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## ARTICLE

# STRUCTURE AND VALUE IN THE COMMON LAW


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## INTRODUCTION

Common law concepts have fallen into disrepute among legal theorists. The rise of Legal Realism in the early twentieth century marked a turning point in legal thought and analysis. One of the defining characteristics of the movement was complete disregard, not to say contempt, towards legal conceptualism.[1] The founding fathers of the movement viewed the core concepts of the common law as devoid of any independent meaning or functional significance.[2] They considered the common law's conceptual edifice indeterminate and manipulable so as to render it altogether contingent on the working of the system.[3] Walking along the same path, efficiency-minded scholars see the common law system as a collection of rules that are in reality motivated solely by the ideal of wealth maximization.[4] In this view, legal concepts exist in the common law to further its economic goals,

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[1] For a sample of the literature documenting this, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 200 (1992) ("Hostility to conceptualism was a hallmark of Legal Realist criticism."); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 59 (2010); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335-36 (1988); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447-48 (1930).

[2] As a perfect example, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) ("*Legal concepts* . . . are supernatural entities which do not have a verifiable existence except to the eyes of faith."). For work contributing to this critique, see RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 45 (1990) (describing Judge Cardozo's use of concepts as "bluff"); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926).

[3] *See* Cohen, *supra* note 2, at 820; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699 (1976).

[4] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 270-71 (7th ed. 2007); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977).

or are otherwise completely redundant.[5] Legal philosophers, for their part, have chimed in as well, characterizing the common law's concepts as embodying their own autonomous commitment to reason, which they see as altogether independent from the instrumental goals of the law.[6] With the general move towards instrumentalism in American legal analysis and thinking,[7] the net result has been that common law concepts are seen today as largely vestigial artifacts.

In this Article, we mount a defense of the common law's architecture. We argue that the criticisms leveled by legal theorists at the common law's extensive use of legal concepts are misguided. In treating the common law's conceptual architecture as a contingent feature of the system, these criticisms fail to account for how the common law has endured over time and context, and in the face of changing social values and preferences. The persistence of the common law and its continuing vitality is in large measure attributable to the subtle balance that it achieves between stability and change, a balance for which it relies almost entirely on its conceptual structure. Our core thesis is that the common law's commitment to its conceptual structure is in many ways the key to understanding not just how the common law works but, in addition, what the common law itself is.

For the purposes of this Article, we define common law concepts as *the operational legal devices that the common law uses in doctrine to understand and compartmentalize aspects of a legal issue or dispute*. Concepts are in effect the building blocks of common law doctrine, its language of analysis, so to speak. It is through its concepts that the common law strikes a balance between stability and change, both of which are essential to the effective operation of a legal system. A legal system needs to be sufficiently stable in order to guide the behavior of its subjects. An ever-changing legal system would vitiate the expectations of its subjects and force them to constantly adjust to the oscillations of legal opinion, undermining its own legitimacy in the process.[8] At the same time, however, a legal system that remains frozen in time would fail to respond to the changing needs of the citizenry and

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5 *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14 (1987) (arguing that the very tort concept of "fault" has an "economic rationale" and that the "doctrinal structure" of tort law can be seen as economic); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (arguing that Learned Hand's formulation of the duty of care—the Hand Formula—was driven by economic considerations).

6 *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

7 *See* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 862-63 (1981).

8 *See, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 42-43 (1997).

would invariably run afoul of its subjects' ideals, values, and preferences.[9] Such a system too, much like the one that remains in a perpetual state of change, is likely to lose its claim to legitimacy and prove to be ineffective. As Justice Holmes famously said, it would be "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[10] Stability and change in the law, while seemingly at odds with each other, are thus both central to a legal system's claim to legitimacy—a concern that the common law takes very seriously.

Common law concepts are uniquely designed to accommodate the seemingly conflicting demands of stability and change. They perform this task by virtue of what we term their "duality of meaning." Common law concepts have, at once, a *jural* meaning and a *normative* meaning. The jural meaning refers to the structural core undergirding a legal concept that enables its use by participants in legal discourse. This jural meaning is indeed what Wesley Hohfeld described as the "intrinsic meaning" of a legal concept in his famous taxonomy of jural conceptions and relations.[11] While the jural meaning forms the core of the concept, it is usually incapable of being applied to all situations and contexts by itself, owing to its intrinsic "open-endedness." It is the normative meaning of the concept that renders it applicable to a context. The normative meaning refers to the meaning that a legal concept and its jural meaning come to be cloaked in as a result of external interpretive influences, which may in turn be drawn from a variety of situational goals. The normative meaning does not displace the jural meaning of the concept but instead works in tandem with it to collectively enable the concept to be applied during adjudication. Over time, the two meanings work together, with the jural meaning producing the common law's stability effect while the normative meaning allows the common law to accommodate changes in its values and goals. The jural meaning remains stable and operates as an anchor, enabling actors to build their expectations and plan their activities. At the same time, the open-ended nature of legal concepts renders them capable of accommodating different normative values and ideals. It is for this reason that most common law concepts are structured as legal standards (as opposed to rules).[12]

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9 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150-51 (1921); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1-2 (Little, Brown & Co. 1923) (1881).

10 O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

11 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 58 (1913).

12 *See, e.g.*, Norway Plains Co. v. Bos. & Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854) (explaining that one of the great merits of the common law is that its structure relies on a few broad and comprehensive principles, as opposed to a series of detailed practical rules). For a discussion of

Examples are legion. Consider, first, the concept of "duty of care" in tort law. The core jural meaning of the concept is that an actor is under an obligation to avoid causing harm; this obligation is deemed significant enough to constrain his or her behavior. While scholars disagree on the scope and reach of this obligation—that is, on whether it is general or relative[13]— they generally agree on the actual structure of the duty as an obligation, which forms the jural correlative of a claim-right.[14] Despite this common jural understanding of the concept, over the years scholars of tort law have continued to debate what exactly it is that a duty of care connotes as a normative matter. Some have argued that the obligation is a moral one, imposed on individuals in society to take care (and precautions) against causing harm to others that emanates from basic moral principles;[15] others contend that it is nothing more than a device through which the law imposes liability on the cheapest cost avoider,[16] or the party best positioned to bear the loss.[17]

Consider, next, the concept of "touch and concern" in property law. The concept of "touch and concern" is the litmus test used by courts to determine whether a covenant binds third parties who did not directly agree to its existence.[18] As an analytical matter, the jural meaning of "touch and concern" as a legal concept is indisputable: to bind third parties, the covenant must be related to the realty itself (i.e., to the *res*). As a normative matter, however, the concept of "touch and concern" has come to be imbued with different normative understandings. Some argue that it is little more than a mechanism allowing courts to police the contracting parties' mutual intent and to determine the extent to which a third party's autonomy can be

rules and standards, see Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 29 (1967); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992); and Kennedy, *supra* note 3, at 1776.

13 *See, e.g.*, W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008) (documenting the debate surrounding the concept); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 282 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1829-30 (1998) (offering a relational conception of duty based on "relationships").

14 *See* Hohfeld, *supra* note 11, at 30 (describing the jural structure of rights and duties as jural correlatives).

15 *See, e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 22-23 (2001); WEINRIB, *supra* note 6, at 123.

16 *See, e.g.*, Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-91 (1975); *see also* LANDES & POSNER, *supra* note 5, at 1.

17 *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900-01 (Cal. 1963) (en banc) (imposing strict liability on a manufacturer where it was in a better position to bear the costs of injuries than the people who were powerless to protect themselves).

18 *See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1038-40 (2d ed. 2012).

permissibly impaired.[19] Others contend that the concept in reality works (and ought to work) as a mechanism of efficient resource allocation, allowing courts to weed out obligations that might be inefficient when imposed on third parties.[20] Still others point out that the concept of "touch and concern" could have been used to undo racially restrictive covenants and that it thus promotes the values of justice and equality.[21] Importantly, the different normative constructions accept the jural meaning of the concept. Indeed, despite their disagreement, all these accounts take the jural meaning of the concept as a given. The competition among them is over the right set of values that should animate the concept and determine how it should be operationalized by courts.

A third example is the concept of "good faith" in contract law. The common law of contracts has long been thought to impose an obligation of good faith on parties in the performance and enforcement of the contract.[22] While courts and scholars have maligned the concept for being too open-ended and uncertain,[23] this criticism ignores the reality that there remains a jural core to the concept that explains its persistence over time. Doctrinally, good faith connotes an obligation imposed on one contracting party, and inuring to the benefit of the other, to behave in an honest and commercially fair manner in its contractual dealings. On account of its open-endedness, the concept of good faith is capable of accommodating various normative

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19 *See, e.g.*, Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 890-91 (1988) (presenting the two sides of the "touch and concern" debate); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359-60 (1982) (arguing that the "touch and concern" requirement denies the original parties their contractual freedom); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1233 (1982) (finding that the "touch and concern" test is beneficial as it safeguards individual freedom as well as promotes efficiency).

20 *See, e.g.*, Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 930 (proposing that courts will "find that a covenant touches and concerns land when the benefit or burden at issue is more efficiently allocated to the successors than to the original parties to the covenant").

21 *See, e.g.*, Carol M. Rose, *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants* 19 (Ariz. Legal Studies Discussion Paper No. 13-21, 2013), *available at* http://ssrn.com/abstract=2243028.

22 *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); *see also* U.C.C. § 1-304 (2012) ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement." (alteration in original)).

23 *See, e.g.*, Empire Gas Corp. v. Am. Bakeries Co., 840 F.2d 1333, 1339 (7th Cir. 1988) (calling the good faith requirement "a chameleon"); Victor P. Goldberg, *Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith*, 35 U.C. DAVIS L. REV. 319, 348 (2002) (analyzing seven factually similar cases with divergent outcomes to demonstrate "the futility of relying on a good faith standard absent a coherent framework for understanding the transaction").

constructions. Hence, it is not surprising that, to some, good faith partakes of the idea of commercial morality and fairness, implicating the ideals of horizontal equality and fairness between the parties,[24] while to others, it is used as a proxy for the law's realization of its intrinsic efficiency goals relating to the regulation of contract making and enforcement.[25] It is crucial to understand, though, that the disagreement revolves around the normative content of the concept, not its jural meaning.

As we will show, other common law concepts, including the "reasonable person," share the same design.[26] All these concepts embody a core jural meaning that leaves sufficient elbow room for normative, value-driven/based constructions. It is precisely because of this reality that these concepts have endured the test of time and remain an integral part of the common law's vocabulary and functioning to this day. For the same reason, common law concepts continue to inform and play a key role in statutory reforms.[27]

While concepts in the common law have a relatively stable jural meaning embedded in them, their normative meaning certainly changes over time and context, allowing the common law as a whole to accommodate a plurality of normative values. It is precisely through the interaction between the two meanings that the common law itself changes. As is well known, substantive doctrinal change in the common law (i.e., the wholesale replacement of common law rules) is somewhat rare. The doctrinal content of the common law thus remains relatively static.[28] The elements of "trespass," "nuisance," "repudiation," "adverse possession," and the like have remained largely the same for ages (and in some cases centuries) now. All the same, in its actual functioning, the common law has had no problem accommodating changing social preferences, values, and ideals. We argue that it is entirely because of its reliance on its conceptual architecture that the common law is able to

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24 *See, e.g.*, Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982) (arguing that "good faith" symbolizes a commitment to justice and contractual morality); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1225 (1999) (suggesting that the "good faith" requirement implicates "the role of the state in imposing minimal standards of honesty and fairness" in contractual dealings).

25 *See, e.g.*, Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 852-53 (2006) (describing the use of precise terms in loan agreements, such as "promise to insure," as proxies for good faith ex post).

26 *See generally* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012) (arguing that reasonableness should be defined normatively, not positively or empirically).

27 *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (preventing corporate charters from limiting the liability of directors for, among other things, violations of the common law duties of loyalty and good faith).

28 *See* Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 256-65 (1980) (illustrating this reality using different doctrines in the areas of tort, contract, and property law).

achieve such normative change while leaving its doctrinal content largely intact. Change in the common law is thus in a sense *chameleonic*, insofar as it comes about with minimal structural disruption. As we argue, common law concepts contribute to this process of normative change in three possible ways.

In the first method, which we characterize as the process of *interpretive* change, courts bring about change in the normative content of the common law by altering the relative importance of the jural and normative meanings of a legal concept. At any point in time, a legal concept embodies an equilibrium between its normative meaning and its commonly understood jural meaning. When a court seeks to change the normative meaning of a concept, it shifts the emphasis of the concept away from the more specific normative meaning and towards the more general jural meaning, which then allows it to imbue the concept with new or different normative content. A good example of such intraconceptual change is seen in the concept of "unreasonable interference," which has long been a part of private nuisance.[29] In developing nuisance doctrine, courts initially used the idea merely to examine the objective nature of the defendant's interference, that is, whether it was material.[30] In due course, however, they began interpreting "unreasonable interference" as requiring a balancing of the plaintiff's harm against the importance of the defendant's activity.[31] Courts that achieved this change did so by emphasizing the concept's jural meaning—of requiring a holistic balancing exercise—over its normative meaning, thereby altering the salience of the jural meaning in order to imbue it with new content.

The second method of normative change is best described as *interconceptual* change. Here, the common law working through its substantive doctrines comes to emphasize one concept over others *within a particular doctrine*, thereby enabling it to affirm the normative values and ideas that are associated with that specific concept over others within the relevant doctrinal framework. And over time, the concept that the common law doctrine emphasizes evolves to determine the normative orientation of the doctrine as a whole. This phenomenon is seen in the doctrine of "adverse possession" in property law, which has long been known to consist of five conceptual elements: hostility, continuity, openness, actual possession, and exclusivity.[32] At

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[29] Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 409 (1974).

[30] *See id.* at 405 ("All [a plaintiff] must show is that he has been injured by the defendant's conduct . . . .").

[31] *See id.* at 409 (describing how the courts began to evaluate reasonableness "by striking a balance between [the plaintiff's] suffering and the general standard of amenity").

[32] *See* Dimmick v. Dimmick, 374 P.2d 824, 826 (Cal. 1962) (en banc) (analyzing the five conceptual elements); West v. Evans, 175 P.2d 219, 220 (Cal. 1946) (en banc) (same); Hacienda Ranch

different times, the law has emphasized one of these elements over the others, in effect altering the normative orientation of the doctrine. At one point, the common law emphasized the element of hostility, using it as a mechanism by which to scrutinize the motives of a party in an effort to emphasize fairness.[33] Over time, adverse possession in many jurisdictions moved away from this concept and instead came to emphasize actual possession, which can be seen as an effort to imbue the doctrine with an emphasis on efficient resource use rather than subjective fairness.[34] Thus, by increasing (or decreasing) the relative weight of hostility and actual possession in adverse possession, the common law oriented the doctrine towards (or away from) fairness at different times. Another good example of such salience alteration is to be found in the law of negligence, in the early battle between the concepts of "duty of care" and "proximate cause."[35] Courts have used the terms in different contexts to modulate the scope of liability in the pursuit of different normative goals.[36]

A third method of normative change in the common law that we describe here is the process of *additive* change, which involves the common law adding an altogether new concept into its repertoire, principally in order to introduce a new normative dimension (or objective) to an existing area of law. This method of change is fairly common. A familiar example is the inclusion of the "implied warranty of habitability," which concretized the goal of

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Homes, Inc. v. Superior Court, 131 Cal. Rptr. 3d 498, 500 (Cal. Ct. App. 2011) (same); *see also* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 680 (1986) ("With adverse possession the requirements that possession be actual, open, notorious, continuous, hostile and under color of title are often read into statutes in order to flesh out their basic structure.").

33 *See, e.g.*, R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 336 (1983) (finding that in the majority of cases, judges have not hesitated to look into the possessor's state of mind and subjective intent); *see also* Walls v. Grohman, 337 S.E.2d 556, 562 (N.C. 1985) (overturning prior precedent that required a possessor to be a thief in order for the possession to be adverse); Epstein, *supra* note 32, at 687-89 (considering whether good faith possessors and bad faith possessors should be subject to different standards); Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1039-40 (2006) (describing how courts overwhelmingly favor good faith possessors).

34 *See* Chaplin v. Sanders, 676 P.2d 431, 435-36 (Wash. 1984) (en banc); Fennell, *supra* note 33, at 1059-60 (arguing that the true purpose of adverse possession is to move land into the hands of a "higher-valuing user").

35 *Compare* Palsgraf v. Long Island R.R., 162 N.E. 99, 100-01 (N.Y. 1928) (finding that the injury was not foreseeable, and therefore the defendant had no duty), *with id.* at 103-05 (Andrews, J., dissenting) (arguing that the plaintiff's injury was proximately caused by the defendant); *see also* Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 53 VAND. L. REV. 1039, 1063 (2001) ("The proximate cause issue . . . focuses on the purpose, not the application, of the relevant community norm.").

36 *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 950 (2010) (describing different suggested normative orientations for duty doctrine).

consumer (i.e., tenant) welfare into the law of leases, an area of substantive law that historically treated the parties' interactions as an arm's length transaction.[37] It has since become a staple of the common law of landlord–tenant relations. An additional example of this phenomenon is the concept of "quasi-property," which the common law developed to connote a basis for liability that flowed from an obligation analogous to property's right to exclude, but which would not attach to the physical boundaries of a resource.[38] We see this concept emerging in the context of burial rights[39] and in the context of informational resources of fleeting economic value.[40]

In addition to giving the common law an element of jural determinacy over time and normative determinacy on a contextual basis, legal concepts thus operationalize the common law's basic mechanism of change: one that scholars have routinely characterized as "incrementalism"[41] without explicating the nuance through which this actually comes about in practice. Examining the common law's conceptual structure and the dual nature of meaning that these concepts embody reveals in somewhat granular detail precisely how common law incrementalism works in practice.

Our analysis and defense of the common law's basic conceptual architecture in this Article yields three key contributions. Our first contribution is theoretical. By introducing the distinction between jural meaning and normative meaning, we bring into light the deep architecture of the common law that holds the key to the system's vitality and longevity. It is through this unique combination that the common law has been able to provide legal actors with a solid foundation on which to build their legal expectations,

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37 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072-73, 1082 (D.C. Cir. 1970) (holding that there is an implied warranty of habitability in leases of urban dwelling units). *See generally* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011) (discussing the history and gradual weakening of the implied warranty of habitability doctrine).

