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LEGAL TAXONOMY

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This essay examines the ambition to taxonomize law and the different methods a legal taxonomer might employ. Three possibilities emerge. The first is a *formal* taxonomy that classifies legal materials according to rules of order and clarity. Formal taxonomy is primarily conventional and has no normative implications for judicial decision-making. The second possibility is a *function-based* taxonomy that classifies laws according to their social functions. Function-based taxonomy can influence legal decision-making indirectly, as a gatekeeping mechanism, but it does not provide decisional standards for courts. Its objective is to assist in analysis and criticism of law by providing an overview of the body of legal doctrine. The third possibility is a *reason-based* taxonomy that classifies legal rules and decisions according to the moral principles or "legal principles" thought to justify them. Reason-based taxonomy of this type offers courts a set of high-level decisional rules drawn from legal data. Its objective is to guide courts in deciding new cases and evaluating precedents. A predominantly formal taxonomy facilitates legal analysis and communication. A functional taxonomy can assist those who make and apply law by providing a purposive overview of the field. Reason-based taxonomy may be useful to lawmakers but is unhelpful when offered as a guide to adjudication of disputes.

I. INTRODUCTION

In recent years, a number of scholars in the United Kingdom and elsewhere have turned their attention *legal taxonomy*, debating how best to organize and classify the common law.[1] To some extent, taxonomy inevitably plays a role in legal analysis: to think intelligently about law, one must sort legal

1. *See, e.g.*, 1 PETER BIRKS, ENGLISH PRIVATE LAW xxxv–xliii (2000); THE CLASSIFICATION OF OBLIGATIONS (Peter Birks, ed. 1997); Hanoch Dagan, Legal Realism and the Taxonomy of Private Law, in STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 103; Daniel Friedmann: The Creation of Entitlements through the Law of Restitution, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 185 (Charles Rickett & Ross Grantham eds., 2008); Steve Hedley, The Shock of the Old: Interpretivism in Obligations, in *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 205 (Charles Rickett & Ross Grantham eds., 2008); Mitchell McInnes, Taxonomic Lessons for the Supreme Court of Canada, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 77 (Charles Rickett & Ross Grantham eds., 2008); Richard Sutton, Restitution and the Discourse of System, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 127 (Charles Rickett & Ross Grantham eds., 2008); Stephen Waddams, Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 167 (Charles Rickett & Ross Grantham eds., 2008). *See also* STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 1–22, 222–233

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rules and decisions into categories and generalize about fields of law. For English taxonomers, however, classification of the common law is not simply an incidental task but an independent theoretical project, important in its own right.

The U.K. debate over legal taxonomy grew out of a wave of scholarship on the subjects of restitution and unjust enrichment.[2] A significant portion of this work focused not on the content of particular legal rules but on how the law of restitution should be organized and what place it occupies within the larger picture of private law. Is restitution a category of substantive law, on a par with tort or contract, or is it a set of remedies? Does unjust enrichment as a ground for relief cut across the fields of private law, or is it confined to cases in which tort and contract law do not support a claim? This line of inquiry led in turn to broader efforts to categorize the whole of private law.[3]

Perhaps the best known legal taxonomer is Oxford's late Regius Professor Peter Birks. Birks's master project is a "map" of the common law based on the Institutes of Justinian. Birks's classification begins at the highest level of generality with a division between public and private law. Birks then divides private law into the law of persons, the law of rights, and the law of actions; and further divides rights into property rights and obligations between parties. Next, he sorts obligations according to the different "causative events" that give rise to them and alternatively according to the different remedial outcomes associated with obligations, such as compensatory damages or restitution of gains.[4]

(2003) (discussing legal taxonomy and concluding that law is too complex and interrelated to accommodate logical classification). In an earlier essay, I offered tentative views on the subject of legal taxonomy, which I have since revised in substantial ways. *See* Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 103 (Charles Rickett & Ross Grantham eds., 2008).

2. *See, e.g.*, PETER BIRKS, UNJUST ENRICHMENT (2003); PETER BIRKS, THE FOUNDATIONS OF UNJUST ENRICHMENT: SIX CENTENNIAL LECTURES (2002) PETER BIRKS, INTRODUCTION TO THE LAW OF RESTITUTION 28–48 (1985); Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1778–1779 (2001); JACK BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION (1991); ANDREW BURROWS, THE LAW OF RESTITUTION (2d ed. 2002); HANOCH DAGAN, A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1997); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004); PHILIP DAVENPORT & CHRISTINA HARRIS, UNJUST ENRICHMENT (1997); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 12 (6th ed. 2002); STEVEN HEADLEY, RESTITUTION: ITS DIVISION AND ORDERING (2001); PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT (2000); GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION (1999); ESSAYS ON THE LAW OF RESTITUTION (Andrew Burrows ed., 1991); Robert Goff, The Search for Principle, in THE SEARCH FOR PRINCIPLE 313, 324 (William Swadling & Gareth Jones eds., 1999); UNDERSTANDING UNJUST ENRICHMENT (Jason W. Neyers, Mitchell McInnes, & Stephen G.A. Pitel eds., 2004); RESTITUTION (Lionel Smith ed., 2000).

3. *See, e.g.*, BIRKS, ENGLISH PRIVATE LAW, *supra* note 1, at xxxv–xliii.

4. Birks's taxonomic scheme is set forth succinctly in *id.* For additional statements, *see, e.g.*, BIRKS, UNJUST ENRICHMENT, *supra* note 2, at 19–35; Peter Birks, *Definition and Division, A Meditation on* Institutes *3.13*, *in* THE CLASSIFICATION OF OBLIGATIONS 1, 35 (Peter Birks, ed. 1997); Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1778–1779; Peter Birks, *Equity in the Modern Law*, 26 W. AUSTL. L. REV. 1, 8 (1996). For an early version, *see* BIRKS, INTRODUCTION TO THE LAW OF RESTITUTION, *supra* note 2, at 28–48.

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For Birks, this framework yielded various taxonomic insights. For example, Birks argues that it is a mistake to speak of "tort, contract, and restitution" as the pillars of law. Tort and contract are "causative events" for rights, while restitution is an outcome common to various rights; therefore the classification "tort, contract, and restitution" is "bent."[5] Accordingly, Birks insists that the correct series of causative events must be "tort, contract, unjust enrichment, and other events," with "restitution, compensation, punishment, and other goals" cutting across them as the outcomes of legal claims.[6] Birks also takes the view that the categories of law must not overlap. For example, "unjust enrichment" cannot include enrichment attributable to "wrongs," because unjust enrichment and wrongs are discrete categories of causative events.[7]

Birks's project sparked a variety of criticisms, not only by those who disagreed with the particulars of his scheme but also by those who rejected his overall approach to classification of law. Birks's critics view his taxonomy as formalistic and pointless because it lacks normative content. Some of these critics argue that legal classification must be attuned to the social and economic background in which laws operate.[8] Others propose that legal classification should track the justifications for legal rules.[9]

American scholars have shown little interest in comprehensive taxonomy of law in the manner of Birks.[10] Lawyers, judges, and legal scholars constantly engage in taxonomy, sorting the law into classes as they discuss and apply it. Treatises, textbooks, and Restatements often posit or assume fairly systematic taxonomies within fields of law. Large-scale doctrinal essays may also be consciously styled as contributions to the taxonomy of law; some

5. Birks, *Definition and Division*, *supra* note 4, at 21.

6. *See, e.g.*, BIRKS, ENGLISH PRIVATE LAW, *supra* note 1, at xli–xlii; BIRKS, UNJUST ENRICHMENT, *supra* note 2, at 20–21; Birks, *Definition and Division*, *supra* note 4, at 19–21; Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1771–1772, 1777–1779.

7. "The test of the validity of a taxonomy is precisely the question of whether any item within its purview can appear in more than one category pitched at the same level of generality. . . . It is no more possible for the selected causal event to be both an unjust enrichment and a tort than it is for an animal to be both an insect and a mammal." Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1780–1781. *See also* Nicholas J. McBride, *The Classification of Obligations and Legal Education*, *in* THE CLASSIFICATION OF OBLIGATIONS 71 (Peter Birks, ed. 1997), (adopting a similar approach to legal taxonomy).

8. *See, e.g.*, David Campbell, *Classification and the Crisis of the Common Law*, 26 J.L. SOC'Y 369 (1999) (criticizing "abstract doctrinal" attempts to classify law as indifferent to social and economic reality); Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomical Debate*, 24 OXFORD J. LEGAL STUD. 335 (2004) (proposing a classification scheme based on different forms of social relations in modern life). *See also* Hanoch Dagan, *Legal Realism and the Taxonomy of Law*, *in* STRUCTURE AND JUSTIFICATION: ESSAYS FOR PETER BIRKS 147 (Charles Rickett & Ross Grantham eds., 2008) (writing on the question of taxonomy from a perspective inspired by American Legal Realism).

9. *See, e.g.*, Peter Jaffey, *Classification and Unjust Enrichment*, 67 MOD. L. REV. 1012 (2004) (arguing that unjust enrichment fails as a "justificatory" category of law).

10. One exception is the undergraduate legal text book initially compiled by Robert Summers: ROBERT S. SUMMERS, KEVIN M. CLERMONT, ROBERT A HILLMAN, SHERI LYNN JOHNSON, JOHN J. BARCELO, III, & DORIS MAE PROVINE, LAW: ITS NATURE, FUNCTIONS, AND LIMITS ix–xi (3d ed. 1986).

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well-known examples are Warren and Brandeis's article identifying interference with privacy as a type of tort and Fuller and Purdue's article classifying the interests that may be harmed by a breach of contract.[11] Nevertheless, the debate surrounding Birks's taxonomic work has gone largely unnoticed in the United States, perhaps because legal taxonomy appears to have little practical consequence.

