was wary of any claim that reliance upon the existing state of the law meant that the law cannot change.68 But the Supreme Court’s description of “artificial rules” that “create” legal relations maps onto the category of legal powers under discussion and shows that there might be special considerations for some forms of reliance upon the law. We might reframe the concerns stated in the following manner. Individuals use legal powers to create legal relations and so they rely upon the law in relation to these powers in a manner that is unlike the way in which individuals rely upon the existence of legal liability. Liability “rules” operate as a

67 Supra note 26, at para. 49, citing Friedmann at 873-877.
68 See supra note 33 and accompanying text.
constraint—individuals need to have some way of ascertaining what triggers liability so that it is possible to act in a manner that avoids liability. In relying upon the existing state of law in relation to liability individuals seek to avoid legal consequences but, apart from this, the law does not play a role in enabling individuals to set and achieve their purposes. Reliance upon the law relating to the exercise of legal powers, however, is different in that individual here seek to use law to effect their purposes and to do so in a manner that requires law because these purposes can only be achieved through the creation of legal rights and obligations. To change such rules, particularly in the context of property law where the legal effects of the exercise of such control powers are long-lasting, can have a significant retroactive effects in terms of unsettling existing legal relations. Again, this is different from changing liability rules even where these have been relied upon, because there what is unsettled are social practices but not formal legal relations, and social practices that are not themselves constituted by the legal doctrine at issue. It may be that sometimes such changes to liability rules do themselves raise issues of retroactivity but they do not seem to generate the kind of judicial statements regarding the need to keep them for entirely formal reasons such as the statements adverted to by Charron J.

(b) Possession and Title Conditions

Possession is one of the areas of the common law of property that is regularly taken up as indicating the close connection between property law and philosophical justifications of ownership. As Harris points out, “[f]rom classical times there has been a juristic tendency to
clothe the law’s reliance on first occupancy as a root of title with the dress of natural right.”69

Nonetheless, as I will outline, the idea of possession at common law raises a number of puzzles if we take it to map onto an idea of ownership. Looked at from the perspective of legality, however, these puzzles disappear.

Take, for example, first possession cases such as the famous fox-hunting case of *Pierson v. Post*.70 One can understand this case to hold that in order to become an owner of some unowned thing, an individual must establish first possession of that thing, which involves both factual possession and the intent to possess. Moreover, there are numerous accounts that argue that first possession is demanded by the very idea of ownership and its justification.71 However, what seems strange about this rule is that one has to establish actual possession in order to acquire the right of possession but this right then permits one to relinquish one’s actual possession—you can let go of the thing owned and still be the owner, even if someone else picks it up. Why would such facts be normative in relation to the acquisition of rights but irrelevant to the subsequent exercise of rights? And then it turns out to only be irrelevant under some circumstances: if another possesses your fields then after a time the so-called adverse possessor may in fact be treated like an owner.72 In fact, common law lawyers like to talk about the “relative” nature of title at common law and this is sometimes used to argue that the common law does not even recognize a concept of ownership.

I propose that the puzzles of possession are not puzzles about the concept of ownership in the common law, or its underlying justification. Instead, we need to distinguish ownership and

69 Supra note 5, at 214.
71 See, e.g., ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY (2009).
72 Although how this becomes legally effective is not solely a story about the common law. For example, in Ontario s. 15 of the Real Property Limitations Act provides that at the end of the limitation period, “title” is “extinguished. R.S.O. 1990, c L. 15, s.15 (Can.).
title and understand that the doctrines of possession are title conditions that are not so very puzzling at all. Title conditions tell us who is the owner of something. I argue that the best way to understand title conditions is that they are one of the central ways that the common law makes ownership consistent with legality. For example, if the concept of ownership involves the idea that third parties have obligations in relation to the owner (e.g. trespass rules) then legality would demand that these third parties know that something is owned rather than unowned. In many circumstances I need to know who owns it so that I can avoid liability by seeking the permission of the owner for some use or so that when I seek to acquire permission or even ownership that I do so from the person who is legally entitled to provide me with permission or transfer their ownership. If ownership is transferred to me, then this must also meet the formal requirements of a conveyance of title, so that this transfer also conforms to these publicity conditions. These requirements make ownership public and publicity makes it possible for third parties to respect the ownership claims of others—by refraining from interfering with what is owned or by negotiating with the owner for the requisite permission. Therefore publicity supports another principle of legality, the possibility of compliance with the law. These are reinforced by the principle of clarity. Individuals should not be subject to vague and uncertain liability. There is no reason to think that this should only affect the clarity of legal rules and not also the clarity of social facts that trigger legal liability—like the fact of ownership and the boundaries of the thing owned. On this view, therefore, the common law rules of possession articulate title conditions and these title conditions are what render the social practice of ownership consistent with legality. This emphasis on the social practice of ownership is important for, as I will argue

