Legal Theory Workshop
UCLA School of Law

Shyamkrishna Balganesh
Sol Goldman Professor of Law
Columbia Law School

“The Eunomics of Intellectual Property”
Thursday, March 21, 2024 3:20 – 5:20pm
Law School Room 1314

Draft, March 2024. For UCLA Workshop.
Please don’t cite or quote without permission.
THE EUNOMICS OF INTELLECTUAL PROPERTY

Shyamkrishna Balganesh†

Originally developed by the legal theorist Lon Fuller, eunomics is the "study of good order and workable arrangements" and is directed at understanding the structure, form or ordering adopted by an area of law. Yet unlike the ordinary analysis of institutional design, eunomics views the form adopted by an area of law as neither pre-ordained nor wholly contingent. Instead, eunomics sees the form as playing an important role in clarifying and developing the goals of the area through a means-ends interaction. This Article develops the central insights of Fuller’s eunomics project for intellectual property. Most theoretical accounts of intellectual property have hitherto paid surprisingly little attention to the unique structure and form that each area of intellectual property embodies, and have focused instead on justifying or explaining the area’s core substantive goals and values in the abstract. In so doing, they have neglected the crucial import that the individual form of ordering adopted by each area has on the construction and realization of those values. The Article develops a eunomics-driven typology of intellectual property forms: the appropriation form, the grant form, the use/registration form, and reveals how each of these forms embodies its own normative structure, value commitments, and conception of institutional authority for lawmaking. In so doing, it shows how theorizing about intellectual property and its values remains grossly incomplete without a greater engagement with each individual area’s underlying structure.

INTRODUCTION .............................................................................................................. 2
I. LON FULLER AND THE EUNOMICS AGENDA: A JURISPRUDENCE OF FORM ............. 10
   A. Means-Ends Correlation .................................................................................... 13
   B. The “Inner Morality” of Form ........................................................................... 17
   C. Institutional Design Conventionalism ................................................................ 20
II. THE MISSING GAP IN INTELLECTUAL PROPERTY THEORIZING .............................. 25
   A. Substantive Goals Over Essential Forms ........................................................... 27
      1. Utilitarian Accounts ................................................................................... 28
      2. Rights-Based Accounts .............................................................................. 33
   B. Form Neglect and Normativity in Intellectual Property ..................................... 37
III. THE LIMITED FORMS OF ORDERING IN INTELLECTUAL PROPERTY ....................... 40
   A. The Logic of Limited Forms ............................................................................... 41
   B. The Principal Forms of Ordering in Intellectual Property ................................ 45
      1. The Appropriation Form ............................................................................ 46
      2. The Grant Form ......................................................................................... 49
      3. The Use (and Registration) Form .............................................................. 53
CONCLUSION ............................................................................................................... 58

† Sol Goldman Professor of Law, Columbia Law School.
INTRODUCTION

There is no dearth today of efforts to theorize the field of intellectual property. While some of these efforts have attempted to offer a theoretical justification for a distinct area of intellectual property (such as patent or copyright), others have limited themselves to the theory behind individual provisions or rules therein. Dominating both categories are utilitarian and incentive-driven accounts, some of which draw from economic theory and situate the rationale for intellectual property within a market-driven framework. More recently, scholars have attempted to offer justifications for intellectual property grounded in moral theories, such as those associated with Locke, Kant, and Hegel.

Regardless of their particular normative orientation, these theories of intellectual property have all been characterized by a unifying deficiency. And this is their inability to account for the uniqueness of the particular form that each area of intellectual property assumes. In their singular focus on offering a substantive justification for the existence and working of different intellectual property rights, almost all theories of intellectual property treat its structure as an altogether secondary and contingent feature of the system. Its means of creating, protecting, and limiting rights are seen as contributing very little (if

---


anything) to the content of the system’s pre-determined goals and are instead seen as simply being in service of them.

Consider, by way of example, the fact that copyright—ever since its existence—has relied on a framework of private liability that centers around the act of copying, which it renders actionable. Its form thus consists in treating copying as a wrong. Despite this undeniable fact, both economic and moral theories of copyright limit themselves to justifying the idea of exclusive rights underlying copyright (the provision of an economic incentive to create and the protection of individual autonomy, respectively), but do nothing to tell us why copyright relies on the framework of copying (over other options) to realize its goals, or indeed what that reliance brings to those very goals. Even accepting the goals identified for copyright, why is a framework of privately actionable copying the chosen way to realize them over others such as a prize, a property-like monopoly, or even the criminalization of copying? Either the account of copyright’s normative ideals is incomplete, incorrect, or oversimplified. In an important sense, both types of theories see copyright’s structural focus on copying as contingent and as adding nothing to the framing of its goals that they identify for it. When presented with a clear divergence between copyright’s substantive goals and its actual framework, the theories then either fall back on a vision of an ideal (but hypothetical) copyright or instead make tepid reference to notions of the second-best.

The same is just as true of patent law, which is routinely justified in terms of the economic incentives needed to invest in research. All the same, theories of patent law rarely ever engage (let alone explain) why patent law has never depended on copying/free-riding in its form (like copyright), but has instead

---

5 See, e.g., Copyright Act of 1790, §2.
6 For an elaboration of this idea, see: Shyamkrishna Balganesh, The Obligatory Structure of Copyright: Unbundling the Wrong of Copying, 125 Harv. L. Rev. 1664 (2012).
7 See Landes & Posner, supra note __, at 345-47 (justifying the focus on copying in terms of economic costs but saying nothing about the mechanism of enforcement); Balganesh, Immanent Rationality, supra note __, at 1064 (noting how Drassinower’s Kantian account provides “no explanation for the institution’s very specific enforcement machinery”).
8 For a survey of the voluminous literature and arguments comparing intellectual property rights to prizes, see: Benjamin N. Roin, Intellectual Property versus Prizes: Reframing the Debate, 81 U. Chi. L. Rev. 999, 1020 (2014). Interestingly, Roin is critical of attempts to see prizes as superior to intellectual property rights because of their “fundamental misunderstanding of intellectual property rights”. Id. at 1007. All the same, his own theoretical account of intellectual property rights, drawn from economic theory, says nothing about the form and structure of those rights, which are instead seen as doing no more than creating artificial scarcity. See id. at 1035.
9 See id.
10 For the classical account of this theory, see: Arnold Plant, The Economic Theory Concerning Patents for Invention, 1 Economica 30, 32 (1934) (noting how it is “generally agreed that the ultimate aim is to encourage inventing”).
adopted a property-like “grant” model for its working, which carves out a negotiated domain of monopoly for the patentee.11 At best, patent law’s grant form is seen as driven by the need for stronger incentives;12 yet, no theory really explains the continued endurance of that form within patent law or why it best serves the area’s goals in light of alternative avenues of realizing incentives to invent.

In an important sense then, existing theories of intellectual property may do well to justify the bare idea of each regime but say surprisingly little about the reasons for the structure and form each adopts. What intellectual property therefore singularly lacks is a sustained engagement with the area’s limited but stable legal forms to understand its very foundations. Almost all theorizing within the area begins with end-goals (or values) for each regime and only then, if ever, moves to making sense of the forms involved. Almost never is form at the center of the analysis, let alone its starting point.13

For better or worse, the failure of legal theory to engage the question of form is hardly new or limited to intellectual property. Its earliest analytical identification emerged in a paper by the legal theorist Lon Fuller, titled American Legal Philosophy at Mid-Century wherein he identified the directed study of “means” as a neglected area of jurisprudential inquiry and proposed a plan of study to remedy the neglect—what he termed “eunomics”.14 Fuller’s work thus set the stage for what is best described as a jurisprudence of form.

Fuller is today best remembered as the twentieth century legal thinker who famously debated the British philosopher H.L.A. Hart about the nature of law in what is today called the Hart-Fuller debate, and clearly lost.15 Somewhat

---

11 This reality has been true over history. See Fritz Machlup & Edith Penrose, The Patent Controversy in the Nineteenth Century, 10 J. Econ. Hist. 1, 10 (1950) (documenting the dominant theoretical justifications for patent in the nineteenth century). It is equally true in the most influential theory of the twentieth century, the prospect theory. See Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265 (1977). As evidenced in Kitch’s work, these theories focus on “function” over form. More modern iterations of the prospect theory fare marginally better, but continue to take the form of ordering underlying the patent system as secondary. See, e.g., John F. Duffy, Rethinking the Prospect Theory of Patents, 71 U. Chi. L. Rev. 439 (2004).

12 See John Shepard Wiley, Jr., Copyright at the School of Patent, 58 U. Chi. L. Rev. 119 (1991) (describing the patent system as an “intellectual success[ ] worthy of imitation”).

13 For an astute identification of this reality two decades ago now, see: Clarisa Long, Information Costs in Patent and Copyright, 90 Va. L. Rev. 465, 466 (2004) (“We have developed robust theories to explain why we have the institution of intellectual property rights, but such theories provide a thin basis at best for analyzing the structure of those rights.”). For a fuller engagement with information cost theory, see infra Part II.

14 Lon L. Fuller, American Legal Philosophy at Mid-Century, 6 J. Legal Ed. 457, 473 (1954).

15 See Kristen Rundle, Forms Liberate 1 (2012) (noting that Fuller is remembered as the “natural lawyer who lost the debate about the connection between law and morality to his analytically superior opponent”). For the original Hart-Fuller debate, see: H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Lon L. Fuller, Positivism and Fidelity to Law—A Reply to
relatedly, he is also remembered for his book *The Morality of Law*, which identified the conditions of what is commonly termed “the rule of law” and argued that there is a core ideal of morality underlying the structure of law that is crucial for its authority and legitimacy.\(^\text{16}\) Less commonly remembered however is that Fuller’s lifelong work, initiated well-before he was drawn into the law/morality debate with Hart, was in the realm of legal form. Eunomics, a term that he seemingly drew from Aristotle, was meant to be “the science, theory or study of good order and workable arrangements”.\(^\text{17}\) In introducing the idea, Fuller saw it as concerned “with the means aspect of the means-end relation”, which would “contribute[] to the clarification of ends” themselves.\(^\text{18}\)

While he set out the core motivations behind the idea of eunomics in his initial critique of legal philosophy as it was practiced at the time, Fuller then followed it up with a rather significant body of work in the years after, giving the idea more substantive content and meaning.\(^\text{19}\) Sadly, very little of it was published during his lifetime, primarily because he soon became preoccupied with the law/morality debate that catapulted him to international fame. He returned to the eunomics project towards the end of his career and developed it further in a series of papers, the most prominent of which was *The Forms and Limits of Adjudication*, published posthumously.\(^\text{20}\) A draft book manuscript that he had been working on to bring his writings on eunomics together, was also edited and published after his death under the title *The Problems of Social Order*.\(^\text{21}\) In it, we have a rather well-developed and truly underappreciated body of work that showcases the core motivations and principles behind the notion of a jurisprudence of form that Fuller had sought to develop.

Fuller’s thinking has seen something of a revival in the last few decades. Central to this “reclamation” of Fuller and his ideas has been the recognition that the Hart-Fuller debate was at best something of a distraction in Fuller’s overall oeuvre, and that his real passion lay elsewhere.\(^\text{22}\) The eunomics project has

---


\(^{17}\) Fuller, *American Legal Philosophy*, supra note __ at 473.

\(^{18}\) Id. at 478.

\(^{19}\) See Rundle, * supra note __, at 32.


instead been shown to have occupied that space, and its undercurrents are seen to have inflected—both directly and indirectly—almost all of what Fuller wrote, including crucial aspects of his debate with Hart. Key to Fuller’s thinking was the idea that a jurisprudence of forms was not just some pedantic taxonomical exercise; it was instead critical to understanding the manner in which authority and legality manifested themselves in the world. Yet, there was nothing pre-ordained about that manifestation, which was instead a matter of choice. That choice was in turn driven by the nature of the law’s connection between its authority and the agency of those subject to such authority, and thus in itself a form of freedom. It is in this sense that one intellectual biography of Fuller uses his own phrase “forms liberate” to capture the essence of his thinking and argue that to him, form had serious implications for “the character, existence, and normativity of law.”

While Fuller’s eunomics project had an undeniably critical side to it in as much as it saw the deficiencies of associating “natural law” with some kind of extra-human ordering, it at the same time had an important constructive dimension to it, which Fuller expounded on in due course. This was the reality that institutional design, or the architecture of the law, was much more than just a pathway to the law’s realization of its goals. It was instead in itself a deeply normative exercise, wherein the distinctive features and elements of the form influenced the very normativity of the law and thus the agency of actors who were in some sense constrained by it. In other words, each different form of problem-solving deployed by the law brought its own distinct set of robust values—and thus morality—to bear on the very problem that it was seeking to solve (as a means). While Fuller’s work on adjudication is the best-known example from this body of work, his other writing within the eunomics project focused on myriad other forms: mediation, legislation, contract, and managerial direction. And each of these forms was, in turn, not just an artificial creation but instead a reflection of a society’s effort to order itself in addressing a problem. Such ordering was but a reflection of the reality that freedom inhered in choosing among forms, which liberated by constraint.


24 Rundle, supra note __, at 2.


26 The Problems of Social Order: Selected Essays of Lon L. Fuller, supra note __, at 125, 169, 158, 188.

27 This is indeed the basis of Fuller’s famous “forms liberate” observation that Rundle makes the basis of her biography. Rundle, supra note __, at 1. For Fuller’s own exploration of the idea, see: Lon L. Fuller, Freedom as a Problem of Allocating Choice, 112 Procs. Am. Phil. Soc’y 101 (1968). See also Dan Priel, Lon Fuller’s Political Jurisprudence of Freedom, 10 Jerusalem Rev. Leg. Stud. 18 (2014).
Given that Fuller’s project never saw the light of day during his lifetime, it was necessarily incomplete. And this incompleteness was not just in Fuller’s own identification of the different forms relied on by claims to authority, but in addition the variability internal to each of them, which generated their own set of normative precepts. Be that as it may, the strength of Fuller’s idea behind eunomics lies less in his own application of it and more in his elaboration of its methodological lessons—about the dialectical relationship between means and ends that underlies any legal exercise of authority, and the manner in which the normativity and moral commitments of a particular design choice interface with the substantive goals towards which the choice is exercised.

This Article brings the central ideas of Fuller’s eunomics project to intellectual property to show how the field cannot be adequately understood and theorized without studying the essential features and elements of its individual forms. And in so doing, it fills a crucial gap in the literature attempting to justify intellectual property by arguing that the unique legal form embodied in each intellectual property regime embodies its own inner morality and commitment to specific goals that cannot be ignored, and which inform the goals and values identified as independent ends of the system. Building on Fuller’s insights about the interconnectedness of means and ends in institutional design, it argues that the protection of informational resources through intellectual property law typically enlists one of three primary forms of ordering, what this Article describes as the appropriation form, the grant form, and the use and registration form.