In this essay, I examine several different approaches to legal taxonomy. The principal contending methods of legal classification are formal classification of legal doctrine based on logical relations among legal rules; function-based classification based on the social roles of legal rules, and reason-based classification based on common rationales underlying legal rules and decisions. These different possible approaches to classification serve different purposes and range widely in their ambitions to guide and constrain judicial decision-making.

I begin with a brief taxonomy of legal taxonomy, in which I pose three questions about the enterprise of classifying law. First, what is the subject matter to be classified? Second, what are the criteria for classification? Third, what are the purposes of legal classification? I address these questions in the order just presented, although the classifier's purpose often limits or determines both the choice of subject matter and the criteria for classification. To illustrate the different approaches I identify, I return briefly in the final section to the problem of unjust enrichment, which has occupied such a central role in English legal taxonomy.

II. A TAXONOMY OF LEGAL TAXONOMY

A. Raw Material for Classification

The subject matter of legal taxonomy may seem obvious: the taxonomer is sorting and classifying *rules of law*. For this purpose, however, rules of law can be understood in a variety of ways. At least three possibilities come to mind, and these may not be exhaustive.

1. *Posited Rules*

First, the law to be classified might be the set of legal rules posited by authoritative sources.[12] For this purpose, I assume that positing a rule is an

11. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest and Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936–1937).

12. By rules, I mean prescriptions that are general, in that they apply to classes of cases; determinate, in that they are readily and consistently understood by their intended audience; and authoritative, in that they are intended to dictate the outcome of all cases that fall within their terms. For discussion of the nature, function, and problems of "serious" rules, *see* LARRY ALEXANDER & EMILY SHERWIN, THE RULES OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 53–95 (2001); JOSEPH RAZ, THE MORALITY OF FREEDOM 57–62 (1986); JOSEPH RAZ, THE AUTHORITY OF LAW 16–19, 22–23, 30–33 (1979); FREDERICK SCHAUER, PLAYING BY THE RULES: A

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intentional act. It follows that a posited rule exists if and only if the rule-making authority intended to formulate a general prescription for action or decision, and that the meaning of a posited rule is the meaning intended by author of the rule.[13]

In a legal system that accepts the doctrine of precedent, courts as well as legislatures have authority to posit legal rules. Legislative rules are normally posited explicitly, while court-made rules may be explicit or implicit in judicial opinions. If an opinion indicates that the court viewed its decision as representative of a general prescription, applicable both to the case before the court and to other cases within the terms of the prescription, the court has implicitly posited the prescription as a rule.[14] Suppose, however, that the court did not intend to recognize a general prescription, but later courts read its decision as representing a general prescription and accept that prescription as a rule for cases that fall within its terms. The prescription is now an authoritative posited rule, but the positing authority is not the original court but the later courts that adopted the rule.

All posited rules are generalizations, but the degree of their generality may vary widely.[15] At one end of the continuum, a fairly narrow description of the facts and outcome of a case counts as a posited rule if it is general enough to cover at least some other disputes. At the other, fairly broad statements offered by precedent courts may count as posited rules if the precedent court intended them to serve as decisional standards for future cases that fall within their descriptive terms. At some point, however, a very general prescription is likely to lapse into indeterminacy, particularly if it incorporates controversial moral standards.[16] If the prescription is too vague or controversial to be consistently understood and applied, it can no longer operate as a posited rule but only as a background justification for more concrete rules posited by others.

PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LIFE AND LAW 42–52, 77–134 (1991).

13. The assumption that the meaning of a rule is the meaning intended by its author is likely to be controversial, particularly when rules are posited by multimember bodies such as courts or legislatures. This assumption is defended in Alexander & Sherwin, *supra* note 12, at 96–122.

14. *See* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 54–55 (2008). On canonicity as a characteristic of rules, *see* SCHAUER, *supra* note 12, at 68–72; Frederick Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911, 916–918 (1997).

15. On generality as a characteristic of rules, *see* Schauer, *supra* note 12,at 17–37. A distinction is often drawn between rules and "standards," which are not sufficiently determinate to dictate results without reference to controversial moral or evaluative propositions. *See, e.g.*, ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 29–30; CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 27–28 (1996); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. REV. 557 (1992); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

16. My analysis assumes that language is capable of carrying determinate meaning. *See, e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY 34–89 (1992); H.L.A. HART, THE CONCEPT OF LAW 132–144 (1961); Schauer, *supra* note 12, at 53–68; Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1992); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

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When the subject matter for classification is posited rules, the taxonomer's first step is faithfully to gather and report the set of rules actually posited by legal authorities. As part of this process, the taxonomer may engage in interpretation, for example by scanning the explanations courts have offered for their decisions to find rules the courts appear to have had in mind but failed to state explicitly. Once the taxonomer has identified the set of posited rules, he or she can proceed to sort the rules into broader categories.

2. *Attributed Rules*

Second, the law to be classified may be a set of rules attributed by the taxonomer to prior judicial decisions. An attributed rule is a proposition drawn (or "abduced")[17] from authoritative decisions but not actually formulated by prior decision-makers and thus not intended by those decision-makers to serve as a rule for future cases. To arrive at a body of attributed law, the taxonomer studies the facts and outcomes of authoritative legal decisions and identifies the rules that fit the data. The subject matter for taxonomy, in other words, is a reformulation of the existing raw material of law.[18] Once the taxonomer completes the process of reformulating rules and decisions, he or she can proceed to sort and classify attributed rules.

Attributed rules are drawn from the decisions of courts and legislatures but are not posited by those authorities. Instead, their author is the person who abduces them from legal materials. Thus a taxonomer who abduces and classifies attributed rules is the source of those rules. They become posited rules only if and when they are adopted by an authoritative decision-maker, such as a court that consults the taxonomer's work.[19]

Like posited rules, attributed rules can be fairly general or quite specific. An attributed rule may be based on a minimal description of the facts and outcome of a judicial decision (the best description of what the case "stands for"). It is nevertheless an attributed rule if it differs from the precedent court's own description of the case or if the precedent court did not intend to establish a rule.

17. "Abduction" is the term Charles Peirce uses to describe the process by which scientists move from observed data to tentative explanatory hypotheses. *See* CHARLES S. PEIRCE, PHILOSOPHICAL WRITINGS OF PEIRCE 150–156 (Justus Buchler ed., 1955); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 945–949 (1996).

18. Ronald Dworkin's description of law follows this model. *See* RONALD DWORKIN, LAW'S EMPIRE 254–258 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 115–118 (1978).

19. *Cf.* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 49, 228 (using the term "interpretation" in a special sense that refers to the insider's perspective toward law). Attribution of this kind is not, in my view, a form of "interpretation." I assume throughout this essay that the meaning of any rule (or other text) is determined by the intentions of its authors. Interpretation, accordingly, is the process of discerning intended meaning. Any other ascription of meaning to a text, including attribution of rules and principles to legal materials generated by others, is not interpretation but authorship of a new text. This is, of course, a contested position, which I shall not attempt to defend here. For full discussion, *see* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 14, at 131–141; ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 96–122.

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Alternatively, an observer of legal material may formulate a broader proposition to explain a judicial decision, a pattern of decisions, a judicial or legislative rule, or some combination of legal materials. As in the case of a posited rule, an attributed rule may at some point become too indeterminate to serve as a rule. At that point, it becomes an attributed rationale, or what Ronald Dworkin calls a "legal principle."[20] I shall have more to say in later sections about attributed rationales.

3. *Ideal Rules*

Third, the subject matter to be classified might be a set of rules that has not been posited by any authority but which the taxonomer believes to be the best imaginable set of rules to govern conduct and decisions.[21] In this case, taxonomy is an incidental project. The main task for the taxonomer is to design a set of rules that satisfy some external criterion of goodness—moral, economic, or otherwise. Once the task of identifying ideal rules is complete, the categories to which they are assigned serve as tools for organization of and access to the rules.

4. *Summary*

Legal taxonomy may operate on posited rules, semi-ideal rules attributed to legal decisions, or ideal rules. None of these possibilities represents an intrinsically correct understanding of the subject matter for taxonomy. The choice among them depends on the taxonomer's method and objectives.

B. Criteria for Classifying Law

A second dimension in which legal taxonomies may differ is the criteria for classification: How are the categories of law defined?

1. *Intuitive Similarity*

I begin by setting aside the possibility of intuitive classification.[22] As a psychological matter, it may be possible to arrive at a judgment of similarity among legal rules and to categorize the rules accordingly, based on pattern recognition or spontaneous emotional responses to the subject matter.[23] Typically,

20. DWORKIN, LAW'S EMPIRE, *supra* note 18, at 240–250, 254–258; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 22–31, 115–118 (1978).

21. Judge Richard Posner's economic analysis of law might be viewed as a project of this kind. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

22. It has often been suggested that legal decisions can be sorted intuitively, at least by those who are well trained in law. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 27–41 (1995); ANTHONY KRONMAN, THE LOST LAWYER 109–162, 170–185, 209–225 (1995) EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–6 (1948); LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 78–90 (2005); Charles Fried, *The Artificial Reason of the Law, or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981).

23. For discussion of incompletely reasoned, or "System I," responses in human psychology, *see, generally,* GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1981); HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF

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however, what appear to be intuitive categories of law reflect either conventional groupings or generalizations about the functions or rationales of rules included in the category.[24] Some generalizations are so deeply internalized that the classifications they support appear to be spontaneous; in fact, however, the classifier is relying on an unexamined proposition that identifies relevant similarities among the rules included in each class. For example, a taxonomer who groups rules governing battery with rules governing false imprisonment is likely to have in mind that both are conventionally known as torts, that both address claims to compensation for harms, or that both promote public safety.

To the extent that intuitive classification is possible, it is hard to see the point of the enterprise. Intuitive classification is arbitrary in the sense that it is impossible to articulate a reason for any particular category to be recognized as such.[25] If there were no other methods of classification available and no existing conventions for organizing legal doctrine, then arbitrary classification might be better than no classification at all, at least if the classifier were in a position to establish conventions. Both conventions and alternative criteria for legal classification, however, are readily available.