38 *See* Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1899-1900 (2012) [hereinafter Balganesh, *Quasi-Property*] (arguing that for quasi-property interests, the entitlement derives from the nature, context, and consequence of the parties' interactions).

39 *See, e.g.*, Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) (holding that relatives of the deceased have a quasi-property right to the body); Louisville & Nashville R.R. Co. v. Wilson, 51 S.E. 24, 26 (Ga. 1905); O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899); Burney v. Children's Hosp. in Bos., 47 N.E. 401, 402 (Mass. 1897).

40 *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("Regarding the news, . . . it must be regarded as *quasi* property, irrespective of the rights of either as against the public.").

41 *See, e.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 106 (2009); *see also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 53 (1999); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996).

while leaving the door open to normative infusions of meaning, which produces a process of constant updating. As a result of the latter effect, common law doctrine has managed to remain relevant even in the face of radical changes in social preferences.

Second, and relatedly, we show that the unique design of the common law system underwrites a constant competition in the marketplace for ideas. By keeping the normative meaning open to competing value-based interpretations, the common law metaphorically extends an open invitation to champions of particular philosophies and ideologies to reshape the normative meaning of common law concepts. In our vision, common law doctrines are never fully dominated by one value at any given time, as theorists like Judge Richard Posner and Professor Ernest Weinrib have suggested,[42] but rather always embody a plurality of values even when it appears that a single value such as efficiency or fairness predominates. As a descriptive matter, it is therefore our view that the common law is impervious by its very structure to value monism.

Third, we posit, as a normative matter, that it would be highly undesirable—indeed, impractical—to endorse the calls of some legal theorists to engage in free-floating policy analysis that is not pegged to concrete legal concepts.[43] In our view, legal concepts provide an essential framework for policy analysis and debate. General calls of the type to "maximize economic efficiency" or "do what is just" cannot on their own form a basis for the operation of a legal system. They are too abstract and general to serve a useful function. Legal concepts, by contrast, allow policymakers to take account of value-based theories that inform the law and apply them in a contextualized and nuanced fashion, such that they better fit our social preferences at any given time.

The Article unfolds in three parts. Part I begins with a discussion of the common law's conceptual architecture. It unpacks the idea of legal "concepts" and differentiates it from other analogous (but distinct) terms such as principles and doctrines. It also discusses the two types of meaning that legal concepts in the common law can and do embody—jural and normative—and provides an overview of how the two operate symbiotically. Part II builds on the framework set out in Part I to argue that it is through the common law's architecture of concepts that it is able to maintain an operational equilibrium between stability and change over time and across contexts. Part II explains the precise mechanism by which the common law's normative goals can change over time, while the jural meaning remains static, and how this

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42 LANDES & POSNER, *supra* note 5, at 24; WEINRIB, *supra* note 6, at 19.

43 *See, e.g.*, Saul Levmore, *Judging Deception*, 74 U. CHI. L. REV. 1779, 1789-90 (2007) (suggesting that cases with different factual elements be decided with a "more general theory").

interaction contributes to the "growth," "evolution," and flexibility of the common law over time. Part III addresses the payoffs that flow from our account of the common law's architecture, especially in the face of a barrage of criticism that has been leveled at the common law and legal concepts over the last several decades. A short conclusion ensues.

## I. LEGAL CONCEPTS AND THE DUALITY OF MEANING

Ever since the advent of Legal Realism as the dominant approach to common law analysis in the United States, legal concepts and conceptual analysis in the common law have come to be regarded with undue suspicion. Perhaps the most dramatic criticism of such conceptual analysis was seen in Felix Cohen's account of the "heaven of legal concepts" that contained "all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems," a process that was in the end of little value since it was "freed from all entangling alliances with human life."[44] The study of legal concepts and their role in legal reasoning was, to Cohen, mere "transcendental nonsense."[45] While conceptual analysis in the law has seen a resurgence in the years since, it has taken place largely within the domain of the philosophical analysis of the concept of law and only rarely ever beyond.[46] Theorization about the common law, in particular, has tended to underemphasize the role of legal concepts.[47]

A large part of the reason why conceptual analysis tends to be disfavored in the common law today is because it is commonly associated with a belief in the autonomy of law and legal reasoning. In other words, admitting a role for legal concepts is taken to be incompatible with a scrutiny of the common law's underlying normative goals. This need not be the case.[48] Legal concepts can coexist with a normative account of the common law. Indeed, they facilitate

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[44] Cohen, *supra* note 2, at 809. Cohen's rhetoric was powerful enough that Hart too thought it necessary to refer to it in his seminal book. *See* H. L. A. HART, THE CONCEPT OF LAW 130 (3d ed. 2012).

[45] Cohen, *supra* note 2, at 821. For a comprehensive rejoinder to Cohen, discussed in more detail below, see Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000).

[46] *See* Charles Lowell Barzun, *Legal Rights and the Limits of Conceptual Analysis: A Case Study*, 26 RATIO JURIS 215, 215-16 (2013).

[47] For exemplary work contrary to this trend, see Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 36; Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012); and Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

[48] Judge Cardozo's judicial decisions and writings can be seen as an effort to refute the idea that any reliance on legal concepts entails a belief in the autonomy of law (i.e., in mechanical jurisprudence). For an excellent account, see John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1455-74 (1999) (book review).

such an account because they are capable of accommodating and affirming multiple and different normative goals at different points in time. This Part provides an overview of what legal concepts are and how their duality of meaning renders them compatible with the normative analysis of the common law.

### A. *Legal Concepts in the Common Law*

Since legal concepts are often used to define ideas in the law, it is somewhat artificial to attempt to define a legal concept. All the same, such a definition is of practical utility insofar as it enables us to understand legal concepts as distinct functional entities in the law. Legal concepts are ubiquitous in law and legal analysis, despite the influence of Legal Realism. They often serve to simplify complex social realities, thereby allowing the law to attach specific consequences to such realities. In the common law, legal concepts are thus best understood as *the operational legal devices that the common law uses in doctrine to understand and compartmentalize aspects of a legal issue or dispute*. This understanding of a legal concept embodies two important and perhaps related dimensions: (1) it must be operational and (2) it must be interpretive. Each of these deserves elucidation.

In insisting that a legal concept embody an operational dimension, the understanding above limits legal concepts to those that are actively employed in legal doctrine and analyses, when applied to the facts of a particular case. It thereby excludes concepts that are purely academic or abstract and never directly employed as part of a court's legal reasoning when deciding a case. An example of the latter would be the idea of "reciprocal" causation made famous by Ronald Coase.[49] Very importantly, this operational dimension also helps distinguish between a legal concept and a legal doctrine. Legal doctrines in the common law usually depend on individual constituent elements, each of which in turn embodies one or more legal concepts that the doctrine uses to interact with the facts in question. On rare occasion, a doctrine may itself operate as a concept, in which case the operational dimension is satisfied. The doctrine of "unclean hands" in equity provides a good example.[50] It relies on the concept of the exact same name for its working. Legal concepts, in our understanding, must therefore have a practical orientation and interact directly with facts in individual disputes.

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[49] R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). For a critique, see Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 391 (2001) (referring to Coase's approach as one of "causal agnosticism").

[50] *See generally* Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877 (1949).

It is for the same reason that legal concepts *generally* remain distinct from what Ronald Dworkin described as "principles."[51] Principles generally operate as background jural statements that merely provide *a reason* for a legal decisionmaker to decide one way or another, without necessitating a particular decision, as would be the case with a legal rule.[52] In other words, a principle may be altogether disregarded by the decisionmaker, or come to be outweighed by a rule. As a general matter, then, principles are usually of indirect operational significance in doctrine, insofar as they are used to shape the application of doctrine without *directly* interacting with the facts of a case, rendering them distinct from legal concepts as defined here.[53] When, however, a legal principle comes to be directly embedded into a legal rule, such that it starts interacting directly with facts during the legal analysis, the principle becomes a legal concept in our understanding.[54]

In addition, and perhaps somewhat more importantly, legal concepts are usually interpretive in nature. The idea of interpretive concepts was also made famous by Dworkin, who argued that the interpretive nature implies that these concepts have more than just a descriptive element to them.[55] They are instead understood by participants as serving some purpose or interest that has an existence quite independent of the concept itself. This interpretive nature also ensures that application of the concept to individual circumstances involves a distinct element of sensitivity to that purpose or value in question, such that the concept can be interpreted to be "modified or qualified" by the relevant purpose.[56] Legal concepts therefore do more than just describe factual reality. The purposive and normative nature of legal reasoning imbues them with an evaluative dimension—wherein they (i.e., the concepts) are used to evaluate and understand reality, and at the same time are themselves influenced by criteria and values that are seen as

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51 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-26 (1977).

52 A good example that Dworkin provides is the principle that "[n]o man may profit from his own wrong." *Id.* at 26.

53 For a useful rejoinder to Dworkin, suggesting that legal principles are not very distinct from legal rules in practice as understood by positivism, see Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972). This debate is orthogonal to our analytical claims here and we therefore take no position on it.

54 Dworkin recognizes this possibility himself. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 51, at 28. The use of "reasonableness" in the Sherman Act is a good example, where unreasonableness at first played the role of a background principle in light of the terse wording of the statute but, in due course, came to play a more direct role once courts developed the "rule of reason" approach to antitrust analysis. As the name indicates, in the "rule of the reason," the question of unreasonableness becomes part of the rule and is directly applied in the analysis. Here, we may legitimately say that it is a legal concept. *See id.* at 27-28.

55 *See* RONALD DWORKIN, LAW'S EMPIRE 45-46 (1986).

56 *Id.* at 47.

important to such reasoning. Or as Dworkin puts it, in such interpretive concepts "[v]alue and content have become entangled."[57] This point, as we shall see, is crucial to the role that such concepts play in facilitating normative change in the common law.

Both of these conditions are characteristic of innumerable legal concepts in the common law. Even a cursory examination of common law doctrine will reveal that legal concepts, as captured in the definition above, dominate the actual content of the common law in a variety of areas. "Good faith," "privity," "duty of care," "proximate cause," "foreseeability," "reasonableness," "commercial fairness," "unreasonable risk," "offensive," "substantial harm," "wanton disregard," "intentional," and a host of others readily qualify.

### B. *The Duality of Meaning*

Legal concepts are usually terms of ordinary linguistic usage. All the same, as a result of their use within legal reasoning, such terms can come to acquire an understanding that is different—in varying degrees—from their ordinary linguistic one. Yet this specialized (i.e., legal) understanding itself embodies two distinct dimensions. We describe these two dimensions as the "jural meaning" and the "normative meaning" of legal concepts.

Scholars have previously noted the idea that legal concepts can have two meanings. Some legal theorists refer to it as the distinction between the "descriptive" and "prescriptive" meanings of legal terms, as the distinction between the "definition[al]" content of legal concepts and their "justificatory theory," or as the difference between the legal concept as a mere "conceptual marker" and the foundational theory in the service of which it is employed in a particular context.[58] What varies in these accounts is the precise source of each type of meaning, the contingent–permanent nature of the meaning, and the way in which the two meanings interact within legal reasoning. It is in these important respects—and not just terminological—that our account is distinct, since the common law's conceptual architecture—as we argue—is intrinsically designed to accommodate the process of incremental normative change over time.

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[57] *Id.* at 48.

[58] *See generally* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Timothy P. Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1981); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541. We also see Zipursky implicitly adopting a similar distinction, though not explicitly. *See* Zipursky, *supra* note 47, 474-78.

### 1. Jural Meaning

The jural meaning of a legal concept refers to its core structural understanding, which derives from both (1) the concept's semantic content and (2) its use within the legal community (i.e., its pragmatic content). Our account of the jural meaning does not take the semantic (or plain) meaning of the concept to exhaust its entire jural domain. It also recognizes that the concept's use within a certain community builds on the semantic content to give it a meaning that goes beyond its purely literal meaning—what is often referred to as the pragmatic content of the concept.[59] The two (i.e., the semantic and pragmatic content of the concept) together give a concept its jural meaning. It begins with the semantic meaning of the concept but then situates that semantic meaning within the context of how the concept is actually used—jurally—within the relevant legal community.[60]

Consider the concept of "proximate cause" in tort law.[61] In its plain, linguistic sense, the concept simply denotes a close-enough antecedent event that can be causally attributed to a subsequent event.[62] This constitutes the semantic content of the term and might seem almost entirely factual or descriptive. As used by the community of tort lawyers and courts, we see the semantic content coming to be refined such that the purely factual dimension is instead replaced with a distinctively evaluative one. When the semantic content is now understood together with the context of its usage (i.e., the pragmatic content), "proximate cause" now comes to mean the judgment that a certain antecedent event should be deemed by the law as close enough to be treated as legally responsible for the subsequent event based not just on fact but on independent evaluative criteria as well.[63] This represents the jural meaning of the concept of proximate cause. Open-ended, abstract, and amenable to the exercise of judicial discretion as it may be, the jural meaning nonetheless gives the concept of proximate cause its basic structural content

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59 For an account of the semantic–pragmatic distinction, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 987 (1996).

60 *See* COLEMAN, *supra* note 15, at 7 (describing a similar process of using the inferential role of a concept to analyze a term as "inferential role semantics").

61 *See generally* Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229 (1932); Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

62 *See* Beale, *supra* note 61, at 633.

63 *See generally* LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985).

as a legal concept that in turn enables it to be used as a part of the common vocabulary of tort law.

Perhaps the best-known effort to discern the jural meaning of legal concepts along the lines just described is seen in the work of Wesley Hohfeld.[64] Hohfeld is well known for having created an elaborate taxonomy of jural relations in the law in an effort to render legal usage clear.[65] In so doing, however, Hohfeld's approach was at once sensitive to both semantics and to usage within the legal community, both of which he sought to balance. While he of course did not seek to ground his analysis in a purely empirical investigation of how terms were actually used within the legal community, he at the same time allowed the jural content of the various concepts under analysis to be influenced by this reality. Describing his motivations and constraints in this regard, Hohfeld's colleague Arthur Corbin characterized his approach as follows:

> Hohfeld effected this compromise at a convenient and serviceable point. He followed "inveterate usage" closely enough to be understood by the average lawyer. He accepted fundamental concepts "as used in judicial reasoning." . . . All that was necessary was for him to see jural relations with *their* eyes, and to identify the several fundamental varieties of factual situations and to describe them in ordinary human words.[66]

In thus trying to discern the jural meaning and content of different legal concepts as used in legal reasoning, Hohfeld's approach was sensitive to both ordinary semantic meaning and the specialized usages within the relevant community. Very importantly, Hohfeld's work was trans-substantive and looked to a host of different substantive areas for support. Surely, as Hohfeld himself recognized, each of these areas remains wedded to different goals and purposes. Yet what allowed his project to retain its trans-substantive dimension was its recognition that the structural meaning of a concept could be discerned independent of an area's commitment to specific goals. A "right" and a "duty" in this analysis meant something specific, and indeed the same thing, regardless of whether one was using the term in the context of contract law or constitutional law. It denoted an affirmative claim that an individual or entity had, which placed another

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64 *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Hohfeld, *supra* note 11.

65 *See generally* Albert Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 U. ILL. L. REV. 24 (1920).

66 Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 235 (1921).

person or entity under an obligation of a certain kind. This is indeed what we mean by the jural meaning of a legal concept.

Hohfeld's analytical work, its trans-substantive dimension, and its endurance for a full century highlight a fairly important reality for our analysis; namely, that almost all legal concepts in the common law do indeed contain a discernible structural logic that undergirds their ability to remain a part of the common vocabulary within the broader legal community. This structural component may originate in the pure semantics of the concept, in its structural relationship to other concepts within a given domain, and in the way in which the relevant interpretive community comes to understand it.

An important caveat is in order here. Merely because the jural meaning of a concept—as we describe it—can derive some of its content from the way in which the concept is used by the relevant legal actors, we should not be taken to suggest that such use alone, when taken from an external point of view, can on its own constitute the concept's jural meaning.[67] In other words, the allowance for usage to play a role in determining the jural meaning does not imply that jural meaning now becomes a purely, or even principally, empirical inquiry. While the inquiry may indeed look to what the relevant legal actors see as the relevant legal concept, the inquiry is an attempt to understand the meaning of the concept through their eyes (i.e., from a principally internal point of view). It therefore is not an effort to understand how they modify their behavior in light of such concepts, or an effort to predict the consequences that flow from the use of a legal concept. To adopt the latter approach would in effect be to deny legal concepts their own internal meaning, in the suggestion that such concepts are metaphysical placeholders that are "meaningless" in their own right, an idea famously advanced by the Scandinavian Realists.[68]

In looking to the relevant interpretive community to understand the jural meaning of a concept, the examination is therefore of that community's understanding of the concept's structural prerequisites. And to achieve this, one must look to the semantic and linguistic content of the legal concept in order to appreciate how the community's understanding builds on, and interfaces with, that understanding. Indeed, this is precisely what we understand Hohfeld to have been attempting to do as well, in looking into how courts and judges understood and applied the various jural relations that he identified. The precise balance between semantic content and actual usage will of course vary from one context to another, but the task of

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67 For a similar point, see H. L. A. Hart, *Scandinavian Realism*, 1959 CAMBRIDGE L.J. 233, 237-38.

68 *Id.* at 235.

discerning a concept's jural meaning must not lose sight of the fact that both remain equally relevant to the exercise.

Consider the example of "originality" in the federal common law of copyright.[69] As understood by copyright lawyers and courts today, and in the wake of recent jurisprudence in the United States, originality is equated with "creativity" and understood to require that a work of authorship exhibit a modicum of creativity for it to qualify for copyright protection.[70] If one were to simply look to what judges *say* about originality in cases, one might be tempted to treat originality and creativity as synonyms, and nothing more. Yet this would miss an important jural reality behind the meaning of originality; namely, that it is not sufficient if the work in question is objectively creative, but that such creativity must *originate* (i.e., have its *origins*) in the creator seeking protection.[71] Courts rarely ever address this question given how basic it is; and most take it as embedded within the semantic meaning of originality as requiring the *origin*ation of the creative content by the claimant. It is only when one recognizes that there is indeed an internal logic to such concepts and that usage can help glean that logic rather than replace it altogether, that looking to usage can be helpful. In the example of originality, the usage by the community *builds* on the semantic content and adds the objective requirement of creative evaluation onto the semantic one of origination. Both work together to produce the jural meaning.