Viewed through the lens of eunomics, each form of ordering in intellectual property reveals not just a design choice in furtherance of a pre-identified end, but also a recognition that the very form introduces its own values and constraints into the system. Each form emerges from the diagnosis of a central issue that is thought to lie at the heart of a problem, and the evolution of a unique convention directed at that issue. The form of ordering thus comes to be seen as integral to the very nature of what the specific regime of intellectual property is, and thus introduces new goals into it. In the process, it also limits (and qualifies) the working of other goals. Thus, for instance, copyright’s timeless reliance on the appropriation (copying) form brings an acute focus on actionable behavior, which suggests that copyright is more than just about incentivizing creativity, as the standard narrative assumes. Additionally, and perhaps equally importantly, each form of ordering also embodies a commitment to a modality of institutional authority in the working of the regime and thus a different conception of normativity. With its focus on actionable wrongdoing after its occurrence, the appropriation form adopts a distinctive form of horizontal normativity that is inter-personal, whereas the grant form relies less
on identifying such wrongdoing and thus retains a much more traditionally vertical form of normativity.

In thus developing a eunomics of intellectual property law, the Article also reveals there to be important and unappreciated dimensions to Fuller’s own project, beyond the ones that he himself recognized. The first of these is the recognition that the forms of legal ordering are generative on their own, even if not infinite. Over time, they remain little more than ideal types. Through a process of hybridization, they often produce new sub-forms. Thus, Fuller’s discussion of adjudication did not anticipate the emergence of class actions, which combine aspects of adjudication with elements of managerial discretion—directly addressing a concern with adjudication that he famously described as “polycentrism”. Second and relatedly, this generativity, wherein a form retains a core structure but then adopts elements from other forms, introduces a form of pluralism about goals and ideals into the working of the ordering but in a considered and deliberate way. A form of ordering built around the ideal of efficiency, for instance, may well—through such hybridization—come to show a greater affinity for the autonomy and agency of participants in different ways even while retaining its core commitment to efficiency as its central goal.

The argument of the Article unfolds in three Parts. Part I introduces Fuller’s eunomics project and unpacks the central ideas behind the domain of inquiry that it entailed. It may seem counterintuitive to begin with eunomics rather than the problems of intellectual property, so as to make the payoffs of eunomics for intellectual property obvious. Yet, as will be clear the eunomics agenda embodied an important diagnostic component which will help bring intellectual property’s problems of form into stark relief and thus allow for their direct engagement. Part II then moves to intellectual property law to argue that the field embodies two unsolved structural puzzles. The first is the apparent disconnect between the individual goals and objectives of various intellectual property regimes and the unique (and stable) legal forms that they rely on; and the second is the related question of appropriate lawmaking authority and institution that each such form sees as central to its working. It thus sets the stage for a eunomics-based analysis to be applied to these puzzles. Part III then applies the insights of Fuller’s eunomics to intellectual property. It first sets out what such an inquiry reveals about intellectual property’s legal forms, and then develops a taxonomy of legal forms within intellectual property. In the process,

28 Fuller, Forms and Limits, supra note __, at 371. See also J.W.F. Allison, Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication, 53 Camb. L.J. 367 (1994).

29 There is an important sense in which this process of hybridization allows the law to resolve issues of incommensurability between competing normative values, by conceptually sequencing each value as part of the ordering. See Bruce Chapman, Law, Incommensurability, and Conceptually Sequenced Argument, 146 U. Pa. L. Rev. 1487 (1998).
it shows how each individual form embodies its own conception of legal normativity as well as a commitment to certain goals and values.

Before proceeding much further, two caveats are in order—which will be elaborated on in due course. First, it is important to note that a eunomics-based analysis of intellectual property is much more than just a purely academic exercise; it instead has critical implications for the actual working of intellectual property regimes. And this lies in the design of such regimes for different—and new—subject matter, which is almost always predicated on matching the goals behind the need for protection with those of a particular regime. For instance, when it was decided that computer software needed intellectual property protection in order to protect programmers’ economic incentives to create, that goal was seen to align with the principal justification for the copyright system.30 Accordingly, the choice was made to fit computer software into copyright. Yet, in so doing scarce attention was paid to the nuances of the appropriation model (underlying copyright) and the manner in which that form introduced its own goals and normativity into the analysis.31 The years since have seen nothing short of a system-wide struggle to manage the mismatch between the form so chosen (the copying form) and the subject matter involved.32 A more directed focus on the form at issue—the means—might have perhaps served to avoid some (even if not all) of the chaos that has ensued ever since.

Second, as will become clear, eunomics is much more than just institutional design. Questions of institutional design have obviously existed in all areas of law for some time now, and long pre-date Fuller.33 Fuller was clearly aware of that reality. Yet, what set his eunomics project apart from ordinary institutional design questions was his recognition that institutional “form” contributed much more than the mere structure for an area of law to realize its goals. It instead added to those goals and at times confounded and overrode them in unforeseen ways. It is this “more” that eunomics emphasized, and which theories of intellectual property have been lacking, even though efforts at institutional typology in intellectual property are hardly new.34

30 See National Commission on New Technological Uses of Copyrighted Works, Final Report 11 (1979) (“The Commission is, therefore, satisfied that some form of protection is necessary to encourage the creation and broad distribution of computer programs in a competitive market.”).

31 Id. at 7-11.


33 The earliest known engagement with institutional design on a sustained basis was by Jeremy Bentham. See Gerald Postema, Bentham and the Common Law Tradition (1986).

34 For one well-known effort, see: J.H. Reichman, Legal Hybrids between the Patent and Copyright Paradigms, 94 Colum. L. Rev. 2432 (1994).
Lon Fuller is today remembered primarily for his participation in the Hart-Fuller debate about the merits/demerits of legal positivism and the role of morality therein. Within that context, his ideas formed little more than a foil for Hart’s theory, which rose to prominence in the years since. Relatedly, Fuller is also remembered for his theory of the “inner morality of law”, which he developed in The Morality of Law. The theory has since come to be associated with accounts of the rule of law, despite its somewhat misplaced use of the term “morality”. Largely forgotten is the reality that independent of these two contributions, Fuller’s oeuvre contained a third agenda, one that began well before these other two and indeed lasted until Fuller’s death: eunomics.

Fuller first introduced the idea of “eunomics” publicly in his 1954 article critiquing the state of legal philosophy and jurisprudential theory in America at the time. Eunomics was intended to serve as a form of inquiry that rejected what he called “the infinite pliability of social arrangements”, the belief that once an end (objective, goal or value) was identified, then social arrangements could be ordered and organized in any number of ways to effectuate that end without any noteworthy internal constraints. Such infinite pliability was in his view endemic to the social sciences, including law. Eunomics, “the study of good order and workable arrangements” was meant to give lie to this belief and show how a myopic focus on ends was illusory.

Eunomics was the study of the means deployed in different legal arrangements. Beginning with the premise that the pliability of such arrangements was indeed finite, it sought to make sense of this finiteness on its own terms, i.e., as constraints that were internal to the arrangements themselves rather than imposed on them through the ends from outside. While eunomics rejected the abstraction of ends in the analysis of arrangements, Fuller at the
same time sought to make clear that it was not just doctrinal analysis that sought to make sense of the interplay of different rules. Eunomics was instead meant to operate as what he termed “affirmations of the middle range” that showcased the analytical and normative underpinnings of the forms of legal and social arrangements.41

Fuller’s use of the phrase “affirmations of the middle range” is intriguing in multiple respects, and tells us something about eunomics. The term “affirmation” was intended to convey the reality that the inquiry was directed at extrapolating normative ideals from existing forms of ordering and arrangements. This was a recurrent—but controversial—theme in Fuller’s philosophy of law, wherein he believed that there could be no rigid separation between the “is” and the “ought”.42 The rejection of the fact/value distinction, which Fuller appears to be have drawn from pragmatism, was a constant theme in his work even though he was consistently hard-pressed to defend it in philosophical terms.43 Much of his affinity for it appears to have originated in his fondness for the process of common law rule development and its reliance on the declaratory theory of lawmaking that allowed for retroactive legal change.44 It was this abandonment of the fact/value distinction that caused some to characterize his approach to law as a form of “natural law,” a term that undermined his work in ways that he did not anticipate.45 All the same, it is clear that he saw his account of the is/ought merger as connected to the eunomics project and its attempt to ensure a greater focus on the “means”. In one early paper, Fuller thus noted:

The dilemma we confront when we attempt to apply the fact-value dichotomy to human purpose may be restated in terms of the means-end relation. … On the one hand, it seems clear that the selection of an apt means for the realization of a given end is an activity engaging man's reasoning faculties and his capacity for accurate analysis and observation. The other line of thought leads, with equal persuasiveness, to the

42 See Lon L. Fuller, The Law in Quest of Itself 5-12 (1940).
44 Id. at 339. A fondness he appears to have drawn from Dewey.
conclusion that this activity must have a terminal point and that the end ultimately pursued cannot be determined by analysis or observation, but must in some manner or other be projected upon events. These two lines of thought can coexist peacefully so long as they are not applied to any process of decision. When that happens the distinction that holds them apart disappears and their latent conflict becomes manifest. For when we are confronted with the necessity of making an actual decision about a course of action, means and ends no longer arrange themselves in tandem fashion, but move in circles of interaction.46

Means and ends were thus as integrated and seamless as fact and value. Even though he never directly acknowledged it, eunomics bore a direct relationship to Fuller’s skeptical view of the fact-value distinction.

The second portion of Fuller’s description of eunomics and the reference to “middle range” is suggestive of a particular analytical framing that is situated midway between heavy detail and foundational abstraction. The notion of a middle range is seemingly drawn from an idea famously developed in sociology around the same time by the theorist Robert Merton: “middle range” theorizing.47 As developed by Merton, theories of the middle range “lie between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities of social behavior, social organization, and social change.”48 And while they certainly involve “abstractions… they are close enough to observed data to be incorporated into propositions that permit empirical testing.”49 Fuller’s methodological approach was in some ways closer to sociology than it was to analytic philosophy, and while there is no clear evidence that he interacted with Merton, their contemporaneity and shared subject interests suggests that Fuller drew from Merton’s framing.

Understanding eunomics as a form of middle range theorizing helps shed light on why it was much more than just a taxonomical project for Fuller. The generalization that each category of ordering entailed was meant to be in service of its testable deployment in different contexts, and thus directly related to certain “ends”.50 The means—i.e., the ordering—were thus never intended to be insensitive to ends, but instead uninfluenced by them. Or, as he put it, ultimate

46 Lon L. Fuller, Human Purpose and Natural Law, 3 Natural L. Forum 68, 71-2 (1958).
48 Merton, supra note __, at 448.
49 Id.
50 Fuller, Means and Ends, supra note __, at 63.
“[e]thical judgments are postponed until a framework has been constructed for them by an analysis that appears to be ethically neutral.”\textsuperscript{51} This did not mean that the analysis of the framework was value-free. To the contrary, each institution/ordering was “an active thing, projecting itself into a field of interacting forces [i.e., values], reshaping those forces in diverse ways and in varying degrees.”\textsuperscript{52} The categorization that eunomics entailed was therefore to be testable by context, imbuing it with an indelibly empirical dimension.

This Part pieces together the theory underlying Fuller’s eunomics project from different parts of his writing. It first examines the means-ends correlation that lay at the heart of the project (I.A), then looks to how it interacted with his vision of an “inner morality of law” and the varying forms of legal normativity at play (I.B), before examining what it meant for the notion of “institutional design” that Fuller often associated with it (I.C).

\textit{A. Means-Ends Correlation}

At its core, eunomics was a program of study directed at understanding the \textit{means} deployed in mechanisms of social and legal ordering. In thus emphasizing the centrality of means, Fuller went to extraordinary lengths to explain what such a focus did and did not entail so as to ensure that the project did not collapse into a banal restatement of existing rules and procedures. A focus on the means did not mean a neglect of ends; it merely stood for the prioritization of means over ends in approaching an analysis of an arrangement. The two were to be understood as being in a relationship of “reciprocal adjustment” at all times.\textsuperscript{53} The key to understanding Fuller’s focus on means lies in recognizing that he saw the adoption of specific means in different social arrangements as an element of choice rather than pre-determined.\textsuperscript{54} This is why he readily broke with the discipline of sociology, which saw human behavior (the object of its study) in deterministic terms, and instead believed that it was the task of legal philosophy to appreciate the role of human agency in the framing of the means.\textsuperscript{55} Human freedom, in his worldview, was furthered and protected through the choice of form underlying different ends, in addition to the choice of the ends of themselves. Hence, “forms liberate.”\textsuperscript{56}

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 68.
\textsuperscript{53} Fuller, \textit{American Legal Philosophy}, supra note __, at 479.
\textsuperscript{55} Fuller, \textit{Human Purpose and Natural Law}, supra note __, at 68-70.
\textsuperscript{56} Rundle, \textit{supra note __}, at 8.
The ideal of reciprocal adjustment between means and ends becomes clearer from one of the early examples Fuller uses to analogize the eunomics project to: architecture.\(^{57}\) Indicating no obvious awareness of the less-known field of philosophy of architecture,\(^{58}\) in a paper that set out the manifesto for the project and titled *Means and Ends*, Fuller argued that the insufficiency of an ends-based focus was best revealed through the logic of architecture, a practical art that was about “the satisfaction of certain human ends”.\(^{59}\) An architect setting out to design a building could not, in his view, simply begin work with abstract ends in mind such as utility or beauty. Instead:

We must know what is possible before discussing what is desirable. A building suspended in mid-air might have a certain esthetic appeal, but since there is no means for constructing such a building we may dismiss it from consideration, or at best turn our minds to the problem of creating the most effective illusion of such a building by the means at hand. … It is an obvious economy of thought, therefore, to survey available means before addressing ourselves to ends.\(^{60}\)

Fuller’s analogy has obvious problems, of course; yet his core point remains. Architecture is a good analogy since it has two obvious (and potentially incommensurable) ends at all times: beauty and utility. The means obviously constrain the realizability of either of those ends, but in addition do more: they also add meaning to the ends themselves. The notion of an aesthetically appealing building is constrained by the fact that the means used to construct it must follow certain limitations (such as those of physics, as in Fuller’s own example of the “suspended” building). The physical constraint is however accompanied by the fact that the means impose a constraint on the very meaning of the end: beauty or utility for a building, mean something more limited (and different) than what those ends might allow for on their own. The meaning of the end thus takes color from the means.

Fuller saw the same logic applying to social (a subset of which was legal) architecture and believed that eunomics was where legal philosophy could intervene in this dynamic. Legal thinking and lawyering were about deploying particular forms of ordering and meaning on human relationships, thus changing

---

\(^{57}\) Fuller, *Means and Ends*, supra note __, at 64.


\(^{59}\) Fuller, *Means and Ends*, supra note __, at 64.