2. *Evolutionary History*

A more coherent method of classification might be to sort legal materials according to common descent, on the model of Darwinian taxonomy in natural science. Owing to the doctrine of precedent, most common-law rules have an evolutionary history. For example, some rules and remedies were first developed by the English chancellor, while others emerged in decisions of the King's Bench or the Court of Common Pleas.

Common origin, however, is not a promising criterion for comprehensive classification of modern law. Doctrinal history can shed light on the meaning of legal rules and decisions, but a classificatory scheme that relies primarily on history is likely to produce a confusing degree of functional overlap among categories. Not surprisingly, therefore, taxonomers have increasingly deemphasized the origins of legal rules and decisions.[26]

JUDGMENT 1–6, 42–86 (1987); Steven A. Sloman, *Two Systems of Reasoning*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 379 (Thomas Gilovick, Dale Griffin, & Daniel Kahneman eds., 2002); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 4 PSYCHOL. REV. 814 (2001).

24. This is true of any form of analogy. For an extended version of the argument that analogies are applications of general rules that pick out relevant similarities and differences among instances, *see* ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 64–88. Similar arguments appear in MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 84–87 (1988); SCHAUER, PLAYING BY THE RULES, *supra* note 12, at 183–187; Brewer, *supra* note 17, at 962–965; Peter Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153, 1163 (1982).

25. *See* Haidt, *supra* note 23, at 818 (defining reasoning as conscious deliberation about choices in terms capable of articulation).

26. Historical criteria for legal classification were more popular in the past than they are now. *See, e.g.*, WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893); JOHN NORTON POMEROY, EQUITY JURISPRUDENCE (1881). The RESTATEMENT OF RESTITUTION initially divided the restitution into legal and equitable bodies of rules. *See* RESTATEMENT OF RESTITUTION pts. I & II

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3. *Formal Classification*

Formal legal taxonomy focuses on the logical relations among categories of law.[27] Internal logic, rather than external considerations such as the social functions or moral justifications of particular laws, is the primary criterion for classification. Of course, no taxonomy can be purely formal. The taxonomer must begin with some loose set of legal categories, drawn from tradition (tort, contract) or from the general functions of the rules (governing wrongs, governing agreements). From that starting point, the object is to sort the body of legal materials into a logically coherent classificatory scheme. For my purposes, a taxonomy counts as formal if the taxonomer's predominant concern is with the internal logical relationship among legal categories rather than the social functions of or higher-order reasons for the legal rules grouped within them. Birks's classification of the common law, although not purely formal, follows this model.[28]

Because the objective of formal legal taxonomy is logical coherence, there are no uniquely correct criteria for classifying legal rules. The structural rules governing a formal taxonomy might hold, for example, that all existing legal materials must be accounted for;[29] that legal categories should be ranged in an orderly hierarchy in which all subcategories are in fact instances of the more general categories to which they belong;[30] that legal categories should be determinate enough to be widely and consistently understood;[31] and perhaps, as Birks insists, that legal categories

(1937). In the new draft RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, the law-equity distinction is dropped. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2000; Tentative Draft No. 1, 2001; Tentative Draft No. 2, 2002; Tentative Draft No. 3, 2004; Tentative Draft No. 4, 2005).

27. I have borrowed the term "formal classification" from Peter Jaffey. *See* Jaffey, *Classification*, *supra* note 9, at 1015–1017.

28. *See* notes 5–7 and accompanying text, *supra*. *See also* Jaffey, *Classification*, *supra* note 9, at 1017–1018 (characterizing Birks's taxonomy as formal). Another example of formal classification comes from Nicholas McBride, who argues that classification should "tell us all there is to know about our obligations in the most economical and accurate manner." McBride, *supra* note 7, at 72. This requires a list in which no obligation listed is "an instance of another obligation on the list" and no two obligations on the list "are both instances of another obligation which is not on the list." *Id.* at 74, 78. *See also* Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 254–255 (2000) (defending Birks's taxonomic scheme, which Smith describes as giving "moderate" recognition to the law's own organizational "self-understanding").

29. Birks, for example, was careful to include catchall categories to cover legal materials not otherwise accounted for. *See* BIRKS, ENGLISH PRIVATE LAW, *supra* note 1, at xlii; BIRKS, UNJUST ENRICHMENT, *supra* note 2, at 21–22; Birks, *Definition and Division*, *supra* note 4, at 19; Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1769.

30. This explains Birks's claim that the series "tort, contract, restitution" is mistaken because restitution is an outcome of rights rather than a causative event for rights. *See* Birks, *Definition and Division*, *supra* note 4, at 20–21; Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1768–1769, 1771–1772.

31. *See* McBride, *supra* note 7, at 71, 79 (listing, as one of six guidelines for classification of obligations, a requirement that obligations must not be "completely indeterminate").

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must not overlap.[32] If the governing structural rules yield a comprehensive, internally coherent picture of the law, formal taxonomy is agnostic about the substantive contents of particular legal categories.

A formal scheme of legal classification is normatively inert. By their nature, the rules being classified are normative: a rule of law implies institutional consequences, such as a legal right to damages. Yet the classificatory scheme itself, the structural rules that shape it, and the categories it yields have nothing to say about how courts should decide cases. Consider, for example, "unjust enrichment" as a category of events leading to legal liability. Used in a normative sense, the term "unjust enrichment" is shorthand for the proposition that one person should not be permitted to gain at another's expense in circumstances that make the gain unjust. It implies that when a court determines that an unjust enrichment has occurred or may occur, it should intervene with legal relief. In a formal taxonomy, the term "unjust enrichment" carries no such implication. Rather than prescribing a reason for courts to grant relief, "unjust enrichment" is a shorthand reference to a class of events that courts commonly treat as grounds for legal relief rather than a reason to grant relief. Each rule within the category implies a right to relief, but unjust enrichment as a category does not imply that all instances of unjust enrichment warrant relief.

Because formal classification has no normative implications, it naturally operates on the subject matter of posited legal rules. Formal classification might also be suitable for a set of ideal rules that require an organizational scheme for ease of use. A formal taxonomy of attributed legal rules is logically possible but unlikely in practice. The first step in such a project would be to abduce attributed rules from existing legal material, an active process calling for the exercise of moral judgment. The second step, in contrast, would be a passive, nonnormative categorization of the rules. This combination is not likely to appeal to taxonomers; the same scholarly interests and assumptions that lead a taxonomer to attempt to extrapolate normatively attractive interpretive rules from legal decisions probably will lead the same taxonomer to design a normatively charged scheme of classification.

4. *Function-Based Classification*

In a function-based taxonomy, legal rules are classified according to the roles they perform within the legal system or society at large. Each category of law contains a set of solutions to a particular type of problem or dispute.[33]

32. As described above, Birks argues strenuously that the category of unjust enrichment must not include enrichments stemming from wrongs. *See, e.g.*, Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1780–1781.

33. Function-based categories comprising primary rules of substantive law are likely to correspond directly to social activities or disputes found in society. Function-based categories comprising legal remedies or secondary rules for creation and application of law may incorporate notions of legal function that derive from the fundamental objective of settlement. For examples of function-based remedial taxonomy, *see* DOUGLAS LAYCOCK, MODERN AMERICAN

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Thus, for example, legal rules might be classed as responses to wrongs or as default rules for interpretation of private contracts. "Unjust enrichment," in a function-based taxonomy, denotes a category of rules that settle disputes over gains.

Although the categories in a function-based taxonomy are purposive, the functions of legal rules should not be confused with the justifications for their prescriptive content. The categories of law in a taxonomy of this kind may be shaped by assumptions about the overall objectives of law—to settle controversy, for example, or to solve problems that lead to social disharmony.[34] But they do not refer to the rationales that support particular legal rules or explain why the rules are sound solutions to the problems they address.

One striking if somewhat unconventional illustration of function-based taxonomy is Robert Summers's undergraduate legal textbook, *Law: Its Nature, Functions, and Limits*. After several preliminary efforts, the third edition of the text organizes legal materials under the headings "Law as a Grievance-Remedial Instrument," "Law as a Penal Instrument," "Law as an Administrative-Regulatory Instrument," "Law as an Instrument for Organizing Conferral of Public Benefits," and "Law as an Instrument for Facilitating Private Arrangements."[35] Although the editors refer to these categories as legal "instruments" or "techniques," they capture what I have in mind as functions, as opposed to purposes, of legal rules.[36]

Function-based taxonomy is not directly normative in the sense that it aims to guide the process of adjudication. Function-based legal categories may direct a court facing a particular type of problem toward certain bodies of law and away from others. In this way, they may influence judicial decision-making indirectly by performing a gatekeeping role. But they do not operate as standards for decision.

Both actual posited rules and ideal legal rules are amenable to function-based classification. In either case, function-based legal categories provide a connection between classes of rules and classes of cases and thus make it easier for courts to locate and use appropriate rules. Attributed rules can

REMEDIES 3 (3rd ed. 2002); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 267 (1997).

34. On the settlement function of law, *see* ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 11–15; Eisenberg, *supra* note 24, at 4–7; JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 187–92 (1994).

35. SUMMERS ET AL., *supra* note 10. For prior versions, *see* CHARLES G. HOWARD & ROBERT S. SUMMERS, LAW: ITS NATURE, FUNCTIONS, AND LIMITS (1965); ROBERT S. SUMMERS, LAW: ITS NATURE, FUNCTIONS, AND LIMITS (2d ed. 1972). The third edition of the text represents a collaborative effort among Summers and a number of colleagues. A forthcoming fourth edition of the book retains the basic organizational scheme deployed in the third edition.

36. On this point, it is interesting to note that a second section of the Summers text addresses what it terms the "Ends of Law." SUMMERS ET AL., *supra* note 10, at xi. This section discusses, by way of illustration, promotion of safety and promotion of equality, analyzing how different legal "techniques" (what I call functions) advance these ends. *See id.* at 636 (noting that law serves a wide variety of ends).

