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Cornell Law School research paper No. 06-020

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Legal Taxonomy

Emily Sherwin *

Abstract

This essay examines the ambition to taxonomize law and the different methods a legal taxonomer might employ. Two possibilities predominate. The first is a *reason-based* taxonomy that classifies legal rules and decisions according to “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, for use in deciding new cases and evaluating precedents. The second possibility is a *formal* taxonomy that classifies legal materials according to rules of order and clarity. Formal taxonomy serves less ambitious objectives, such as facilitating legal analysis and communication. It does not provide decisional standards for courts.

I conclude that reason-based taxonomy, classifying law according to legal principles, is a misguided enterprise. It may be more satisfying to the taxonomer, but it will not improve the process or outcomes of judicial decisionmaking.

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In recent years, a debate has arisen among English legal scholars over how to classify the substantive rules of private law.¹ English scholars, in other words, have turned their attention to *legal taxonomy*. The curious English debate over taxonomy has generated a considerable body of literature in the United Kingdom and elsewhere, but has attracted little attention in the United States.

Interest in taxonomy grew out of a wave of scholarship on the subjects of restitution and unjust enrichment.² A significant amount of this work focused, not on the substantive law of restitution, but on the positions that restitution and unjust enrichment occupy within the larger picture of law. Is restitution a category of substantive law on a par with tort or contract, or is it a means of vindicating various legal rights? Does unjust enrichment describe a broad category of gain-based legal claims, or is it a stand-alone ground for relief that excludes claims based on contracts or wrongs? At least for some scholars, this line of inquiry led to further questions about the overall taxonomy of private law.³

The English taxonomical debate seems oddly removed from the concerns that typically drive American legal scholarship. Rather than identifying normative theories of law, or arguing about the purposes of legal rules, participants have attempted to fit the law into a rational scheme.

¹See, e.g., 1 Peter Birks, *English Private Law* xxxv-xliii (2000); *The Classification of Obligations* (Peter Birks, ed. 1997).

²See, 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, 1778-79 (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: Vitiating 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); *The Search for Principle* 313, 324 (William Swadling & Gareth Jones, eds. 1999); *Understanding Unjust Enrichment* (Jason W. Neyers, Mitchell McInnes, and Stephen G.A. Pitel, eds., 2004); *Restitution* (Lionel Smith, ed. 2000).

³See, e.g., 1 Birks, *supra* note 1, at xxxv-xliii (2000).

The object is to sort legal materials into logically coherent categories.⁴

Perhaps the leading exemplar of English legal taxonomy is Oxford's late Regius Professor, Peter Birks. Birks' master project was a "map" of the common law based on the Institutes of Justinian. His classification began, at the highest level of generality, with the division between public and private law. Birks divided private law into the law of persons, the law of rights, and the law of actions; and further divided rights into property rights and obligations between parties. He then sorted obligations according to the different "causative events" that give rise to them, and, alternatively, according to the different outcomes obligations may produce ("goals," as Birks put it).⁵

This structure yielded various taxonomic insights. For example, Birks argued 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 classification "tort, contract, and restitution" is "bent."⁶ Instead, the correct series of causative events is "tort, contract, unjust enrichment, and other events," with "restitution, compensation, punishment, and other goals" cutting across them as the outcomes of legal claims.⁷ Birks also

⁴See, e.g., id. at xlvi-xlvi; Nicholas J. McBride, *The Classification of Obligations and Legal Education*, in *The Classification of Obligations*, supra note 1, at 71.

This approach is not universally accepted among Commonwealth scholars. For some contrary views, see, e.g., David Campbell, *Classification and the Crisis of the Common Law*, 26 *J. Law & Society* 369 (1999) (criticising "abstract doctrinal" attempts to classify law as indifferent to social and economic reality); Peter Jaffey, *Classification and Unjust Enrichment*, 67 *Modern L. Rev.* 1012 (2004) (arguing that unjust enrichment fails as a "justificatory" category of law); Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomical Debate*, 24 *Ox. J. Legal Studies* 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*, forthcoming in *The Structure of Private Law: Essays in Memory of Peter Birks* (Charles Rickett, ed. 2008) (writing on the question of taxonomy from a perspective inspired by American Legal Realism).

⁵Birks' taxonomic scheme is set forth succinctly in 1 Peter Birks, *English Private Law* xxxv-xliii (2000). 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 *Classification of Obligations* 1, 35 (Peter Birks, ed. 1997) [hereinafter Birks, *Definition and Division*]; Birks, *Unjust Enrichment and Wrongful Enrichment*, supra note 2, at 1778-79; Peter Birks, *Equity in the Modern Law*, 26 *W. Aust. L. Rev.* 1, 8 (1996). For an early version, see Birks, *Introduction to the Law of Restitution*, supra note 2, at 28-48 (1985).