\(^{60}\) Id.
the nature and value of those relationships, i.e., their ends. Contractualizing a relationship—e.g., marriage or a friendship—changes the very meaning of that relationship in important ways.

To further buttress the idea of the means-ends relationship, Fuller proceeded to identify five common mythologies that he saw as impeding the deeper study of means in institutional arrangements. While Fuller did not use these terms, they are best described as the mythologies of: severability, ordinality, infinite pliability, determinacy, and contingency. Each adds an element to his vision of the means-ends interaction.

The first was the recognition that the ends of social institutions and arrangements are not severable from the institutions themselves. In other words, he saw the idea that institutions existed and took color from identified ends and goals as necessarily incomplete. Instead, the institution was to be seen as an “active” participant in the framing and definition of the end itself. As he noted “[w]e take legal measures to insure the impartiality of jurors, we defend the jury system because it tends to inculcate a habit and taste for impartiality.”

While the jury system (institution) is seen as existing to further impartiality in decision-making (end), Fuller’s argument is that in so doing, the jury system itself defines and adds meaning to our understanding of impartiality. The ideal of impartiality is not severable from our thinking about the jury system.

A second myth, in Fuller’s understanding, was the belief that social ends (or values) were capable of being independently ranked in order at a level of abstraction. While this may have been desirable in theory, in practice it was incapable of realization because the implementation and realization of each end, i.e., the means deployed, themselves imposed burdens (and benefits) on the ordering. Ordinal rankings of ends thus ignored “means-costs” and “means-surplus[age]”, which altered the feasibility of any such ranking.

In an indirect sense, Fuller appears here to be identifying the incommensurability of ends, a longstanding problem in preference ordering. In his view, at least part of the reason for such incommensurability was the result of a failure to properly acknowledge the role of means in realizing ends.

---

62 Fuller, Means and Ends, supra note __, at 68.
63 Id.
64 Id. at 69.
65 Id. at 69-70.
The next misconception that Fuller identified would play a more significant role in his later application of the eunomics project to individual forms of ordering, and this was the misplaced belief that there was an “infinite pliability” to social arrangements. What this implied was that once a socially desirable end/outcome was chosen, the social architect had to modify the means in any number of ways with the sole goal of realizing those ends.67 That nature and content of those means were themselves seen as imposing no constraint on that pliability. This is where Fuller came to recognize that means embodied their own goals, ranging from basic ideals such as “simplicity” and “efficacy”, which constrained their pliability.68 Or, as he put it: “[i]t takes something more than a rub of the technician’s lamp to bring into existence a social procedure apt for the solution of any given problem.”69

A fourth mythology about the means-ends relationship that Fuller sought to expose was the belief that ends are always structurally pre-determined unlike means, or the notion that “[m]eans we design, ends we merely choose.”70 In this view, a converse of the myth of infinite pliability was the view that ends are rigid and unpliable. It is in this element that Fuller’s embrace of sociology becomes apparent. When it came to social institutions, ends were much more than just abstract ideals such as preference-maximization. They instead had to be contextualized in terms of their implementation. To Fuller, a stark example of this misconception was to be seen in the value-oriented jurisprudence developed by the New Haven school of McDougal and Lasswell. In his view, “any social goal, to be meaningful, must be conceived in structural terms, not simply as something that happens to people when their social ordering is rightly directed”.71 Ends themselves thus took meaning from context, a large part of which was in the mechanism of ordering/arrangement set out to realize them, and were thus malleable. All the same, he was quick to note that acknowledging the pliability of ends in this contextual manner did not mean accepting their infinite or unlimited pliability; the real answer lay somewhere in between.

The final misconception that Fuller sought to dispel was one that was a recurring theme through his prior discussion of ends and means, and this was the idea that the means employed in social arrangements were always contingent. To him, it was a mistake to treat them as a “necessary evil” needed to realize an end and thus carrying no independent value of their own. Means

67 Fuller, Means and Ends, supra note __, at 70.
68 Id. at 71.
69 Id.
70 Fuller, American Legal Philosophy, supra note __, at 479. The piece that Fuller was critical of was: Myres S. McDougal, The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order, 61 Yale L.J. 915 (1952).
71 Fuller, Means and Ends, supra note __, at 71.
were to be seen as doing more than just imposing a “cost” on the realization of an end in social arrangements, and instead as adding a benefit or “surplus” to them.72

The means-ends correlation that Fuller went to great lengths to emphasize highlights the manner in which eunomics was meant to analyze and understand the structure and form of social and legal arrangements. In an important sense, elements of these arrangements (the means) were seen to have their own ends that were in addition to—and which routinely modified and limited—the independent ends towards which they were deployed. And above all else the interaction between the two framed the form and structure as singularly non-contingent.

B. The “Inner Morality” of Form

Among Fuller’s most enduring scholarly contributions—indeed, one that has withstood the test of time—is his attempt to develop the notion of “legality” based on certain structural precepts seen in the working of a legal system.73 He famously called this the “inner morality of law” and argued that the very idea of law required a system committed to these elements. Without these elements, the content generated by the system was not just bad law, but not law at all. While his use of “morality” was seen as largely out of place in a philosophical sense, the idea has nevertheless since come to be used by scholars to develop a philosophical underpinning for the rule of law.74

Fuller’s idea of “inner morality” is of course foundational in its own right. All the same, it is important to see that the idea was developed from the roots of the eunomics project and thus imbued with a methodological basis that transcends its limited domain. As Ken Winston, who eventually gathered Fuller’s collected works on eunomics and published them as a volume described Fuller’s endeavor, eunomics was in the end a form of “moral sociology” rather than philosophy.75 Its methodology was bottom-up and inductive, but normatively oriented with what Rawls termed “provisional fixed points” that identified middle-level principles.76 As Winston puts it:

72 Id. at 72.
73 Fuller, Morality of Law, supra note __, at 33, 155.
75 Winston, supra note __, at 9.
76 Id. at 4.
The idea is to uncover, and to refine, and only sometimes systematize, the moral perceptions, sentiments, or conventions that are salient for social agents… The sociological insight on which Fuller depends [in eunomics] is that the authoritative principles necessary for a critical assessment of conventional practices are not derived from an external source but from a deeper understanding of the practices themselves. In particular, the resources for moral criticism and justification emerge ineluctably in any society, because moral conformity is itself a reflective practice, generating criteria for its own assessment.\(^\text{77}\)

Eunomics, and The Morality of Law embody a version of what would come to be known as the “sociology of law” or “sociological jurisprudence”, developed more fully by the sociologist Philip Selznick.\(^\text{78}\) Selznick and Fuller were correspondents, and in an early paper that set the stage for Selznick’s then-new theory of the field, he relied on Fuller’s work as prototypical of the method he was advancing, wherein he argued that such a sociological understanding demanded a degree of naturalism, in that it involved recognizing a set of practices and behaviors in society as recurrent and at least partially determined, and therefore normatively desirable.\(^\text{79}\) Despite the heavy baggage that the phrase “natural law” carried at the time, Fuller embraced this naturalistic orientation in eunomics.

Returning to The Morality of Law and Fuller’s identification of an inner morality for a legal system therein, what we see in it is Fuller’s effort to look within legal systems to see what set of conventions and practices were worthy of normative emulation and then convert those into middle level precepts that constituted his theory. The “inner morality” idea was thus at its base a recognition that in a normative system (such as law), there were structural elements that were salient to participants for the system’s realization of its goal—authority—and therefore necessary to its existence as a normative practice. Relatedly, and connected to the aforementioned element of naturalism, the inner morality ideal also entailed recognizing the need for identifying ideal-types that embodied the aspirational normative elements reflectively drawn from existing practice. This is where Fuller’s notion of “morality” played a key role, even if it was a terminological misfit. Situations (i.e., practices) that deviated from the ideal-type did not embody their own—or different—morality. They simply lacked the inner morality of the ideal-type and were thus ineligible to be

\(^{77}\) Id.


\(^{79}\) Selznick, Sociology and Natural Law, supra note __, at 85, 98.
cloaked with its aspirational attributes. The “inner morality” thus entailed identifying features that constituted the *sine qua non* of the ideal type. In *The Morality of Law* it was of a legal system and its idea of law, and with eunomics it was different forms of legal arrangements.

At the core of Fuller’s eunomics project was therefore an ineffable belief that each different form of legal ordering embodied its own “inner morality”. Each had a set of characteristics and criteria that constituted its ideal-type, such that arrangements that deviated from these criteria were simply no longer eligible to be judged and treated as belonging to that category any more. This inner morality, however, mattered not just for taxonomical/categorization purposes. It was instead tied to the nature of the orders and systems that Fuller was studying, which were all deeply normative. The inner morality of the order—be it a legal system or a legal arrangement/ordering—was what gave it its normativity, which allowed it to claim and assert authority over participants. And when the order (or system) lacked that inner morality, its normativity (authority) was thereby directly impacted. But herein lies an often-overlooked reality: just as the components of that inner morality varied from one form of ordering to another, so too would the manner in which that normativity would manifest itself. In *The Morality of Law*, Fuller’s unstated focus is on legislation as a means of legal ordering. With eunomics, that focus broadened to encompass additional mechanisms of ordering and consequently, normativity. It is therefore somewhat misplaced to apply Fuller’s criteria for inner morality identified in *The Morality of Law* to domains beyond legislation, such as private law regimes. Identifying their inner morality requires engaging Fuller’s thoughts on eunomics instead.

Fuller’s treatment of adjudication as a form of legal ordering within the eunomics project tracks the idea of “inner morality” that he developed in *The Morality of Law*. Setting out to analyze the “forms and limits” of adjudication, Fuller readily recognized that the validity of the project hinged on identifying what “true adjudication” as an ideal-type meant and extracting its core features, such that deviations from them could be understood as illegitimate. Rebelling against the relativism of the era, he lamented that “[t]he modern professional university philosopher is particularly allergic to anything suggesting the doctrine of essence and takes it as a sure sign of philosophic illiteracy when a writer speaks of ‘the essence of art’ or ‘the essence of democracy’.”

---

80 Rundle, *supra* note __, at 39-40 (referring to this as the notion of integrity).
81 Fuller, *Morality of Law*, *supra* note __, at 33; Winston, *supra* note __, at 54.
84 *Id.* at 356.
essence of a form was to him instead a “rational inquiry” since social institutions were always driven by “goals or ideals”. Yet those ideals “are never perceived with complete clarity” such that the “existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles”. Those guiding principles were therefore essential to make sense of how the institution was meant to realize its goals. In practice and over time, institutions—including adjudication—certainly came to be embellished with elements beyond those guiding principles, what he termed “tosh”:

Surely there is a good deal of tosh — that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit — in the adjudicative process as we observe it in this country. Our task is to separate the tosh from the essential. If in undertaking that task we go counter to a deeply held modern belief that there is nothing about society or about man's relations to his fellows that is essential and that all is in effect tosh, this is a price we shall have to pay to accomplish our objective. Certainly there is nothing commendable in a procedure that avoids having to pay that price by keeping the discussion on a speciously ad hoc plane, where its broader implications raise no questions because they are not perceived.

Applying this approach to the working of adjudication in different contexts before him, Fuller arrived at what he saw as the essence of true adjudication: “the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.” The “mode of participation” and its singular reliance on “reasoned argument” were thus essential features such that deviations from them “destroys the integrity of adjudication itself”. And when the integrity of the ordering is impacted, its normativity is correspondingly compromised as well.

C. Institutional Design Conventionalism

At its root, eunomics was a project about institutional design. Yet, institutional design in the modern sense in which that term has come to be

---

85 Id.
86 Id.
87 Id.
88 Id. at 364.
89 Id.
90 Winston, supra note __, at 54; Fuller, Means and Ends, supra note __, at 69.
deployed, was not what Fuller envisioned. Efforts to simplistically characterize eunomics as just another term for institutional design miss much of this nuance. As traditionally understood, institutional design represents a form of normative social engineering: institutions are to be designed to further some important value, be it wealth-maximization, efficiency, or the reduction of transaction costs. The term design in institutional design is a verb, connoting the actions of the social engineer, i.e., the designer.

To Fuller, institutional design was something other than just the construction of institutions with an end in mind – which, as we have seen was the whole basis of eunomics to begin with. It was instead something of a sociological exercise in the sense that institutions and forms of ordering were not always designed but instead embodied features that reflected a particular social context. “Design” was thus closely tied to Fuller’s notion of how law operated in society, and his development of what some have called the “interactional” or “implicit” dimension of law.92

In an essay published in 1969 titled *Human Interaction and the Law*, Fuller developed what was arguably his most nuanced account of the normativity of law, and offers what is in some ways a powerful supplement to his account of the morality of law.93 In it, he argues that at its base law is fundamentally directed at facilitating human interaction and often does so by reflecting back different arrangements and conventions that develop habitually as appropriate for that context.94 Gerald Postema characterizes Fuller’s account of law as thus driven by convention as “common law conventionalism” and the idea that “modern law is continuous with, and fundamentally dependent upon, informal social practices.”95 Social and moral phenomena thus inform and shape elements of the law. All the same, Fuller’s account of social practices shaping the law was a decidedly strong one, one that Postema accurately describes as embodying a “congruence thesis” according to which “legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society generally.”96

Fuller’s conventionalism applied just as much to arrangements and orders within law, as they did to the substance of legal rules.97

---

92 Id. at 393; Gerald J. Postema, *Implicit Law*, 13 Law & Phil. 361 (1994).
94 Id. at 20-36.
95 Postema, *supra* note __, at 362.
96 Id. at 373-74.
97 Soltan, *supra* note __, at 392.
forms of ordering/arrangement developed organically through social convention, as practices that individuals in society put in place to facilitate their interaction. And often, these forms of ordering are not developed with a clearly identified goal (e.g., wealth maximization) in mind, but rather through little more than habituation, or the simple fact that they seem “appropriate” to the interactional task at hand, an allusion to the notion of fit.98 Formal law then often sought to absorb the structures of these interactional orderings/arrangements rather than remake them entirely from scratch. This, of course, did not mean that formally constructed orderings did not often deviate from pre-existing conventional orderings; rather that the default approach was congruence to such convention.99

The conventionalism thus embodied in institutional arrangements also gave them an organic and evolutionary dimension—drawing on felt social need, conceptions of morality, and as Fuller occasionally put it, human ingenuity. 100 They thus represented moral intuitions shared by a society and evolved over time as those very intuitions changed or came to be seen as better-represented in alternative arrangements or ordering. Both aspects of Fuller’s conception of institutional design, i.e., its conventionalism and its organic nature, are readily apparent in one of his least known essays which formed part of the eunomics project, published as a law review article. Oddly titled Irrigation and Tyranny, it attempts to review a book that relied on historical and archeological evidence to conclude that “irrigation is normally accompanied by tyranny”.101 Fuller uses his review to examine the form of social ordering embodied in a tyranny, which he elsewhere describes as “managerial direction”.102 And in so doing, he examines the circumstances under which society would ever come to adopt tyranny (or managerial direction) as a form of social ordering.