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also be classified according to function, although in practice this is unlikely to occur. Because the process of attribution makes reference to higher-order principles that explain and justify legal outcomes, taxonomers who begin by abducing rules from the bare data of legal outcomes will tend to sort those rules according to the principles on which they are based.

5. *Reason-Based Classification*

Yet another approach to legal taxonomy is to classify legal rules according to the higher-level reasons that explain or justify them. Any sound rule is an instantiation of broader purposes or principles.[37] For example, particular legal rules and decisions may reflect the principle that wrongful harm imposes a moral obligation of redress on the wrongdoer or the principle that losses should be charged to the party best able to avoid them in order to encourage cost-effective care. Other rules and decisions may reflect the principle that promises should be honored or the principle that deterring breaches of promise will facilitate efficient exchange. Still others may reflect the normative principle of unjust enrichment: courts should act to prevent one person from profiting unjustly at another's expense. These principles are too open-ended and contestable to operate as rules, but they often inspire more concrete legal rules. In a *reason-based* method of legal classification, common justifying principles of this kind define the categories of law.[38]

A project of reason-based legal classification can proceed in three ways. First, the taxonomer can identify the intended rationales for posited legal rules—that is, the justifying reasons that judges and legislators actually relied on in reaching legal decisions. Particular rules and decisions are then sorted according to these rationales. For example, the taxonomer might group together legal rules designed to promote public safety.[39] Under this first type of reason-based approach to classification, the process of identifying rationales is one of interpreting intentions: for the purpose of classification, only those reasons that actually motivated authoritative legal decision-makers to adopt particular rules count as the rationales for those rules.[40]

Traditional forms of legal scholarship, such as treatises and hornbooks, often purport to identify the intended rationales for legal rules. As a basis for classification, however, intended rationales are not promising. First, they are not likely to produce a comprehensive taxonomy of law. Judges and legislatures often do not furnish or even contemplate rationales that are sufficiently general to serve as the basis for categories of law. Second, the reasons actually relied on by rule-making authorities may not cohere with

37. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 12, at 54–55 (discussing the relationship between rules and their justifications).

38. Jaffey refers to this type of classification as "justificatory" classification. Jaffey, *Classification*, *supra* note 9, at 103–105.

39. *See* SUMMERS ET AL., *supra* note 10, at xi (listing public safety as one possible rationale for legal rules and processes).

40. On interpretation, *see* note 19 and accompanying text, *supra*.

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one another. Rules posited by diverse authorities are likely to be motivated by equally diverse and often conflicting reasons, yielding a messy if not incomprehensible taxonomic scheme.[41]

A second, more ambitious form of reason-based taxonomy classifies legal rules and decisions according to attributed rationales, or what Ronald Dworkin calls legal principles.[42] Under this approach, the taxonomer begins with a collection of legal rules and decisions, then constructs a set of broader rationales that explain them.[43] It is important to note that attributed rationales are the work of the taxonomer, who is seeking out the best rationales that fit the body of law; they are not necessarily the rationales intended by legal authorities, who may have had different reasons in mind.[44] At the same time, attributed rationales are not equivalent to ideal moral principles because they must explain the nonideal rules and decisions actually laid down by legal authorities. Once the taxonomer has identified

41. A further difficulty is that there is very little in it for the taxonomer, whose job is simply to interpret and record the rationales adopted by other decision-makers.

42. *See* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 240–250, 254–258; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 22–31, 115–118. Dworkin developed the notion of legal principles as a response to legal positivism. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 22. Courts, he argues, often rely on principles that are not posited rules but are derived from preexisting rules and decisions and are themselves part of the law.

43. Typically, the material to be classified will be posited rules and judicial decisions. However, the taxonomer might first construct a set of attributed rules based on judicial decisions and narrower posited rules, then construct a further set of rationales that provide more general explanations for the attributed rules.

44. In Dworkin's account of law, current judges formulate legal principles as standards for adjudicating particular disputes. A legal principle is not based on the intentions of the authorities who first announced the rules and decisions from which the principle is drawn, who may have had in mind a different principle or no principle at all. Rather than attempting to discern prior lawmakers' intentions, the current judge begins with the data of decisional outcomes and posited rules, formulates a principle or set of principles that meets the twin criteria of moral appeal and explanatory fit with legal data, then applies the principle to decide a pending dispute. *See* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 240–250. A taxonomer classifying law according to attributed rationales would use the same method to provide judges with off-the-rack principles extracted from existing law and assembled in a comprehensive scheme.

As defined by Dworkin, legal principles must explain a certain portion of existing rules and decisions; beyond this, however, flawed rules and precedents can be discarded to achieve the morally best eligible principle. *See* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 230–231, 239–250, 255; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 118–123. Insofar as legal principles must be the morally best principles they can be, consistent with the requirement of fit, presumably all flawed materials *must* be discarded once the threshold is passed. *See* Larry Alexander & Kenneth Kress, *Against Legal Principles*, 82 IOWA. L. REV. 739, 756–757 (1997); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 380–381 (1984) Thus, assuming that at any point in time some number of prior legal rules and decisions will be mistaken, legal principles enable judges to improve on the raw material of existing law. In an imperfect world, however, legal principles cannot be ideal principles because they must satisfy the threshold requirement of fit with existing rules and decisions.

A final point about Dworkin's legal principles is that they do not operate as rules dictating the outcome of cases that fall within their terms. Instead, they have what Dworkin calls a "dimension of weight." DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 26–27. Different legal principles may compete; when this occurs, the presiding judge balances them, giving each principle the weight it is due in the context of the case at hand.

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rationales that pass a threshold point on the two axes of moral attractiveness and fit, legal rules can be grouped according to their common attributed rationales.

Attributed rationales, like intended rationales, are a common feature of traditional legal scholarship; the Warren and Brandeis article mentioned above, which extracts a general right to privacy from judicial decisions on a variety of specific topics, is an example. Classification based on attributed rationales is a technique sometimes used in the American Law Institute's Restatements. The Restatement (Second) of Torts, for example, identifies a series of protected "interests" (the interest in freedom from harmful bodily contact, the interest in freedom from confinement, the interest in freedom from emotional distress, the interest in retaining possession of land or chattels, and so forth), which are best understood as rationales for judicial action.[45] More ambitiously, the 1937 Restatement of Restitution purports to identify a new field of law comprising rules and remedies united by the common principle that one person should not be unjustly enriched at another's expense.[46]

A third possible form of reason-based taxonomy classifies legal rules according to ideal rationales. Because the body of actual legal rules will never conform to ideal rationales, the subject matter of this type of taxonomy must be a set of ideal legal rules. Hence the first task for the taxonomer is to devise ideal rules; the resulting rules are then classified according to the ideal higher-order principles that justify them. The difficult part of the project, of course, is not the classification but the formulation of ideal rules.

By definition, ideal rationales are correct according to some understanding of right or good (taking into account whatever moral reasons there may be to refrain from enforcing morality in full through law). For example, a deontologist engaged in reason-based classification might sort ideal legal rules according to the different moral duties they enforced. A welfare economist might sort ideal legal rules according to general principles of efficiency, such as loss avoidance, transaction cost management, efficient risk allocation, and creation of incentives for value-enhancing activity.[47]

In this section, I have described three forms of reason-based classification: legal rules can be sorted according to intended rationales, attributed rationales, or ideal (morally correct) rationales. In any of these forms, reason-based taxonomy is likely to be both undertaken and understood as a normative project in which the reasons that define the categories of law also operate as standards for judicial decision. Nonnormative reason-based taxonomy is possible; a taxonomer might find it useful to organize rules according the reasons for their adoption without intending that those reasons should influence future judicial decisions. More often, however, the

45. RESTATEMENT (SECOND) OF TORTS contents (1965).

46. RESTATEMENT OF RESTITUTION, *supra* note 26.

47. *Cf.* A. MITCHELL POLISKY, AN INTRODUCTION TO LAW AND ECONOMICS ix–xii, 157–162 (2003) (identifying themes in law and economics).

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working assumption is that when ambiguities, gaps, or errors of under- and overinclusion arise in the application of a rule, courts should turn for guidance to the rationale that defines the category to which the rule belongs. A taxonomy based on attributed rationales is particularly likely to be designed for normative purposes; the only sensible motive for constructing a set of coherent but not ideal rationales for legal rules and decisions is to offer courts a source of immanent law that is more comprehensive than the rules themselves.[48]

Reason-based classification, in any form, is likely to offend the logic of formal classification. Particular decisions or rules may reflect a combination of rationales; therefore the content of legal categories will sometimes overlap. With the possible exception of ideal rationales, rationales will also compete with one another, and their comparative weight may vary according to the context of adjudication.[49] Therefore categories within the taxonomy may resist hierarchical ordering. Matters of form, however, are not likely to be of serious concern to a taxonomer interested in justifying rather than describing law.

6. *Summary*

There are at least three plausible methods for classifying law. The first is formal taxonomy, which sorts legal rules according to organizational rules designed to maintain certain logical relationships between the categories of law. The second is function-based taxonomy, which sorts legal rules according to the types of controversies they are designed to resolve and thus reflects the different roles legal rules play in society. The third is reason-based taxonomy, which classifies rules and decisions, or attributed rules, according to their more open-ended supporting rationales.

C. The Purposes of Classification

Not surprisingly, both the subject matter and the method of legal classification are affected by the purpose of the taxonomic project. The purposes of classification vary both in their implications for taxonomic structure and in the level of the taxonomer's ambitions for shaping the law. At least three possible purposes emerge: facilitating use and discussion of law, supporting critical evaluation of law, and influencing the outcomes of legal decision-making.

48. Legal principles, as conceived by Dworkin, are inherently normative. Legal principles are not simply justifications for more determinate rules that govern the outcome of disputes. Instead, they operate as principles of *law*, which elaborate, extend, and sometimes override more particular legal rules and decisions. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 23–24, 29–39.