Most concepts in the common law thus have a jural meaning that is discernible through the semantic meaning of the concept and its common usage within the interpretive community, when viewed from an internal point of view. In addition, since it is oftentimes impossible to distinguish between decision rules and conduct rules in the common law,[72] many of the common law's legal concepts also embody a distinctive evaluative dimension and come to partake of what Bernard Williams famously described as "thick concepts."[73] Thick concepts, as philosophers have since come to understand the term, refer to evaluative concepts where the evaluative content comes

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69 *See generally* Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3 (1992) (highlighting the serious repercussions attached to copyright law's definition of originality).

70 *See id.* at 14.

71 *Id.* at 14-15 (describing this as the "independent effort" or "independently originated" standards).

72 *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (describing conduct rules as rules designed to guide behavior and decision rules as rules directed to officials applying the law).

73 BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140-44 (1985).

with an identifiable descriptive content that influences and directs such evaluation.[74] A common example is the distinction between the concepts of "good" and "beautiful." Both involve an evaluation; yet the former (good) is open-ended and specifies no descriptive criteria for the evaluation, whereas the latter (beautiful) conveys additional descriptive content—that of requiring the evaluation to focus on aesthetically pleasing dimensions—in carrying out the evaluation. Thick concepts contain implicit semantic direction to the evaluator about the appropriate criteria that may be used whereas thin concepts leave this open-ended. Once again, we see how the semantic content of the concept itself contributes to the jural meaning of the concept. As a normative enterprise, the law contains innumerable thick concepts. Examples are legion: "good faith," "reasonableness," "best interests," "business judgment," "fair use," etc. The precise descriptive content is of course different for each of these concepts, which is why thickness is understood as a continuum rather than as a binary.[75] All the same, these concepts require actors to carry out their evaluations using different criteria. One may of course complain that such criteria are too open-ended, or that they give judges too much discretion and so on, but one cannot accuse the concepts of lacking meaning and analytical content.

It is this underlying structural logic to legal concepts—which we term as the concept's jural meaning—that contributes to what Jeremy Waldron has previously described as the "systematicity" of the law.[76] In his rejoinder to Felix Cohen, Waldron argues that legal concepts play a crucial role in enabling the legal system and decisionmakers therein to see its various rules as necessarily interrelated. As he puts it:

> [T]he technical language of the law . . . must be able to express the actual interrelationships of legal provisions, laid down by diverse and competing lawmakers. The conceptual terminology of legal doctrine must be able to accommodate policy initiatives inspired by different moralities, ideologies, and programs, while resisting theoretical identification with any one of them. It must be understood as a sort of neutral matrix on which their interlocking

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74 *See generally* Simon Kirchin, *Introduction: Thick and Thin Concepts* (providing an example using the terms "good" and "honest" to describe the different degrees of thickness), *in* THICK CONCEPTS 1 (Simon Kirchin ed., 2013).

75 *See* Samuel Scheffler, *Morality Through Thick and Thin: A Critical Notice of* Ethics and the Limits of Philosophy, 96 PHIL. REV. 411, 417-19 (1987) (book review) (reasoning that because our "ethical vocabulary is very rich and diverse," simply designating terms as thick or thin is an oversimplification).

76 Waldron, *supra* note 45, at 19 & n.14.

> relations can be laid out without any assumption that the various elements were, so to speak, made for one another.[77]

It is the jural meaning of the concept that in our view contributes to this ideal of systematicity, by forming the elements that go into the construction of the "neutral matrix" of interlocking ideals and propositions in the law.

In short, the jural meaning of a legal concept refers to the structural core that gives the concept its logical basis as a term of usage. It originates in the semantic content of the concept, which may include both structural and descriptive criteria that are relevant and often interfaces with usage within the community that sharpens or modifies the semantic content in question.

### 2. Normative Meaning

While the jural meaning of legal concepts gives them a common structural understanding within the relevant interpretive community and contributes to the overall systematicity of the legal system, the jural meaning on its own is oftentimes insufficient to apply the concept to individual scenarios and arrive at distinct conclusions. For instance, knowing the jural meaning of "proximate cause" as a device for evaluating the causal connection between two events for the purposes of legal responsibility does not on its own tell a court whether a particular defendant's actions *should*—in a particular case—be treated as the proximate cause of the plaintiff's injuries, for example, whether the railroad company's actions should be treated as a proximate cause of Mrs. Palsgraf's injuries.[78]

Legal concepts, despite being endowed with jural meaning, exhibit a characteristic that has been variously described as the phenomenon of "open texture,"[79] "pervasive vagueness,"[80] or "furry edges."[81] Applying them to any particular context requires the decisionmaker or interpreter to rely on additional factors beyond the domain of the standard jural meaning, since the jural content of the concept has in effect run out.[82] This reliance on

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77 *Id.* at 47.

78 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 352 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

79 See Hart, supra note 44, at 124.

80 Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1124 (2008).

81 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 51, at 22 (using the term "furry edges" to describe Hart's theory).

82 *See* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 18 (1993) (describing the "need for judges in some cases to make 'a fresh choice between open alternatives'"); Schauer,

additional factors is discretionary on the part of the interpreter but is of course to a large extent constrained by the jural meaning of the concept itself. Yet it works in tandem with the jural meaning to now generate meaning for the term that allows it to be applied to a given context. The choice of additional factors is an indelibly normative one, and the meaning that is so produced constitutes the normative meaning of the concept. In our example before, if the decisionmaker were to decide that the question of whether to find a cause to be close enough for legal responsibility ought to track his or her understanding of morality (in ascribing responsibility), the jural understanding of proximate cause now combines with this additional, non-structural (i.e., moral) understanding to generate the normative meaning of the concept: as representing sufficient closeness between the events such that it is morally acceptable to consider one as the cause of the other for the purposes of legal responsibility.[83]

The normative meaning of a legal concept thus involves the superimposition of a normative consideration on the jural meaning of the concept when applying it to a particular context or dispute. A few things therefore flow from this. First, the normative meaning of a legal concept is oftentimes a highly contested issue among courts, scholars, and lawyers. Since the additional variable chosen is not dictated by the concept itself, actors invariably tend to choose different normative values based on their own preferences. This contestation, however, is also the site and basis of legal change in the common law, as we show in Part II below. Second, the jural meaning of the concept is itself constitutive of the normative meaning, such that the normative meaning has no existence independent of the former. Part of what the normative meaning of a legal concept is depends on its taking the jural meaning and infusing it with non-structural normative considerations. Understanding this overlay is important because disagreement over the normative meaning tends to be couched as disagreement over the very jural meaning of the legal concept. Relatedly, such disagreement over normative meaning is also used by some to suggest that the concept is altogether meaning*less*, since there remains no common understanding about the concept itself.[84] It is only when the superimposition of the two is appreciated that such claims can be seen to be exaggerated.

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*supra* note 80, at 1125 (explaining how, with vague laws and multiple applications, judges are required to sometimes exercise discretion and apply extralegal factors to reach a decision).

83 *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505-06 (1992) (linking proximate cause to outcome responsibility).

84 *Cf.* Hart, *supra* note 67, at 235.

As Dworkin noted, actors engaged in legal reasoning invariably approach concepts with an interpretive attitude—characterized by the recognition of a purpose underlying a concept and the ability of that purpose to qualify or modify the meaning of that concept.[85] It is indeed this interpretive attitude that generates the normative meaning of legal concepts. As a result of the recognition that concepts in the law serve important purposes—defined by distinctively normative considerations—the very process of interpreting a concept involves infusing it with those pre-identified purposes, a process that while generally couched in positive language (e.g., concept *x* means *y*) in reality involves a normative judgment (i.e., concept *x* should mean *y*). The process of elucidating the normative meaning of a concept is therefore a distinctively "justificatory" exercise, even if it is framed as a purely "explanatory" one.[86]

In characterizing this second meaning of legal concepts as "normative," we should not be understood as claiming that the jural meaning of the concept is in some ways purely descriptive, or as embodying a truth-value that renders it altogether value neutral.[87] We thus are in no way attempting to resurrect the analytic–synthetic and fact–value distinctions that philosophers have famously come to reject.[88] Indeed, some have criticized efforts to derive separate meanings for legal concepts as requiring just such a distinction and, in addition, a purely positivist approach to law, that is, the belief that legal rules and ideas are altogether immune from morality and other similar considerations.[89] Our claim here is quite different.

The distinction between the jural and normative meanings that we draw here would work perfectly well as long as one takes the difference between structural and substantive concerns underlying the concept to be our central concern. Whereas the jural meaning is a reference to structural concerns, the normative meaning relates to substantive concerns. It is very well

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[85] *See* DWORKIN, LAW'S EMPIRE, *supra* note 55, at 47 (describing how the interpretive attitude has two components, the first being an assumption about value, and the second that the rules and concepts are "sensitive to [the] point").

[86] *See* COLEMAN, *supra* note 15, at 9.

[87] *But see* Westen, *supra* note 58, at 544 (arguing that some concepts, such as "federal," are descriptive and neutral).

[88] For accounts of these distinctions, see HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS (2004); Ruth Anna Putnam, *Creating Facts and Values*, 60 PHIL. 187 (1985); W. V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951); Richard Swinburne, *Analytic/Synthetic*, 21 AM. PHIL. Q. 31 (1984); Friedrich Waismann, *Analytic–Synthetic*, 10 ANALYSIS 25 (1949).

[89] *See, e.g.*, Barzun, *supra* note 46, at 216 (explaining and critiquing how some theorists argue legal rights can be derived from purely conceptual claims and do not require any normative arguments).

possible that these structural concerns themselves derive from predispositions as to certain values within the relevant legal community. Going back to the example of proximate cause in tort law, it might well be argued (as some have) that the very idea underlying the proximate cause concept and requirement exhibits a judgment that there is an outer bound to the causal chain that the law will recognize in order to impose liability. Even so, this judgment call is very different from the additional judgment call of whether, accepting the need for such an outer bound, we then ought to draw that boundary based on considerations of morality, as opposed to, say, pure efficiency. It is this intuition that our distinction between the jural and normative meanings of legal concepts hopes to capture.

The distinction above is perhaps best captured in the distinction between epistemic values and moral values that Brian Leiter has made, in defense of what he calls "descriptive jurisprudence."[90] The epistemic value refers to "truth-conducive desiderata we aspire to in theory construction," whereas the moral value relates directly to "practical reasonableness."[91] The former focuses on the significance and importance of the phenomenon in question being captured by the concept, while the latter directly engages the "ought" question.[92]

This distinction leads us to another important insight about the normative meaning of a legal concept. Since it derives from the open-textured nature of the concept, and such open texture becomes obvious primarily when the concept is sought to be applied to a given situation, the normative meaning of a concept is generally formulated during the concept's direct application to a scenario. It is therefore rare to see the concept of proximate cause being understood in moral and ethical terms while in the abstract; though it is routinely associated with values of morality or efficiency when applied to individual cases or circumstances. The normative meaning of a concept is thus principally application-driven. Constitutional law scholars have captured a largely analogous idea in the distinction between the "interpretation" and "construction" of texts or rules.[93] The former focuses on linguistic and semantic meaning, while the latter is concerned principally with the legal

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**90** Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 30-43 (2003).

**91** *Id.* at 34-35.

**92** *See id.* at 35 ("Moral values are those values that bear on the questions of practical reasonableness, e.g., questions about how one ought to live . . . .").

**93** *See* Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 100-08 (2010) (highlighting the distinction between construction and interpretation and arguing that it is important for legal scholars to understand this "real and fundamental" distinction).

effect of the text when applied, which is an entirely normative exercise and looks to considerations external to the text itself.[94]

An important caveat is in order here. In characterizing the "normative" factors that go into generating a legal concept's normative meaning from its jural meaning, we remain indifferent to the question of whether these factors constitute "legal" or "extra-legal" factors. In Hart's positivist account, these factors, which he saw as central to the exercise of judicial discretion, were extra-legal, in transcending the traditional domains of legal reasoning.[95] To Dworkin on the other hand, these normative considerations were emblematic of "principles" that courts use as part of legal rules thereby rendering them legitimate sources of law.[96] Our account here remains perfectly compatible with either view, since nothing in our identification of a concept's normative meaning turns on its characterization as legal or extra-legal.

In summary then, the normative meaning of a legal concept refers to the meaning that the structural idea behind the concept comes to acquire when sought to be applied to individual scenarios, necessitating a decisionmaker's reliance on values and considerations external to the concept itself. In so doing, the decisionmaker is making a direct normative judgment about what values ought to be driving that concept, when applying it as part of common law doctrine.

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The duality of meaning that we defend here might be contrasted with accounts which argue that legal concepts contain a single meaning at any given point in time. In recent work, Jody Kraus offers a single meaning account of concepts in the common law and suggests that this single meaning can undergo a radical transformation over time, in order to accommodate competing normative values.[97] An account of legal concepts that is wedded to the idea of a singularity—as opposed to duality—in their meaning, is then compelled to identify "the" meaning of a concept, as used and applied by courts across a substantive area.[98] Failing this identification, a singularity-based account risks the argument that the inability to identify

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94 *Id.* at 96.

95 See HART, *supra* note 44, at 127; *see also* BIX, *supra* note 82, at 25-28; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 51, at 17.

96 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 51, at 28-39.

97 Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 303, 326 (2007) (describing this process as "radical semantic evolution").

98 *Id.* at 331-36.

a consistently accepted meaning suggests that a concept is in the end altogether meaningless. The "duality of meaning" account, by contrast, provides a coherent explanation for the seeming "inconsistencies" in courts' usage of the term.

## II. STABILITY AND CHANGE IN THE COMMON LAW

In Part I, we examined how concepts work in the common law and the difference between the jural and normative meanings that legal concepts embody. In this Part, we proceed to show how the interaction between the two is responsible for maintaining an adequate level of stability necessary for the successful operation of the common law, while at the same time allowing for change at the normative level.

### A. *The Static–Dynamic Equilibrium in the Common Law*

One of the core functions of the law is to guide behavior.[99] For this reason, the law must remain relatively stable, so that law-abiding citizens can plan their actions in accordance with the law and develop reasonable expectations about the legitimacy of their decisions.[100] This logic is central to the idea of the rule of law and is often captured by the simplistic observation that "the rule of law lies in a law of rules."[101] An ever-changing legal system would impose an impossible cost on its subjects, forcing them to constantly re-educate themselves about the content of the law or live in fear of breaking it. And if laws were routinely broken and violated, even without actual enforcement, the overall legitimacy and credibility of the legal system would as a direct result come to be undermined.[102] Therefore, lawmakers cannot change the law haphazardly.

At the same time, no one seriously argues that the legal system should remain frozen in time—especially insofar as the system's values and ideals go. The law must reflect the normative values of the people who enacted it and as they change over time; the law must adapt to ensure a good fit between its normative underpinnings and the content of its rules. In fact,

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99 *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 218 (2d ed. 2009) ("[T]he law should be capable of providing effective guidance.").

100 *Id.* at 214-15 ("Stability is essential if people are to be guided by law in their long-term decisions.").

101 The idea was coined by Justice Antonin Scalia, *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), and is often associated with him, *see* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 203 (2013).

102 *See* DAGAN, *supra* note 101, at 203.

when the law falls behind the times, it fails to serve the society that adopted it, thereby undermining its own legitimacy.

Striking the right balance between the demands of stability and change is therefore a challenge that every legal system must overcome. Jurists have long identified this challenge and have argued that the best way to reconcile the conflicting demands of stability and change is through a mechanism of incremental or accretive evolution, often characterized as "incrementalism"[103] or "minimalism."[104] In their descriptive accounts of the common law, Atiyah,[105] Cardozo[106] and Holmes[107] masterfully explain how common law doctrine has evolved over centuries through incremental doctrinal changes. By avoiding abrupt and sweeping reform (unless absolutely crucial), common law judges were able to secure continuity in the law without unduly disrupting actors' expectations. This task was facilitated by their reliance on the "declaratory theory" of the common law, according to which incremental (judicial) changes in the common law were seen as merely restating the "correct" version of the common law that had always been so, rather than as actively altering the law to create altogether new rules.[108] While almost everyone understood that judges were in effect creating new rules, the declaratory theory provided the process of incremental change with a rhetorical alibi that legitimized the process. At the heart of this theory lies the idea that the law comes to be modified through a process of small and gradual changes.

More recently, Professor Cass Sunstein has elevated incrementalism (or "minimalism," as he calls it) to the level of a normative theory, advocating that all important legal changes, not only those of traditional common law areas, should be effected gradually.[109] In addition to unfairly disrupting expectations, Sunstein argues that minimalism, which he associates with the political theorist Edmund Burke, is premised on the idea that "established traditions are generally just, adaptive to social needs, or at least acceptable."[110] Burke who

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103 *See, e.g.*, Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 58 (2007) (noting how the incrementalism of the common law appears to contribute to "legal predictability").

104 *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) ("Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices.").

105 *See generally* P.S. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW (1987).

106 *See generally* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW (1924); CARDOZO, *supra* note 9.

107 *See generally* HOLMES, *supra* note 9; Holmes, *supra* note 10.

108 For an excellent recent account of the declaratory theory, see Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421 (2013).

109 SUNSTEIN, *supra* note 41, at 5.

110 Sunstein, *Burkean Minimalism*, *supra* note 104, at 353.

considered the common law "the pride of the human intellect,"[111] lauded the common law for closely tracking actual practices.

While these accounts of incrementalism in the common law are both accurate and persuasive, they miss an important insight about incrementalism itself. In focusing on the gradual nature of the change at the *doctrinal* level, these accounts of incrementalism ignore the intrinsically adaptive role that the actual content of the static doctrine plays, which in turn enables common law doctrine to remain by and large unchanging while, at the same time, responsive to shifting social values and preferences. In other words, although common law doctrine may itself change infrequently and only over extended periods of time, it is able to nonetheless remain relevant as a social institution because its underlying devices (i.e., its legal concepts) are capable of accommodating and advancing the "felt necessities of the time."[112] The common law's conceptual framework thus forms the very backbone of its commitment to incrementalism as a process of growth. Yet extant accounts of common law incrementalism tend to ignore this reality, which contributes to the characterization of the common law as an institution that is traditional, conservative, and archaic in multiple respects, which is indeed far from being true in practice. It is this omission in discussions of incrementalism that our account addresses. Our claim is that the common law's ability to adapt to changes without unduly disrupting actors' expectations is embedded in the unique design and role of common law concepts.