In his view though, it was important to recognize that any form of ordering—including tyranny—was a product of the interactive nature of law and the implicit conventions that emerge therefrom:

By “the forms of social order” I do not refer to the forms by which men’s relations are often supposed to be structured, where conformity is assumed to take place automatically without any awareness of an alternative. Rather I have in mind those active processes of social decision by which

---

98 Id. at 393. See also Fuller, Human Interaction and the Law, supra note __, at 13.
99 Postema, supra note __, at 374.
100 See Fuller, Human Interaction and the Law, supra note __, 12-13 (describing this idea using traffic laws as an example).
102 See, e.g., Fuller, Forms and Limits of Adjudication, supra note __, 398.
deficiencies and conflicts are removed, and a stable foundation for future relationships is established.103

Despotism (i.e., tyranny) was a form of social ordering imbued with its own inner morality, just like any other institution. A denial of this reality, to Fuller was “based on a profound misconception of the relation between morality and social forms.”104 Instead, it required recognizing a form of “institutional morality” which emerges as a matter of convention from “the simple picture of human beings confronting one another in some social context, adjusting their relations reciprocally, negotiating, voting, arguing before some arbiter, and perhaps reluctantly even deciding to toss for it”105.

Internal to such conventionalism was an organic dimension, which Fuller described in Darwinian terms: in creating conventions, participants themselves evolve and thus bring into existence newer and more sophisticated conventions over time. As he observed:

To enjoy a game the child must have the moral insight to see the necessity for rules and must possess the self-control that will enable him to abide by the rules, even in defeat. These are qualities obviously lacking in the very young child. Yet the only way he can acquire them is to start playing games. When he does, working within the institutional forms of the game generates the moral qualities necessary to make the game playable. … [M]oral insights [develop] through participation in institutional procedures. …

So, if humanity has over the centuries shown some slight capacity to outgrow its inclination toward and its dependence upon despotism, this growth reflects not only the increasing availability of social alternatives to despotic rule, but also an increasing moral disposition to employ these alternatives which has itself been nurtured by actual experience with their use.106

Returning to eunomics, it is important to appreciate that Fuller’s insistence on the conventionalism and organicity of social ordering and institutional design was more than just a descriptive claim. It had an important diagnostic dimension to it. This related to the manner in which eunomics was meant to analyze and extract the “essential” features of a form of ordering. Recognizing that the forms were (a) sociologically derived from conventions

---

103 Fuller, Irrigation and Tyranny, supra note __, at 1030-31.
104 Id. at 1033.
105 Id.
106 Id. at 1033-34.
and, (b) that they evolved incrementally over time and context, played directly into the task of sifting between the necessary elements of the form and the irrelevant “tosh” that accompanied it. Indeed, this was an unstated element in Fuller’s own analysis of despotism in the piece described above, where the hallmark of the ordering he elsewhere characterized as “managerial direction” was “direct, personal rule”.  

* * *

Eunomics was thus designed to be a subject devoted to the study of institutional form and arrangements within the law, which Fuller saw as neglected and misunderstood within the world of legal theory and philosophy. All the same it was much more than just the study of form/design as it had been traditionally understood at the time, and ever since. The arrangement/form was to be seen as imbuing the domain with its own goals and values rather than as just servicing pre-identified ones. These values, often described as “process values” were less foundational than the ends commonly articulated for different substantive laws but were, in his account of eunomics, perhaps more (or at the least, just as) important in being closer to the actual functioning of the law. And in as much as these forms took shape from existing social conventions and practices, their values were a reflection of existing social morality.

The recognition that the means deployed in a legal ordering, i.e., its form, could interject an independent set of values into the regime was an unstated source of normative pluralism in the system, something that Fuller recognized. In so doing, eunomics identified a form of pluralist reasoning in the law, one that legal philosophers have described as “conceptual sequencing” and traced back to the Kant’s own conception of private right. In conceptual sequencing, divergent (and at times incommensurable) values are introduced into a legal regime but in stages, where each “presupposes and complements the previous one without invalidating it.” Eunomics was at its root then, a modality of identifying such conceptual sequencing in the law.

Finally, the eunomics project was an integral part of Fuller’s project of attempting to identify the modes of legal normativity. This search for normativity was not just about understanding how, when—and when not—the

107 Id. at 1033.


109 Weinrib, Reciprocal Freedom, supra note __, at 97.
law exercised authority of individuals, but also about determining the institutional mechanism through which such authority manifested itself. Its commitment to analyzing the operation of law was inextricably tied to insights about lawmaking processes themselves.

II. THE MISSING GAP IN INTELLECTUAL PROPERTY THEORIZING

The term “intellectual property” conceals more than it reveals. Routinely used as a stand-in for various forms of exclusive rights regimes that relate to discrete intangibles, it is today seen as an umbrella concept that encompasses patent, copyright, trademark, trade secret, and allied areas. Their minimal commonality—as denoted by the term—is thought to lie in their reliance on exclusivity and exclusion as their functional mechanisms, which mimics the working of property’s “right to exclude” and thus lends credibility to their characterization as forms of property.110

Often, but not always, missed in this facial continuity between the reliance on exclusivity/exclusion and property is the reality that the manner in which such exclusion is structured (i.e., ordered) by each legal regime within intellectual property tends to differ. Copyright relies on a regime that is dependent on proof of copying for liability, and is structured around that idea; patent law, by contrast, has no concern for copying and organizes itself as a state-granted monopoly that restricts all uses of the protected invention. Finally, trademark law ties itself to a claimant’s market-based use and then focuses on comparing a new entrant’s use to the claimant’s prior use. While it is all too easy to ignore these differences as minimal, a closer scrutiny reveals them to be foundational to the very existence of each regime.

To date, the most sophisticated treatment of the variation among intellectual property forms is to be seen in the work of information cost theorists, who have sought to explain it in terms of the costs of delineating and processing information about entitlements in these regimes.111 Yet, the explanatory potential of information cost theorizing—as a normative account for the myriad forms at play—is concededly minimal.

Clarisa Long’s work has focused on explaining the variation in “form” between patent and copyright law using information cost theory.112 Analogizing the theory to transaction cost minimization, she has argued that “it is most

112 Long, supra note __, at 467.
efficient” to align the specific “organizational form” with the “intellectual good” at hand, which involves examining the information costs surrounding each such good.113 With this in mind, her account attempts to explain key differences between the two regimes based on taking the intellectual good/asset as a given in the analysis. While her work eschews any effort to offer a “unifying theory” based on the variations, it nevertheless accepts as a given the normative ideal of maximizing welfare.114 In accepting this framing (and the primacy of welfare), the descriptive account nevertheless begins with a pre-identified end and connects its theorizing to that end. And while it is persuasive on its own terms, it treats elements of the architecture as emanating from a “master plan”, instead of taking them on their own terms and understanding their normative valence in the system.115 In the process, the account fails to countenance considerations other than welfare and cost-minimization, rendering it unidimensional.

Drawing on his work identifying “exclusion” and “governance” as two alternative (ideal-type) strategies of entitlement delineation in property, Smith has also argued that much of the variation in the designs of copyright and patent law can be explained by their differing approaches to managing information costs.116 All the same, Smith is rightly tentative about the implications that can be drawn from his account about the working of intellectual property’s broader theories, examining which he sees as largely “fruitless”.117 Even if testing his information cost theory on intellectual property is feasible, he rightly observes that the implications of the theory as a full explanation for “differences among areas of intellectual property” is at best “tentative” and but a “begin[ning].”118 Smith’s emphasis thus highlights that his theory is an interpretive—rather than normative—one, and Smith makes a conscious effort to avoid tying his account to the broader normative ends that are usually associated with intellectual property.

Recognizing that intellectual property regimes model themselves on “exclusion” does not however account for how that exclusion is ordered differently within each regime. Smith’s work suggests that a connection between the reasons for these differences and the original justifications for the regimes might well be difficult to discern, analogous to the mythical “philosopher’s

---

113 Id.
114 Id. at 467 n.4.
115 Fuller, Means and Ends, supra note __, at 69.
117 Smith, Intellectual Property, supra note __, at 1798.
118 Id. at 1799.
Integrating information cost theory into the broader normative rationales for intellectual property is something that Smith sees as largely orthogonal to his endeavor, and for good reason since his aim is not to offer an overarching normative justification for intellectual property regimes.

On the other hand, as this Part shows, normative theories that attempt to justify the very basis and existence of individual intellectual property regimes in terms of specific ends and values encounter an obvious (albeit, underappreciated) puzzle. And this lies in their inability to extend their end-based normative justifications to the peculiarities of the form of exclusion deployed in those very regimes. Using Fuller’s eunomics framework to examine this deficiency reveals that it is much more than just a minor theoretical oversight. The oversight instead extends to elements of these forms that have long been taken as stable and thus considered essential to the very regimes at issue. Further, it muddies the conversation about the appropriate lawmaking institution at the helm of each regime and thus distracts from a clearer understanding of the nature of legal normativity that individual forms of intellectual property rely on.

A. Substantive Goals Over Essential Forms

An unmistakable hallmark of justificatory theories commonly offered for intellectual property is their emphasis on normative ends while only superficially (if at all) engaging with the form and structure of the law. The structure of each regime is instead seen as contributing very little to those ends, even if it is shown to be compatible with specific ends. This is unfortunately as true of economically-oriented utilitarian accounts of the field which dominate the discourse today, as it is of the various rights-based and moral theories that have seen a resurgence in recent times. Their methodology, as Fuller put it, is to develop a hierarchical ordering of human ends as a “master plan” and then fit “the details of social architecture” into that plan. The architecture (form) is seen as unrelated to—and adding nothing to—the meaning and content of the ends identified in the master plan. Now it certainly is not the case that a justificatory theory needs to explain every structural feature of a regime, for as Fuller also noted many such features are simply superfluous “tosh” added out of expediency and compromise. All the same, there is a core structure to each

---


120 Fuller, Means and Ends, supra note __, at 69.
intellectual property regime that these theories also gloss over as normatively insignificant to their accounts.

1. Utilitarian Accounts

Within copyright law, the dominant justificatory account for the existence of the system is today utilitarian. According to this theory, which of course emerges in different nuanced versions, copyright exists in order to provide creators with a market-based economic incentive to create original works of expression. In other words, copyright’s promise of exclusivity (through its regime of exclusive rights) exists in order to motivate creators to produce their work, without which they would find little reason to do so given the non-rival and non-excludable nature of the resource at issue, i.e., expression. Such is the influence of this theory that it had found widespread acceptance not just among scholars, but also among courts. Many decades ago now, the U.S. Supreme Court described copyright’s underlying theory in the following terms: “By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”

Scholarly accounts of the incentive theory either ignore copyright’s central features altogether, or instead find a way to fit these features into the goals of the theory. One of the earliest theoretical accounts of the incentive theory in copyright comes from the Chicago-economists Robert Hurt and Robert Schuchman, who examined whether copyright’s incentive argument can be understood in terms of welfare economics. To be sure, as economists—and not lawyers—their focus was on the broad working of the copyright system rather than with its details, but they said surprisingly little about copyright’s focus on copying. Despite this, their conclusion on the theory itself was surprisingly weak:

[As to] the view that copyright protection should be judged by its effect upon economic welfare. Here we enter an inconclusive area of speculation… we can say that the traditional assumption that copyrights enhance the general welfare is at least subject to attack on theoretical


grounds; the subject certainly deserves more investigation and less self-righteous moral defense.\textsuperscript{124}

A few decades later, Richard Posner and Bill Landes sought to develop the incentive account further as part of the law and economics movement.\textsuperscript{125} Their account of the incentives theory recognized the need for optimization, leading them to observe that copyright “trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. … the central problem of copyright law.”\textsuperscript{126} All the same, their model was about the end goal of economic efficiency, and they noted at the outset that “[f]or copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”\textsuperscript{127} And with this model in mind, they set out to examine aspects of the copyright system. It is here that they parted ways with Hurt and Schuchman.

To their credit, Landes and Posner did address copyright’s key structural detail: its reliance on copying to effectuate its exclusivity, and attempted to explain its centrality to copyright while acknowledging it to be a “difficult question”.\textsuperscript{128} And while they offered two separate accounts for its existence, their approach followed the pattern Fuller was critical of—the attempt to fit this problematic detail into their account of the broader master plan of economic efficiency. Their first explanation was that copying was a cost-saving mechanism in that it lowers the cost of producing new expression since creators do not need to worry about the similarity of their creation to other work as long as it is not copied.\textsuperscript{129} Such cost-saving reduces welfare losses and thus feeds into the goal of economic efficiency. Their second (alternative) explanation at first appeared more promising: that copying is problematic because it is a form of free-riding that detracts from overall welfare.\textsuperscript{130} And it does so because a copier’s free-riding on a protected work allows the copier to avoid internalizing the “cost of expression”.\textsuperscript{131} All the same, this internalization matters only because it otherwise allows for a form of unfair competition by the copier who

\textsuperscript{124}Id. at 432.
\textsuperscript{126}Id. at 326.
\textsuperscript{127}Id.
\textsuperscript{128}Id. at 344-45.
\textsuperscript{129}Id. at 345.
\textsuperscript{130}Id. at 346.
\textsuperscript{131}Id.
whose free-riding has lowered its costs of competing in the market. In other words, the inefficiency of such competition is driven by the disparate cost-saving that free-riding would produce.

At a superficial level, the Landes-Posner attempt to connect copying to free-riding and its inefficiency may seem plausible. Yet, again it misses a reality that is integral to copyright law: while copyright law relies on copying for exclusivity, not all copying is treated as problematic. When copyright treats copying as problematic, it does so quite independent of the effect (if any) of such copying on market competition. And conversely, when free-riding (even with a market effect) is shown to exist, that in itself does not mean that copying—as understood by copyright law—exists. Copying and free-riding can diverge and are not necessarily the same.

Yet what the Landes-Posner account starkly illustrates is precisely what Fuller complained of in making the case for eunomics. The Landes-Posner “model” is driven by their acknowledged end of economic efficiency, and the institutional details of copyright are then slotted into that model to show how such details are informed by the same end.132 The analysis thus begins with the key goal, rather than the key institutional details of copyright. This forces them to then ask: “how does copyright’s reliance on copying square with its commitment to economic efficiency?” rather than “why does copying play a central role in framing copyright law?” The latter may well require a less dogmatic reliance on economic efficiency as the “end” of the system. Indeed, as we shall see later, beginning the scrutiny of ends concomitantly with essential features of an institution for copyright brings underappreciated attention to aspects of copyright that the efficiency/competition analysis of copyright misses. This includes the relational (or bipolar) aspect of copying in its manifestation as a wrong, its corresponding reliance on adjudication for resolution, and thus the form of horizontal normativity that copyright law comes to rely on.