49. Truly ideal rationales presumably would include a set of meta-rationales capable of resolving conflicts among more specific rationales.

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1. *Ease of Use*

The most basic and least ambitious goal for legal taxonomy is to organize the body of law in a way that makes it understandable and accessible to those who use it. A comprehensive classification of legal rules helps legal actors locate pertinent rules. It also generates a set of abstract legal concepts that enable legal actors to understand, discuss, and manage law in general terms.[50] If the classification is widely accepted, it can also coordinate the use of legal terminology and allow legal actors to communicate more effectively about the law.

Viewed in this way, legal classification is more akin to grammatical taxonomy than to taxonomy in the natural sciences. Grammarians sort language into categories—verbs, nouns, adverbs—that permit users to express themselves clearly and consistently in both private reflection and public communication. Similarly, by sorting the rules of law into categories, legal taxonomers can harmonize and refine the terms in which law is studied and discussed.

To some extent, any taxonomy of law that gains general acceptance facilitates understanding by enlarging the vocabulary of law. Formal taxonomy, however, is particularly well suited to this purpose. Formal taxonomy is conventional. It gives primacy to order and clarity, with only minimal concessions to external considerations, such as the functions and justifications of legal rules, that might upset its inner logic and detract from its structural precision and linguistic clarity. Formal taxonomy is also likely to be more stable over time. It does not purport to track social conditions or normative principles and so will not be under constant pressure to adapt to changed conditions and beliefs.

Clarifying and enhancing the vocabulary of law is a modest objective for taxonomers.[51] Its influence on legal outcomes is remote and indirect. Yet a taxonomic project that pursues these goals faithfully can contribute significantly to the lucidity of legal thought and the quality of legal decision-making.

2. *Critical Overview*

Another possible objective for legal classification is to help lawmakers and other interested parties determine whether existing legal rules are

50. Formal legal concepts abstracted from the fact of particular cases were a prime target of American legal realists writing in the first half of the twentieth century. *See, e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). For a contemporaneous defense of formal legal concepts, *see* Bernard C. Gavit, *A "Pragmatic Definition" of the "Cause of Action"?*, 82 U. PA. L. REV. 129, 139–143 (1933) (arguing that "One who wishes to escape concepts must remain unborn"). *See, generally*, LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 at 3–44 (1986); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 21–30 (2007).

51. Birks speaks somewhat derisively of information storage, suggesting that the best tool for storage is alphabetization. Birks, ENGLISH PRIVATE LAW, *supra* note 1, at xlviii. But in fact information storage in quite important, and a sensible classification scheme makes it much easier to store and retrieve legal information.

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operating effectively to settle recurrent disputes and achieve social objectives. Taxonomy can do this by providing an overview of the law, which in turn will expose inconsistencies and gaps among legal rules.[52] A comprehensive taxonomy also enables legal reformers to import ideas more readily from one area of law to another.

The natural choice of subject matter for a taxonomy designed to facilitate evaluation of law is the set of actual rules and decisions posited by legal authorities. A taxonomy of ideal rules can also serve this purpose; a scholar interested in designing an ideal body of law may wish to assemble the proposed rules within a comprehensive scheme as a check against omissions and contradictions. A taxonomy of attributed rules, classifying a set of rules devised by the taxonomer to explain prior legal decisions, is of no help in assessing the performance of law because it does not reveal defects in posited or potentially posited law.

For the purpose of evaluating the existing body of law, the most effective method of classification probably relies on a blend of formal and function-based criteria for categorizing law. Attention to formal considerations, such as the completeness of legal categories and the hierarchical relations among categories, ensures that all rules are covered and helps identify gaps in the law. Attention to the social functions of legal rules provides a sense of the rules' ability to settle disputes that arise frequently or are of special importance to the community.

A reason-based classification that identifies the rationales for legal rules can also be helpful for evaluative purposes, but here there is some need for caution. If the rationales assembled by the taxonomer are intended rationales—reasons that legal authorities actually relied on in issuing rules or reaching decisions—comprehensive classification can reveal inconsistencies in both the ends pursued by decision-makers and the means-ends reasoning decision-makers used to advance their ends. Legal authorities can then use the insights that result to correct mistakes by discarding faulty rules or rationales. The same is true of a reason-based taxonomy that classifies ideal rules according to their ideal rationales. A taxonomy of attributed rationales, or legal principles, is less likely to be helpful for the purpose of evaluating law. Classification may illuminate conflicts among attributed rationales, and the rationales can then be adjusted to achieve a greater level of internal coherence. By definition, however, attributed principles are non-ideal; they are the best rationales that can be fitted to existing law.[53] As long as existing rules and decisions—or some proportion of existing rules

52. *See id.* at xlviii ("[w]ithout such a map of the law . . . it will be . . . impossible to pass the mind's eye over the many different locations in which difficult facts might fit"); MITCHELL MCINNES, *supra* note 1, at 87–88.

53. Dworkin, discussing legal principles (which are, in effect, attributed rationales), appears to recognize that the principles he describes inevitably diverge from correct moral principles. In Dworkin's explication of the common law, judges are left to "weigh" competing principles and so resolve the conflicts among them case by case. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 26–27; note 44 *supra*.

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and decisions—are taken as given, perfect harmony among their attributed rationales will never be possible, and at some point attempting to reconcile them will become a pointless exercise.

3. *Guidance for Decision-Makers: Normative Taxonomy*

A third possible objective for legal taxonomy is to guide legal authorities in reaching decisions. A taxonomy undertaken for the purpose of guiding decision-makers is directly normative; the scheme of classification is designed not only to organize existing rules and decisions but also to provide standards for future rules and decisions. For example, the taxonomer might identify various legal rules and decisions that invalidate transfers of property made by mistake and classify them as instances of the principle that one person should not be unjustly enriched at another's expense. In a normative taxonomy, the unjust-enrichment principle does not simply describe a common feature of a class of rules and decisions; it provides a basis for analogous rules and decisions in future cases. The implication is that if an enrichment occurs in circumstances deemed to be unjust, legal authorities have at least a prima facie reason to provide relief. The category "unjust enrichment" becomes not just an organizational tool but a decisional standard indicating that decision-makers should reach like results in all cases it encompasses.

The objective of guiding legal decision-making implies a reason-based method of classification. To some extent, of course, any form of legal taxonomy will influence decision-making. Because human reasoning is path-dependent, the categories by which a reasoner organizes his or her subject matter are certain to shape the reasoner's conclusions. Therefore, a function-based taxonomy, or even a formal taxonomy that is indifferent to the content of legal categories, will point legal reasoners in certain directions and block others.[54] Yet for a taxonomy to be normative in the strong sense that legal categories indicate legal outcomes in cases that fall within them, it must classify legal materials according to common decisional principles from which rules or outcomes can be deduced.

4. *Summary*

There are at least three plausible reasons for undertaking a taxonomy of law, which shape the enterprise of legal classification in substantially different ways. First, legal classification can be conceived of as a way to make law easier to access and use. By providing a common vocabulary of general legal terms, taxonomy helps practitioners of law to discuss their subject consistently and understand it at a higher level of abstraction. Typically, the subject matter of a taxonomy undertaken for this purpose is actual legal rules interpreted according to the intentions of the authorities who posited them. The primary method of classification is formal, arranging

54. *See, generally*, LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, *supra* note 23; LAKOFF & JOHNSON, METAPHORS, *supra* note 23; Margolis, *supra* note 23.

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determinate legal categories according to rules of taxonomic logic. The categories employed neither track nor establish normative grounds for legal decision-making.

Second, legal taxonomy can accommodate critical evaluation of law as a social institution by providing a comprehensive overview of the field. Again, the subject matter will typically be actual posited rules and authoritative legal decisions. The method of classification is likely to blend functional criteria, which reflect the various roles law plays in human society, and formal criteria, which add clarity and order to the resulting picture of law. A classification of this kind provides an analytical tool that may shape legal reasoning, but it does not purport to answer legal questions that arise within the different categories it establishes.

Third, legal taxonomy can be conceived of as a guide for authoritative legal decision-making. A taxonomy undertaken for the purpose of guiding decision-makers must be reason-based, classifying rules and decisions according to their underlying rationales. Rationales not only organize existing law but also serve as standards for analogical decision-making in new cases.

Formal taxonomy is unlikely to appeal to U.S. cholars; laboring to avoid an overlap between categories seems an unambitious if not pointless pursuit. Function-based taxonomy may also seem an overly passive enterprise to those who wish to contribute more directly to improvement of the law. A reason-based taxonomy, and particularly a taxonomy based on rationales formulated by the taxonomer, is more likely to capture American attention because it promises to make the law not just clearer but better and more complete. Yet, for reasons addressed in the following section, normative forms of reason-based taxonomy should be approached with care.

III. FURTHER THOUGHTS ON NORMATIVE TAXONOMY

A normative taxonomy is one in which the categories of law do not simply organize the law but indicate legal outcomes in future cases. Legal categories are in effect generalizations designed to support analogical decision-making within the classes they define.[55] Although reason-based classification does

55. Analogical decision-making is sometimes depicted as a based on a special form of reasoning in which the decision-maker reasons directly from the outcome in one case to a parallel outcome in another case deemed to be analogous to the first. *See, e.g.*, BURTON, *supra* note 22, at 25–41; RAZ, AUTHORITY OF LAW, *supra* note 12, at 201–206; WEINREB, *supra* note 22; Brewer, *supra* note 17, at 925, 925–929, 962–963; John F. Horty, *The Result Model of Precedent*, 10 LEGAL THEORY 19 (2004); Grant Lamond, *Do Precedents Create Rules?*, 11 LEGAL THEORY 1 (2005). *See also* Levi, *supra* note 22, at 1–6 (endorsing analogical decision-making but acknowledging its logical flaws); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 77–87 (1960) (discussing "the leeways of precedent"); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66–69 (1960) (same); SUNSTEIN, *supra* note 15, at 62–100 (defending analogical decision-making as a form of "incompletely theorized" decision-making).