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73 Supra note 5. Harris argues that every system of ownership requires “title conditions,” or legal criteria that determine how one acquires the status of owner.
74 This position is therefore compatible in a number of interesting ways with the emphasis on information costs as a way of understanding property law in the work of Henry Smith. See, e.g., Property and Property Rules 79 N.Y.U. L.
below, the concerns that courts routinely address in their discussions of possession are not about particular owners, or the relationship between particular owners and specific others, but the broad systemic demands of a system of ownership where this is understood in terms of how it actually operates “on the ground” as a system of social order.

Consider a classic common law context for questions of possessory title and its “relative” nature: finders cases. The basic common law position is that a finder has good title as against everyone except the true owner. For example, in the classic case of *Armory v. Delamirie*, Pratt C.J. stated:

That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. 75

In discussing this case in *Parker v. British Airways Board*, Donaldson L.J. found that “[t]he rule as stated by Pratt C.J. must be right as a general proposition, for otherwise lost property would be subject to a free-for-all in which the physically weakest would go to the wall.” 76 This looks like a policy reason that has nothing to do with the relationship between the individual and the thing found. However, I want to argue that this can be fruitfully understood through the lens of legality. The concern regarding the free-for-all is a concern to maintain social order with respect to things. Moreover, it points to the key consideration, which is the way in which possession signals to third parties that something is owned. In the context of finders, the idea of possession functions as evidence upon which third parties can rely to tell them who the owner is. This is why who the original owner is does not matter except as between the finder and true owner. The

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point of possessory title is to tell everyone else that something is owed and therefore not available to their claims. In other words, the function of the test for possession is to permit third parties to treat as owner the person who is openly acting as owner.\footnote{See also Harris, \textit{supra} note 5, at 83, for the point that possession means acting like an owner, although he does not connect this to title in the way that I am arguing.}

What about first possession cases, where there is no true owner? Although cases like \textit{Pierson v. Post} play a large role in first year case books, they play such a small role in the actual practice of law and common law reasoning that it is not clear they should be taken as core cases that illustrate the common law idea of possession. Nonetheless, in my view, Carol Rose has given one of the most persuasive accounts of the law first possession. What counts, she argues, is that an individual be the first to give the right kind of sign that she is claiming ownership.\footnote{Carol Rose, \textit{Possession as the Origin of Property}, 52 U. CHI. L. REV. 73 (1985).} The right kind of sign, according to Rose, is one that the relevant community understands. My legality account of possession is quite sympathetic to this reading of the cases but differs in a number of respects. From the perspective of legality, what is important in a system of property is that people know whether things are owned. Possession operates as a public system of title, permitting individuals to treat as owners the individuals who are acting as owners. In this way it preserves ownership as a public institution, with the emphasis on institution and its systemic implications in social practice and consequent focus on third parties. On this account, emphasis on the question of “first acquisition” is somewhat misleading. It is true that the operation of the doctrine of possessory title means that the first possessor in a sense acquires ownership. But only in a sense. It is a consequence of the more primary role of the doctrine, which is to tell the world that whoever happens to be in possession (acting like an owner) is to be treated as the owner.
The central problem in using possession as evidence of title is that it would seem to require owners to maintain possession at risk of losing their status as owner. For example, if I own a farm and, while on vacation someone else starts acting as owner then it would seem that all others are entitled to treat that person as owner. The problem is that this would seem to undermine one of the basic ideas of ownership, which is that ownership gives the owner the right of possession. As C.B. MacPherson argued, “[a]s soon as any society, by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right.” 79 This creates a dilemma from the perspective of legality: if possession is the way in which individuals publicly signal their status as owners then how can owners do this without needing to constantly assert possession, thereby undermining the idea that ownership gives rights? The common law deals with this dilemma through the law of adverse possession by requiring that the owner continue to periodically assert acts of ownership—on this view, a public signal that the land is indeed owned.

However, note that if the story of adverse possession is a story of the publicity of title rather than the nature of ownership then we would expect the doctrine to become legally irrelevant once a legal system moves to more formal and systematic means of dealing with title. Developed legal systems now have very formal systems of title for land ownership whereby the boundaries of estates are mapped, title to such estates are registered in formal land registries, and specific conditions are dictated that govern the legal validity of any conveyance of title. These systems can avoid the dilemma that a system of possessory title runs into because the publicity of title is provided through a registry rather than through acting like an owner. An absent owner,

79 C.B. Macpherson, The Meaning of Property, in Property: Mainstream and Critical Perspectives 1 (1978). Widespread agreement on this point is consistent with widespread disagreement regarding whether this defines ownership and what its limits are.
therefore, does not introduce uncertainty to the question of whether something is owned and by whom. In fact, in some systems of title such as the Torrens system of title, where the state guarantees that the registered owner is in fact the owner recognized at law, the doctrine of adverse possession has been abolished.