A related eunomics-driven critique of the Landes-Posner approach derives from Fuller’s identification of the myth of end-based determinacy, described previously, or the mistaken belief that ends are chosen while means are designed.133 As is obvious from the manner in which they approach their analysis, Landes and Posner see the end of economic efficiency as chosen rather than molded. This in turn has important implications in that it is seen as not just incompatible with other non-efficiency goals, but also displacive of other ends even when they describe components of the system. In other words, their model sees it as necessary not just to explain the overall working of copyright law in

132 Id. at 326.
133 Fuller, Means and Ends, supra note __, at 71.
terms of economic efficiency, but to also additionally make the case that individual components of the system—its means—are driven by that end. Or, in their view, once the end is chosen, the means are designed exclusively with that end in mind.

These shortcomings are perhaps equally stark when we move from copyright law to patent law, where economic accounts have long dominated the justificatory discourse. Stated in very general terms, these accounts posit that patents “provide an incentive or reward for the sizeable investments needed to create the intellectual property disclosed in the patent document.”\(^{134}\) The most influential version of this theory originated in the work of Edmund Kitch, who developed what came to be called the “prospect theory” of patents in a 1977 article.\(^ {135}\) According to this theory, patent law exists to provide inventors not just with an incentive to invest in research, but does so at an early stage in the development of an invention so as to avoid inefficient and wasteful races among competitors working in the same domain. Patents thus work like mineral prospecting rights and allow their holders to explore the domain of the grant without fear of interference from competitors.\(^ {136}\)

Kitch’s account has had its fair share of critics and champions.\(^ {137}\) Almost all of that literature has, unsurprisingly, focused either on elements of Kitch’s underlying economic theory and its assumptions, or the disconnect between the theory on the one hand and the actual working of the patent system and the nature of inventions that it protects on the other. Missing in this is a discussion of the central intuition that Kitch seems to have relied on, but submerged in his original analysis, relating to the form of the patent grant, which resembled property rights in mineral prospecting licenses. As he put it, patents are designed to “award[] exclusive and publicly recorded ownership of a prospect shortly after its discovery.”\(^ {138}\) In his original article, Kitch’s focus was the economics and functioning of patents as prospects, which he then sought to justify as contributing to social welfare, measured of course by economic efficiency.\(^ {139}\) With that goal in mind, Kitch moved rather rapidly to understanding the economic value inherent in such prospects, taking the patent-property rights analogy as a given in his model. If Kitch was on to something in noticing that the form of patent rights mimicked the working of mineral prospecting rights, he never fully explored what that form brought to bear on the patent system,


\(^{136}\) *Id.* at 266.

\(^{137}\) For an account of this commentary, see: Duffy, *supra* note __, at 440-43.

\(^{138}\) Kitch, *supra* note __, at 266.

\(^{139}\) *Id.* at 267.
given his ultimate goal of establishing the efficiency (and “useful social function”) of the patent system, so understood. And the large amount of literature on his theory ever since has done little to resurrect it.

Other utilitarian theories in patent law fare much worse in this respect. Prior to Kitch’s work, patent law thinking had come to be dominated by the reward theory, according to which patent rights operate as rewards for inventive activity that would otherwise be difficult to incentivize. Almost all of the literature that focused on rewards failed to address why the reward necessary for such incentive activity needs to take the particular form seen in a patent right, a grant-based monopoly. Indeed some it focused on the effects of imitation, which arguably would be better captured by a system that focuses on copying. Yet, reward theory and its variants skip this analysis altogether, focusing more on the goals of the patent system and thus the consequences—rather than the form—of the patent grant.

We see a similar emphasis in theories that some characterize as “ex post”, wherein the focus is on the value derived from allowing the rights-holder to coordinate (and control) all future uses of the intangible underlying the right, in order to maximize value from it. These theories are often not limited to patent law, but used to explain other areas as well such as the right of publicity as well as aspects of trademark law such as its dilution doctrine. Again, both the theories as well as critiques of it, pay scant attention to the form of ordering underlying the right being analyzed. Even if such coordination and control were desirable ends, these theories do not tell us why the form that patent law takes in structuring its rights and rendering them enforceable serves that end better than others. And critiques of the theory, for their part, focus on the mismatch between the theory and the working of the system, thus directing their attention once again at the ends chosen in the theory over all else.

---

140 Id. at 289.


142 Indeed, even economists have argued that this remains an unexplained puzzle within the reward theory. See Steven Shavell & Tanguy van Ypersele, Rewards versus Intellectual Property Rights, 44 J.L. & Econ. 525 (2001) (arguing that when measured as a reward, intellectual property rights do not possess an economic advantage of traditional forms of rewards such as direct payments).


145 Id. at 131-32, 141-42.
2. Rights-Based Accounts

More recently, intellectual property law has seen the emergence of multiple efforts to try and offer alternatives to the dominant utilitarian accounts just described. At least part of this has been motivated by the inability of utilitarian accounts to account for several crucial features of the patent and copyright regimes, which these accounts purport to do a better job with.\textsuperscript{146} In contrast to utilitarian theories, these accounts begin with the stated need to make sense of why intellectual property regimes are structured as rights rather than as other possible mechanisms, such as collective (i.e., criminal) enforcement. While this seeming prioritization of structure may at first seem promising as a eunomical exercise, they soon embrace many of the same problems and deficiencies that Fuller identified, and which the utilitarian accounts failed to overcome.

Arguably the most successful rights-based account of copyright in recent decades is to be seen in the work of Abraham Drassinower, who tries to develop a Kantian account of copyright law.\textsuperscript{147} Central to Drassinower’s account is the effort to make sense of copyright’s “fundamental features”.\textsuperscript{148} On its face, this may seem to be a direct echo of the eunomics exercise; yet, he soon takes it in a different direction. Instead of simply identifying copyright’s fundamental features and then examining what they bring to copyright, Drassinower’s project is instead to try and fit them into a “coherent whole” in order to explicate the rationality of the interconnected system.\textsuperscript{149} And this leads him to rather quickly identify an end for the system: protecting the “integrity of the work as a communicative act.”\textsuperscript{150} With this end in mind and coherence as his overarching methodological goal, the account then proceeds to identify and explain individual doctrines in copyright to show how they are all connected by the emphasis on communicative autonomy.

Despite seemingly structured around the issue of form as the book’s title suggest, Drassinower’s theory itself elides any deeper examination of the form of exclusivity reflected in copyright’s reliance on copying, and which he elsewhere categorically abjures as central to copyright.\textsuperscript{151} And soon enough, the account starts fitting elements of copyright doctrine into its theory of communicative freedom. Now as an account that is directed at revealing the

\textsuperscript{146} See, e.g., Abraham Drassinower, What’s Wrong with Copying? 1-5 (2015).
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 7-8.
\textsuperscript{149} Id. at 8.
\textsuperscript{150} Id.
\textsuperscript{151} Abraham Drassinower, Copyright is Not About Copying, 125 Harv. L. Rev. 109 (2012).
internal rationality of copyright doctrine, Drassinower’s Kantian theory is very successful. All the same, it altogether avoids engaging copyright’s form and falls back on the approach that Fuller criticized. Drassinower’s identification of the end—both substantive (communicative freedom) and methodological (system coherence)—motivate him to pick and choose doctrinal elements of copyright to explain his theory. Unlike some other accounts that prioritize coherence and thus use doctrine and form to generate an end (e.g., Weinrib and corrective justice \(^{152}\)), Drassinower’s theory reveals no connection between his identified end and the particular form of copyright doctrine. He thus nowhere stops to ask an obvious question that we saw utilitarian accounts also miss: even assuming his identified ends are defensible, why does copyright’s current form—its insistence on a private law mechanism of rendering copying actionable—best serve those ends? What is it about copying, even when accompanied by appropriate attribution, that makes copyright focus on it as an essential feature? In constructing his theory, Drassinower’s focus is on doctrine and principle rather than structure/form and as such treats form as a contingent part of the account.

A somewhat more far-ranging rights-based theory that unfortunately also neglects form despite going beyond foundational ends is Rob Merges’ account in *Justifying Intellectual Property*. \(^{153}\) Merges frames his theoretical account as a response to the standard utilitarian argument for intellectual property, which he sees as “empty” and incapable of being a “serviceable first-order principle” of the system. \(^{154}\) He therefore proposes taking seriously the idea that intellectual property is structured and described in terms of “rights”. Instead of taking this in a structural direction directly, Merges then ties the notion of rights to the concept of property, arguing that the “right” in intellectual property is rooted in the system’s functioning as a property right, which allows for a “one-to-one mapping between owners and assets”. \(^{155}\) The key to Merges’ theory lies in what he calls “midlevel principles”, or as he puts it “basic concepts that tie together a number of discrete and detailed doctrines, rules, and practices in a particular field”. \(^{156}\) Drawing on Jules Coleman, Merges’ approach is inductive and begins in the “middle”. \(^{157}\) He contrasts these with “foundational” principles and

---

\(^{152}\) See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 966 (1988). Weinrib’s account is much closer to the eunomics project. Weinrib, for instance identifies “essential characteristics” of the law’s content, which he sees as essential for the theory, without which the theory may be “regarded as contrived or artificial or somehow amiss.” *Id.* at 966-67.


\(^{154}\) *Id.* at 3.

\(^{155}\) *Id.* at 5.

\(^{156}\) *Id.* at 139.

\(^{157}\) *Id.* at 139-40
specific details, thereafter proceeding to identify a few that he then argues collectively justify intellectual property: nonremoval, efficiency, proportionality, and dignity.158

Again at first glance, Merges’ account seems to have a lot in common with eunomics. The notion of mid-level principles appears to echo Fuller’s notion of the middle-range, and Merges’ abjuration of foundational ends suggests that it may well locate its anchors in the structure of the field. To be sure, Merges gestures in this direction, especially with his effort to root the field in the structure of property. All the same, the similarity abruptly ends there since it turns out that Merges’ theory has no place for structure/form at all, and even in contrast to Drassinower’s is simply ends-based but in a slightly different sense than is traditionally understood.

The dissimilarity originates in Merges’ idea of midlevel principles. While Merges draws on Coleman’s use of midlevel principles to explain tort law, his use of the idea is very different. To Coleman, midlevel principles partake of what some have called “pragmatic conceptualism” in that they look for such principles as “embodied in the relevant practice of the field”.159 All the same, his search for such principles in tort law is “structural”, and rooted in the bipolar nature of the system wherein the defendant’s responsibility is measured by the harm sustained by the plaintiff.160 It is indeed the structural nature of Coleman’s inquiry that gives it its pragmatic—i.e., functional—orientation.

By contrast, Merges has little interest in structure devoid of ends. His midlevel principles do little more than explicate the rationales behind discrete sets of rules in intellectual property. But in so doing, they indelibly identify an “end” that the rules are directed towards and indeed Merges’ own account of them is heavily interpretive in this sense. Thus, while Coleman at least in theory tries to frame his account as an explanation—rather than a justification—in an effort to eschew a commitment to a moral end, Merges actively embraces a focus on ends. The only variation is that his ends are not “foundational” but rather at the level of principle, a distinction that allows him to embrace a form of normative pluralism in the abstract.161

Merges’ singular focus on justificatory ends or values for intellectual property is borne out further in the complete absence of any sustained discussion within his book of the differences in form that one encounters in the field of intellectual property. Indeed, at times Merges treats intellectual property as a monolithic body of law without making much of its doctrinal and institutional

---

158 Id. at 139.
160 Coleman, supra note __, at 15-16.
161 Merges, supra note __, at 9-10.
nuances. At the risk of stating the obvious, Merges’ account is perhaps what Fuller very much had in mind in developing the eunomics framework to begin with, given its rather emphatic and exclusive focus on ends, without ever acknowledging that the forms (i.e., means) deployed in individual regimes play a crucial role in making each regime what it is.

* * *

In short then, almost all theoretical accounts that have sought to justify intellectual property, whether as a whole or by individual regime, routinely emphasize the ends and normative goals of the regime and altogether neglect any serious discussion of the structure and form that different forms of intellectual property take. Indeed, this is as true of utilitarian accounts as it is of rights-based accounts. In singularly focusing on the goals and values of intellectual property regimes, most theories treat the form and structure of individual regimes as contingent details (or “necessary evils”) needed to operationalize their account, and no more. Never once do they stop to ask whether the goals being identified for the system are influenced by, compatible with, or detract from, the actual forms at work in each individual regime. And this is true despite the universal recognition that the basic form of each of these regimes—patent, copyright, trademark—has remained surprisingly stable ever since their origins.

It is perhaps worth pausing to ask why it is that intellectual property theorizing has over the decades paid such scant attention to the question of form in its unidimensional focus on substance. Again, Fuller’s diagnosis appears to hold true. As Fuller made clear in setting out the idea of eunomics, the belief in a value-oriented approach to legal theory was a theme made prominent (and mainstream) by Legal Realism. He saw in the work of Harold Lasswell and Myres McDougal at Yale, a rather egregious example of this approach, wherein they sought to identify “fundamental values” that law should strive toward and then treated form as but technical implementation. Fuller’s use of the Lasswell-McDougal project as a foil for his theory was but a continuation of his well-known fight with the Legal Realists, which included McDougal. We see a direct thread from this exchange to modern theorizing about intellectual

---

162 See id.


164 Fuller, *American Legal Philosophy*, supra note __, at 479.

property, where Legal Realism is today the dominant intellectual methodology. The law—certainly intellectual property law—is only ever valuable when measured through “relatively concrete social ends.”

B. Form Neglect and Normativity in Intellectual Property

Theories of intellectual property law have a difficult time making sense of the institution’s overall form and the forms underlying individual regimes. And this is of course when they try to extend their theory to form, given that most of them simply overlook any discussion of form. As previously noted, this form—at its roots—relates to the mechanism of exclusion that each regime embodies. This oversight, however, is more than just an explanatory failure that exposes the inadequacy of each theory. It instead has deeper ramifications that connect directly to the form and nature of legal normativity that the intellectual property regime at issue relies on, and thus to the question of lawmaking authority within the regime. While Fuller hinted at these concerns in his work, they require some further elucidation and extension for clarity.

As an idea, the normativity of law is understood to lie in the manner in which law provides agents with independent reasons for their behavior. It thus relates in a direct way to the mechanism by which legal rules exercises legitimate authority over individual behavior. To Fuller, normativity was integral to his very vision of legality, and as we noted previously the notion of the “inner morality” of a form of legal ordering was tied to its very normativity. The essential features of a form of legal ordering were therefore indelibly tied to the normativity of law emanating from that ordering. For instance, adjudication’s reliance on reason was critical to the normativity of the common law. When devoid of such reason—for instance, if courts were to issue orders bereft of express reasoning—adjudication would lose its inner morality and deeply erode the normativity, i.e., the authority, of the common law that emanates from such a reason-free process (which Fuller would not even call adjudication).