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not necessarily carry normative implications, normative taxonomy must be reason-based.

I have identified three forms of reason-based classification. The first classifies posited rules and decisions according to the rationales consciously adopted by authoritative decision-makers; the second classifies posited rules and decisions (or attributed rules) according to rationales constructed by the taxonomer to fit the rules; the third classifies ideal rules according to their ideal rationales. In theory, any of these forms of reason-based classification could be employed for normative purposes, to provide legal authorities with standards for decision. The resulting standards, however, differ in significant ways. Moreover, the effect of each form of classification may depend on the authorities to whom it is addressed. The potential target audience for a normative taxonomy of law includes two types of legal decision-makers—those who posit legal rules and those who adjudicate disputes—with different implications for the choice of classificatory scheme.

A. Classification as a Guide for Adjudicators

Suppose a taxonomer undertakes to classify law in a way that will provide decisional standards for judges adjudicating disputes. The classification may track intended rationales for past rules and decisions, attributed rationales for past rules and decisions, or ideal rationales for ideal rules. Two of these choices—intended rationales and ideal rationales—run a risk of self-contradiction.

Beginning with intended rationales for actual rules, the difficulty here is that the authorities who posited the rules might not want the rationales that motivated them to have the force of law, for several reasons. First, rule-making authorities might view their rationales as tentative and therefore might prefer to limit the positive effect of their decisions to the terms of a comparatively narrow rule. Second, rule-making authorities may have chosen to posit limited, determinate rules because they believed that determinate rules would coordinate behavior more effectively than relatively indeterminate rationales or that decision-makers would err less often if they followed determinate rules than they would if they referred directly to the rationales behind the rules.[56] Determinate rules are likely to be underinclusive or overinclusive and consequently likely to prescribe some outcomes

Others (including myself) have maintained that analogical decision-making is in fact a more or less conscious application of general rules. *See, e.g.*, ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 14, at 66–87; ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 125–135; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 86–98 (1990); SCHAUER, PLAYING BY THE RULES, *supra* note 12, at 183–187; Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80–86 (1996). *See also* Emily Sherwin, *A Defense of Analogical Reasoning*, 66 U. CHI. L. REV. 1179 (1999) (defending the indirect benefits of a practice of analogical reasoning).

56. For fuller discussion of the reasons rule-makers may prefer that rule subjects obey the rules without considering whether the outcomes of the rules are consistent with the purposes and principles the rules are designed to carry out, *see* ALEXANDER & SHERWIN, RULES OF RULES,

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that are wrong, judged by the rationales that support the rules. Human reasoning, however, can also result in error. If the sum of error likely to follow when judges attempt to apply broad principles to particular cases is greater than the sum of error likely to follow from consistent adherence to the rules, the best course is for judges to follow the rules according to their terms. Accordingly, legal authorities who have chosen to posit rules presumably intend that the rules, not their rationales, should govern judicial decisions.[57] It follows that a taxonomy that offers actual rationales as standards for decision departs from and may contradict the intentions of the authoritative sources on which it relies.

Similar reasoning applies to a taxonomy that classifies ideal rules according to ideal rationales. In this case, there are (as yet) no rule-making authorities; the taxonomer formulates both the rules and their rationales. The choice of determinate rules implies that consistent application of the rules will yield a better sum of decisions than direct reference to their rationales, because determinate rules settle controversy, facilitate coordination, and prevent reasoning errors. If so, normative application of a reason-based taxonomy based on ideal rationales will distort the operation of the system's ideal posited rules and thus indirectly contradict its ideal rationales.[58]

When classification is based on attributed rationales, normative use of a reason-based taxonomy is not contradictory in this way. The objective is not to provide a supporting framework for ideal legal rules but to enable courts to elaborate on and update the body of existing rules. The enterprise of constructing attributed rationales for posited rules and decisions assumes that within the limits imposed by the requirement of fit, rationales trump rules. Attributed rationales are supposed to provide courts with a superior and more comprehensive source of decision-making authority, drawn from but not limited to existing rules and precedents, which will enable them to distinguish recalcitrant rules and develop new rules by analogy. A comprehensive taxonomy of law based on attributed rationales offers courts an organized set of ready-made rationales (legal principles, in Dworkinian terms) to facilitate the project of expanding and improving on law.[59]

supra note 12, at 53–95; SCHAUER, PLAYING BY THE RULES, *supra* note 12, at 128–34; Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991).

57. *See* RAZ, MORALITY OF FREEDOM, *supra* note 12, at 57–62, 70–80 (discussing "exclusionary" reasons and the "normal justification" for rules).

58. Perhaps this effect could be avoided by limiting access to the taxonomy of ideal reasons for law to those who design legal rules and withholding access from those who are expected to follow and apply legal rules. Yet the prospect of an esoteric legal taxonomy, hidden from most legal actors, poses a variety of practical and moral problems. *See* ALEXANDER & SHERWIN, RULES OF RULES, *supra* note 12, at 86–91; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1211–1222 (1994). Not least of these practical difficulties is that in a system that accepts the doctrine of precedent, adjudicators *are* lawmakers.

59. *See* Lawrence Alexander & Michael Bayles, *Hercules or Proteus: The Many Theses of Ronald Dworkin*, 5 SOC. THEORY & PRAC. 267, 271–278 (1980); Alexander & Kress, *supra* note 44, at 753–754.

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At the same time, a taxonomy of attributed rationales, designed for normative use, will not be as effective as a set of determinative, authoritative rules in settling controversy and coordinating conduct. In contrast to determinate rules, rationales are open-ended, inviting substantial variations in interpretation.[60] Nor are rationales conclusive; they are influential reasons for decision that may come into conflict in particular cases. When this occurs, judges must weigh them against one another with a process that is likely to yield varying results.[61]

In my own view—a view that is influenced by positivism—normative taxonomy based on attributed rationales is not a fruitful enterprise. For a positivist, law consists of the set of prescriptions identified as authoritative by social rules of recognition.[62] In cases not governed by authoritative law, judges must exercise their best judgment, all things considered, to resolve the disputes before them.[63] That is to say, they must engage in moral and empirical reasoning, seeking wide reflective equilibrium between initial judgments and plausible justifying principles.[64] Attributed rationales do not fit into this understanding of law; they are not rules posited by authorities,

60. A preliminary difficulty is that there is no unique set of attributed rationales that best meet the criteria of overall virtue and fit with rules and decisions. It is not obvious how closely rationales must fit with existing rules and decisions to qualify as attributed rationales. *See* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 255 ("different judges will set [the threshold of fit] differently"). The problem of fit is further complicated by the effect of new decisions: new decisions add to the body of law and thus alter the threshold of fit. *See* Alexander & Kress, *supra* note 44, at 756–757; Kress, *supra* note 44, at 380. In the absence of moral consensus, judges also might differ about which qualifying rationales are best. Thus, if the threshold of fit could be regularized, decision-makers still might not converge on the same set of attributed rationales. Different taxonomers might propose different schemes, and judges might not accept what taxonomers had to offer. If a particular scheme became prestigious enough to command substantial loyalty among judges, the problem of divergent rationales would be solved but the additional sources of inconsistency mentioned in the text would remain.

61. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 26–27. Assigning weight to attributed rationales is a difficult if not impossible task. Attributed rationales are not morally ideal rationales; they are shaped in part by the requirement of fit with existing rules and past decisions and so are sure to incorporate some number of mistakes. Thus, when attributed rationales conflict, the question for judges is what moral weight to assign to reasons for decisions that are, by hypothesis, morally flawed. Correct moral principles cannot provide the answer, because the question itself makes no moral sense. Ultimately, therefore, the weight assigned to different principles depends on the judge's unregulated sense of which principle leads to the best result. *See* Alexander & Kress, *supra* note 44, at 756–757.

62. *See, generally*, HART, *supra* note 16, at 77–107.

63. *See, generally*, *id.* at 121–133.

64. Wide reflective equilibrium is the method of moral reasoning described by John Rawls, in which the reasoner tests a tentative moral principle against moral judgments about the correct outcome in particular instances within its scope. *See* JOHN RAWLS, A THEORY OF JUSTICE 14–21, 43–53, 578–582 (1971); John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951). The reasoner continues to adjust both the tentative principle and his or her more particular judgments, and also to seek independent confirmation from accepted background theories about the world, until an equilibrium is reached. As a method of justifying action or decisions, reasoning to wide reflective equilibrium is open to some devastating logical criticisms, but it is probably the best option we have. For explanation and defense of the method of reasoning to wide reflective equilibrium, *see* Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance*, 76 J. PHIL. 256 (1979). For criticism, *see, e.g.*, D.W. Haslett, *What Is Wrong with Reflective Equilibria?*, 37 PHIL. Q. 305 (1987).

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nor are they moral principles of the type that positivist judges apply in the absence of rules.[65] Instead, they are imperfect norms constructed from the data of prior decisions and preexisting rules, which have neither legal nor moral authority for decision-makers.

In contrast, both formal taxonomy and function-based taxonomy are consistent with legal positivism. A formal taxonomy makes posited rules more accessible to judges; a function-based taxonomy may help judges connect posited rules to disputes. A formal or function-based taxonomy of existing rules and prior decisions may also help judges decide cases in the absence of posited rules by providing a ready source of examples for use in the process of reasoning to reflective equilibrium.[66] Neither of these methods, however, purports to override rules posited by recognized legal authorities.

B. Classification as a Guide to Lawmakers

A normative, reason-based taxonomy of law might also be addressed to authorities who posit legal rules. In this case, categories of law based on the rationales for legal rules would serve as standards for assessing current rules or announcing new ones. The implication of each category included in the scheme would be that lawmakers should promulgate conforming rules and repeal rules that either lack rationales or produce too many outcomes in conflict with their supporting rationales. Again, any of the possible forms of reason-based classification—classification based on intended rationales, classification based on attributed rationales, or classification based on ideal rationales—could in theory provide normative guidance.