Nonetheless, a puzzle remains. In systems that have a land registry system where the system records but does not guarantee title, the doctrine of adverse possession remains. Moreover, there are some jurisdictions with a Torrens system that retain the doctrine for dealing with boundary disputes.\(^{80}\) The retention for boundary dispute issues is easier to explain. Even if there is no uncertainty or possibility of mistakes regarding whether property is owned, there still might be mistakes in relation to the boundaries of property so that an individual might use some land under the mistake that she is the owner of the land. This can occur when the historic pattern of occupation of the land (e.g. fences) is one that does not match the official survey description. Different jurisdictions make different choices regarding whether to retain the law of adverse possession as a means to deal with such boundary disputes. These are just different ways of implementing the requirement that individuals know whether land is owned—this requires clear and public boundaries. Therefore there is a legitimate choice between the reasonable and publicly ascertainable boundaries on the ground and those determined by an official survey. In this way, a registry system that simply requires all land interests to be registered but does not guarantee the accuracy of the registry would clearly retain a role for adverse possession to deal with mistakes.

However, what is less clear is why courts would permit the application of the doctrine of adverse possession to intentional, rather than mistaken, trespassers. For example, in the UK case

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\(^{80}\) See Ziff, supra note 50 at 125-6.
it was entirely clear to the adverse possessors (the Grahams) that they did not own the land that they were using—not only was the land was registered but there was no evidence of any question of a mistake.\textsuperscript{81} There seems to be no role in such a context for the law of adverse possession to make the fact of ownership publicly ascertainable and certain. Indeed, in some jurisdictions courts have recoiled at the idea of permitting adverse possession to operate in the context of intentional trespassers.\textsuperscript{82} While this latter position seems more defensible, considerations of legality in these cases is in fact quite complex. Adverse possession is not entirely a creature of the common law but arises out of the interplay between statutes of limitation and the common law understanding of possession. The result is that it is not a simple judicial task to argue that this doctrine should not operate in relation to intentional trespassers—depending on the wording of the statute in issue, it can seem an unwarranted judicial interpretation. Nonetheless, some courts have created such an exemption out of a sense of judicial outrage. In some Canadian jurisdictions, it is couched in terms of wrongdoers profiting from their wrongs, which itself is a principle that looks like a claim to protect against a certain kind of inconsistency in the law.\textsuperscript{83} But the difficulty involved in balancing various competing claims of legality is quite clear from the \textit{Pye} saga and both the House of Lords and later at the various levels of the European Court of Human Rights.\textsuperscript{84} For the purposes of this paper is not important which approach is correct but that the debate is best understood as one that is framed by legality and not either broad policy concerns or deeper principles engaging the nature of the concept of ownership.

\textsuperscript{83} This is how the Supreme Court of Canada interprets the idea of illegality in \textit{Hall v. Hebert}, [1993] 2 S.C.R. 159 (Can.)—illegality would have to introduce an inconsistency into the law.
The irrelevance of possession that results when the state institutes formal systems of title shows up in other contexts as well. Consider a number of old common law doctrines regarding the conveyance of land. The common law position used to hold that it was the individual seised of the land (in possession) who is the one entitled to transfer ownership by sale. Again, here possession is a title condition that performs the function of ensuring that transfers of ownership conform to the requirements of legality. That this is so can also be seen from the fact that these doctrines no longer operate where modern land registry systems provide a more systematic means of providing the appropriate title conditions. What changes is the nature of the system of title, not the idea of ownership.

(c) Liability and its Limits

As a final set of property ideas that I want to reexamine through the lens of legality, I will look at some cases dealing with the limits of liability for trespass. Trespass is often one of the sites of debate regarding the extent to which property doctrine reflects a core idea of exclusive possession or something more limited or complex. I want to suggest that we cannot accurately enlist trespass cases to support these various views without taking into account the role of the principles of legality. In particular, cases that might seem to support the centrality of the right to exclude might do so for reasons that support these formal principles rather than some more substantive idea of ownership. Similarly, cases that might seem to support limits on the right to exclude might do so for reasons best understood through the framework of legality rather than other types of values. I do not propose to resolve these questions here, as I will not examine the
merits of different views of the nature of ownership. Instead, my aim is simply highlight the potential role that legality plays in these contexts and why it needs to be taken into account.