In so far as exclusion remains the conceptual idea that unifies intellectual property, each intellectual property regime operationalizes that exclusion—i.e., produces agent behavior that realizes such exclusion—in different ways. Each of those ways, in turn, produces the desired exclusionary effect because of its structure, i.e., its means. In traditional (i.e., tangible) property, that structure is mediated by the role of the res (the thing), a point that Henry Smith has forcefully made in prior work, showing how the thing mediates the normativity

166 Id. at 838.
167 See generally Jeffrey Kaplan, Attitude and the Normativity of Law, 36 Law & Phil. 469 (2017); Joseph Raz, Authority, Law and Morality, 68 The Monist 295 (1985).
168 See supra text accompanying notes ——.
of exclusion in different ways using different doctrinal “means”, such as trespass, nuisance, and the like. Another way of conceptualizing this same phenomenon, as some legal philosophers have, entails recognizing that the conceptual structure of a legal regime dictates its normativity, in terms of what is referred to as the “normative structure” of the domain at issue. Tort law’s normative structure, for instance, is seen to emanate from its reliance on the concepts of “right”, “duty”, and “liability”, among others that structure its directives.

Rather unsurprisingly, the same is true of intellectual property regimes, where exclusion is differentially structured in each instance. Take the case of the two best known intellectual property regimes: copyright and patent. As has been noted, a crucial difference between them is that exclusion in copyright is structured around copying, i.e., it operates by granting its holder the exclusive right to copy the work under protection. This is in contrast to patent law, where exclusion is closer to tangible property and built around use, i.e., it operates by giving its holder the exclusive right to use the invention in any and all ways. It is all too easy to say that this difference is of no consequence since both are forms of property, or to simply characterize it as varying mechanisms of providing notice to actors through “claiming”. It instead alters the very nature of normativity underlying the law’s exclusionary signal. This merits some elaboration.

Patent law adopts a mechanism of exclusion that operates by identifying the contours of a notional res, the invention. It specifies the details of that invention in detail (the specification, and its claims) and provides a mechanism of heightened notice of it (publication with presumptive constructive notice). And with this, it signals a duty to others to exclude themselves, or forebear from the domain of the invention. Much like tangible property, the published patent mediates the right-duty relationship between patent-holder and the world at large, in what might be best described as a form of resource-mediated relational normativity. Unlike patent law though, copyright operationalizes its exclusionary signal through a more directed focus on behavior, specifically the act of copying. And for this, it relies much less (if at all) on a res and focuses instead on the nature, scope, and consequences of the defendant’s behavior. It therefore embodies what we might call simple relational normativity, of the kind

---

172 See, e.g., Epstein, Disintegration, supra note __.
173 See, e.g., Jeanne C. Fromer, Claiming Intellectual Property, 76 U. Chi. L. Rev. 719 (2009);
commonly seen in other domains of private law such as tort law. Both are of course forms of private law normativity structured around right-duty relationships that operate at an inter-personal level. And yet, the form through which the exclusion is signaled—i.e., whether it is resource-mediated or unmediated altogether—is hardly just an incidental detail. Resource-mediation adds an impersonal dimension to an otherwise interpersonal normativity, and one where the shaping of the res by the state imbues the normativity with vertical elements, beside the horizontal.

The next Part unpacks this variation and its implications further, but for now the central point is that a failure to acknowledge the salience of these form differences is not just a matter of “tosh”, but has a crucial qualitative aspect to it that lies in the regime’s conception of legal authority. To further appreciate this, we need to unpack the obvious connection between normativity and lawmaking institution that emanates from the difference just alluded to (between a resource-mediated relational normativity and an unmediated one).

Resource-mediation involves identifying a resource (res) through which the exclusionary signal manifests itself in a right-duty relationship. The “thing” forms the basis of the right, and the correlative duty of forbearance is directed at the right-holder through the thing. Shaping the thing is therefore a crucial precondition to the subsistence and workability of the normativity. Put simplistically, it is impossible to operationalize the directive “stay away from X’s invention” without specifying what that invention is. And with intangibles, unlike tangible objects, delineating the thing is an important task. Yet for obvious concerns of rational self-interest, the law chooses to avoid delegating that task to private parties but instead demands a more direct role for the state in this task, in the hope of greater neutrality and out of a normative commitment to the collective (rather than just individual) good.

The state’s involvement in shaping the resource which mediates the right-duty relationship calls for it to take a more directive action, which takes it out of the framework of the traditional common law where the law is less directive and allows the right-duty relationship to be understood and enforced at the interpersonal level. In other words, this shaping function calls for a lawmaker other than courts. In the patent system, the executive (i.e., the Patent Office) is seen as best suited to that end, but conceptually one might see it emanating from the legislature.

The nature of legal normativity is therefore closely tied to lawmaking institution. The relationship between them is less cause-effect, in that the nature of normativity calls for a particular institution, or indeed vice-versa. It is much more of a two-way dynamic wherein both normativity and lawmaking institution reinforce each other in the understanding of the form deployed in each intellectual property regime. Again, to bring us back to Fuller, the key lies in
treat neither as wholly contingent nor fully determined, but instead as both constraining and facilitating.

Neither utilitarian nor rights-based accounts of intellectual property grapple with the nature of legal normativity embodied in intellectual property regimes, whether individually or as a whole. And as a result, they never even reach the question of lawmaking institution. On the rare occasion that they do reach discussion of the institution, they unsurprisingly view the constraint as emanating from external considerations (e.g., separation of powers) rather than as integral to the very domain and its form, and as thus unconnected to their theories.

III. THE LIMITED FORMS OF ORDERING IN INTELLECTUAL PROPERTY

The eunomics framework allowed us to see how theorizing in intellectual property, whether justificatory or not, has neglected the limited means deployed in individual intellectual property regimes to structure the system. The ubiquity and persistence of a finite number of ways in which intellectual property regimes are ordered is perhaps seen as reason to treat them as givens and avoid theorizing their role in the system. Yet it is precisely this persistence in form that merits further investigation. For centuries now, across time, geography, technological development and changing conceptions of law, the individual forms of intellectual property law have remained stable at their core—much like other foundational areas of the common law. Copyright law has always centered around a right against copying, patent law on the grant of a defined monopoly by the state, and trademark law on the use and possible registration of reputational-identifiers.

Fuller’s account of eunomics provides us with a plausible way of making sense of these forms, their persistence, and perhaps most importantly what they each bring to the goals and values of each regime. And it is here that the conventionalism that he associated with his identification of different forms of ordering, coupled with his theory of freedom emerging from limited forms, offers an explanation for both the limited set of forms seen in intellectual property as well as their persistence.

This Part unpacks the link between eunomics and the limited forms of ordering seen in intellectual property. It begins by first situating the idea of limited forms within Fuller’s account of freedom and conventionalism, in effect suggesting that Fuller identified the equivalent of a *numerus clausus* of sorts in the forms of ordering (II.A), which is observationally true in intellectual property. It then moves to identifying the essential features of the three most persistent forms of ordering seen in intellectual property, and in the process
unpacks the normativity and commitment to institutionalized form of lawmaking underlying each of them (II.B).

A. The Logic of Limited Forms

Before proceeding to discuss the forms of ordering seen in intellectual property, it is worth pausing and asking why it is of any consequence that these forms are limited. What does the finite/limited number of forms that the domain is organized around tell us about the ordering? The answer has implications for how we think of intellectual property and its constraints on behavior.

According to eunomics, individual forms of ordering embody their own inner logic, morality, and normativity. Agents, in opting in to one or the other of these forms—i.e., in choosing among them—need to be guided by this logic and normativity, which is the core lesson of Fuller’s eunomics exercise. Connected to the notion of conventionalism, eunomics also posited that these forms, much like other domains of “implicit law”, evolved organically through social practice. “[I]nterrelated individual acts” form the basis through which such orders emerge, as society tries to organize itself towards certain common purposes. They thus set the “terms” of human interaction.

To Fuller, such conventionalism did not imply an infinite pliability. Any generativity that the conventionalism entailed was instead gradual, and reflected the evolution of society (and social needs) over time. Yet, Fuller was singularly unclear in his writing on how and why this generativity necessarily limits itself—taking it instead as something of an observational given. It is perhaps in this move over most others that we see his natural law and pragmatist ideal of merging the is/ought distinction at play. Probing a little deeper suggests that the limited nature of the forms was rooted in Fuller’s vision of freedom and choice, and thus had its own logic.

In one early exchange, Fuller acknowledged that the pragmatist merger of means and ends had indeed motivated his recognition that the forms of ordering were limited. Speaking of John Dewey’s influence on his own thinking, Fuller observed:

---

174 See generally discussion in Part I, supra.
175 Soltan, supra note __, at 391.
179 Id. at 343 n.42 (discussing Fuller’s exchange with Selznick).
His means-ends continuum and treatment of fact and value were of course generally congenial to me, and perhaps had a lot to do with my own thinking. What I missed, however, was the Gestalt idea, that means-ends relations fall into a limited number of patterns—what I call “forms of social order”.180

Fuller therefore clearly believed that the forms of ordering were a limited set. On the face of things, this unsupported assertion may strike one as odd. Making sense of it requires relating it to Fuller’s notion of freedom, and the nuances of what he meant by the term “limit”. Indeed, this is much more than a simple academic exercise, for as we shall see, it holds key lessons for how we think about intellectual property’s stable forms and their potential for evolution.

In a set of papers that at first appear unrelated to eunomics, Fuller set out to develop a theory of freedom.181 Central to his theory was the idea that is today commonly described as the distinction between positive and negative conceptions of liberty. Fuller called it the difference between “freedom from” and “freedom to”, and argued that theories that built the notion of freedom around autonomy typically failed to focus on the latter, i.e., “freedom to”, and in the process skipped over the crucial recognition that the goal of human existence was not just to live without constraint but instead to live a life socially, in interaction with others.182 And such interactive social existence, in turn, required the creation of appropriate means to enable and facilitate such interaction.183 Freedom—in this positive sense—required enablement; which in turn necessitated providing individuals with choices.184

At the same time, for these means to realize their ends—i.e., socially—the choice among means could not be “unlimited”. As an illustration, Fuller turned to language. Language was obviously necessary for social interaction.185 Yet, if each person developed their own individual language in recognition of the unlimited nature of choice, the means would cease to be beneficial and in a sense counter-productive to the very ideal of positive freedom. Thus, for the

180 Id. (emphasis supplied).
182 Fuller, Freedom—A Suggested Analysis, supra note __, at 1305-07; Fuller, Case against Freedom, supra note __, at 320–21. For an elaboration of this point in Fuller’s jurisprudence, see: Dan Priel, Lon Fuller’s Political Jurisprudence of Freedom, 10 Jerusalem Rev. Legal Stud. 18, 20-24 (2014).
183 Lon L. Fuller, Human Interaction and the Law, supra note __, at 2-3.
184 Fuller, Freedom—A Suggested Analysis, supra note __, at 1312.
185 Fuller, Freedom as a Problem of Allocating Choice, supra note __, at 101-03.
ideal of “freedom to” to function, it needed to abjure the notion of “unlimited choice”. In its place, “effective” choice needed the provision of identified “forms of social order”, for individuals to select from. Implicit in the move to providing individuals with such pre-identified forms of order was the recognition that it both facilitated and restrained choice. Yet, freedom was enhanced by increasing the range of choice.

The forms of social order therefore needed to be finite and identifiable for people to opt into them and utilize them socially. The idea of the forms of order being “limited” is to be understood as less of a hard constraint in the sense of a list closed for all times, and more as a basic precept that in as much as they were to be operationalized through the choice of actors, they needed to be identifiable, relatively stable, and capable of social acceptance. An unlimited set of choices was necessarily incompatible with this precept since it was hardly enabling.

This loose sense of a “limit” is obvious from the manner in which Fuller explicated his list of forms in other work. In an essay on the sociology of contracting, he lists nine “distinct” forms of ordering, but then is quick to note that the list does not imply any “logical neatness” and “leaves out many nuances and combinatorial forms” thus suggesting that there wasn’t any rigidity to the length of the list as such. What appears to have instead been at the root of the list was the identifiability of individual forms so as to make sense of their differences, which would then allow for a comparison and effective choice. A limited number of forms thus enabled more effective choice and thereby furthered the ideal of positive freedom.

Implicit in the idea of a limited number of forms was also Fuller’s recognition that forms themselves were limiting, but in a positive sense given the emphasis on identifiability. The identifiability of individual forms necessitated not just that the number of such forms was finite (and manageable), but that each form revealed a minimal level of epistemological uniformity, even if only for a short period. This was an insight that he appears to have drawn from pragmatism, especially the work of John Dewey, who relied on Heisenberg’s principle of indeterminacy: observing and describing a pattern/form (of ordering) had the undeniable effect of rendering it more determinate (and thus limited) in an artificial manner that might well be at odds with its actual working

---

186 Fuller, Freedom—A Suggested Analysis, supra note __, at 1311.
187 Id. at 1312.
189 For a general discussion, see: Winston, supra note __, at 336-37. For an account of Heisenberg’s theory as applied by Dewey, see: John Dewey, The Quest for Certainty 201-05 (1929).
in reality. To describe a form of ordering in terms of its essential features was thus to limit it; yet such a description—in a list to choose from, no less—was essential to the purpose of enabling human freedom.

Put another way then: form is inevitable but constrains and thus, forms liberate. In an important sense therefore, the limited and limiting nature of forms is about optimizing and channeling freedom in the positive sense. The idea of optimizing between certainty and numerosity and thus trading them off is hardly new. Indeed, in the property context it has been the basis of the philosophical puzzle commonly described as the numerus clausus principle, which scholars have grappled with for decades. All the same, its connection to positive freedom makes it particularly relevant to intellectual property.

For some time now, critics of intellectual property have noted how as a set of regimes framed around exclusion, intellectual property is freedom constraining. In this view, aptly summarized by Seana Shiffrin, the fear is that the rights granted by intellectual property “violate the uninfringeable rights of all individual speakers to express whatever content they wish” and thus “enable private parties to constrain the social communicative environment thereby threatening our interests in a flourishing democracy of timely, responsive, free exchange, evaluation, and critical reflection.” In short, and simplified to Fuller’s terms, intellectual property regimes are seen to be freedom curtailing when freedom is understood in the negative sense, as “freedom from” constraint.