As an example, consider a recent account of common law incrementalism offered by Justice Breyer of the U.S. Supreme Court in a dissenting opinion involving the overruling of a common law precedent.[113] In describing the process, he notes that "[c]ommon-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest."[114] Clearly unhappy with the majority opinion in the case, he goes on to note that "[t]he reader should compare today's 'common-law' decision with Justice Cardozo's decision in *Allegheny College* . . . and note a gradualism that does not characterize today's decision."[115] These observations about the common law's process of gradual change emphasize the restraint that common law

111 Edmund Burke, *Reflections on the Revolution in France*, *in* THE PORTABLE EDMUND BURKE 416, 456 (Isaac Kramnick ed., 1999).

112 HOLMES, *supra* note 9, at 1.

113 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 928 (2007) (Breyer, J., dissenting).

114 *Id.*

115 *Id.* (citation omitted).

courts are believed to exhibit, even when they see pre-existing law as worthy of being changed. What this account altogether ignores, though, is the all-important role that legal concepts played in enabling this—especially in the very decision that Justice Breyer extolls as the archetype of common law incrementalism!

*Allegheny College v. National Chautauqua County Bank*[116] has long been understood as a case involving the doctrine of promissory estoppel and its relationship to the requirement of consideration in contract law.[117] In the short opinion, then-Chief Judge Cardozo is taken to have successfully allowed a claim of promissory estoppel by the plaintiff notwithstanding the existing understanding of consideration.[118] While the opinion may be a perfect example of common law incrementalism, Cardozo succeeds in adopting an incremental strategy by working closely with the legal concept of consideration. As one scholar aptly puts it, in Cardozo's hands, consideration "is a more open and flexible concept than is usually appreciated."[119] The opinion showcases the role that legal concepts play in underwriting the process of incremental doctrinal change, with some even using it to characterize Cardozo as a "pragmatic conceptualist."[120] In the opinion itself, Cardozo offers an interesting account of legal concepts in the common law,[121] which scholars have in the years since spent significant time interpreting. He thus notes:

> Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.[122]

In this somewhat obscure language, Cardozo is in effect extolling the malleability of legal concepts in the common law—which enables them to

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116 159 N.E. 173 (N.Y. 1927).

117 *See* Curtis Bridgeman, Allegheny College *Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 150 (2005).

118 *See id.*

119 Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the* Allegheny College *Case*, 36 BUFF. L. REV. 645, 670 (1987).

120 Bridgeman, *supra* note 117, at 183 n.170. The original characterization of Cardozo's jurisprudence as a whole derives from Goldberg, *The Life of the Law*, *supra* note 48, at 1462 ("Cardozo was a 'pragmatic conceptualist.'").

121 *See* Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 175 (N.Y. 1927).

122 *Id.* at 175 (citation omitted).

take new meaning and content—while remaining "distinctive" within the doctrinal apparatus of the law.[123] The incrementalism of the common law then, even to Cardozo, was a direct result of the law's conceptual structure that in turn allowed for the common law as a whole to balance stability and change. To Cardozo, common law concepts were forged and refined by the contextual needs of individual cases (i.e., what we refer to as "values"), and yet—perhaps most importantly—they were *not* to be treated as altogether dispensable elements of the law.[124]

As noted previously, common law concepts have a core jural meaning that remains constant through time and a normative meaning that is adaptable.[125] It is through the interaction between these two meanings, both embodied in legal concepts that the common law's process of incremental change is enabled. The jural meaning of legal concepts gives the common law its requisite stability. Whenever the common law is used by courts and litigants, it invariably relies on doctrines to resolve individual disputes. These doctrines, in turn, employ legal concepts. Consequently, when actors go about their daily affairs, they rely on those concepts as guideposts. For example, professionals know that they must act reasonably. Similarly, in a contractual setting, parties understand that they must negotiate in good faith. The same is true when a dispute arises. In the standard common law case, the litigants agree on the particular doctrine that applies to their dispute and the key concepts that inform it. What they tend to *disagree* about, then, is the question of *how* that doctrine applies to the agreed upon facts and circumstances of the case, or how to construe the relevant concepts.

The jural meaning of concepts, in our account, stabilizes the common law edifice, providing an important focal point for actors, judges, and even scholars. The jural meaning can be thought of as the anchor of the common law, the component that operationalizes stare decisis.[126] Without this anchor, courts would be unable to find common ground in prior decisions in order to treat them as binding and applicable. It is thus concepts, by virtue of their jural meaning, that provide a common denominator that ensures continuity in the common law.

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123 *See* Konefsky, *supra* note 119, at 647.

124 For an excellent account of Cardozo's approach to legal analysis and his extensive reliance on legal concepts, see Goldberg, *The Life of the Law*, *supra* note 48, at 1452 (arguing that, to Cardozo, the job of the judge "was to understand, articulate, and apply—rather than to deconstruct or hide behind—the concepts embedded in law.").

125 *See supra* Part I.

126 *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735-36 (1949) ("*Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.").

Take, for example, the concept of "good faith" in the common law of contracts.[127] Under the common law of most jurisdictions, contracting parties are under an obligation to negotiate and perform contracts in good faith. This rule is taken to be a fairly well-established and immutable one that has persisted for at least two centuries now.[128] And yet the law speaks of the content of this obligation in largely open-ended terms. The Uniform Commercial Code, for instance, which largely codifies the common law standard,[129] defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[130] While the particular list of behaviors that violate the obligation of good faith have no doubt changed over time and with context—for example, the obligation in relation to banks is different from that in relation to merchants—the core jural meaning of the concept has remained the same.[131] Courts, judges, legislatures, and practitioners all have a shared understanding or common knowledge of the concept and the obligation that it connotes as a structural matter, even if not in its application to an individual case.

The idea described here is also captured in the distinction that some legal philosophers make between the notions of indeterminacy and contestability in the language of the law.[132] While legal indeterminacy can originate in a variety of reasons, in many situations legal terms (i.e., concepts) are often "contestable" rather than ambiguous or vague. In these situations, as Jeremy Waldron explains, it is not that the terms in question lack meaning or that the determinacy of their meaning is compromised.[133] Instead, as he clarifies, "it is part of the meaning of these words to indicate that a value judgment is required, a function which the words perform quite precisely."[134] This captures rather well our point about the jural meaning of legal concepts. The jural meaning grounds legal actors' common understanding of a concept; and yet the concept preserves significant room for the actor's own

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127 For a good overview of good faith in contract law, see Summers, *supra* note 24; Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

128 For an overview of the origins of good faith, see Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 690-94 (2013).

129 *See, e.g.*, Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933) ("[I]n every contract there exists an implied covenant of good faith and fair dealing.").

130 U.C.C. § 1-201(b)(20) (2012).

131 *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4, at 11 (6th ed. 2010).

132 *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 512-14 (1994) (distinguishing between "vague," "ambiguous," and "contestable" expressions).

133 *See id.* at 527.

134 *Id.*

value judgment, embodied in the normative meaning that the concept carries. From the fact that the normative meaning of a concept can change over time and context, and that it can generate disagreement among actors, one *cannot* (indeed, *should* not) draw the inference that the concept lacks all meaning. Indeed, Waldron makes the point somewhat sharper when he further notes that in eliciting some kind of value judgment from actors, such concepts embody a "clear meaning."[135]

The open nature of legal concepts therefore does not imply that such concepts lack meaning, or indeed that such meaning can originate in and perhaps define a shared understanding among actors. The reason for this is rather straightforward: it is because linguistic vagueness, which derives from natural language, need not correspond to jural certainty or uncertainty in legal usage.[136] In other words, a term that is otherwise palpably unclear (or even meaningless) can obtain jural content within a particular discourse (such as legal discourse), if actors converge around a common understanding over time. Indeed, this is the entire idea behind so-called "terms of art" or "legal fictions." It informs how the jural meaning of concepts ensures a modicum of stability and operates as an anchor.

Another way of understanding the working of a concept's jural meaning is therefore as a form of shared understanding among actors. Recall that a vast majority of legal concepts are evaluative, in the sense that they require actors to make value judgments when applying the concept to specific contexts and disputes.[137] In so requiring actors to make value judgments, the jural meaning of the concept does not, however, give its interpreter complete *carte blanche*. Instead, it grounds and directs that value judgment in a particular direction. It takes certain *kinds* of normative considerations off the table and renders certain other ones more relevant and salient to the judgment itself. We noted previously that this is precisely how "thick" concepts work. Drawing on the linguistic philosopher R.M. Hare, Waldron characterizes this idea as the strict or specific "evaluative meaning" that the concept carries.[138] Each legal concept, in other words, despite its normative open-endedness when applied to specific situations, signals to judges and actors that the disagreement (if any) in application is to be limited to certain specific criteria. The identification of such criteria enables the jural meaning of the legal concept to feed into a community's shared understandings and linguistic conventions, despite the

135 *Id.*

136 *See id.* at 537 ("[W]e must not make the mistake of assuming that the vagueness of natural language predicates matches our pragmatic uncertainty about what should be done in future or unanticipated cases.").

137 *See supra* text accompanying notes 74-75.

138 Waldron, *supra* note 132, at 528-29.

overall ethical and evaluative nature of the legal concept. A concept's thickness, in other words, contributes directly to the stability of the concept's meaning, even in the face of differential application.

Indeed, a careful perusal of common law cases reveals that judges have a shared understanding of the jural meaning of the common law concepts. The core jural meaning of the concept of good faith in contracts is understood or defined in the same way by all judges. It requires judges to evaluate the contracting parties' behavior and motives contextually, using certain normative criteria. The normative criteria can vary, but the central evaluative obligation that the concept requires does not. Additionally, the evaluative dimension is hardly unspecified. The legal concept also indicates the general character that the evaluation is to take. For example, it excludes aesthetic judgments, character assessments, political considerations, and criteria relating to legal status. Furthermore, good faith in contract law is understood to connote something quite different from the legal concept of reasonableness in torts. Contract law does not simply say that parties have an obligation to behave reasonably. Instead, it says that they need to act in good faith. The definition in turn focuses on the elements of honesty and fairness, suggesting that the evaluation has as much to do with a party's motives and intentions as its outward manifestation.

The combination of the stable jural meaning and the flexible normative meaning with which common law concepts can be imbued creates an important equilibrium. This equilibrium allows the common law to guide behavior, promote reliance, and ground decisionmaking, while at the same time remaining open and receptive to competing normative theories and values. The equilibrium is relatively robust, which explains the endurance of the common law's core architecture of concepts for centuries. It has enabled the common law to respond to changing social preferences and conditions without abolishing its core concepts.

Of course, to introduce the requisite degree of adaptiveness to varying preferences and criteria, judges have over the years employed several legal techniques to vary the meaning of individual concepts without altogether destabilizing the core jural understanding and function of those concepts within common law doctrine. It is to the analysis of these techniques—which together reflect the dynamic side of the equilibrium just described—that we next turn.

### B. *Normative Change in the Common Law*

The success of the common law—both as a body of law and as a method of lawmaking—can be attributed in large measure to its ability to keep up

with changing social values and preferences over extended periods of time. The common law, in other words, is susceptible to *change*. Yet change can come about in two distinct forms, and it is important to differentiate between them. On the one hand, change in the law can be at the level of legal rules (i.e., doctrinal).[139] This form of change involves the process of modifying the jural content of individual rules, by making alterations at the margins, adding altogether new rules, or at times eliminating old rules. While this form of change is certainly present in the common law, it is somewhat less commonly seen, since extensive recourse to it runs the risk of undermining the very working of the common law, which in turn depends on the ideals of tradition and consistency at the level of doctrine. More frequently seen is the process of change at the normative level—best described as "normative change."

Unlike doctrinal change, normative change entails change occurring not in the actual content or structure of the common law's individual doctrinal mechanisms but instead at the level of normative meaning, embodied in the common law's conceptual structure.[140] Normative change, in other words, operates through the interaction between the jural and normative meanings of the common law's different concepts, which in turn enables common law doctrine to accommodate and affirm changing social values, and ideals without having to alter the actual doctrinal content of the law. Change of this kind is critical to the functioning and legitimacy of the common law insofar as it allows the law to keep up with the needs of society, and at the same time remain firmly anchored (as a doctrinal matter) in relatively stable practice. And it is once again the common law's conceptual edifice that enables such normative change.

One might, of course, object that the distinction we are drawing, between doctrinal and normative change, is less clear in practice than we make it out to be and that in many situations the two do in fact go hand in hand. A doctrinal change—involving, say, an alteration in an individual rule—might indeed be motivated by a change in normative ideal or value.[141]

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139 For a discussion of common law doctrinal change, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Rubin, *supra* note 4.

140 For a previous account of normative change, see Kraus, *supra* note 97, at 327.

141 As an example, consider the emergence of contributory negligence doctrine in tort law. *See* Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 254 (1908) (discussing the origins of contributory negligence in nineteenth-century tort law); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 154-55 (1946) (linking the sudden rise of contributory negligence to the rapid expansion of railroads and tort lawsuits against common carriers).

We fully accept this possibility. Yet our simple point is that, at multiple points in its development, the common law goes through a process of change without exhibiting any overt or patent alterations to its form and jural structure. On the face of things, one might thus think that the law has remained altogether static, since no actual doctrinal modification has occurred. Our claim is merely that this need not be always true and that even when the common law does not exhibit variation in form and structure, it can nonetheless undergo important changes at the normative level, which can obviate the need for alterations at the doctrinal level.

The process of normative change allows the common law to be overtly pluralist in its functioning. This form of "functional pluralism" stands in stark contrast to structural pluralism, a form of pluralism that is associated with the common law.[142] Structural pluralism posits that the diversity of legal institutions and doctrines in the common law allows it to embrace a diversity of values, insofar as individuals are allowed to choose among these various institutions (and therefore values).[143] Premised on the overarching value of autonomy, structural pluralism situates the common law's pluralism in its doctrinal structure.[144] In so doing, it is forced to rely entirely on doctrinal change in order to realize any alterations in social values and ideals. By contrast, functional pluralism—of the kind that we offer and defend here—situates the common law's commitment to pluralism in its actual functioning rather than in its structure. It explains how the common law's process of normative change, modulated through its conceptual architecture, allows individual doctrinal areas to affirm and embrace different normative values over time and context.

We identify three principal ways in which normative change occurs in the common law through the use of legal concepts: *interpretive* change, *interconceptual* change, and *additive* change. Each of these methods of normative change relies fundamentally on the relationship between the jural and normative meanings of legal concepts, a relationship that judges effectively deploy to stabilize the content of the law while altering its contextual meaning. This Section describes and illustrates each of these mechanisms.

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142 Functional pluralism, as used here, should not be confused with its philosophical analog, an idea commonly associated with the work of Michael Lynch. *See* MICHAEL P. LYNCH, TRUE TO LIFE: WHY TRUTH MATTERS (2004) (developing a contextual theory of truth); Gila Sher, *Functional Pluralism*, 46 PHIL. BOOKS 311 (2005) (reviewing LYNCH, *supra*) (critiquing Michael Lynch's functional pluralist account of truth).

143 For a prominent recent account of structural pluralism, see DAGAN, *supra* note 101, at 193-223; Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1421 (2012).

144 *See* Dagan, *supra* note 143, at 1424.

### 1. Interpretive Change

Interpretive change is perhaps the most common mechanism through which normative change comes about in the common law. At its simplest, it entails a court imbuing a legal concept with new normative meaning while keeping the jural meaning of the concept static. All the same, the process involves a subtlety that is often ignored.

As described previously, the jural and normative meanings of a legal concept are in equilibrium with one another at any given point in time.[145] There thus exists a shared understanding of the jural meaning of the concept among most legal actors. In addition, concepts often have a dominant normative meaning that emerges from authoritative judicial pronouncements. The process of interpretive change involves altering the equilibrium between the concept's jural meaning and normative meaning. In essence, the process can be broken down into two steps. In the first step, a court interprets the prevailing normative meaning of the legal concept in a way that brings it into close (if not complete) alignment with the concept's jural meaning. In so doing, the open-textured nature of the legal concept renders it indeterminate or vague insofar as its application to the specific context in question goes. This in turn produces the second step, which involves the court infusing the jural meaning of the concept with a new normative orientation. Almost always, the two steps occur contemporaneously even though they remain jurally distinct.

The process of interpretive change is in many ways just as much a rhetorical strategy as it is a process of common law interpretation. In addition, since the focus is entirely on the internal dynamics of the legal concept (i.e., its duality of meaning), it is in essence a form of intraconceptual normative change. Thus, if $a$ is the jural meaning of the concept, and $n_1$ its prevailing normative meaning at time $T_1$; at time $T_2$ when the court seeks to introduce the normative change, the steps are: first, $n_1$ is interpreted to be as close as possible to $a$ (i.e., $n_1 \rightarrow a$), as a result of which it is rendered indeterminate in application, requiring a second step, that $a$ is in turn interpreted in terms of $n_2$ in order to render it applicable to the particular context in question. The process is best illustrated through a few examples.

Consider first the common law of nuisance in England at the turn of the nineteenth century.[146] At the turn of the century, nuisance law placed great emphasis on the concept of a "reasonable use" which operated as the lynchpin of the action in individual disputes.[147] The concept invariably

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145 *See supra* text accompanying notes 141-142.

146 *See generally* John P. S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155 (1983).

147 *See* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418-20 (1942).

entailed a reasonableness-based balancing exercise. Yet, by the mid-1800s, most courts had come to interpret the concept as weighing the plaintiff's alleged harm against the "general and minimal standards of comfort."[148] The basic requirements of living were thus deemed to be the appropriate baseline against which the defendant's actions were to be measured. Altogether missing in this analysis was any consideration of the potential benefits that the defendant's actions might entail and the feasibility of its being performed or undertaken at an alternative location.[149] Such an approach would obviously involve infusing the common law of nuisance with a distinctively utilitarian overtone insofar as it now measured the actual benefits of the defendant's actions, regardless of the unfairness of the plaintiff's harm, the primary concern under the pre-existing formulation of an "unreasonable interference."