Henry Smith has argued that there is a “gap” between property doctrines such as exclusive possession and a variety of justifications for ownership such that we can find numerous contexts in which exclusive possession is not justified.\(^8^5\) Nonetheless, he argues, departing from exclusive possession imposes too many information costs on third parties. On this view, the desirability of exclusive possession is not tied to a particular justification story for ownership but instead on the dynamic of information costs as they play out in a system of property. I agree with Smith that justificatory stories for ownership are of little relevance to understanding the right to exclude as it is expressed in legal doctrine.\(^8^6\) However, instead of information costs I think that the important legal story is that of legality itself.

Suppose that we had a system of ownership in which the boundaries of what is owned were completely clear but one’s entitlement to exclude was subject to a range of concerns. These might be factors that go to the underlying justification for property in some way, so that one only has a right to exclude in situations demanded by this justification. Or these might be factors that engage concerns broader than property, such as the social obligations of citizenship, that serve to limit one’s right to exclude.\(^8^7\) A number of concerns would emerge. First, a person deciding to act in the world needs to know whether they can use a particular thing or access a particular

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\(^8^6\) My point says nothing about its importance to broader questions of political morality.

\(^8^7\) See Gregory Alexander, *The Social-Obligation Norm in American Property Law*, (Cornell Legal Studies Research Papers, Paper No. 08-002, 2008), available at http://ssrn.com/abstract=1104757 (he seems to suggest that these are property norms but this mixes up norms internal to the idea of property and norms that are about something else but nonetheless operate to limit property).
place. Suppose they come across a “fence” and therefore have a *prima facie* obligation to get permission to use. But then they weigh the various factors that might defeat this obligation, decide these are present, and use it without permission. Suppose then that they encounter the owner who, in weighing these factors, comes to a different conclusion. Now they need to seek to have this conflict resolved, and go to court to get a more determinate decision. The problem is that if there are a variety of factors that need to be weighed in individual circumstances, then a gap opens in the enforcement of the law. In some areas of the law, this is not important but in areas that depend upon self-policing then this is indeed very important. Once this gap opens, it will either be filled by informal social norms that do not reflect the law 88 or simply open a space for lawlessness.

We can see this concern that a lack of certainty “on the ground” might lead to lawlessness throughout the law of property. For example, as previously discussed, judges have understood the need to treat finders as if they were owners (except in relation to the true owner) as a way of avoiding a “free-for-all” with respect to chattels. 89 Apart from such contexts involving possessory title, this concern has also arisen in the context of limits on the right to exclude. For example, in London Borough of Southwark the English Court of Appeal considered the defence of necessity in the context of a trespass claim against two homeless families who were squatting in houses owned by the local borough council. 90 In deciding against the families, Lord Denning held that the defence of necessary must be “carefully circumscribed” for otherwise “necessity would open the door to many an excuse.”

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89 Supra note 72.
If homelessness were once admitted as a defence of trespass, no one’s house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man’s. The plea would be an excuse for all sorts of wrongdoing. Justice Davies echoes these concerns in his judgement, arguing that

the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear—necessity can very easily become simply a mask for anarchy.

The concerns here that motivate maintaining the very narrow scope of the defence of necessity are more about law and order than they are about the idea of ownership. The worry is that broadening the scope of the defence to encompass ideas as broad and vague as “need” would open a large gap for arbitrariness in how individuals applied the law to their own circumstances. In other words, the narrowness of the defence of necessity in the context of trespass does not come from the judicial endorsement of a particular view of ownership but from judicial concerns regarding legality.

Clarity on the ground in terms of clear boundaries, clear title, and clear limits permits individuals to be guided by the law. All action in the world takes place in particular locations and involves things. It would seem, therefore, that one of the basic conditions of social order is that there be some kind of regime determining entitlements in relation to locations and things—some kind of property regime. And to the extent that our idea of social order is bound up with the rule of law then some form of property regime is both demanded by and constrained by legality.

Although this cannot tell us why we should organize places and things through the practice of private ownership rather than some other mode of social ordering, and I have not tried to argue
that it can generate for us all elements of the practice of private ownership, it does indicate that 
whatever practice of social ordering we do have is intrinsically tied to ideas of legality.