But if we switch the framing from negative to positive freedom, i.e., to “freedom to”, and in the process assume the inevitability of exclusionary rights in intangibles, the limited number of forms in which these rights emerge help channel and direct the interactive context in which they are seen as necessary. Accepting this argument does of course mean recognizing that there is a conventionalist account to why such exclusionary rights emerge to begin with, which is not that difficult given social intuitions about imitation, failure to credit, and their associated economic implications. Yet once the need for mechanisms of ordering interactions and relationships around such intangibles is accepted, these limited forms now play an enabling role by expanding the “range of choice open” through defined mechanisms. Individuals come to associate one kind

190 Id.


193 Fuller, Freedom—A Suggested Analysis, supra note __, at 1311.
of intangible (e.g., expressive content) with a particular form of ordering (e.g., the appropriation form) and come to develop a set of expectations around it. Variations and hybrids may of course be countenanced, but this does not detract from the essentiality of the core forms and thus of a finite list at any given point in time.

A largely analogous—albeit distinct—argument is offered by Nestor Davidson in his defense of the *numerus clausus* principle in property. 194 Differentiating his account from information cost theories as well as pure social good driven ones, he argues that property law’s impulse towards the standardization of forms emanates from its commitment to a form of normative pluralism underlying property’s public ordering and the recognition that the forms operate as focal points to guide behavior. 195 Implicit in his account is an idea that was crucial to Fuller: that the key to understanding limits on forms of ordering lies in moving beyond the realm of freedom from constraint. 196

Herein then lies the logic for limited forms in intellectual property, which connects back rather perfectly to Fuller’s core mission in eunomics: (i) the recognition that each form captures a set of social intuitions about human interaction centered around an intangible, (ii) that in those intuitions is a normative ideal, reflected in the unique (i.e., essential) features of the form, and (iii) a belief in the full list at any given point in time covering the range of plural normative ideals associated with the interactional domain at issue, i.e., relationships around intangibles.

**B. The Principal Forms of Ordering in Intellectual Property**

Recognizing that the list of forms in intellectual property is limited and that the *limit* has a minimal logic to it, we now move to identifying the main forms of ordering seen in intellectual property. While they each originate in a specific regime, the discussion that follows attempts to isolate the essential structural features undergirding (and distinguishing) each of them, to then examine the normative and institutional implications that they bring to each form. The discussion identifies three main forms of ordering within intellectual property: (i) the *appropriation form*, seen in copyright, (ii) the *grant form*, seen in patents, and (iii) the *use and registration form*, seen in trademark.

---


195 *Id.* at 1636.

196 *Id.* at 1651 (“[S]tandardization fits more comfortably with a vision of property grounded in public norms rather than in freedom from state coercion.”).
1. The Appropriation Form

At a fundamental level, it must be remembered that any form of ordering being contemplated in intellectual property regimes revolves around mechanizing the working of exclusion, since each regime attempts to mimic (or simulate) the working of property’s exclusionary structure in relation to non-rival resources. A key challenge that regimes therefore face lies in the manner by which they communicate such exclusion in relationships involving the intangible at issue.

One way through which this is done involves focusing on the behavior of an actor in relation to an intangible that is seen as worthy of being excluded/proscribed. Seen predominantly in copyright, the appropriation form refrains from any detailed ex ante delineation of the intangible in terms of its protectability. Instead, it chooses to treat the behavior—so chosen to be proscribed—as a wrong, and operates through a duty that it imposes on the world at large, in rem. Only as part of the process of examining whether that duty has indeed been breached, and thus a wrong committed, does it then scrutinize protectability. In other words, the abstract eligibility of the intangible to protection under the regime is only ever scrutinized when the duty generated is deemed breached.

Stated in property terms, the essence of the appropriation form lies in its focus on the defendant’s act of taking. In treating the act of taking as a wrong, the appropriation form then attempts to unbundle it by drawing attention to a series of second-order questions around the act: What was taken? How did the taking occur? Why was it so taken? And, what effect, if any, occurred from the taking?

In this form, the treatment of the appropriation/taking as a wrong is structured bilaterally as a right-duty relationship. Potential defendants (i.e., non-right holders) are placed under an obligation of forbearance that is correlative to a right held by another, and the appropriation is then treated as a breach of that duty, in turn triggering the wrong and thus liability. All the same, given the minimal upfront emphasis on delineating the object of the taking, the

---

198 Id. For a more elaborate version of this claim, focusing on the role of duties in intellectual property, see: Jeremy Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property, 68 Chi.-Kent L. Rev. 841, 844 (1993).
appropriation form is built around a horizontal normativity between the owner of the intangible and those under an obligation of forbearance that is unmediated by a resource. In other words, the duty at issue is directed at the holder of the right without an object (res) intervening.

This is of course not to suggest that the object of the taking, the intangible, is altogether ignored in the appropriation form. To the contrary, it is merely that any concern with delineating that object is subsumed within a scrutiny of the defendant’s behavior in relation to that intangible. Scholars have on occasion made this point by analogizing it to the distinction between trespass and nuisance, and pointing to how the former focuses on the resource and the latter on the parties’ behavior.200 One might take this one step further, and note that the salience of the trespass/nuisance distinction is best appreciated by seeing that nuisance is merely one step farther along the entitlement-delineation continuum from the tort of negligence (or more specifically, negligent harm to property). An action for negligence focuses entirely on the defendant’s behavior and its consequences, which may implicate the res; a nuisance action focuses on behavior surrounding the res; while trespass directly involves actions directed at the res. One dimension along which to compare them relates to the degree to which they each focus on a defendant’s behavior as opposed to the protection of the res at issue, where they exhibit a continuum. It is precisely when understood in this vein that the appropriation model in intellectual property is seen as occupying an intermediate position wherein it does not altogether ignore the intangible being protected (qua negligence), but at the same time does not focus on that intangible tout court (qua trespass).

The singular essential feature of the appropriation form in intellectual property is therefore the treatment of appropriative behavior—often referred to as copying or free-riding—as legally wrongful. Through the mechanism of a legal wrong and its underlying dyadic right-duty structure, the appropriation form operates to generate an exclusionary signal from the intangible without relying on the intangible res to mediate that signal on its own, as is the case with traditional property. The obvious next question that this raises is when and where the appropriation form is commonly deployed, and what it therefore brings to the particular intellectual property regime that relies on it.

Owing to its emphasis on treating the act of appropriation as an actionable wrong that deserves redress, the appropriation form is heavily reliant on adjudication and its fundamentally bipolar (plaintiff-defendant) nature. Protectability is closely tied to wrongdoing, i.e., a wrongful appropriation. But since the intangible at issue is only ever delineated through the wrong, the

wrongdoing at issue assumes as indelibly relational dimension. The wrongfulness of the appropriation is thus directed at the actions of the original right-bearer, albeit as manifested in the intangible. Now, it may be difficult to appreciate this relational dimension in as much as the intangible still is the basis through which the defendant’s wrongdoing is analyzed. They key lies in remembering that without sufficient delineation upfront, any wrongdoing directed at the intangible is tantamount to wrongdoing directed at the actions of its originator/creator, i.e., the original right-holder (for instance, the difference between “defendant copied work $A$” and “defendant copied work $A$ created by $B$”). The ability of the intangible to impersonalize the analysis is significantly attenuated as a result. Consequently, the appropriation form adopts a strongly relational construction of the intellectual property right at issue.

And this relational aspect gives deployments of the appropriation form an inescapably moral dimension. This becomes most obvious if one looks at the domains where it is utilized. Copyright is obviously the best-known regime that uses the appropriation model. There, despite the dominance of the utilitarian theory today, moral theories continue to subsist. And central to these moral theories, as noted previously, was the belief that the appropriation deemed by copyright as wrongful was in some crucial way a violation of the right-holder’s personal—rather than property—interest. Indeed, Kant’s own theory of copyright readily emphasized that the appropriative wrong at the center of copyright—the unauthorized publication, in his words—was an incursion on to the author’s autonomy and thus a violation of a personal right.

All the same, copyright is hardly the only intellectual property regime to rely on the appropriation form. The right of publicity, sometimes referred to as appropriation of likeness, follows the same pattern and is dependent on a showing of an unauthorized use of an individual’s name or likeness. An offshoot of the right to privacy that sought to ground itself in the structure of copyright, the right to publicity today relies on a defendant’s appropriation of a plaintiff-celebrity’s likeness as the basis of the action. While the appropriation does not have to be intentional in the strict sense of that term, it must be an advertent action in much the same way that it is in copyright. And as is well-known, much of the justification for a robust right of publicity comes from the recognition that the action serves to protect an individual (plaintiff) against

---

201 See supra Part II, for an elaborate discussion.


204 See Restatement (Second) of Torts §652C (1977).

205 Id.
dignitary harms, likely to occur from an unauthorized commercial exploitation. Again, the relational nature of the claim—emanating from the appropriation form—grounds the moral justification.

A final domain where the appropriation form has come to be deployed is in the domain referred to as “hot news misappropriation” or “quasi-property.” These are situations where intangible information collected by an actor is subject to an entitlement that is characterized by its imposition of little more than an obligation on competitors to forebear from free-riding by appropriating that information. While they are free to collect the exact same information on their own, the proscription is limited to the free-riding, i.e., appropriation. While scholars have long debated the normative basis of hot news misappropriation, an undeniable reality is that its reliance on the appropriation form and the relational nature of the wrong that it entails has imbued the domain with a clear moral overtone. Indeed, this was apparent in the Court’s invocation of the seemingly Biblical precept of “reaping without sowing” in its initial formulation of the action.

Finally, given the centrality of adjudication to the appropriation form, it conceives of a more involved role for courts as lawmakers in the regimes that deploy this form. Indeed, even in areas that originate in the statute, such as copyright, courts play an essential role in shaping the key feature of this form: appropriation, i.e., copying. This includes defining its key elements, directing the manner in which it is to be proven, and finally situating it in relation to the regime’s other elements. The same dynamic is true, perhaps to an even greater degree, with the right of publicity and misappropriation.

2. The Grant Form

Whereas the appropriation form works by focusing on exclusionary behavior through liability and thus signals the duty underlying its normative structure as a personal obligation, the grant form attempts to track the working of tangible property in a closer way. Instead of waiting for adjudication (or potential liability) to be the basis for the exclusionary signal, the grant form—most prominently seen in patent law—attempts to have an artificially constructed res mediate the signal of exclusion in rem, just as it does for tangible property. That artificial construction is the culmination of a “grant” from the state, which is cloaked in constructive notice and widely publicized.

206 Post & Rothman, supra note __, at 93-125.


Having the grant mediate the signal between owner and third parties has a few important consequences in the design of the system. To begin with, it “blunts” the signal in an intentional way. With the notional res intervening in the law’s communication of its duty of forbearance (i.e., exclusion), the exclusionary signal operates in a less tailored way. In other words, instead of simply saying that non-owners need to refrain from copying or doing something specific in relation to the res, the grant form widens the scope of exclusion to all uses. In effect, therefore, it communicates a “stay away” signal, in much the same way that a tangible object does for property.

Indeed, the bluntness described above is precisely what some see as the difference between patent law being a wider monopoly than copyright, in so far as it treats all uses of the patented invention as infringements. Yet, instead of viewing it as a given, it should be seen as a direct consequence of different elements of the grant form coming together. The grant form devotes an inordinate amount of attention to a nuanced framing and delineation of the res, which only matters if that framing is functionally relevant, which it is as a result of the broad exclusionary signal underlying the form.

This returns us back in a meaningful way to an analogy that was previously discussed, but not quite fully explored, between patent law and mineral prospecting permits. Recall that Ed Kitch famously sought to analogize patent grants to mineral prospecting permits, on the basis that both rewarded early discovery by keeping competitors out, and thereby allowing their holders to exploit the domain of the grant. In the years since, many have criticized the analogy as missing key institutional features of the patent system, including the limited duration and scope of the grant. Yet, these criticisms do not give the analogy sufficient credit, in so far as it was instructive at the level of design even if not in its details.

Even if the analogy did not quite capture the details of how the patent system works, it put its finger on a design element that is characteristic of the grant form: the identification of the metes and bounds of the grant and the generation of a strong exclusionary signal in rem thereafter. A grant with exclusionary implications attached to the grant only ever works if the domain of such exclusion is made sufficiently clear. The grant form of intellectual property—much like a mineral prospect—therefore requires significant ex ante effort to specify the domain of the grant, not merely in an effort to ensure that

---

210 Kitch, supra note __.
the grantee does not unduly benefit but to allow the broad exclusionary signal ("keep away from the grant") to work. This has serious design consequences.

To begin with, it requires identifying a neutral actor that needs to be tasked with delineating the scope of the grant prior to a dispute arising. As should be obvious, it makes little sense to have a wide-ranging exclusionary signal if actors are unable to ascertain the scope of such exclusion in advance, before incurring liability. As a result of potential grantees being highly self-interested, it is also insufficient for the system to rely on their own delineations of the scope of the res underlying what would be ordinarily seen in a simple title registration/recordation system of property. And given that the grant operates as a res and thus in rem, the entity best positioned to engage in this delineation process with the assumption of keeping the public interest in mind is the state. Further, the determination of the scope of the grant is a time- and resource-intensive process, in many ways negotiated between the grantor and the grantee. As a foundational design precept therefore, the grant form envisions a more directed and involved role for the state at the very beginning.

On the face of things, this initial involvement of the state (in framing the grant) may seem like little more than a formality. Yet it is more, and in two interrelated ways. First, it modifies the private law normativity involved by mediating it through the grant, i.e., the res. Any obligation of forbearance that potential users (defendants) are placed under is directed at the grantee only ever through the grant. This resource mediation gives the normativity a distinctly impersonal dimension, which is in contrast to the appropriation form. And while it may of course be analytically imprecise to speak of duties owed to objects, that is indeed the functional salience of the resource mediation. Second, the state’s involvement in framing the grant and thus the res interjects elements of vertical normativity into the form. One way of understanding this is to see that in terms of the duty of forbearance, an incursion upon the grant is not just an incursion upon an ordinary private ownership interest, wherein the state does little more than offer private individuals means of protection. It is instead an incursion upon a state-created ownership interest, upon a grant generated by the state. The state’s role in creating the grant—and thus the res—adds a layer of significance to the exclusionary signal underlying the grant. While the duty of forbearance communicated by the exclusionary signal is formally a duty owed to the grantee; the state’s role in producing the grant and (as grantor) invests it with some minimal interest in the realization of that duty and rectifying its breach. Indeed, this is hardly an unintended consequence of the form: the very idea of a patent is rooted in the historical notion of a “letters patent”, which
implied an order issued by the monarch/government. The grant is thus much more than a mere contract between private parties; it instead embodies elements of a mandate.

The state’s involvement and residual interest in the grant does not of course mean that the normativity underlying the grant form ceases to be that of private law, and thus inter-personal. All the same, it is qualitatively different. The grant form therefore embodies two essential features: a state-created/issued grant of exclusivity, and a mechanism of private redressal for incursions upon that exclusivity. The two are equally significant, unlike in the appropriation form where the former is altogether absent. The analytical structure of the grant form in many ways mimics the working of other state-created entitlements and rights, which follow a similar two stage process of first having the state create and define the conditions of the entitlement and then second, delegate the enforcement of that entitlement/right to grantees in private law style. And as private law scholars have acknowledged, this two-step pattern imbues the regime with normative considerations that transcend the domain of private enforcement. The state’s collective interest in a shared morality drives its very recognition, creation, and grant of the entitlement, which the enforcement mechanism is fully parasitic on.