The old approach—of focusing on the plaintiff's harm and measuring it against the minimal standards of comfort—looked entirely to the fairness of the plaintiff's claim, and operated under the basic recognition that the plaintiff had a pre-existing right to comfortably enjoy his property, with the only question remaining being whether such enjoyment was indeed possible in light of the defendant's actions.[150] This standard altogether disregarded any independent value that the defendant's actions might produce, despite its causing the plaintiff actual harm. In the mid-nineteenth century, an important (but short-lived) English decision sought to alter this standard.

In *Hole v. Barlow*, the court was motivated by utilitarian considerations, which it saw as altogether absent under the prior standard.[151] The court thus observed that under the existing standard the "great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious or offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community."[152] Instead of overtly claiming to then change the law to address this concern, the court thereafter looked to the concept of "reasonable use," which courts had utilized in conjunction with the concept of the "unreasonable interference" in prior cases.[153] It concluded that in situations of a "reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on," no claim for nuisance would lie.[154]

148 Brenner, *supra* note 29, at 410.
149 *Id.*
150 *See, e.g.*, Walter v. Selfe, (1851) 64 Eng. Rep. 849 (Ch.) 852; 4 De G. & Sm. 315, 322-24.
151 (1858) 140 Eng. Rep. 1113 (C.P.) 1117; 4 C. B. N. S. 334, 342-43.
152 *Id.* at 1114.
153 *Id.*
154 *Id.*

Scholars have described *Hole* as a "radical departure from previous law" and have observed that "under the guise of semantic continuity, an actual change in the law itself did occur."[155] This is precisely the normative change that the court brought about. On the face of things, no overt change in the jural structure of nuisance doctrine occurred. The concept of "reasonable use" formed the focus of the court's analysis. What the court in effect did was to treat the prevailing normative meaning of the concept (of reasonable use) as sufficiently indeterminate (i.e., as being no different from its jural meaning), which required no more than a balancing exercise that scrutinized the use against a baseline. It then proceeded to eliminate (or solve) that indeterminacy by infusing the concept with a new normative meaning, which would satisfy the minimal requirements of the concept's jural meaning. "General and minimal" standards of comfort, which formed the pre-existing normative meaning, was first equated with the sufficiently vague idea of "reasonable use," which the court then replaced with "convenient and proper place" as the new normative standard that would enable the doctrine to now accommodate avowedly utilitarian considerations.[156] Later courts, to be sure, came to disagree with the court's decision in *Hole*, preferring instead to emphasize fairness—rather than utilitarian—considerations in the working of nuisance law.[157] Interestingly enough, their reasoning too relied on the ideas of "reasonable use" and "unreasonable interference," thereby effectively preserving the doctrinal content of nuisance law and the jural meaning of the legal concept in question while nonetheless effecting an important normative change.[158]

A second example is seen in the law of riparian rights as it evolved in nineteenth-century America. By the early nineteenth century, riparian rights in the United States generally followed what scholars describe as the "natural right theory" or the idea of a "natural flow."[159] According to this approach, courts allowed riparian owners to use a stream at will, as long as they did not interfere with the natural flow of the stream beyond minimal levels needed for their domestic use, agriculture, or animal husbandry.[160] In

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155 Brenner, *supra* note 29, at 409, 411.

156 *Hole*, 140 Eng. Rep. at 1114.

157 *See* St. Helen's Smelting Co. v. Tipping, (1865) 11 Eng. Rep. (H.L.) 1483; 11 H.L.C. 642; Bamford v. Turnley, (1862) 122 Eng. Rep. 27 (Ex.); 3 B. & S. 66.

158 *See, e.g.*, *Bamford*, 122 Eng. Rep. at 30 ("It may be observed that . . . there is a want of precision, especially in the words 'reasonable' and 'convenient,' which renders its meaning by no means clear.").

159 *See* JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 129-40 (2004) (detailing the development of natural rights theory); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 34-35 (1977) (explaining the natural flow theory in the United States).

160 HORWITZ, *supra* note 159, at 35-40.

essence, this approach emphasized the riparian property owners' exclusive dominion and the normative ideal of owner-autonomy. Considerations of efficiency, optimal social use, and the like found little place under this approach.

A few early courts had sought to deviate from the natural flow approach and introduce in its stead a balancing test that examined the relative efficiencies of the owner's use and the neighbor's use.[161] These deviations were met with immense criticism from scholars at the time.[162] They were seen as abrupt transformations— and therefore outliers— in the development of the law. All the same, they rendered salient the importance of moving the law in the direction of affirming utilitarian, efficiency-based considerations, by balancing a riparian owner's entitlement against the needs of downstream uses and economic development that might maximize overall social welfare (i.e., utilitarianism over autonomy). It was not until Justice Story's famous opinion in *Tyler v. Wilkinson*, delivered in 1827, that these normative considerations were made an actual part of the formal law of riparian ownership, unlike the prior efforts that had sought to change the doctrine altogether.[163] Morton Horwitz describes Justice Story's opinion as reflecting the reality that "[c]ommon lawyers are more comfortable with a process of gradually giving *new* meanings to old formulas than with explicitly casting the old doctrines aside."[164] This was in essence a process of interpretive normative change.

Justice Story begins his opinion by affirming the natural flow approach as the default position on riparian ownership.[165] He then goes on to make the following observation, which has since been credited with effecting an important alteration in the law:

> When I speak of this common right, I do not mean to be understood as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the *injury of the other proprietors* or not. . . . The diminution, retardation, or acceleration, not positively and sensibly *injurious by*

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161 *See, e.g.*, Platt v. Johnson, 15 Johns. 213, 218-19 (N.Y. Sup. Ct. 1818); Palmer v. Mulligan, 3 Cai. 307, 314 (N.Y. Sup. Ct. 1805).

162 *See* JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW, IN RELATION TO WATER-COURSES 40-41 (1824) (describing these developments as "obviously unjust").

163 24 F. Cas. 472 (Story, Circuit Justice, D.R.I. 1827) (No. 14,312).

164 HORWITZ, *supra* note 159, at 38 (emphasis added).

165 *See Tyler*, 24 F. Cas. at 474.

> *diminishing the value of the common right*, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights.[166]

In this paragraph, Justice Story is credited with introducing the idea of a reasonable riparian use into the analysis of riparian rights and with moving the law in the direction of recognizing efficiency and social welfare considerations as part of the doctrine.[167] The genius of his approach lies in the simple fact that overtly, he effected no change whatsoever in the doctrine or applicable concepts themselves. Horwitz describes it as the "classically transitional judicial opinion."[168]

On closer analysis, we see how exactly the opinion introduces its desired normative change interpretively. The prior law had emphasized the existence of a riparian owner's "right" and the need to protect it against interferences, which were characterized as "injuries." Relying on the idea that every infraction of a right (e.g., the right to exclude) was an injury at law, the natural flow theory rendered such injuries actionable.[169] The jural meaning of the concept thus entailed the idea of an actionable interference (e.g., "*injuria sine damno*"),[170] and the pre-existing normative meaning situated that concept in the notion of natural rights and the value of owner autonomy. In *Tyler*, Justice Story played on the legal concept of "injury" by admitting that its basic jural meaning rendered it contextually indeterminate, thereby allowing him to infuse it with the idea of actual harm (i.e., damage and compensable loss). In this vein, the leading historical account of water rights at common law argues that the opinion successfully "transforms strict natural rights into reasonable rights by playing on the ambiguity of the notion of 'injury', both at law and in common speech."[171] In essence, then, Justice Story's reasoning accepts the injury-based rationale of the test but proceeds to treat the idea of an injury as an empirical question, based on the "value" of the use and the right at issue.[172] In so doing,

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166 *Id.* (emphasis added).

167 *See* GETZLER, *supra* note 159, at 275-76; HORWITZ, *supra* note 159, at 39; Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 285-88 (1990).

168 HORWITZ, *supra* note 159, at 39.

169 For an excellent discussion of the jural moves here, see GETZLER, *supra* note 159, at 61-63.

170 *Id.* at 62.

171 *Id.* at 275.

172 *See* Tyler v. Willkinson, 24 F. Cas.472, 474 (Story, Circuit Justice, D.R.I. 1827) (No. 14,312) (emphasizing the diminution in "value" of the right).

it successfully infused the doctrine with distinctively utilitarian considerations through the process of interpretive normative change.

Interpretive normative change is thus a fairly well-known method of infusing the common law with new normative ideas and content, without actually altering the doctrinal content and jural structure of the rules themselves. As we saw, it relies very heavily on the common law's conceptual structure and works with the jural indeterminacy of legal concepts to take them in new normative directions as circumstances demand.

### 2. Interconceptual Change

The second method through which normative change comes about in the common law is best described as the process of interconceptual change (or as interconceptual salience alteration). In basic terms, this mechanism works by altering the relative salience of different concepts, all of which are embedded in a common law doctrine, to the working of that particular doctrine. Whereas interpretive change effects an alteration of a concept's own normative meaning, interconceptual change accepts a concept's prevailing normative meaning as a given but either enhances or reduces the influence of that concept (and its normative meaning) in the overall scheme of the doctrine.

Common law doctrines routinely entail multiple elements or factors, all of which courts are required to consider during their analysis and application of the doctrine.[173] Each of these elements in turn commonly embodies distinct legal concepts, which in turn contain their own jural and normative meanings as previously described. In interpreting a doctrine, courts do not give factors, elements, and concepts equal weight. Indeed, just the opposite is true. In applying a multi-element doctrine, courts usually emphasize one (or more) elements of a doctrine over others, either explicitly or implicitly. Insofar as the concepts underlying each of the elements reflect different normative ideals, this process of emphasizing or deemphasizing one element over another has the direct effect of raising or lowering that particular concept's salience and its associated normative value for the overall doctrine.

Assume that a common law doctrine contains four independent (and cumulative) elements ($e_1$, $e_2$, $e_3$, and $e_4$), each of which in turn embodies a distinct legal concept ($c_1$, $c_2$, $c_3$, $c_4$). If the concepts emphasize varying normative ideals and values ($n_1$, $n_2$, $n_3$, $n_4$), the process of emphasizing or deemphasizing one or more

173 For a particularly harsh criticism of multifactor tests and doctrines in the law, see RICHARD A. POSNER, REFLECTIONS ON JUDGING 262 (2013) ("[W]hen the factors are numerous, unweighted, and open-ended . . . , a multifactor test is an invitation to the exercise of uncanalized discretionary authority.").

elements (e.g., $e_3$) of the doctrine as more important than the others has the direct effect of rendering the normative values associated with the concept ($c_3$) contained in that element ($n_3$) more salient and influential within the overall analysis of the doctrine. Indeed, we see this occurring somewhat frequently in the common law, when courts come to treat one element of a multi-element doctrine as more important than others and in the process raise the salience of the legal concept embedded within that particular element. The following examples are illustrative.

The doctrine of adverse possession is without a doubt the most striking and controversial way of acquiring property rights in realty and personality.[174] It effectively allows trespassers to divest rightful owners of their ownership rights and acquire good title to assets that they initially wrongfully possessed. For this to occur, the doctrine requires that the possession be actual, open and notorious, hostile (or adverse), exclusive, and continuous for the statutory period.[175] These requirements are considered the "elements" of the doctrine, but they each originate in an important conceptual device with its own jural and normative content.[176]

Given the somewhat draconian nature of adverse possession as a mechanism of acquiring ownership, as a historical matter courts treated the element of hostility as especially important in the analysis since it allowed them to police the behavior and motives of the claimant.[177] The normative ideal of fairness remained at the core of this emphasis. This perspective reigned supreme when land records were poor and innocent third parties stumbled into others' land and cultivated it, believing in good faith that there was no wrongdoing involved in their actions.[178] The law of adverse possession sought to benefit these putatively innocent occupiers by protecting their labor and reliance interests. Jurally, the legal concept of hostility focused on the intent of the adverse possessor towards the original owner and the asset

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174 *See, e.g.*, Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) ("Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.").

175 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.02 (Michael Allan Wolf ed., LexisNexis Matthew Bender 2014); THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 34-35 (2010); *see also* Henry Winthrop Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219, 219 (1919).

176 16 POWELL, *supra* note 175, §§ 91.02-.07.

177 *See* Helmholz, *supra* note 33, at 337-341 (discussing the role of hostility and mistaken belief in the adverse possession analysis); William Sternberg, *The Element of Hostility in Adverse Possession*, 6 TEMPLE L.Q. 207, 207 (1931) (describing hostility as the "most frequently contested element of adverse possession").

178 *See* Sternberg, *supra* note 177, at 215 (citing precedent from 1840 adopting a largely analogous view).

in question, and examined the adverse possessor's state of mind. Courts emphasizing the element originally seemed to suggest that considerations of fairness required that only adverse possessors who acted in good faith, on the honest albeit erroneous belief that they were possessing their own land, could avail themselves of the doctrine.[179] These courts used the element (and its underlying concept of "hostility" or that the possession be "adverse") to deny other claimants any relief; again, in the belief that the fairness ideals underlying the doctrine were best served by this approach.[180]

More recently, the fairness justification for adverse possession has begun to lose ground and an efficiency-based rationale has begun to gain sway. In this perspective, the goal of adverse possession is to put land to productive use, accomplishing this by simultaneously (1) penalizing slothful owners who allow their land to lay fallow and (2) incentivizing third parties to seek such fallow land and make efficient use of it.[181] On this view, not only was the good faith (i.e., mistaken belief) of the possessor irrelevant, but an affirmative bad faith—wherein the actor knew he or she was trespassing on another's property—was preferable. A minority of courts thus tried altering the very normative meaning of the concept of hostility to require a showing of bad faith, all in order to further their utilitarian emphasis.[182] This process was in essence an attempt to bring about normative change interpretively.

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179 This position came to be known as the Connecticut rule. *See* French v. Pearce, 8 Conn. 439, 445 (1831) ("The possession is not the less adverse, because the person possessed intentionally, though innocently. But in the moral nature of the act, there is undoubtedly a difference, when the possessor knowingly enters by wrong."). For further discussion, see Helmholz, *supra* note 33, at 337-49. For cases accepting this position, see *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969); *West v. Tilley*, 306 N.Y.S.2d 591 (N.Y. App. Div. 1970); *Brehm v. Johnson*, 531 P.2d 991 (Colo. Ct. App. 1974).

180 *See, e.g.*, Eddings v. Black, 602 S.W.2d 353, 358 (Tex. Civ. App. 1980) (concluding that where claimant had knowledge of a prior claim (i.e., was not acting in good faith), the adverse possession claim was "wanting in intrinsic fairness").

181 *See* Fennell, *supra* note 33, at 1059-60 (describing the true niche goal of adverse possession as "moving land into the hands of a (much) higher-valuing user, where ordinary markets cannot accomplish that task"). *But see* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2435-36 (2001) (critiquing this rationale by discussing times when "productive use can be undesirable"); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130-31 (1985) (offering a similar critique).

182 This approach came to be known as the Maine rule. *See* Preble v. Maine Cent. R.R. Co., 27 A. 149, 150-51 (Me. 1893) ("It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin."), *overruled by* Dombkowski v. Ferland, 893 A.2d 599 (Me. 2006); *see also* Sternberg, *supra* note 177, at 213-14 (discussing the early Maine rule, where "there can be no adverse possession when there is a mistaken belief of ownership"). For an argument that efficiency demands an adherence to this rule, see Fennell, *supra* note 33, at 1038-39.

In due course, however, this approach failed to garner support.[183] When this occurred, advocates of the normative change—towards utilitarianism—adopted an alternative strategy—namely, seeking such change through an interconceptual salience alteration.

Instead of seeking to reinterpret the concept of hostility in terms of bad faith, courts came to adopt the view that the element of hostility, with its emphasis on the possessor's state of mind, was altogether irrelevant to the adverse possession analysis.[184] In its place, they elevated the element of actual possession and the concept of "actuality" underlying it.[185] Jurally, actual possession requires the court to undertake a factual and empirical examination of the nature of the possessor's use to see if the possessor behaves as a standard owner would.[186] In a vast majority of cases, all actual possession required was the enclosure or improvement of the relevant tract. Clearly, the concept of actuality is more consistent with the utilitarian justification for adverse possession, insofar as it privileges the possessor's actual use of the land. By emphasizing the importance of "actuality" over "hostility" in adverse possession, this approach ensured that the doctrine as a whole came to affirm the utilitarian ideal of effective land use rather than the doctrine's original fairness goals.[187] One element and concept (i.e., actual possession, and actuality) was emphasized, while another (i.e., hostility) was simultaneously deemphasized, in the process rendering salient the normative ideals associated with the former.

A second example of interconceptual normative change is seen in the federal common law of copyright, specifically the famed fair use doctrine. The fair use doctrine sanctions certain unauthorized uses of copyrighted works

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183 R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 83 (1986) (discussing how American courts have moved away from the bad faith requirement).

184 *See* Chaplin v. Sanders, 676 P.2d 431, 435-36 (Wash. 1984) (en banc) (observing that the adverse possessor's "subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination"); 16 POWELL, *supra* note 175, § 91.05[1][a] (discussing the majority understanding of hostile as referring to actions and not intent).

185 *Chaplin*, 676 P.2d at 436 ("The nature of his possession will be determined solely on the basis of the manner in which he treats the property.").

186 16 POWELL, *supra* note 175, § 91.03 ("[T]he claimant must use and possess the land to the same extent as a record owner would, in light of the property's particular attributes.").

187 The clearest statement to this effect is to be found in a decision of the Supreme Court of Washington. *See Chaplin*, 676 P.2d at 435 ("The doctrine of adverse possession was formulated at law for the purpose of, among others, assuring maximum utilization of land, encouraging the rejection of stale claims and, most importantly, quieting titles.").

that would otherwise constitute copyright infringement.[188] In adjudicating fair use cases, courts are required to consider four factors: First, they must consider the purpose of the defendant's allegedly infringing use, including whether the use is commercial or not and whether it is transformative in nature.[189] Second, they must take account of the nature of the plaintiff's copyrighted work.[190] Third, they have to weigh the amount and substantiality of the defendant's appropriation.[191] Finally, they must assess the copying's impact on the actual and potential market for the plaintiff's copyrighted work.[192]

While fair use is today codified in the Copyright Act, it emerged from the decisions of common law and equity courts.[193] Indeed, Justice Story is commonly credited with originating the doctrine in his now famous opinion in *Folsom v. Marsh*.[194] Even while codifying the fair use doctrine, Congress intended that courts continue to develop it as they had done before, in traditional common law style through the "process of accretion."[195] Indeed, the legislative history accompanying the codification indicates that Congress mandated that "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[196] A review of the courts' application and development of fair use jurisprudence since its codification reveals an ongoing tussle between the normative ideals of fairness and autonomy, and efficiency.[197] And in this tussle, we see courts effectively employing the mechanism of interconceptual change to mold the doctrine along the lines of their preferred normative goal.