As a final example of legality operating in the other direction—pulling against the right 
to exclude—I want to look at the question of limits on an owner’s right to exclude from property 
to which the public has been invited. To illustrate, I want to look at the leading Canadian case 
regarding trespass in shopping malls, Harrison v. Carswell. This case is interesting because, 
unlike other recent similar cases, the issue was not framed in relation to the demands of freedom 
of expression as Canada at the time did not have its Charter of Rights and Freedoms. For the 
court, the central question was the legal significance of inviting the public onto one’s property 
and whether this limited an owner’s right to exclude. Moreover, Justice Laskin’s dissent in the 
case does talk about the underlying justification for the right to exclude. He suggests that 
historically this has protected privacy in one’s home and that therefore the legal significance of 
inviting the public onto one’s property is that it takes one outside the scope of this justification. 
This is a fairly weak argument, as the right to exclude has been defended on many grounds other 
than privacy. I want to instead suggest that the fact of inviting the public onto one’s property is 
the central question because this act engages legality concerns in a manner that other, more 
limited invitations, does not. These concerns are reflected in a number of aspects of the case.

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92 The Supreme Court of Canada has signaled that its decision would be the same even under the Charter: see Committee for Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 at 228 (Can.) per McLachlin J. See also Appleby v. United Kingdom, [2003] E.C.H.R. 222.
93 There is also a strong argument to make that the historical association between privacy and property has more to do with ideas of the rule of law than with ideas of privacy. Many of the early search and seizure cases that are later interpreted to protect both ideas of property and privacy were centrally concerned with the scope of discretionary authority of the state. See generally Entick v. Carrington, 95 ER 807 (King’s Bench) 1765, Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B,Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547 (1999), The Honorable M. Blane Michael, Reading the Fourth Amendment: Guidance From the Mischief that Gave it Birth, 85 N.Y.U.L.Rev. 905 (2010).
Waldron argues that “it strains our ordinary concept of law to apply it to norms that address matters of personal or partial concern or institutions which make no pretense to operate in the name of the whole community, orienting themselves instead to the benefit of the individuals who control them.” In inviting the public to use your property, the rules that you set for your property take on a public quality that they otherwise do not have because these rules, in effect, govern the public. In other words, the act of inviting the public to use your property transforms rules regarding the use of your property from the expression of private inclinations to something that approximates law-making. This is why pulls so strongly on judicial intuitions—in general the law will not tolerate a private citizen who purports to govern the behavior of members of the public in an arbitrary manner.

In *Harrison v. Carswell*, this was the backdrop that framed the dispute between Dickson’s majority decision and Justice Laskin’s dissent. Laskin, in proposing that owners should only be able to exclude members of the public upon “misbehavior” or “unlawful activity” chafed at the otherwise arbitrary power of the mall owner:

> It is contended that it is unnecessary that there be a reason [for exclusion] that can stand rational assessment. Disapproval or the owner, in assertion of a remote control over the “public” areas of the shopping centre, whether it be disapproval of picketing or disapproval of the wearing of hats or anything equally innocent, may be converted (so it is argued) into a basis of ouster of members of the public. Can the common law be so devoid of reason as to tolerate this kind of whimsy where public areas of a shopping centre are concerned? 

Justice Dickson, writing for the majority, disagreed with Justice Laskin that the picketing in question should be permitted. However, it is not clear that he disagreed with Justice Laskin’s point regarding the common law tolerating “whimsy.” Indeed, he pointed out that the owner had never permitted such picketing, that there was academic support for the legitimate basis of such a

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94 *Supra* note 10. But contrast with Fuller who argues for calling the rules of organizations “law” in some contexts.  
95 *Supra* note 88, at 208.
policy, and that “[t]here is nothing in the evidence supporting the view that in the present case
the owner of the centre was acting out of caprice or whimsy or mala fides.” In turn, Justice
Dickson was motivated by other concerns regarding the role of the court in changing the law.
What is important for the purposes of this paper is that the dispute in the case can be framed as a
dispute about the requirements of legality and not a dispute about justifications for ownership
and limits on ownership.

Note that the idea that individuals who use such property consent to these rules does not
matter—unless there is an actual contract (for example, there is ticketed admission) then the
property owner is not engaged in a mutual undertaking to which contract principles might apply.
The owner is explicitly taking up a kind of lawmaking function in respect to public use of her
property and although the law of property permits the owner to do this, subject to any applicable
legislation, this function must conform to legality. However, recognizing this cuts against the
force of other principles of legality such as clarity, stability and non-retroactivity. Moreover, in
the specific context of a case like Harrison v. Carswell it cuts against the court’s understanding
of its role in relation to a particular statutory regime.