For the purpose of guiding lawmakers, a classification based on the intended rationales for prior rules and decisions is likely to have only modest benefits. Lawmakers might look to the reasons relied on by previous lawmakers to support rules as a source of epistemic authority based on the experience and presumed wisdom of their predecessors.[67] They might also

65. Nor is an attributed rationale a form of moral principle incorporated by authoritative sources into law. Positivists disagree about whether moral principles can become legally authoritative by incorporation. *See, e.g.*, RAZ, MORALITY OF FREEDOM, *supra* note 12, at 42–51 (defending exclusive legal positivism); Jules L. Coleman, *Incorporationism, Conventionalism, and the Practical Difference Thesis*, 4 LEGAL THEORY 381, 383–385 (1998) (defending inclusive legal positivism); Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998) (defending exclusive legal positivism).

66. Examples furnished by the prior decisions can serve as a check on tentative decisional principles formulated by the judge. Using past cases to test decisional principles, however, is quite different from reasoning by analogy based on legal principles drawn from past cases. A judge constructing a legal principle takes the outcomes of past decisions as fixed starting points; a positivist judge deciding a case that falls outside the scope of prior posited rules uses the facts of past cases to test the moral soundness of an independent decisional principle. *See* Alexander, *Bad Beginnings*, *supra* note 55, at 66–68 (explaining the differences between analogical reasoning in law and reasoning to reflective equilibrium).

67. For a discussion of epistemic authority, *see* HEIDI M. HURD, MORAL COMBAT 63–65 (1999).

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consult the rationales of existing rules to determine whether changed circumstances had made the rules obsolete or whether the rules were misconceived from the outset.

A scheme of classification based on ideal (morally correct) rationale for ideal rules would certainly be helpful to lawmakers designing rules, if in fact a set of ideal rationales for legal rules could be compiled. Of course, a taxonomy sorting ideal rules according to ideal rationales would provide a set of rules; but lawmakers might turn to the set of rationales it assembled when new problems called for additional rules. One difficulty with a scheme of this kind is that ideal rationales ultimately reduce to a single master principle or a small set of deontic principles, either of which is likely to be controversial. Nevertheless, in principle a taxonomy assembling ideal rationales for legal rules for ideal legal rules has obvious benefits for lawmakers.

A classification based on attributed rationales, used to providing normative guidance to lawmakers, is more difficult to assess. Attributed rationales for posited rules (or for rules attributed to legal decisions) are not ideal rationales.[68] Because they are constructed to fit a body of existing rules or decisions, they incorporate the flaws of existing rules or decisions. A taxonomer assembling attributed rationales might reject some number of posited rules and decisions as mistakes, but the rationales the taxonomer constructs cannot qualify as attributed rationales unless they explain a significant proportion of the material from which they are drawn. Therefore, attributed rationales provide morally imperfect standards for future rules. On the other hand, some might argue that a comprehensive set of attributed rationales for existing legal rules and decisions, relied on by lawmakers for guidance in designing or revising rules, would promote consistency in law. On this view, internal consistency in the body of law has intrinsic virtue independent of the substantive content of particular legal rules.[69]

C. The Problem of Judges

I have suggested that the advantages and disadvantages of different forms of normative taxonomy intended to guide legal decision-making depend in part on the audience of decision-makers to whom the taxonomy is addressed. In particular, a taxonomy that sorts posited rules according to their intended rationales or a taxonomy that sorts ideal rules according to their ideal rationales can be self-contradictory when relied on by adjudicators if the rule-making authority intended to posit authoritative rules.

68. *See* text accompanying note 44, *supra*.

69. *See* DWORKIN, LAW'S EMPIRE, *supra* note 18, at 178–182, 217–219 (discussing "legislative integrity" and arguing that legislatures should avoid "checkerboard" laws in order to maintain "consistency in principle among the acts of the state," even if legislation of this kind would achieve a fair compromise among competing political views). Dworkin warns, however, that considerations of justice can override considerations of consistency. *Id.* at 218–219.

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Addressed to lawmakers, however, a taxonomy based on intended or ideal rationales does not have this negative effect and may assist the lawmaker in designing or evaluating rules. A taxonomy based on attributed rationales is not self-contradictory when relied on by adjudicators but will undermine the benefits of determinate rules. Depending on one's point of view, a taxonomy of attributed rationales, when offered to lawmakers, either promotes internal consistency or incorporates an unacceptable level of error. In any event, audience matters in evaluating reason-based methods of taxonomy.

In a system that recognizes the authority of judicial precedent, normative taxonomy aimed at judges presents a particularly complicated problem because judges function both as adjudicators and as lawmakers. Moreover, judges face special difficulties as rule-makers because they announce rules in the course of deciding concrete disputes.[70] When a judge designs a rule after hearing or reviewing the evidence in a particular case, the facts of that case will stand out prominently in the judge's mind. As a result, a variety of cognitive biases may affect the judge's perception of the consequences of the rule.[71] For example, what cognitive psychologists call the "availability heuristic" may lead the judge to assume that the facts of the current case are representative of the class of cases governed by a proposed rule and consequently to ignore or discount statistical likelihood.[72] Similarly, the "affect heuristic" may lead judges to give undue weight to facts portrayed in emotional terms by the parties before the court.[73] These and other biases may lead the judge to misjudge the future effects of the rule over the range of cases that fall within its terms.

The susceptibility of judges to cognitive bias suggests that a reason-based taxonomy of law, providing both sound rationales for rules and alternative examples of normatively related rules and decisions for comparison, might be particularly helpful for judges in their role as rule-makers. Yet a reason-based taxonomy may also lead judges acting as adjudicators to depart from well-justified legal rules when the rules prescribe outcomes that

70. *See, e.g.*, ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 14, at 109–114; Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 833, 893–906 (2006).

71. *See, generally,* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); HEURISTICS & BIASES, *supra* note 23; SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993); *Symposium: The Behavioral Analysis of Legal Institutions: Possibilities, Limitations, and New Directions*, 32 FLA. ST. U. L. REV. 315 (2005).

72. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequence and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); PLOUS, *supra* note 71, at 121–130; Schauer, *Do Cases Make Bad Law?*, *supra* note 70, at 894–895; Jeffrey J. Rachlinski,*Bottom-up versus Top-down Lawmaking* 73 U. CHI. L. REV. 933, 942–943 (2006); Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Source of Information*, *in* HEURISTICS & BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103 (Thomas Gilovick, Dale Griffin, & Daniel Kahneman eds., 2002).

73. *See, e.g.*, Paul Slovic, Melissa Finucane, Ellen Peters, & Donald G. MacGregor, *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397 (Thomas Gilovick, Dale Griffin, & Daniel Kahneman eds., 2002); Rachlinski,*supra* note 72, at 943.

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appear to conflict with their rationales. If judges treat rules as transparent to their rationales, they will, over time, undermine the benefits of the rules.

In theory, the two roles of judges are distinct. A judge applying an established rule to resolve a dispute may understand the advantages of determinate, authoritative legal rules and thus ignore the reasons underlying the rules for purposes of adjudication. The same judge, faced with the need to formulate a rule, might seek out the rationales of existing rules and thus might consult a reason-based taxonomy of law. Yet even a judge who is a aware of the theoretical distinction between adjudication and lawmaking may be psychologically unable to compartmentalize in this way. A judge who has glimpsed a set of rationales for rules will find it hard to adhere to a normally efficacious rule when the rule points to a questionable result.[74] There is no easy solution to this dilemma. It does suggest, however, that normative taxonomy should be treated with caution, bearing in mind the value of rules.

IV. TAXONOMY IN ACTION: THE EXAMPLE OF UNJUST ENRICHMENT

To this point, I have discussed legal taxonomy in abstract theoretical terms with few concrete examples. Illustrations are hard to come by, not because taxonomy is scarce but because most available legal taxonomies are both partial and, in terms of the various distinctions I have drawn, hybrid. The example that comes closest to a deliberate, comprehensive, and methodologically consistent taxonomic project is Birks's taxonomy of the common law, and even Birks's taxonomy is sometimes mixed in its approach.[75] For the most part, Birks's classification is formal, shaped by logical imperatives and avoiding normative claims. Yet Birks occasionally aspired to goals such as constraint, consistency, and like treatment of like cases, which suggest a more functional or even a normative approach to taxonomy.[76]

Rather than focusing on particular scholarly works, therefore, I attempt below to illustrate my points with a frequent subject of taxonomic debate, the law of unjust enrichment. In some respects, unjust enrichment is atypical because the value-laden term "unjust" makes prevention of unjust enrichment an unusually amorphous topic. I choose it, however, because it has

74. For a fairly pessimistic assessment of the capacity of judges to distinguish between overruling unjustified rules and disregarding justified rules when they produce unpalatable results, *see* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 14, at 114–117.

75. Legal commentary pursuing a particular substantive approach to law, such as RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 21, often proceeds in taxonomic form as a formal, functional, or reason-based classification of ideal legal rules. *See id.*, contents at xxii. In work of this kind, however, taxonomy is usually incidental to the author's substantive project.

76. *See* Birks, *Definition and Division*, *supra* note 4, at 34–35; Birks, *Equity*, *supra* note 4, at 4–5.

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played a major role in English debates over taxonomy, generating sometimes heated arguments that reflect the different approaches I identify.