Early in the development of the doctrine, the rough idea of fairness—manifested in the notion of consumer autonomy—dominated the framing of

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188 *See* 17 U.S.C. § 107 (2012) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright."). *See generally* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985).

189 17 U.S.C. § 107(1).

190 *Id.* § 107(2) ("[T]he nature of the copyrighted work.").

191 *Id.* § 107(3) ("[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.").

192 *Id.* § 107(4).

193 *See* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1379-87, 1393-1409 (2011) (arguing that the true origins of the doctrine can be traced back to common law and equity decisions in the period between 1741 and 1841).

194 9 F. Cas. 342 (Story, Circuit Justice, C.C.D. Mass 1841) (No. 4901); *see also* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 229-30 (2008) (discussing the impact of *Folsom v. Marsh* on copyright thinking). *See generally* L. Ray Patterson, Folsom v. Marsh *and its Legacy*, 5 J. INTELL. PROP. L. 431 (1998) (criticizing the decision in *Folsom v. Marsh*).

195 H.R. REP. NO. 94-1476, at 66 (1976).

196 *Id.*

197 *See* Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 350-54 (1997).

the doctrine. One of the principal ways in which this was realized by courts was through an emphasis on the first fair use factor, which looks at the purpose of the defendant's use. In *Sony Corp. of America v. Universal City Studios, Inc.*,[198] the Supreme Court did precisely this. In emphasizing that the defendant's actions amounted to a fair use, the Court focused on the first factor and tied it to the concept of commercialism, noting that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[199] By converting commercialism into the cornerstone of the first fair use factor and implicitly making it the most salient factor in the analysis, the Court was able to find for the defendants, since their use was for a noncommercial purpose. In the process, the Court's ideals of consumer autonomy and fairness were emphasized.

A year later, the Supreme Court revisited the fair use doctrine in *Harper & Row Publishers, Inc. v. Nation Enterprises*.[200] As scholars have long pointed out, the Court's decision in the case was unquestionably swayed by the effect that the defendant's actions had had on the market for the plaintiff's work. When the defendant copied and published its work, the plaintiff lost its lucrative book deal and a host of other economic benefits to which it would have otherwise been entitled.[201] In the Court's view, finding the defendant's actions to be fair use would be inefficient and harmful to social welfare. In its own analysis now, the Court unequivocally proclaimed that the fourth (as opposed to the first) fair use factor was "undoubtedly the single most important element of fair use."[202] The fourth factor has long been known to embody the concept of "market effect," which entails a scrutiny of the economic harm that the defendant's copying imposes on the plaintiff.[203] In no uncertain terms, the Court even connected the concept of market effect to efficiency considerations, citing to economic literature on the question.[204] Upon so doing, the Court concluded that the fair use analysis needed to emphasize the normative ideal of economic efficiency, which in the end favored the plaintiff.

In both instances, we see the Court raising the salience of one element or factor over others in the analysis and then highlighting an important conceptual device embedded within its preferred factor. Then, using the normative ideals associated with that concept (or its normative meaning),

198 464 U.S. 417 (1984), *superseded on other grounds by statute*, 17 U.S.C. § 1201 (2012).
199 *Id.* at 451.
200 471 U.S. 539 (1985).
201 *Id.* at 567.
202 *Id.* at 566.
203 *See* 17 U.S.C. § 107(4).
204 *Harper & Row*, 471 U.S. at 566 n.9.

the Court is able to render that normative goal pervasively influential in the overall fair use analysis. In *Sony*, the Court emphasized the concept of "commercialism" over all other concepts, while in *Harper & Row*, the Court emphasized "market effect" over commercialism and other concepts or ideals. This was in essence the process of interconceptual normative change.

We see the Court continuing to use the vehicle of interconceptual change in later fair use decisions as well. The 1990s saw far-reaching changes in the production and dissemination of expressive content. The emergence of new technologies allowed creators to freely borrow from pre-existing works in the process of creating new ones, a paradigm colorfully described by some as "remix."[205] This paradigm gained instant popularity in the world of music. Creators in other areas were quick to follow suit and many academics called on the copyright system to enable the new creative paradigm on grounds of individual autonomy.

In *Campbell v. Acuff-Rose Music, Inc.*,[206] the Court was asked to determine the legality of this practice using the fair use doctrine. In deciding to emphasize the ideal of individual autonomy in the creative process, the Court chose to simultaneously deemphasize both the notion of commercialism and efficiency considerations standing on their own. Drawing on academic literature, it thus developed the concept of "transformative[ness]," which it read into the first fair use factor.[207] Upon doing so, the Court then reasoned that this concept—embedded into the first factor—was of such importance that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use,"[208] in effect suggesting that the concept of transformativeness ought to trump both commercialism and market efficiency. Once again then, we see the use of the interconceptual method in fair use in order to realize a normative change in the doctrine: from market efficiency back to individual creative autonomy.[209]

Interconceptual change is thus a frequently adopted mode of normative change in relation to common law doctrines that consist of multiple elements or factors. It relies heavily on the connection between each element and a specific conceptual device embedded within it and works by altering the

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205 *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

206 510 U.S. 569 (1994).

207 *Id.* at 579.

208 *Id.*

209 *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 941 (2002) (associating transformativeness with free speech); Rebecca Tushnet, Essay, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 549-52 (2004) (discussing the connection between transformativeness and free speech).

relative salience to the doctrine of the different elements—and with it the different concepts and their normative underpinnings.

### 3. Additive Change

A third mechanism of concept-reliant normative change in the common law involves the process of introducing an altogether new conceptual device into an area of doctrine, with the express understanding that the new concept embodies a normative ideal that is seen as beneficial and worthy of consideration within that particular area. In other words, it entails the addition of a new concept to the area in question, in the process imbuing that concept with a specific jural—*and normative*—meaning.

The concept being introduced to the area in question need not be completely new in the sense of being altogether invented for this particular purpose. To the contrary, in most situations, the concept is one that is taken from another area of doctrine and modified sufficiently to meet the purposes of the new area. It therefore can partake of what scholars have described as the phenomenon of interdoctrinal borrowing.[210] What is important to appreciate in the process of additive change, however, is that the introduction of the new concept is rarely ever open-ended and purely jural—in the sense of merely injecting the concept into the area without a clear sense of how it will be used or the normative ideals with which it will be infused. To the contrary, the very molding of the concept imbues it with a distinct jural meaning and a sufficiently stable normative meaning (for the area), which its originators see as important to the substantive doctrinal area in question.

As mechanisms of normative change in the common law go, additive change is perhaps the most overt and direct. It is for this reason that it is somewhat rare, especially in comparison to both interpretive and interconceptual change, both of which are far subtler in nature. Additive change in the common law amounts to a direct process of judicial lawmaking, which common law courts are only rarely comfortable admitting to, whereas both interpretive and interconceptual change can be seen as mechanisms of legal interpretation that fit well with the assumptions of the declaratory theory of common law adjudication. The following examples illustrate the working of this method.

The law of landlord–tenant relations has long been characterized by a disparity in bargaining positions between landlord and tenant. This disparity

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210 *See generally* Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651 (2002) (offering a critique of the interdoctrinal borrowing of concepts and rules); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (providing examples of interdoctrinal borrowing in the area of constitutional law).

is especially acute in the context of residential housing where landlords are seen to be motivated almost exclusively by economic considerations, while tenants are driven by concerns that affect their everyday living situation.[211] As scholars have noted, efforts to cure this inequality have characterized the very development of landlord–tenant law in the United States.[212] One of the most important developments in this regard emerged in the year 1970 under the doctrine of the implied warranty of habitability, which in turn revolved around the concept of "habitability."[213]

In *Javins v. First National Realty Corp.*, a set of residential tenants sought to withhold their rent payments when the landlord refused to make a series of important repairs to the premises.[214] Acknowledging the gross disparity between landlords and tenants in the region, Judge Skelly Wright approached his analysis with the observation that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."[215] He then concluded that "a warranty of habitability [must] be implied into all contracts for urban dwellings," and that the content of the local housing code should inform this warranty.[216] Thus emerged the doctrine of the implied warranty of habitability, which imposed a new duty on all residential landlords to ensure that their premises were maintained in a habitable condition at all times. This duty in turn originated in the concept of "habitability," reflecting the jural idea that a putative residential dwelling had to be evaluated by certain external criteria for its suitability as a residence.

*Javins* is universally credited with having introduced the implied warranty of habitability, and the very concept of habitability, into the common law of residential leases.[217] In addition, there remains little uncertainty about what Judge Wright was seeking to achieve through its introduction. He was driven almost entirely by the desire to cure what he saw as the substantive inequality embodied in the residential landlord–tenant relationship and to imbue the

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211 *See* Mary Ann Glendon, *The Transformation of American Landlord–Tenant Law*, 23 B.C. L. REV. 503, 508-11 (1982) (discussing this disparity).

212 *See, e.g.*, 2 POWELL, *supra* note 175, § 16B.01 (discussing the landlord–tenant revolution); Edward H. Rabin, *The Revolution in Residential Landlord–Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 545 (1984) (attributing the development of landlord–tenant law to societal forces aimed at improving the perceived inadequacies of housing law).

213 *See* Super, *supra* note 37, at 451 (describing the events leading up to the development of the implied warranty of habitability); *see also* James Charles Smith, *Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept*, 35 U. KAN. L. REV. 505, 534-46 (1987) (rooting the concept of habitability in tort law).

214 428 F.2d 1071, 1073 (D.C. Cir. 1970).

215 *Id.* at 1077.

216 *Id.* at 1080 (footnote omitted).

217 *See* 2 POWELL, *supra* note 175, § 16B.04[2][a].

regime governing that relationship with the ideal of substantive transactional equality. Transactional equality was thus his principal normative goal, and the concept of habitability was a perfect vehicle for it. As *Javins* conceived of it, the concept of habitability was meant to force not just an evaluation of the premises but also an evaluation in terms of its tenant-friendliness, so as to ensure equality in contracting positions. The concept of habitability—as articulated by *Javins* and later cases—was thus intrinsically aligned with the normative ideals of tenant protection and tenant equality, and it overtly introduced these ideals into the law.

A second example involves the common law's set of interests that are identified by the concept of "quasi-property." In a variety of situations, the common law allows an individual to exclude others from an object or resource, without endowing that individual with the full set of rights over that object that are characterized by the idea of property (e.g., the right to alienate).[218] In these situations, common law courts have employed the concept of "quasi-property" to develop a jural basis for the exclusion and, in addition, have endowed the idea with a specific normative meaning contextually. The most prominent instance where this has occurred is in relation to the law of unfair competition, the "hot news" misappropriation doctrine.[219]

In *International News Service v. Associated Press*, the question was whether a collector of time-sensitive factual information (i.e., news) could prevent a competitor from freeriding on its collection efforts until such time as it published its findings and reaped the economic benefits from its efforts.[220] Recognizing a regular ownership interest in such information would have entailed a set of consequences that the Court wanted to avoid—such as whether the right could be used to control the flow of such information, whether members of the consuming public could be precluded from using it, etc.[221] Instead, what the Court nonetheless recognized as crucial was developing a mechanism to prevent one competitor from freeriding on the efforts of another, in the recognition that such freeriding was economically harmful to the news-collection industry as a whole.[222] The Court in *International News Service* therefore developed the misappropriation doctrine, which allowed for an action to be brought against a freeriding competitor for a limited duration. Firmly embedded within the doctrine was the

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218 Balganesh, *Quasi-Property*, *supra* note 38, at 1891.

219 For a fuller account of the doctrine, see Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011) [hereinafter Balganesh, *"Hot News"*]

220 248 U.S. 215, 232 (1918).

221 *See* Balganesh, *"Hot News," supra* note 219, at 429-38 (providing a historical account of the development of the "hot news" misappropriation doctrine).

222 *Id.* at 438-56.

concept of quasi-property, which the Court used to describe the nature of the interest that the plaintiff newsgatherer had over the information in question. Or, as Justice Pitney famously put it in his majority opinion:

> Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.[223]

It is crucial to appreciate what the Court was doing by introducing the concept of quasi-property into the discussion. First, it was offering up a jural basis for the claimant's entitlement to exclude a freeriding competitor. Quasi-property represents a relational entitlement that situationally entitles its holder to exclude another from an identifiable resource.[224] Second, the Court was also endowing this interest with a distinct normative basis—rooted in the avoidance of freeriding, in order to preserve the efficiencies of the newsgathering industry.[225] The normative basis of the concept, as the Court applied it to the case, was thus rooted in utilitarian considerations. It is questionable whether a desultory reliance on the idea of property might have enabled the Court to inject distinctively utilitarian—as opposed to moral—considerations into the analysis. The concept of quasi-property proved to be a perfect addition to the debate in order to realize this objective.

Interestingly enough, the concept of quasi-property has been introduced into other doctrinal contexts, where it has been understood as embodying the same jural meaning but with a different normative content. Its role in grounding the right of sepulcher is a good example. The right of sepulcher refers to the rights that family members have over the corpse of a deceased relative.[226] These rights normally extend to being able to bury the corpse, perform all necessary last rites, and determine how to dispose of the mortal remains. It also, very importantly, entitles a holder to commence an action against third parties for unauthorized interferences with the corpse, on the assumption that such interferences produce extensive mental anguish for the relatives.[227]

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223 *International News Service*, 248 U.S. at 236.

224 Balganesh, *Quasi-Property*, *supra* note 38, at 1891.

225 For a fuller discussion of this reality and the background conditions that motivated the Court's reasoning, see Balganesh, *"Hot News*," *supra* note 219, at 443-48.

226 For an extended treatment, see Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999).

227 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984).

In developing these rights, common law courts across the United States have relied extensively on the concept of quasi-property, understanding it to represent a non-ownership-based entitlement over an object (i.e., the corpse) that entitles its holder to exclude others from it.[228] Interestingly, though, their normative reason for relying on the concept appears to have been largely non-utilitarian. It was rooted instead in the interest of protecting family members from the emotional and psychological anguish that interferences with the corpse might generate, without overtly commodifying the entitlement as a form of property.[229] The concept of quasi-property in this context—as developed by courts—thus assumed a different normative meaning from the concept as used in the unfair competition setting. Here, it partook of distinctly moral concerns, even though its jural structure remained the same as in the unfair competition context. This divergence in normative meaning between the two areas brings home the core idea described earlier about the duality of meanings that concepts routinely carry. This is not to suggest that courts introducing the concept into the discussion of sepulcher rights were doing so without a clear sense of the concept's intended normative meaning. To the contrary, they saw the concept as sufficiently jurally stable so as to enable it to carry their intended normative meaning, rooted as it was in considerations of dignity and emotional harm. In so doing, the concept served their purpose of introducing a dignitary entitlement over the object into the area without simultaneously commodifying that relationship. In short, the concept effected an additive normative change.

Before moving on, it is worth noting that the process of additive change, unlike the two previous mechanisms of change, usually involves a direct *doctrinal* change to the law as well. In this respect, additive change therefore combines both mechanisms of doctrinal and normative change. Nevertheless, its primary impetus unquestionably remains the need to introduce new or

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228 *See, e.g.*, Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) ("Under Arkansas law, the next of kin does have a quasi-property right in a dead body."); Cohen v. Groman Mortuary, Inc., 41 Cal. Rptr. 481, 483 (Dist. Ct. App. 1964) (recognizing the quasi-property right in a dead person's body "for the limited purpose of determining who shall have its custody for burial"); Burney v. Children's Hosp. in Bos., 47 N.E. 401, 402 (Mass. 1897) (recognizing a quasi-right of property in a dead body); Brown v. Maplewood Cemetery Ass'n, 89 N.W. 872, 879 (Minn. 1902) ("[W]hile a dead body is not property, in the strict sense of the common law, it is a quasi property . . . ."); Hackett v. Hackett, 26 A. 42, 43 (R.I. 1893) (recognizing a widow had a quasi-property right in her dead husband's body).

229 *See, e.g.*, *Hackett*, 26. A. at 43 ("This is not a question of contract, nor of liability, but of sentiment and propriety."); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 237-38 (1872) ("[T]here is no right of property in a dead body . . . . Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property.").

underemphasized normative goals into an area of law. It is therefore indelibly a form of normative change in the law.

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While the three mechanisms of normative change described here may not exhaust the entire gamut of mechanisms through which the common law works in normative change, they do nonetheless represent the most prominent and commonly seen mechanisms. In addition, common law courts invariably weigh a variety of different considerations when choosing amongst them, such as the extensiveness of the intended change, the acceptance of judicial lawmaking within the area, the driving force behind the change in exogenous normative conditions, the likelihood of its persistence over time and context, and their ability to analogize to other areas where such change has been brought about. Upon a weighing of these considerations, common law courts then embark upon one or more of the previously described strategies, occasionally employing them in tandem. In addition, as noted before, the dynamics of the mechanisms at issue are often fairly subtle, with courts rarely ever making their reliance on a particular mechanism explicit or obvious. The table below represents a simple comparison of the three methods described in this Section.

**Table 1: Comparing the Mechanisms of Change**

| | **Interpretive Change** | **Interconceptual Change** | **Additive Change** |
|---|---|---|---|
| **Method of Change** | Interpretation | Salience alteration | Novel addition |
| **Subtlety of Process** | Very subtle | Less subtle and somewhat direct | Overt |
| **Endurance of Change** | Subtlety risks short-lived change | Directness ensures some path dependence | Most enduring since express overruling required |

## III. IMPLICATIONS

Having described the structure of legal concepts, and the critical role that they play in anchoring the common law, enabling normative change in common law doctrines, and in grounding common law reasoning and legal disagreement around a core minimum of shared understanding, this Part addresses the implications and consequences that flow from our account. In particular, we address three important implications that flow from our prior analysis.