Of course, the realist critique of private property offers one way of importing so-called
“public” norms into the private law of property. Cohen’s well-known argument was that property
rights provide their holder with power over others and this power should be governed by the

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96 Id. at 216. The article cited was in fact quoted in a very misleading manner. The comment by Harry Arthurs
actually endorsed the position of permitting labour picketing in malls.
97 Some of this turned on the fact that there was a statute—The Petty Trespass Act—at issue and not just the
common law.
98 After Harrison v. Carswell, a provincial court came to a different conclusion on similar facts, distinguishing
Harrison v. Carswell as turning on the presence of the Petty Trespass Act: Wildwood Mall Ltd. v. Stevens, [1980] 2
same norms that we use in relation to other spheres of governance.\textsuperscript{99} However, this argument would extend to all property rights and not just one’s exercised against the “public”. The perspective of legality offers a different (related but narrower) way of framing the issue and one that makes sense of the key legal issue as defined by the Supreme Court, which is the legal significance of inviting the public onto your property.\textsuperscript{100}

**Conclusions and Further Implications**

This aim of this paper has been to show the pervasiveness presence of the principles of legality in common law reasoning and their resulting impact on the substance of common law doctrine, in particular property law doctrine. In this final section I would like to outline some of the broader implications of this account, both in relation to property law and in relation to our general understanding of common law reasoning. While I mean to only sketch these implications here, rather than offer a full defence in relation to contrasting accounts, what I do hope to show is that calling into question the form/substance dichotomy regarding the rule of law has potentially far-reaching implications for a number of other important debates regarding the nature of ownership, law and legal reasoning more generally.

I have suggested that we can begin to see the pervasiveness of the influence of the principles of legality once we move away from an understanding of legality as indicating formal properties that “norms” or “rules” must conform to and instead see the constitutive role that considerations of legality play in legal reasoning. In this way, although these principles are


\textsuperscript{100} *Supra* note 88.
formal principles they can influence and even generate substantive doctrine in a complex manner. This indicates one reason why it is a mistake to think about certain key concepts in the common law—like the incidents of ownership—as if they are completely separate from the social practices of reasoning that articulates their contours.

This also provides us with a different way to address the question of the relationship between private property and the state. As I indicated at the outset of this paper, the question of the role that property law should play in mediating the relationship between the state and the individual is the traditional locus of debates regarding property and the rule of law. Although I have refrained here from debates regarding the nature of ownership, my analysis of the principles of legality does, albeit obliquely, offer a contribution to debates regarding the nature of ownership that do have a direct bearing on this question of the role of the state. For example, the debate regarding whether there is a “core” idea of ownership, such as exclusive possession, or whether instead ownership is a “bundle of rights” is at least partially motivated by the perceived implications of lining up behind one or the other in terms of how one then has to think about state regulation. Grey’s influential analysis of the “disintegration” of property was meant to effect a shift away from an idea of the “state as enforcer of private law” and open space where “state protection of property rights is more easily seen as the use of collective force on behalf of the haves against the have-nots” so that there can be a debate as to “whether the private power centers of the unregulated capitalist economy, on the one hand, or the augmented state machinery of a socialist or mixed system, on the other, pose the more serious threat to personal liberty.”

In other words, the way one conceives of ownership frames the possibilities for understanding the role of state regulation.

My analysis of legality can offer another element to consider in these debates. I have shown how several central aspects of property law can be understood through the formal ideas of legality without needing to come to any conclusion regarding whether ownership is a coherent idea or a bundle of rights. The rule of law, understood in this formal sense, nonetheless does protect individual freedom of a sort.\footnote{See David Dyzenhaus, How Hobbes Met the “Hobbes Challenge” 73 MODERN L. REV. 488 (2009) for a description of Hobbes’ account of civic freedom along these lines.} This is not a robust idea of autonomy so much as a freedom that comes from security against arbitrariness, and which finds its expression through the principles of legality. But state regulation does not necessarily undermine this kind of freedom, so long as the implementation of any regulation itself conforms to these principles.\footnote{A legislature has options open to it that are not open to the courts. One example of this is with forms of title, as already discussed. Another important example is the ability of legislature to pass laws that operate prospectively.} For example, a statute that retroactively cancels building permits that individuals have relied upon to make investments is quite different from a statute that operates prospectively and permits individuals with robust procedural safeguards in relation to obtaining those permits. This is not a story of property rights ensuring freedom through preventing state interference, nor is it a story of the state ensuring freedom through providing access to property. But it is a story of law and a very particular kind of legal freedom and it has many historical versions. In this sense it connects an older public law story about property and the rule of law with the private law story that I have tried to tell.