What this suggests then is that the grant form is best utilized in domains where the normative considerations at issue—even in the specific case—transcend the immediate actors and thus call for the state’s early and initial involvement in being circumspect about the creation of the grant. Once that step is crossed, then largely individual considerations of course take over (even if not exclusively). Recognizing the collectivist (and thus largely, utilitarian) nature of the first step is however crucial, and explains why the grant form is commonly associated with utilitarian considerations.

Patent law is the most obvious exemplar of the grant form, wherein the Patent Office formally issues a patent upon a close scrutiny of the professed invention and its contribution to the criteria of social good underlying the patent system. Once brought into existence, patent law envelopes the grant with a broad obligation of exclusion that operates in rem. The published patent, invested with constructive notice, is meant to serve the exact notice function that tangible property does. All the same, patent is law hardly the only area where the grant form is utilized.

---

212 Sir William Blackstone, Commentaries on the Laws of England *346 (noting how “they are usually directed or addressed by the king to all his subjects at large”) (1765).


A growing set of rules today, mostly in the regulatory context, attempt to mimic the functioning of patent law—and its reliance on the grant form—in different domains where exclusivity is seen as necessary.\textsuperscript{215} The most common of these are in the pharmaceutical and drug domains, where researchers are able to obtain various short-term “exclusivity” grants upon conducting research and showing that research to have yielded some socially beneficial early results.\textsuperscript{216} Notably, this exclusivity is not anywhere near as extensive as that of patent law and is instead limited to restricting the regulator from granting approvals to competitors in the same field. All the same, it follows the same pattern as patents and adheres to the logic of the grant form.

3. The Use (and Registration) Form

That possession is nine-tenths of ownership remains a well-known precept of property thinking.\textsuperscript{217} Within the world of intangibles, possession is of course difficult to operationalize given the non-rival and non-excludable features of information. All the same, concealed within property law’s reliance on possession is an unstated preference for the normative salience of temporal priority (first in time) as a guiding principle, and intellectual property has on occasion made use of that principle in developing a unique form of ordering for a small group of intangibles.

A distinctive feature of the use and registration form in intellectual property lies in its allowing for the accrual of the entitlement/right initially simply by the actor’s use of the intangible in the relevant domain of activity. Such use—once in compliance with the law’s otherwise prescribed standards and requirements—is on its own sufficient to generate a right as well as priority to it. Priority aside, once the use generates the right, it places others under a corresponding obligation to refrain from a use that competes with the claimant’s right.

Two things thus emerge from this focus on the “use”: first, the form works best when the idea of a use is simple and easy to identify and signal. Given the expansiveness of the term (i.e., “use”) and its operation as a blunt substitute for the idea of possession, intangibles that are simple to identify and therefore administer in a multi-party competitive setting are served best by this form.

\textsuperscript{216} Id.
Second, and related to the use, the nature of the exclusionary duty that is placed on others (in rem) strongly corresponds to the very nature and form of use that forms the basis of the right. In other words, at its simplest, the form makes the scope of the duty to track the scope of the right, which is in turn dependent on the claimant’s actions.

The second point described above is a large part of the reason why the logic of this form is also often caught up in the notion of “unfair competition”—which the common law took to represent situations where a defendant’s actions mimicked (i.e., copied) the plaintiff’s own use.218 This twin focus on the competitive nature of the defendant’s actions and the plaintiff’s initial use made the form focus significantly less on the question of whether there was indeed a res, even in the sense of an intangible. Unsurprisingly, early debates around unfair competition focused on this very dilemma.219

In the absence of an identifiable res, and a focus on comparing the behaviors of the plaintiff and defendant, the main ideal that the form initially emphasized was therefore temporal priority. Over time this changed with the recognition that (the absence of) a one-to-one correspondence between the parties’ actions was often an easy way for the defendant to avoid liability. In due course, what emerged was the recognition that behavior (by the defendant) that didn’t just substitute for the plaintiff’s actual use but also potential or likely uses that were likely to have a similar effect, should qualify for liability since they too risked undermining the plaintiff’s own derivation of value. In justifying this expansion, courts and commentators zeroed in on the device of property to anchor the expansion. Yet, property—as an in rem device—unraveled an additional set of issues, principally around the need to provide third parties (under an obligation of forbearance) with notice. And as a result emerged the second feature of the use form, namely, its provision of a system of registration that would function to give the right at issue full constructive notice, enabling it to operate as an in rem right.

The use and registration form of ordering in intellectual property builds on the idea of “perfecting” an interest already protected by the law.220 As in other contexts, such as land deeds, security interests, and the like, the public registration of the interest provides heightened notice of the interest and its boundaries to potential competitors and thus places them under an obligation of forbearance. All the same, it is crucial to emphasize that the perfection is just

219 Id. at 484-85.
that, an allowance for widening the reach and significance of the right and its corresponding duty—rather than a pre-requisite for its very existence. Registration, in this form of intellectual property ordering, merely provides heightened notice of the claimant’s use, which gives it a claim to exclusivity over that use. As such then, the registration piggy-backs on the use.

The nature of normativity underlying the use and registration form is somewhat chameleonic given the two-staged process through which the right is protected. In the first instance, with a focus on use, the right-duty relationship is mostly unmediated by a specifically delineated res. The focus is on the imitative behavior of the defendant, and its effort to mimic (i.e., compete with) the actions of the initial user. The private law normativity here is therefore horizontal in the traditional sense, and the exclusionary directive is inter-personal. All the same, once the interest is perfected through registration, that process focuses attention (and thereby the exclusionary signal) on the subject of the registration, which is the identified res—usually a mark, identifier, name, or the like. And the res then plays a mediating role in the inter-personal normativity. Since the registration process involves the state playing an important role in according its blessing to the entitlement, the normativity begins to track the working of the grant form but in a more diffuse manner since registration—unlike a grant—is meant to merely perfect, rather than create, the entitlement.

This form of ordering is most commonly seen in the context of intangibles that require minimal delineation in scope for them to remain economically valuable. Regimes associated with reputational signals and identifiers—such as trademark, goodwill, corporate and business names—adopt this pattern. Of them, trademark law is perhaps the best-known example, affording a claimant protection upon mere use (in commerce) of a reputational signifier, which is seen in the law’s creation of a duty of forbearance on competitors from using the same signifier for a competing purpose. That exclusionary directive operates from the moment of use, and its scope is in turn dependent on the scope of the claimant’s own use. All the same, trademark law allows the entitlement to be perfected through registration, which then accords the right-holder more expansive and wider protection. Much of this latter move emerges from the recognition that the process of registering the signifier (i.e., the mark) involves delineating it with a good level of detail such that it comes to mediate the right-duty relationship that previously existed.

The sequenced nature of the normativity that this form embodies reflects a more diverse set of normative concerns at play in its functioning. The use-based pre-registration entitlement that the plaintiff-user obtains reflects a set of concerns that is sometimes described as “the morality surrounding

---

competition.”[^222] Here the principal goal is the correction of a market-based injury experienced by the right-holder, an interest that is occasionally described in moral terms but for the most part is understood as having a consequentialist basis.[^223] When registration—and through it the more direct involvement of the state—enters the picture, the concerns assume a more collectivist basis such as the protection of the public interest (consumer welfare) and market efficiency more generally.

Finally, and as should be obvious, the two-staged nature of the form also implies a diversification of principal lawmaking authority: the use stage is heavily adjudication driven, implying a more involved role for courts in tailoring the specific rules of the form; while the registration stage, with its delineation of the entitlement through constructive notice, implies a correspondingly greater role for the legislature. In practice, it produces something of a symbiotic relationship between the two institutions in the development of form and its specifics.

* * *

Table 1: Comparison of the Principal Forms of Ordering in Intellectual Property

<table>
<thead>
<tr>
<th>Essential Features</th>
<th>Nature of Normativity</th>
<th>Normative Concerns</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appropriation Form</strong></td>
<td>Right defined by duty of forbearance from appropriation</td>
<td>Unmediated private law</td>
<td>Relational/Moral</td>
</tr>
<tr>
<td><strong>Grant Form</strong></td>
<td>Right affirmatively delineated through state grant</td>
<td>Grant-mediated private law</td>
<td>Collectivist/Utilitarian</td>
</tr>
<tr>
<td><strong>Use &amp; Registration Form</strong></td>
<td>Right determined by use and perfected by state-facilitated constructive notice</td>
<td>Initially unmediated; followed by mediated</td>
<td>Relational (consequentialist) + Utilitarian</td>
</tr>
</tbody>
</table>

[^223]: For an early effort, see: Rudolf Callmann, *What is Unfair Competition?*, 28 Geo. L.J. 585 (1940).
The forms of ordering in intellectual property that are described in this section should by no means be seen as a firm, closed list. To the contrary, they represent a form of standardization that is a collective reflection of the full set of goals and ideals underlying the ordering of relations that intellectual property seeks to concern itself with. Much like with other forms of standardization, the forms do not of course capture variations and hybridization that seek to combine elements from multiple forms, especially in relation to new and emerging intangibles. Just as the identification of property and contract as two independent forms of ordering in the common law hardly detracts from the reality that some mechanisms—such as leases—exhibit features of both, so it is with certain novel forms of intellectual property too, wherein elements of one form are combined with those of another. Rather than detract from the standardization, these variations and hybrids reaffirm the centrality of the standardization by revealing the finite means of ordering that the field of intellectual property as a whole exhibits. An example will help illustrate.

In 1984, the microchip industry convinced Congress of the need to put in place a special regime that would protect chip designs with exclusive rights for a limited amount of time. Recognizing that these designs—semiconductor chip designs—were designs of useful articles, a category that was ordinarily excluded from protection under copyright and at the same time too simple to meet patent law’s non-obviousness standard for protection, the decision was made to create a *sui generis* form of protection for the layout designs of such chips, which came to be referred to as “mask works”. The regime that eventually emerged combined elements of the appropriation form and the use/registration form. Protection for an eligible mask work begins the moment it is either first registered or first commercially used in the market place. But if the latter, it needs to be registered within two years of such use for the protection to continue. Once protection begins however, the nature of exclusivity that the regime attaches to the intangible relies on the appropriation form, and focuses on the defendant’s appropriative behavior. Instead of a broad exclusionary signal around a tailored grant, the regime places a duty of

---


227 Id. §§902-03.

228 Id. §908.
forbearance on others to refrain from copying the protected mask work.\textsuperscript{229} Appropriation and a focus on the defendant’s behavior thus become central to the regime’s very working.

The \textit{sui generis} nature of the regime that exists for mask works is of course unique in the limited sense of being distinct from the existing regimes. All the same, its mechanisms are hardly different from those seen in the limited forms of ordering long known to intellectual property. Each form of ordering previously described is therefore best seen as combining a limited set of elements, in the recognition that they together bring attention to a specific set of goals and ideals that each regime’s ordering needs to reflect. In an important sense, each form of ordering therefore embodies a good degree of modularity.\textsuperscript{230} This modularity is an essential complement to the finite forms of ordering, and in many ways serves to render it workable. Indeed, Fuller too recognized precisely this insight, even though he never fully explored it as part of his project.

CONCLUSION

Ever since the advent of Legal Realism, scholarship and theorizing in the law have come to pay scant attention to questions of form and structure. The fear of being branded a “formalist” who focuses on form over substance has no doubt contributed to this in large measure.\textsuperscript{231} The identification of abstract ends and goals has instead come to dominate, with the recognition that the form of the law is intrinsically malleable in pursuit of them. Nowhere is this more obvious than in the study of intellectual property law, a field that has been entrenched in contentious justificatory debates ever since its origins. In developing justifications of varying complexity and persuasiveness for intellectual property, scholarship has somewhat surprisingly altogether ignored engaging the forms that intellectual property regimes take, and the undeniable reality that these forms have remained stable across time, context, and jurisdiction.

As a reformed Legal Realist himself,\textsuperscript{232} Fuller recognized this neglect of form to be true across different areas of law and developed a modality of analysis and reasoning to compensate for it: eunomics. While it encompassed the programmatic study of institutional design, the novelty and significance of eunomics lay in its emphasis on means, and recognizing the reciprocal

\textsuperscript{229} Id. §905.
\textsuperscript{232} Lon L. Fuller, \textit{American Legal Realism}, 82 U. Pa. L. Rev. 429, 462 (1934) (“The modern realist is still not clear in his own mind whether he objects to “conceptualism” because it fails to achieve an accurate formulation of its principles, or because it pretends to proceed according to principle at all.”).
relationship between means and ends in the study of institutional forms. Forms were to be seen as worthy of study on their own, even if they were associated with specific goals and ends. Ends were far from irrelevant; yet the means were to be seen as existing independent of those ends and qualifying/contributing to them in important ways. The forms that eunomics emphasized were the forms of ordering: the modalities and arrangements by which society organized its problem-solving endeavors and which the law absorbed into its working, both formally and informally. And eunomics revealed that the forms of ordering that law and society relied on at any given moment were necessary limited and modular, even if they were open to further evolution over time.

Bringing the insights of eunomics to intellectual property theorizing serves to reorient conversations about the reasons and justification for different intellectual property regimes, which have thus far focused entirely on identifying abstract ends for these regimes (e.g., efficiency, autonomy). It reveals that much as these ends may indeed be indicative of society’s desired goals for these regimes, its reliance on a limited number of forms (of ordering) to instantiate them requires moving beyond abstract ends to understanding the rationale, significance, and limitations inherent in those very forms. While each form attempts to simulate aspects of property’s exclusionary structure, it at the same time does so in an analytically different manner. Submerged within this difference is a variation in the legal normativity of the ordering, the legal actors involved, and the principal institutional loci for lawmaking.

For far too long, theorizing about intellectual property has adopted something of a “pie in the sky” approach, which scholars have themselves variously described as “imagin[ary],” “faith-based,” or as altogether lacking empirical validation. By focusing theoretical attention in intellectual property on its various—but limited—forms, eunomics quite genuinely explores the middle-range. And in the process, it bridges the somewhat extensive divide that today exists between intellectual property theorizing and practice, a divide that is at once polarized and deadlocked. Indeed, as some have argued these divisions are hardly unique to intellectual property but extend to legal scholarship and theorizing more generally. Perhaps Fuller’s grand ambitions behind the eunomics project—“that law is not a datum, but an achievement that needs ever to be renewed”—will someday come to be realized for legal

233 Zimmerman, supra note __, at 29.
235 Id. at 1334-35 (noting the absence of empirical support for intellectual property’s dominant theories).
237 Fuller, American Legal Philosophy, supra note __, at 467.
scholarship more generally; but in the interim, intellectual property law would be a great place to begin.