### A. *Conceptualism, Formalism, and Realism*

Ever since Legal Realism has become a dominant mode of analysis among American legal scholars in diverse subject areas, the study of the common law as a coherent body of law has fallen out of favor.[230] Individual common law subjects such as property, torts, and contracts are discussed and analyzed almost exclusively as merely embodying important normative goals and ideals.[231] The actual jural content of the common law as an integrated body of law, embodied in its multifarious concepts and devices, is treated as a largely contingent feature of the system.[232] Additionally, all too often this jural apparatus is conceived of as open to pure manipulation by courts and litigants.[233] Some even suggest that common law concepts are devoid of *all* jural significance and independent meaning.[234] One torts scholar's argument that the legal concept of foreseeability might as well be called "strawberry shortcake," because it is so open-ended as to be rendered altogether meaningless, is a particularly good (and extreme) example of this phenomenon.[235] In short, Legal Realism—at least in its extreme version—has succeeded in

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230 *See* ALAN BRUDNER WITH JENNIFER M. NADLER, THE UNITY OF THE COMMON LAW 48 (2d ed. 2013) ("The fragmentation of the common-law tradition has spawned a corresponding crisis in the intellectual endeavour to understand it.").

231 *See, e.g.*, John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1641-42 (2012) (describing this trend as the emergence of "brass tacks" pragmatism).

232 Dworkin put it best when he characterized followers of this approach as "nominalists." *See* Ronald M. Dworkin, *Is Law a System of Rules?*, *in* ESSAYS IN LEGAL PHILOSOPHY 25, 26-27 (Robert S. Summers ed., 1968); *see also* MORRIS R. COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 208-47 (1982) (discussing previous uses of the term "nominalism").

233 *See* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 434 (1934).

234 *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 27 (1930) (describing legal concepts as "weasel words").

235 *See* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 740 (2005) ("Indeed, one torts professor teaches that foreseeability might as well be called 'strawberry shortcake,' having been bent, muddled, and co-opted to such a degree that it has lost any real meaning.").

having the jural and doctrinal mechanisms of the common law characterized as altogether contingent features of the system.[236] While a growing body of scholars has sought to reverse this trend along the lines suggested by our account here, the influence of Legal Realism remains pervasive in American legal thinking.[237]

Despite its extreme aversion to formal concepts and doctrinal mechanisms, Legal Realism did have important lessons for the study and analysis of law. In debunking the idea that legal reasoning could be altogether autonomous, or that legal concepts could on their own provide judges with answers in individual cases ("mechanical jurisprudence"[238]), it forced legal scholars to look outside of the law for their analysis and to appreciate the role that external influences play on the content, meaning, and application of the law.[239] This lesson is without doubt an important and enduring contribution of Legal Realism. Yet, when taken to its extreme, it came to be understood as suggesting that legal analysis needed to look *entirely* to external factors to understand the law, and that an internal analysis of the law's own concepts and devices was for the most part a misguided and myopic enterprise.[240]

The rudimentary lessons of Legal Realism are nevertheless perfectly compatible with recognizing an important role for concepts in legal analysis and reasoning. As one prominent scholar notes, "there is no necessary incompatibility between rigorous analysis of concepts and a realist approach."[241] This presumptively clear divide between the realists and formalists—whether real or perceived[242]—has served to distract from the functional role that legal concepts continue to play in common law reasoning to this day; a role that nearly six decades of Legal Realist criticism have failed to eliminate or even attenuate. The simple point remains that the choice between formalism (in the sense of a "mechanical jurisprudence") and realism

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236 For an excellent discussion of these effects, see Fuller, *supra* note 233.

237 These scholars are part of the "New Private Law" school of thought. Goldberg, *Introduction: Pragmatism and Private Law*, *supra* note 231, at 1640 n.1.

238 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617-21 (1908).

239 For an excellent account of Legal Realism and its influence on American legal theory, see Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 54-56 (Martin P. Golding & William A. Edmundson eds., 2005).

240 *See* Fuller, *supra* note 233, at 443-47.

241 WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 35-36 (2d ed. 2012).

242 *See* TAMANAHA, *supra* note 1, at 13-43 (arguing that "formalism" was almost entirely an imaginary movement set up by the Legal Realists to make their point). *But see* Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 410 (2013) (reviewing TAMANAHA, *supra* note 1) (characterizing Brian Tamanaha's claims as "at best misleading; parts are outright wrong").

(in the sense of extreme rule or doctrine skepticism[243]) as modes of legal analysis need not be binary. One can admit a role for legal concepts and related doctrinal devices, while simultaneously acknowledging the presence and significance of external influences on the meaning and application of those concepts and devices. The duality of meaning that we described previously enables precisely such an intermediate position. It recognizes, on the one hand, that the law's concepts are not just contingent attributes of the common law system, and on the other, that they are informed and reconstituted by ideals and influences from outside the legal system. The mere fact that concepts are integral to the system need not endow them with autonomous significance to the decisionmaking process. To the contrary, recognizing their *limited* importance in the process of reasoning to a decision in a case allows for an important intermediary position between realism and formalism as modes of legal analysis.

In our account, legal concepts are *real*, in the sense of being endowed with a normativity of their own by virtue of their origin in the law, in turn enabling them to play an important constraining effect on the form and structure of legal reasoning, though not in its actual normative content.[244] Acknowledging their realness by no means requires accepting that they exclusively influence decisionmaking. Their constraining effect preserves a level of continuity in the law and ensures a chain-novel-like rendering of common law decisions.[245] The mistake of the extreme Legal Realists lies in their inability to recognize that legal concepts can play an important role in the mode and style of common law reasoning, without deluding judges and lawyers into a belief about their autonomous role.[246]

Legal concepts—and the pervasive conceptualism of the common law—gives Legal Realism a distinctive style of reasoning and argumentation, which allows judges to develop an element of continuity with the past, while simultaneously enabling individual doctrines to keep up with changing needs and preferences. And this is our core point: to the extent that common law rule development is judge-made law, developed in a backward-looking process

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243 *See generally* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

244 *See generally* Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215 (2011) (providing an account of the normative content of private law doctrine).

245 *See* DWORKIN, LAW'S EMPIRE, *supra* note 55, at 228-38 (relating how judges build upon prior law to authors building upon the prior stories of other authors).

246 *But see* Brian H. Bix, *Law as an Autonomous Discipline* (noting the realist critique that the law either could not or should not be formalist), *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 975, 979 (Peter Cane & Mark Tushnet eds., 2003); Cohen, *supra* note 2, at 821 (arguing that formalist reasoning leads to nonsensical results).

from the context of individual disputes, conceptualism will remain a core attribute of the system.[247] Rather than working as a system of active deception, legal concepts serve the all-important role of grounding common law analysis in a common language that has been essential to its persistence over time and context. Common law judges who rely on legal concepts are hardly delusional or misguided, and certainly do not believe that such concepts are wholly autonomous. Legal concepts are instead the vehicle that the common law uses to justify judicial lawmaking, which must inevitably balance the past, present, and future all at once.[248]

Even when they acknowledge a role for legal concepts, prominent accounts of common law reasoning view such concepts and their purported meaning as a veritable distraction, rather than as an integral part of the system's machinery. Consider Edward Levi's famous account of legal reasoning.[249] A prominent Legal Realist, Levi saw common law reasoning as originating in the process of analogy.[250] Unlike other realists, however, he admitted that legal concepts were routinely used in such reasoning. Concepts could thus evolve to have a "limiting influence—so much so that the reasoning may even appear to be simply deductive."[251] He puts the point most starkly when he therefore notes that

> it is not simply deductive. In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is built up as cases are compared. . . . The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.[252]

The centrality of "reasoning by example," to Levi, causes common law courts to eventually realize the futility of their reliance on concepts and abandon an established concept altogether in favor of pure analogy.[253] As an example of this cycle, Levi offers up the series of cases developing the idea of "inherently dangerous" products, which culminated in Judge Cardozo's

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247 For the problems associated with common law rule development, see Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 458 (1989) (book review).

248 *See* Fuller, *supra* note 233, at 447 ("We shall have gone a long way toward ending the controversy concerning 'nominalism' if we can secure recognition for the plain fact that the inner mental experience of the individual, however precious and ineffable it may be, is 'conceptual'.").

249 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

250 *See id.* at 5 ("Reasoning by example in the law is a key to many things.").

251 *Id.* at 8.

252 *Id.* at 8-9.

253 *See id.* at 9. Indeed he even argues that when this happens, such concepts embody "no meaning." *Id.*

famous opinion in *MacPherson v. Buick*.[254] Levi argues that Cardozo's expansion of the concept resulted in its complete breakdown, with courts then coming to realize the distinct advantage of pure analogical reasoning over conceptualism.[255] Yet what Levi seems to ignore altogether is that Cardozo's move—and that of later cases—was not simply the abandonment of the old concept. It was, instead, the replacement of the old concept with a broader and more pervasive one that continues to inform the area of law to this day: the concept of the "duty."[256]

Levi's argument illustrates how theorists who are sympathetic to concepts nonetheless see them as a distraction in the overall scheme of common law reasoning rather than as integral to the system's working. While reasoning by example may indeed represent the way in which common law courts develop and apply the law,[257] courts continue to do so through the identification of common patterns and ideas in cases, which they invariably come to rely on, and develop legal concepts as the jural lenses through which they view the facts that produce those very patterns.[258]

As Brian Tamanaha has recently argued, much of the Legal Realists' ire against formalism and conceptualism originated in the mistaken belief that the common law was somehow wedded to the idea of the declaratory theory of lawmaking, according to which judges never make the law themselves but merely find the law in past decisions.[259] Tamanaha's evidence shows that even in the supposed heyday of formalism, most lawyers and jurists readily conceded that common law judges were actively making new law even when they were not overtly modifying legal doctrine or replacing old rules with newly constructed ones.[260] Common law reasoning (both then and now) adopts a method that purports to minimize external doctrinal disruption while simultaneously reaching results demanded by changing situations and contexts. Indeed, it is this disconnect between the minimal (or lack of) extrinsic change and the actual result in individual cases that seems to have produced the harsh realist critique of formalism and its reliance on concepts.[261] Despite this, as Tamanaha rightly points out, "the common law has carried on for centuries

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254 *See id.* at 10-27; *see also* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

255 LEVI, supra note 249, at 24-27.

256 Goldberg & Zipursky, *The Moral of* MacPherson, *supra* note 13, at 1743 (arguing that the concept of the duty was at the core of the decision in *MacPherson*).

257 For a useful summary, see Grant Lamond, *Analogical Reasoning in the Common Law*, 34 OXFORD J. LEGAL STUD. 567 (2014).

258 Indeed, Levi too seems to concede this point. *See* LEVI, *supra* note 249, at 8 ("If the society has begun to see certain significant similarities or differences, the comparison emerges with a word.").

259 *See* TAMANAHA, *supra* note 1, at 13-24.

260 *See id.* at 23-24.

261 *See id.* at 41.

without visible alteration in method,"[262] even while undergoing a great deal of substantive and normative change. What this points to then is that the common law's reliance on conceptual thinking originates in its very structure as a method of judicial lawmaking, which in turn necessitates realizing a delicate balance between doctrinal stability and normative change. The rote criticism of conceptualism in the common law misses this reality altogether.

Understanding the persistence of legal concepts in the vocabulary and content of common law reasoning thus necessitates treating them as "real" and endowed with their own functional significance that judges are aware of and readily accept in the interests of continuity in the working of the law. Now it might well be true that institutional considerations call into question the very virtue of the common law as a method of rule development and reasoning, insofar as it is believed that courts are "ill-equipped"[263] to make law. This is, however, a different question: so long as the common law subsists, we contend that it will continue to develop by relying on legal concepts.

### B. *Facilitating Normative Pluralism*

An additional, important implication that flows from our previous analysis relates to the common law's ability to accommodate a multiplicity of normative goals and values. Our analysis of how concepts work and their reliance on a duality of meanings suggests that the common law adheres to a model of functional pluralism. Unlike structural pluralism, functional pluralism posits that common law institutions come to affirm and advance varying—and at times, conflicting—normative values. It achieves this not simply by delineating separate spheres of influence for each of these goals whereby each value is only ever realized within the confines of an individual doctrinal area[264] but instead by enabling a doctrinal area to embrace different values, varying over time and context. The normative meaning of legal concepts thus enables common law doctrine to adapt itself to conflicting preferences and contexts, each of which might demand a different normative value or ideal.

The open-endedness of common law concepts (i.e., their open texture) should thus be seen as an active invitation from the common law to purveyors of different ideals, values, and ideologies, who are called upon to interpret and apply these concepts to individual cases and contexts using their preferred normative ideal. Over time, these purveyors—value entrepreneurs, so to

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262 *Id.* at 40.

263 Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting).

264 *See, e.g.*, Dagan, *supra* note 143, at 1413.

speak—who might be either judges, scholars, or lawyers, seek to ensure that their chosen normative value comes to be instantiated in the normative meaning of a legal concept, and that this instantiation acquires a level of relative stability owing to stare decisis and the overall path dependence of common law adjudication. Sometimes this entrepreneurship is successful, and sometimes it is unsuccessful, especially in the face of openly competing considerations. Consider, as an example of the latter, the Hand Formula in tort law.[265] Despite its advocates, in actual practice (i.e., as applied by courts), the Hand Formula has been of limited influence in courts' construction of the normative meaning of the "duty of care" in negligence law.[266] In its place, a host of other fairness-based considerations seem to be more prevalent in courts' analyses. In this process, divergent considerations and values thus compete with each other for salience and affirmation in the reasoning of courts, with courts then seeking to resolve this facial incommensurability through a process of practical reasoning from within the context of the dispute—a hallmark of common law adjudication.

Incommensurability refers to the idea that plural values are often times hard to compare against each other, owing to the lack of a common measure along which to undertake the comparison.[267] This phenomenon is "more apparent in the law than anywhere else," [268] and the common law in particular is often singled out as being especially susceptible to the problem of incommensurability given the range of activities and contexts to which it is applied. At the same time though, the common law is also held out by scholars and theorists as embodying what is perhaps the best known approach to solving the problem of incommensurability: practical reasoning (or practical wisdom).[269]

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265 *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.").

266 *See* Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula*," 4 THEORETICAL INQUIRIES L. 145, 151-52 (2003) (recognizing that even in opinions that purport to apply the test, the actual reasoning or results are never based on the test itself); *see also* Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 699 (2002) ("Courts do not rely heavily on the Hand Formula . . . .").

267 *See* James Griffin, *Incommensurability: What's the Problem?* (discussing the various theoretical and colloquial ways that "incommensurability" is used), *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 35, 35 (Ruth Chang ed., 1997); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795-96 (1994) (positing a definition of incommensurability).

268 Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1410 (2001).

269 *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 21 (1995) (noting the "ancient common-law reverence for the virtue of practical wisdom," which entails "a subtle and discriminating sense of how the (often conflicting) generalities of legal doctrine should be applied to concrete disputes"); Stephen R. Perry, *Judicial*

At its simplest, practical reasoning refers to the process of deliberating about choices that result in action. Practical reason is "concerned not with matters of fact and their explanation, but with matters of value, of what it would be desirable to do . . . , [and with making reasoning agents] assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them."[270] To Aristotle, practical reasoning was thus reasoning that resulted in, or was directed at resulting in, action.[271] Given its focus on action, one of the characteristic features of practical reasoning is therefore its indelible connection to the *specifics* of the situation necessitating the choice in question.[272]

As a solution to incommensurability, practical reasoning therefore adopts what philosophers have described as the pragmatic theory of value,[273] rooted in the idea that "the meaning of a statement is exhausted by its practical implications."[274] Accordingly, it entails examining how a given value, when applied to a particular situation, produces a set of consequences. The decisionmaker must then compare and contrast those consequences to examine their overall acceptability. Practical reasoning thus recognizes the centrality of making a *choice* among competing values situationally. As the philosopher David Wiggins puts it, practical reason is in the end a "*judgment* that one course of action is better than another,"[275] rather than an avoidance of such judgment, or an attempt to decide by reference to single value or end, referred to as "monism."[276] Practical reasoning is thus indelibly a form of pluralism.

Legal concepts facilitate the process of practical reasoning through their duality of meaning. While the jural meaning of a concept operates as structural constraint that guides the nature of the court's inquiry, the normative meaning inevitably involves a choice among competing considerations and values, which

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*Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 220-21 (1987) (investigating the nexus between practical reason and precedent).

270 R. Jay Wallace, *Practical Reason*, STANFORD ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/practical-reason/ (last updated Mar. 26, 2014), *archived at* http://perma.cc/D8P6-LP52.

271 *See generally* NORMAN O. DAHL, PRACTICAL REASON, ARISTOTLE, AND WEAKNESS OF THE WILL (1984); M. T. Thornton, *Aristotelian Practical Reason*, 91 MIND 57 (1982).

272 *See* David Wiggins, *Incommensurability: Four Proposals*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 267, at 52, 61-62.

273 *See* Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 267, at 90, 91-95.

274 *Id.* at 90.

275 David Wiggins, *Weakness of Will Commensurability, and the Objects of Deliberation and Desire*, 79 PROC. ARISTOTELIAN SOC'Y (n.s.) 251, 274 (1979) (emphasis added).