Beyond property law, my account raises a number of questions and concerns in relation to how common law reasoning is understood more generally. The prevailing view of a divorce between form and substance has influenced accounts of legal reasoning—and therefore approaches to the common law—in a number of ways. For example, most discussions of the nature of legal reasoning either ignore rule of law considerations or construe their significance...
narrowly and formally in terms of support for the certainty of rules and precedent.\textsuperscript{104} Neil MacCormick stands out as an exception to this in his more sustained, and nuanced, attention to the rule of law.\textsuperscript{105} MacCormick argues that the certainty that is usually associated with the rule of law needs to be reconciled with what he calls the “arguable character of law”—the idea that the content of the law is always open to contestation—and does so by pointing out that rule of law values go beyond certainty to encompass procedural requirements (such as the right to challenge a case against you in a fair and public process). In contrast, I have shown how Fuller’s principles of legality provide a much more complex understanding of the rule of law than simply certainty and, when their role in common law reasoning is appreciated, provide a different way of framing this concerns about legal argumentation. The formal principles of legality are not in tension with legal argument but are what constitute it as a distinctively legal form of reasoning. These principles themselves produced important standards of “reasonableness” to which legal justification must conform, as they outline what it means to succeed as law and so what it means to succeed as a legal justification.

Since Dworkin’s influential work on the interpretive nature of law, many theorists have thought about the many “principles” routinely invoked in common law reasoning in terms of principles of substantive justice and political morality.\textsuperscript{106} In contrast, my position is that many principles adverted to in common law reasoning are best understood as expressions of the formal aspects of the rule of law. Take, for example, Dworkin’s well-known example of \textit{Riggs v.}

\begin{thebibliography}{99}
\bibitem{104} See generally \textsc{Edward H. Levi}, \textsc{An Introduction to Legal Reasoning} (1949); \textsc{Lloyd L. Weinreb}, \textsc{Legal Reason: The Use of Analogy in Legal Argument} (2005); \textsc{Melvin Eisenberg}, \textsc{The Nature of the Common Law} (1991); \textsc{William Twinning, and David Miers}, \textsc{How to Do Things with Rules}, (5\textsuperscript{th} ed. 2010); Frederick Schauer, \textsc{Thinking Like a Lawyer} (2009).
\bibitem{105} \textsc{MacCormick}, supra note 25; see also Weinrib \textit{supra} note 3.
\bibitem{106} \textsc{Ronald Dworkin}, \textsc{Law’s Empire} (1988).
\end{thebibliography}
Palmer and its reliance on the principle that wrongdoers should not profit from their wrong.\textsuperscript{107} However, the Supreme Court of Canada has held that the significance of the principle lies in preventing an inconsistency in the law, which would arise if courts were “in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal.”\textsuperscript{108} Consistency, understood in this case in terms of noncontradiction, is one of the principles of legality and here explains the scope of the wrongdoing principle without reference to ideas of substantive justice or political morality.

Part of the difficulty for Dworkin stems from his views regarding legality. While he agrees that a conception of legality—what he calls the aspirational account of law—helps to frame doctrinal interpretation, his own account of legality is exhausted by the concepts of procedural fairness and substantive justice.\textsuperscript{109} The principles of legality that Fuller articulates, and which I have argued are central to common law reasoning, are for Dworkin part of a “sociological” concept of law—for him a relatively imprecise idea aimed at determining whether some social institution is best labeled law but irrelevant to doctrinal questions.\textsuperscript{110} Because of this, Dworkin does not see their importance to their practice of legal reasoning. While it is true that legal reasoning is concerned with providing a justification for a particular decision, the principles of justification that courts draw upon are not necessarily deep principles of substantive justice but principles that ensure that their decisions are consistent the practice of law as Fuller understands it. It may be that some common law decisions look like Herculean exercises of interpretation of our deepest commitments of substantive justice rather than a judgment.

\textsuperscript{107} Id. at 15-20, citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).
\textsuperscript{109} RONALD DWORKIN, JUSTICE IN ROBES (2006).
\textsuperscript{110} This is a very strange label given the fact that Fuller himself used the language of legality and called it a matter of aspirational morality.
regarding of the demands of legality. However, creating a theory of legal interpretation that ignores the role that the principles of legality play in doctrinal disputes distorts Dworkin’s account of legal reasoning. This distortion is serious for any interpretive account of law, for if one takes the principles invoked by judges to be principles that engage questions of substantive justice then the interpretive exercise that renders these in their best light will be quite different than if one recognizes that many of these principles engage questions of legality rather than justice.\textsuperscript{111}

If Dworkin champions the role of the principles of substantive justice in legal reasoning, it is Posner who champions the role of policy considerations.\textsuperscript{112} Part of Posner’s argument for the form of pragmatic reasoning that he advocates is that “legalism” cannot provide judges with the basis for decisions in difficult cases and that these difficult cases require judges to engage in broad policy determinations. However, this argument takes as its foil a very simplistic view of legalism. For example, he describes the position of “legalism” in the following terms:

Legalism … hypothesizes that judicial decisions are determined by “the law,” conceived of as a body of preexisting rules found stated in canonical legal materials, such as constitutional and statutory tests and previous decisions of the same or a higher court, or derivable from those materials by logical operations.\textsuperscript{113}

\textsuperscript{111} This might be overstating the separation between the formal principles of legality and substantive principles of justice. One feature of Fuller’s account that I find striking is the role that the concept of human dignity plays in animating his principles. This leaves open the question of whether a substantive legal norm that flagrantly violated any idea of human dignity could in fact be a legal norm. However, the particular content demanded by the idea of dignity is something that is deeply contested. And this connects to the substantive principles that Fuller himself suggested might be demanded by his account; “Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.” See FULLER, supra note 1 at 186.

\textsuperscript{112} RICHARD A. POSNER, HOW JUDGES THINK (2008)

\textsuperscript{113} Id., at 41. He points out, at 48, that even originalists who have narrow views regarding the interpretation of statutes and constitutional provisions are more moderate in relation to the common law, recognizing a stronger role for judicial discretion.
In contrast, Posner argues that we must face the fact that judges exercise considerable discretion, that legalism cannot constrain this discretion in the manner claimed, and that we should frankly face the fact that judges engage in policy.

However, Fuller’s view of “legality” is quite different from Posner’s caricature of “legalism.” Fuller’s idea of law is not that of a “body” of rules but of a practice: “the enterprise of subjecting human conduct to the governance of rules.”114 Because this practice has its own integrity—Fuller’s eight principles of legality—these are principles that judges can draw upon in rendering their decisions. They are important considerations that constrain judicial discretion and ensure any resulting decision is indeed a decision consistent with the practice of law rather than something else. However, Fuller is clear that the principles may conflict in particular cases and form a morality of “aspiration” that may be achieved to a greater or lesser extent. Therefore Fuller can agree with the position that there is no right answer in difficult cases and that these cases require exercises of judgment rather than logical deduction. But the further position that therefore judges are engaged in extra-legal reasoning simply does not follow. On my account there is no reason to endorse a view of judging that posits as a normative matter that when judges are called upon to exercise discretion they should draw upon their personal experiences, psychology, and ideology. That they may in fact do this is human nature. Reducing the scope of this is what it means to be a society governed by the rule of law.

Moreover, as I have argued throughout the paper, a more complex understanding of legality can, in turn, show why judges sometimes quite legitimately make consequentialist, or what are sometimes called “policy” arguments, to justify their decisions. These consequentialist arguments are justified by their connection to the principles of legality and not because this is the

114 FULLER, supra note 1 at 96.
best way for a judge to decide a case on its merits when the law “runs out”. A failure to appreciate the role that legality plays in relation to policy arguments is just as distorting as a failure to appreciate the role that legality plays in relation to arguments about principles. With respect to Posner’s account of adjudication it leads him to view the law in an unduly limited manner and advocate for an unjustifiedly broad role for policy.

In sum, reframing of the form/substance debate in relation to the rule of law and property rights in the manner I have outlined has implications for property law and implications that go beyond property law. The implications for property law include the conclusion that the substance of property doctrine is the result of a practice of reasoning that routinely invokes rule of law concerns, rendering the standard form/substance dichotomy untenable. This calls into question both the formalist position that argues that property rights are not specifically demanded by the rule of law and the substantivist position that argues that private property rights are indeed demanded by the rule of law. In contrast, the claim here is that private property rights are substantively shaped by rule of law concerns but that this is consistent with the idea that Legislatures are free to re-shape these rights in ways that depart from the common law but are also faithful to rule of law concerns. Reframing the form/substance dichotomy also calls into question some theories of the nature of ownership. Theories of ownership that purport to provide the best explanation of common law doctrine will fundamentally misunderstand that doctrine if they do not appreciate the role of legality—indeed, they will take what are best conceived as features of legality and instead treat them as features of ownership. But because at the heart of this reframing of the form/substance dichotomy lies an account of the relationship between common law reasoning and the principles of legality, its implications extend beyond property and out to theories of law more generally. In particular, this reframing points to the need to take
seriously the significance of the rule of law in the context of legal reasoning and the practice of legal justification. As I have suggested here, we might agree with Dworkin that there are important principles in the common law and we might also agree with Posner that there is a role for consequentialist claims in the common law, but the best way to understand both is through the framework of legality.