Unjust enrichment has a long history in the civil law and surfaced in American scholarship more than a hundred years ago.[77] In 1937, Warren Seavey and Austin Scott published the first Restatement of Restitution, which identifies unjust enrichment as the common theme of a variety of legal and equitable claims and establishes the term "unjust enrichment" in the vocabulary of American common law.[78] Beginning in the 1950s, John Dawson and George Palmer engaged in a lively debate about the content, function, and virtues of legal relief based on unjust enrichment.[79] Nevertheless, the subject was never well understood in the common-law world, and it fell into a state of confusion and misuse after Dawson and Palmer retired from the scene. In recent years, interest in restitution and unjust enrichment has spiked, particularly in the U.K..[80] Meanwhile, the American Law Institute is at work on a new Restatement (Third) of Restitution and Unjust Enrichment, under the guidance of Andrew Kull.[81]

One subject of debate among scholars interested in unjust enrichment has been the role the concept of unjust enrichment plays or should play in judicial decision-making. Some use the term "unjust enrichment" as a shorthand reference to a category of posited law.[82] On this view, unjust enrichment is not a decisional principle authorizing courts to grant relief but only a conventional reference to a set of more particular legal rules or, at most, a common feature of various disputes in which courts have granted relief. Others associate unjust enrichment with a particular type of legal claim based on gains obtained by one party at another's expense.[83] For other scholars, unjust enrichment is a normative principle that provides courts with a reason for decision in all cases that fall within its scope.[84] On

77. *See* WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (1893); J.B. Ames, *The History of Disgorgement*, 2 HARV. L. REV. 53, 66, 69 (1888); Andrew Kull, *James Barr Ames and the Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297 (2005).

78. RESTATEMENT OF RESTITUTION §1 (1937); *see* Warren A. Seavey & Austin W. Scott, *Restitution*, 213 LEGAL Q. REV. 29 (1938).

79. *See, e.g.*, JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951); 1–4 GEORGE E. PALMER, THE LAW OF RESTITUTION (1978 & Supp. 1998); John P. Dawson, *Restitution without Enrichment*, 61 B.U. L. REV. 563 (1981).

80. *See* note 2 and accompanying text, *supra*.

81. Draft RESTATEMENT, *supra* note 26.

82. *See, e.g.*, PETER BIRKS, *Introduction*, *in* UNJUST ENRICHMENT 18–25 (2003); DAGAN, LAW AND ETHICS OF RESTITUTION, *supra* note 2, at 12–18, 25–33; Birks, *Definition and Division*, *supra* note 4, at 21; Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195–1196 (1995); Emily Sherwin, *Restitution and Equity*, 79 TEX. L. REV. 2083, 2108–2112 (2001). Cf. DAWSON, UNJUST ENRICHMENT, *supra* note 79, at 4–5, 7–8, 24–26 (suggesting that unjust enrichment is too broad an idea to serve as a legal rule).

83. The draft RESTATEMENT appears to reflect this view, although the RESTATEMENT also covers certain claims against defendants who have not received actual benefits, in order to undo the effects of invalid contracts. *See* draft RESTATEMENT, *supra* note 26, §1 cmt. a (Discussion Draft 2000) ("The source of a liability in restitution is the receipt of an economic benefit.").

84. Commentary that can be read this way includes DAN B. DOBBS, LAW OF REMEDIES, §4.1(2), at 557–558 (2d ed. 1993) (characterizing unjust enrichment as "the fundamental substantive

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this view, the principle of unjust enrichment instructs judges to grant relief whenever it appears that a defendant has been unjustly enriched at the expense of a plaintiff.[85]

These different understandings of unjust enrichment correspond to the different approaches to legal taxonomy described above. In a formal taxonomy, the legal category of unjust enrichment describes a class of rules and decisions holding defendants liable to plaintiffs, which are conventionally grouped according to the common feature of unjust enrichment. Because the rules and decisions included in this category do not fit within other commonly recognized legal categories such as tort or contract,[86] unjust enrichment occupies an otherwise unoccupied logical space in the overall picture of law. The legal category of unjust enrichment, however, says nothing, one way or the other, about whether a courts should grant relief in new cases of unjust enrichment.

In a function-based taxonomy, unjust enrichment describes a type of dispute to which courts must respond. The rules included in this category apply to claims based on gains that the claimant believes to be unjust. Once again, however, the existence of a legal category of unjust enrichment does not imply that courts should grant relief whenever they find that an unjust enrichment has occurred.

In a reason-based taxonomy of law, the category "unjust enrichment" encompasses a set of rules and decisions that reflect a broader decisional principle—that courts *should* act to prevent unjust enrichment. Assuming that the taxonomy is intended to be normative for decision-makers (or is accepted as normative by decision-makers), prevention of unjust enrichment also provides an analogical link between those rules and decisions and new cases of unjust enrichment. The implication of the category "unjust enrichment" is that if a plaintiff can establish that the defendant was enriched at

basis for restitution"); Goff & Jones, *supra* note 2, at 12 (characterizing unjust enrichment as a "principle of justice which the law recognizes and gives effect to in a wide variety of claims"); 1 PALMER, *supra* note 79, §1, at 5 (stating that the idea of unjust enrichment "has played a creative role" in the development of restitution); Robert Goff, APPENDIX: THE SEARCH FOR PRINCIPLE, *in* THE SEARCH FOR PRINCIPLE 313, 324 (William Swadling & Gareth Jones eds., 1999) (favoring "the acceptance of a fully fledged principle of unjust enrichment . . . with the emphasis changing from the identification of specific heads of recovery to the identification and closer definition of the limits to a generalized right of recovery").

85. A particularly broad interpretation of this principle holds that unjust enrichment can and should assume the role once played by equity, enabling courts to make exceptions to otherwise applicable legal rules in all areas of law. *See* Peter Linzer, ROUGH JUSTICE: A THEORY OF RESTITUTION AND RELIANCE, CONTRACTS AND TORTS 2001 WIS. L. REV. 695, 700–702, 773–775 (2001); Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 607–610 (1962) (suggesting that unjust enrichment serves as a corrective to rules of law and as a gap-filler when rules fail). In other words, whenever one party benefits at another's expense from technical application of a rule, the principle of unjust enrichment authorizes courts to correct the outcome of the rule.

86. At least, comparatively narrow definitions of restitution take this position. *See* Kull, *supra* note 82, at 1192.

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a plaintiff's expense in circumstances that appear unjust, the court should grant relief.

Unjust enrichment also illustrates the difference between possible forms for reason-based classification. Unjust enrichment has sometimes appeared as an intended rationale for decisions granting relief to restitution claimants when no specific rule applies.[87] Unjust enrichment might also be advanced as an attributed rationale for various decisions in the field of restitution. Thus the principle that one person should not be unjustly enriched at another's expense may be the most morally attractive principle capable of explaining, for example, an order for restitution of money paid by mistake;[88] an order imposing a constructive trust on assets a murderer inherited from his victim;[89] or an order for restitution between unmarried ex-cohabitants.[90] At the same time, unjust enrichment may not qualify as an ideal decisional principle. The moral foundation for a general principle in support of claims based on unjust enrichment is debatable at best. Unlike a claim to compensation for injuries,[91] a claim to restitution of unjust gains focuses on the relative positions of the claimant and the defendant: the defendant is enjoying a benefit that the claimant believes should rightly be the claimant's.[92] The objective of the claim is at least as much to reduce the defendant's welfare as to improve the position of the claimant, and the sentiment involved is akin to resentment or envy. Thus, although unjust enrichment may provide a broad rationale capable of explaining a variety of specific rules and decisions in area of restitution, it may not be a sound decisional principle for unforeseen future cases.

87. Some notable examples are Kossian v. American National Insurance Co., 254 Cal. App. 647 (1967) (allowing recovery for the value of work performed on land taken over by a mortgagee who also collected on the property); Sharp v. Kosmalski, 351 N.E. 2d 721 (N.Y. 1976) (allowing recovery of gifts bestowed in the course of a romance that ultimately failed).

88. *See* draft RESTATEMENT, *supra* note 26, §§5–12 (Tentative Draft No. 1, 2001).

89. RESTATEMENT OF RESTITUTION §187 (1937); *see* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 18, at 23, 28–29.

90. Draft RESTATEMENT, *supra* note 26, §28 (Tentative Draft No. 3, 2004); *see* Dagan, LAW AND ETHICS OF RESTITUTION, *supra* note 2, at 165–183; Emily Sherwin, *Love, Money, and Justice: Restitution between Cohabitants*, 77 U. COLO. L. REV. 711 (2006).

91. *See, e.g.,* DOBBS, *supra* note 84, §1.1, at 3; Laycock, *supra* note 30, MODERN AMERICAN REMEDIES at 15–16.

92. *See* Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1459–1460. In cases of wrongdoing, a reduction in the defendant's welfare might be justified on retributive grounds, but not all claims of unjust enrichment involve wrongdoing, and in any event, legal responses to unjust enrichment are typically not measured according to culpability, as retributive responses must be. For discussion of the moral value of retribution, *see, e.g.,* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 374–380 (1981) (explaining retribution as being necessary to connect the wrongdoer to moral values); Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 122–147 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (explaining retribution as a means of affirming the value of the victim); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987) (defending retribution as a good in itself, on grounds of moral desert); Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 482–486 (1968) (explaining retribution as a balance of moral accounts).

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V. CONCLUSION

I have identified three principal methods of legal taxonomy: formal classification, function-based classification, and reason-based classification. Formal classification organizes law according to a set of structural rules. It is modest in its aims, helping to clarify the law and facilitate legal communication. It does not purport to present courts with standards for decision.

Function-based classification organizes laws according to types of disputes they are designed to resolve. A classification of this type is useful for the purpose of evaluating the body of law. Like a formal classification, it has no direct effect on the outcomes of adjudication.

In a reason-based classification, legal materials are organized according to the broader rationales that support them. Most often, a reason-based classification of this type is normative in the sense that it aspires to guide and improve legal decision-making. The usefulness of this type of taxonomy is mixed, depending on the type of reasons it assembles and the type of decision-makers to whom it is addressed. Assessments of normative, reason-based legal taxonomy will also be affected by the observer's beliefs about the primary functions and virtues of a system of law.

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