276 Ruth Chang, *Introduction* to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 267, at 1, 16.

the court must undertake through the lens of the particular facts involved in the case, rather than merely by adhering to some normative pre-commitment. Indeed, this reality perhaps explains why some judges, who in their scholarly contexts remain committed to certain foundational values, are nonetheless openly "pragmatic" and potentially pluralist in their decisionmaking in individual cases.[277] Practical reasoning in this sense has often been described by legal theorists as the nascent "craft" that underlies common law adjudication, which helps influence judges' choice among competing normative ideas underlying the working of abstract rules, and in turn the competing normative meanings contained in a legal concept.[278] Karl Llewellyn described this ideal most forcefully in his account of the common law:

> The existence of a craft means the existence of some significant body of working knowhow, centered on the doing of some perceptible kind of job. . . . [E]very live craft has much more to it than any rules describe; the rules not only fail to tell the full tale, taken literally they tell much of it wrong; and while words can set forth such facts and needs as ideals, craft-conscience, and morale, these things are bodied forth, they live and work, primarily in ways and attitudes which are much more and better felt and done than they are said.[279]

The duality of meaning underlying legal concepts reinforces the craft of practical reasoning that is central to the working of the common law. It compels judges to balance jural and normative meaning, while understanding the latter in terms of the normative goals best suited to the particular case at hand. Those demands originate from a variety of considerations—situational and institutional (e.g., precedent)—and yet allow for the process of choice to be reasoned. In this sense, then, the very idea of a concept's normative meaning is determined situationally, in pragmatic and reflective fashion rather than in the abstract, or in isolation from the demands of the case. The common law, as Holmes famously observed, "decides the case first and determines the principle afterwards."[280] Choosing among plural normative considerations in

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277 *See* RICHARD A. POSNER, HOW JUDGES THINK 230-31 (2008) (describing the inevitability of pragmatic adjudication among judges); Levmore, *supra* note 43, at 1793 (arguing that Posner the academic is theoretical, while Posner the judge is a "minimalist").

278 *See, e.g.*, ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW 4 (2005); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 637 (2007). *See generally* Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619 (2007); Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001).

279 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 214 (1960).

280 *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870), *reprinted in* Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 725 (1931).

the common law is therefore a contextual process embedded within the interpretation and application of legal doctrines to factual situations and occurs on a routine basis through the process of giving normative meaning to legal concepts.

The process of determining the normative meaning of a legal concept is rarely ever done in a purely deductive fashion where a court reasons from first principles to the individual concept and its application. Instead, the process is largely dialogic and moves between the preferred outcome in the individual case and the general principle that explains or justifies the decision.[281] Emily Sherwin describes this "natural reasoning" in the common law as a process where "[t]he judge begins with an intuitive judgment about the best outcome for the case, then formulates a more general principle that supports the initial intuition."[282] Having done this, "[t]he judge then tests the principle by considering other instances to which it might apply and adjusts both principle and intuition to reach an acceptable accommodation."[283] Thus the normative meaning of a legal concept takes shape through a combination of inductive, deductive, and analogical methods; but it begins with the fundamental recognition that the concept—and the doctrine that it is embedded within—must play a role in deciding the case at hand. It is, in other words, constrained very heavily by the primary purpose for which it is being discerned, rather than as a purely philosophical or ideological matter. Gleaning the normative meaning of a legal concept to reach a decision is the very process of practical reasoning that the common law is believed to embody.

For this reason, legal concepts contribute to a form of practical reasoning that is openly pluralist in structure and orientation. Additionally, this pluralism—which is functional in nature—is dynamic, rather than static. Legal concepts can affirm a multitude of different normative values and ideas sequentially, over time and context. Because the triggers of normative change—such as changing socioeconomic needs, preferences, or judicial predispositions—originate externally to legal doctrine itself, proponents of specific normative values and ideals are always at liberty to offer a normative account of a legal concept that comports with those values and ideals. This is not to suggest that there is *no* stability whatsoever in the normative meaning of concepts over time. To the contrary, institutional attributes of common law

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281 *See generally* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (describing and critiquing the dialogic process); Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919 (2006) (defending the dialogic process).

282 Emily Sherwin, *Common Law Reasoning and Cybertrespass*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 252, 258 (Shyamkrishna Balganesh ed., 2013).

283 *Id.*

decisionmaking ensure that the normative goals of the common law remain minimally stable but partake of a dynamism and generativity. Our account therefore concretizes the common law's essential structure as a functionally pluralist institution.

### C. *Legal Concepts as Anchors in Normative Legal Reasoning*

Our final claim concerns the indispensability of legal concepts to normative theorizing in the law. Specifically, we contend that normative theories of law cannot proceed in a free-floating manner; rather, they must be moored to legal concepts. In our view, it is not accidental that efficiency-minded scholars do not simply post a general call to "maximize welfare." Nor is it surprising that theorists who believe that the paramount value is justice do not settle for a call to do "what is just." We posit that any normative discourse of the law or legal reforms, typically both will—and should—rely on legal concepts. Consider the following example.

The "Hand Formula," developed by Judge Learned Hand in his opinion in *United States v. Carroll Towing Co.*,[284] purported to introduce a cost–benefit analysis into negligence law and is commonly considered an attempt to move the normative orientation of negligence analysis towards efficiency.[285] Yet even when offering up his famous equation—"$B < PL$"—Judge Hand categorically noted that he was doing so to give content to the very concept of duty, and not liability for negligence in the abstract.[286] Or, as he observed: "[T]he owner's *duty*, as in other similar situations, to provide against resulting injuries is a function of three variables."[287] Judge Hand could easily have noted that liability for negligence in the abstract derives from his calculus. Instead, he characterized his argument in terms of *duty*, central to the negligence analysis. Thus, concepts anchor normative reasoning in the law.

Our argument echoes the position espoused by John Goldberg and Benjamin Zipursky in the context of tort law.[288] In their critique of Justice Holmes's skepticism of the concept of duty and William Prosser's subsequent proposal to replace existing negligence doctrine with an open-ended cost–benefit analysis that compares alternative liability regimes, Goldberg and Zipursky note that the Holmes–Prosser model suffers from several

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284 159 F.2d 169, 173 (2d Cir. 1947).

285 For leading accounts, see Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994); Wright, *supra* note 266.

286 *Carroll Towing*, 159 F.2d at 173.

287 *Id.* (emphasis added).

288 *See* Goldberg & Zipursky, *The Moral of* MacPherson, *supra* note 13, at 1740-43 (identifying problems with the Holmes–Prosser paradigm of negligence liability).

deficiencies.[289] First, from an institutional standpoint, there is strong reason to believe that the legislative and executive branches are better suited to engage in policymaking while considering all relevant factors.[290] Second, a negligence model that is based on open-ended cost–benefit analysis gives rise to the specters of arbitrariness, indeterminacy, and doctrinal instability.[291] Furthermore, as they point out, the transformation of negligence law into an unconstrained policy analysis "threatens to drain the analytic structure from torts."[292] Third, and most importantly, it would sever the crucial connection between law, morality, and responsibility, a connection that is vital to the successful operation of the law.[293] This final point warrants elaboration.

In a series of articles, Goldberg and Zipursky have mounted a defense of the concept of duty by placing it in the broader context of the human experience. Legal concepts and norms are deeply rooted in the concept of responsibility sustained by social interactions. On this view, law reflects, as well as reshapes, "the basic obligations that persons owe to various others as they go about their lives."[294] Goldberg and Zipursky maintain that the "law is as much education, explication, articulation, and reinforcement as it is command or threat."[295] Legal concepts, therefore, are informed by interpersonal interactions and daily experiences. They are familiar to individuals and entail the same kind of thinking and behavior as required in social and personal settings.[296] In this view then, legal concepts perform the all-important role of translating the demands and requirements of social interaction into normative ideas that form the basis of the legal system's construction of responsibility and liability.

In other work, Thomas Merrill and Henry Smith have advanced a similar theory connecting property law to conventional perceptions of morality.[297] They make the dual claim that any sustainable property system must be "infused with moral significance"[298] and that the U.S. property system

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289 *Id.* at 1753-61.

290 *See id.* at 1740.

291 *See id.* at 1741.

292 *Id.*

293 *See id.* at 1742-43.

294 John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 391-92 (2005). For other work in this vein, see John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006); Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 36; and John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007).

295 Goldberg & Zipursky, *Accidents of the Great Society*, supra note 294, at 392.

296 *See id.* at 367.

297 *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

298 *Id.* at 1850.

embodies a moral perspective at its core.[299] Merrill and Smith view property as "a device for coordinating both personal and impersonal interactions over things."[300] As rights in rem that avail against the rest of the world and turn all individuals into duty-bearers vis-à-vis property owners, property rights "must be communicated to a wide and disparate group of potential violators,"[301] in a clear manner impervious to misinterpretation.[302] This means that all the subjects of a particular legal system must be aware of the restrictions imposed upon them by various property doctrines.

Property can achieve this goal only if its doctrines overlap with widespread moral conventions that exist in the relevant community. Merrill and Smith proceed to demonstrate their thesis by analyzing various property doctrines.[303] Like Goldberg and Zipursky, Merrill and Smith highlight the interdependence between law and other norms and responsibilities that regulate human behavior and actions. For Merrill and Smith, though, morality is prior to law, but law—through its legal devices and concepts—is seen to play the role again of converting the ideals of social and conventional morality into independent *legal* constraints.

But the problem with free-floating decisionmaking free of doctrinal constraints runs even deeper. Even if it were in principle desirable for courts and individual actors to engage in abstract policy analysis, it would likely be impracticable. As Herbert Simon famously noted, individuals cannot be reasonably expected to evaluate all the possible outcomes of a policy or legal rule because individuals do not have access to all the relevant information, and they could not process and evaluate it if they did.[304] As a result, individuals often rely on heuristics when facing complex choices.[305] Heuristics allow decisionmakers to make mental shortcuts that simplify complex decisions. The use of heuristics is not limited to financial or economic decisions. Heuristics have been shown to guide individuals when they are faced with

299 *See id.*

300 *Id.*

301 *Id.*

302 *See id.*

303 *See id.* at 1871-84.

304 *See* HERBERT A. SIMON, *A Behavioral Model of Rational Choice* (describing the implausibly rigorous cognitive demands of calculating the most rational choice), *in* MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETTING 241, 244-48 (5th prtg. 1967).

305 *See generally* GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (1999) (exploring the use of heuristics in a variety of contexts).

moral dilemmas.[306] Similarly, heuristics have been posited to play a significant role in the law.[307]

The common law's concepts serve as heuristics that facilitate decisionmaking by individual actors and judges within the common law system. Consider once again the concept of "reasonableness." While actors may not have the mental resources or the information to arrive at ideal philosophical solutions that take into account all possible outcomes and justice considerations, individuals can still figure out what constitutes reasonable behavior in a particular set of circumstances. They understand that the law or rule is asking for a normative evaluation of an action or outcome based on the individual's own internal calculus. Similarly, actors have a plausible sense of what "good faith" means based on their everyday interactions and general life experience. At the very least, actors can determine what kinds of behavior in their opinion amount to "bad faith" and avoid them.

The principal virtue of heuristics is also their main vice. While some scholars have lauded the use of heuristics, explaining that they enable fast decisionmaking and lead to largely accurate decisions, others critique heuristics' tendency to oversimplify complex problems and lead individuals to answer the wrong question. In moral contexts, some scholars are even more openly critical of the use of heuristics.[308] Sunstein, for example, argues that the use of heuristics often leads us astray by blinding us to the possibility of better, though more complex, solutions to moral problems.[309] This criticism of heuristics largely misses the point. Heuristic-based decisionmaking was born out of necessity. In an ideal world, actors could be expected to immerse themselves in the difficult dilemmas of moral philosophy or welfarism. In the real world, actors do not have the resources or mental capacity to do so. As Simon famously observed, we do not optimize; we satisfice, that is, we reach decisions that are good enough.[310]

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306 *See generally, e.g.*, Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005) (providing examples of the use of heuristics to guide moral decisionmaking).

307 *See generally* HEURISTICS AND THE LAW (Gerd Gigerenzer & Christoph Engel eds., 2006) (collecting literature on the use of heuristics in the law); MARK KELMAN, THE HEURISTICS DEBATE (2011) (discussing the legal implications of the debate between those who characterize heuristics as an error-producing form of bias and those who view them as a tool for fast and frugal decisionmaking).

308 *See generally, e.g.*, Russell Korobkin, *The Problems with Heuristics for Law* (noting that heuristics in the law may prevent actors from maximizing their utility or reduce the effectiveness of policy incentives), *in* HEURISTICS AND THE LAW, *supra* note 307, at 45.

309 *See generally* Sunstein, *Moral Heuristics*, *supra* note 306. *But see generally* Jeffrey J. Rachlinksi, *Heuristics, Biases, and Philosophy*, 43 TULSA L. REV. 865 (2007) (critiquing Sunstein's arguments).

310 SIMON, *supra* note 304, at 261 (distinguishing satisficing from optimizing and maximizing).

The question thus becomes: are our legal heuristics good enough, or can they be improved? Let us be clear that we do *not* argue that common law concepts—insofar as they function as heuristic devices—are perfect. We readily admit the possibility that some common law concepts could have been substituted by other concepts that can better function as heuristics. Indeed, as we discussed previously, some legal concepts are deemphasized over time and others are practically abandoned or retired. Likewise, the normative meaning of common law concepts is routinely reshaped and updated. Nonetheless, it is entirely possible that legislatures and judges could devise better legal heuristics. Indeed, we see the generative perfectionism of the common law as striving to achieve this ideal.

Our claim is therefore hardly that the heuristic function of the law's existing concepts is perfect; indeed it is far more modest. In keeping with Simon's idea of satisficing, we suggest that common law concepts constitute heuristics that allow individuals and courts to reach satisfactory, albeit at times imperfect, decisions. Common law concepts have survived the test of time. They embody centuries of legal experience and closely approximate the values of our society. Moreover, thanks to their unchanging jural meaning, they constitute clear guideposts for the individual members of our society. As far as courts are concerned, concepts contain the lore of multiple judicial decisions. Judges, when faced with a new case, frame the facts involved around the legal issues that they identify and for which the common law's conceptual machinery provides them with a useful and effective toolkit. The existence of these concepts not only ensures certainty and continuity in the law but also allows the system to operate efficiently. If judges had to approach every case afresh, without any judicial baselines or reference points, they would have to act not only as judges but also as legislators. Judges simply do not have the mental and material resources to perform this task. Such a system would also increase the number of appeals and require appellate courts to approach every case de novo. A major implication that therefore flows from our account is the recognition that normative proposals to reform and modify the law would do well to rely on the conceptual architecture of the law.[311]

It bears emphasizing that in claiming that legal concepts work as heuristic devices in legal reasoning, we should not be taken to suggest that concepts perform an exclusively instrumental role and are therefore not endowed with

311 This is not to say that all normative theories of the law must have a bottom-up structure in the sense that they must grow out of the common law concepts. It is equally possible to start with an abstract top-down theory, but at some point a normative theory should address how it is to be operationalized through the conceptual machinery of the law.

internal meaning of their own. Quite to the contrary, our claim here is that their very ability to function as heuristics derives in large part from their being endowed with their own meaning, as a result of which actors and judges use them to situate and ground their normative reasoning in the law.[312] Indeed our claim here is that the very jural meaning of legal concepts, which remain sufficiently stable over time, functions as a heuristic device that enables courts and litigants to rationalize the facts involved in their dispute into particular patterns and ideas, evaluate them, and undertake a process of reasoning and decisionmaking. The grounding effect of legal concepts as heuristic devices is therefore very much tied to the reality that they do embody their own discernible meaning.

## CONCLUSION

Writing during the heyday of Legal Realism, the noted legal theorist Lon Fuller, himself a realist, cautioned scholars that the "crusade against" conceptual thinking in the law was going "too far."[313] Fuller's cautionary note seems to have had little influence on American common law thinking, where the use and analysis of legal concepts continues to be vilified.[314] Indeed, on occasion, even the justices of the U.S. Supreme Court have criticized conceptual thinking (or "conceptualism"), deriding it as "obsolete"[315] and "long ago discarded."[316] Much of this ire, we have sought to show, originates in a fundamental misunderstanding about the role of legal concepts in the common law.

As we have argued, admitting a role for concepts in legal reasoning and analysis does not collapse into a formalist enterprise, contrary to common understanding. By virtue of their "duality of meaning," legal concepts—much like most other elements of legal reasoning—remain open to being infused with normative values and ideals from a wide range of disciplines, ideologies, and perspectives. All the same, this process does not drain them of all meaning, for they continue to embody at all times a core structural framework that gives them a determinate jural content across time, place, and context. We characterized the former as the concept's normative

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312 For prior efforts to understand the role of concepts through the lens of heuristics and information-processing, see Smith, *supra* note 47.

313 Fuller, *supra* note 233, at 443.

314 *See, e.g.*, Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 55-56 (2004) (describing the classical revival of laws as a "conceptual regress").

315 Snyder v. Harris, 394 U.S. 332, 354 (1969) (Fortas, J., dissenting).

316 Hawkins v. United States, 358 U.S. 74, 81 (1958).

meaning, and the latter as its jural meaning. It is only when the two are seen as equally indispensable elements of a concept's "meaning" that the true role of legal concepts in the common law becomes apparent.

The duality of meaning that underlies legal concepts holds deep functional significance in the common law. As we have shown, it is entirely through the duality of meaning that the common law is able to maintain its delicate balance between stability and change. The jural meaning of concepts allows the common law's doctrinal content to remain relatively stable and unchanging over time, while their normative meaning allows it to affirm and endorse competing normative values, in the process enabling the common law to keep up with changing social preferences.

Indeed, a central element of our argument has been that understanding the common law's conceptual architecture is critical to appreciating not just *how* the common law works but, in addition, *what* the common law actually *is*. As a method (and body) of judge-made law, developed from the context of individual cases with uniquely different fact patterns and normative demands, the common law requires a textured approach to legal rules and reasoning that allows it to provide future actors with sufficient guidance and predictability, while at the same time decide the individual case at hand by reference to existing law. Legal concepts offer common law courts and judges an ideal mechanism by which to realize these twin goals without undermining the overall legitimacy of the legal system. It is in fact the common law's conceptual framework that is, in large part, responsible for its vitality as a *method* of lawmaking and legal reasoning for several centuries now.

The renowned common law theorist Sir Frederick Pollock famously tried to identify the "genius of the common law" in a series of lectures delivered at the turn of the century.[317] Pollock identified a host of characteristics that he believed explained the subsistence, expansion, and continuing vitality of the common law as a body of law. As a method of lawmaking and legal reasoning, though, the true genius of the common law is perhaps to be found in its undying commitment to its conceptual edifice, which has survived the test of time and outlived the diatribes of its critics. In the end, rather than representing a form of "transcendental nonsense," as Felix Cohen famously put it, legal concepts in the common law exhibit a lure, simplicity, and indefatigability that can be explained only by their "transcendent common sense."

317 *See* FREDERICK POLLOCK, THE GENIUS OF THE COMMON LAW (1912).