⁶Birks, *Definition and Division*, supra note 5, at 21.

⁷See, e.g., 1 Birks, supra note 1, at xli-xlii; Birks, *Unjust Enrichment*, supra note 2, at 20-21; Birks, *Definition and Division*, supra note 5, at 19-21; Birks, *Unjust Enrichment and Wrongful Enrichment*, supra note 2, at 1771-72, 1777-79.

took the view that the categories of law must not overlap. As a consequence, the causative event “unjust enrichment” cannot include enrichment attributable to wrongs, because wrongs are covered by the law of torts.⁸

American legal academics may be tempted to view this as an arid form of scholarship, one that overlooks what is most important about law - the purposes and principles that animate legal decisionmaking. Classification plays a necessary role in legal analysis: to think and argue clearly about law, we need to organize the raw material of legal rules and decisions into more general categories. Yet, surely these general categories should correspond to the reasons that underlie the law. Only then will they be of practical use as guides to legal decisionmaking.

In this essay, I shall look more closely at possible methods and objectives of legal taxonomy. The principal contending methods of legal classification are non-normative “formal” classification of legal doctrine, “reason-based” classification based on legal principles drawn from doctrine, and taxonomy incidental to an ideal set of legal rules. Ultimately, I shall conclude that taxonomic efforts should remain formal.

I begin by asking three questions about the enterprise of legal classification, each of which can be answered in several different ways. 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 shall address these questions in the order just presented although, not surprisingly, the classifier’s purpose often limits or determines both the choice of subject matter and the criteria for classification. After setting out the possibilities, I briefly address the relationship between legal taxonomy and legal positivism. Then I return, again briefly, to the problem of unjust enrichment that has occupied such a central role in English legal taxonomy.

A. Three Choices for Legal Taxonomers

1. Raw Material for Classification

The subject matter of legal taxonomy may seem obvious: the taxonomer is sorting and classifying law. For this purpose, however, law can be understood in a number of ways. At least

⁸“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 1780-81.

three possibilities come to mind, and these may not be exhaustive.

(a) *Posited Rules*. First, the law to be classified might be the set of legal rules posited by authoritative sources. By rules, I mean prescriptions that are intended to direct future decisionmaking and are determinate enough to do so effectively.⁹ In a legal system that accepts the doctrine of precedent, courts as well as legislatures have authority to posit legal rules. Legislative rules normally are explicit; judicial rules may be either explicit or implicit in a court's explanation of reasons for a particular decision. To count as posited rules, however, they must be intended to operate as standards for decision, dictating the outcome of all cases that fall within their terms. Implicit judicial rules count as posited rules only if the court's opinion indicates that it viewed the decision it reached as representative of a more general prescription that might be decisive in other cases as well.¹⁰

Posited legal rules may vary in their generality.¹¹ A narrow description of the facts and outcome of a case is a rule if it accurately depicts what the court intended its decision to "stand for" as precedent. The nature of language is such that even a minimal description of facts necessarily entails some generalization. The generalization entailed in the court's description of the dispute then becomes a rule governing future cases that fall within it. At the other end of the continuum, rationales offered by precedent courts are rules if the precedent court intended them to serve as decisional standards for future cases, and if they are determinate enough that future courts can apply them without engaging in controversial moral analysis.¹²

⁹For discussion of the nature, function, and problems of "serious" authoritative 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 Philosophical Examination of Rule-Based Decision-Making in Life and Law* 42-52, 77-134 (1991).

¹⁰See Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* (forthcoming), mss ch. 2 at notes 55-57. On canonicity as a characteristic of rules, see Schauer, *supra* note 9, at 68-72; Frederick Schauer, *Prescriptions in Three Dimensions*, 82 *Iowa L. Rev.* 911, 916-18 (1997)

¹¹On generality as a characteristic of rules, see Schauer, *supra* note 9, at 17-37. A distinction is often drawn between rule and "standards," which are not sufficiently determinate to dictate results without reference to controversial moral or evaluative propositions. See, e.g., Alexander & Sherwin, *supra* note 9, 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).

¹²My analysis assumes that language can carry determinate meaning. See, e.g., Kent Greenawalt, *Law and Objectivity* 34-89 (1992); H.L. A. Hart, *The Concept of Law* 132-44 (1961); Schauer, *supra* note 9, at 53-68; Jules

(b) *Ideal Rules*. Second, the subject matter to be classified might be an ideal body of law. In other words, the object of legal taxonomy might be to identify categories that capture the best imaginable set of posited legal rules.¹³ This suggests a very active role for the taxonomist, who must begin by imagining the best possible law according to an external criterion of legal goodness - moral, economic, or otherwise. Once this task is complete, however, taxonomy itself is not of great consequence; legal categories should fall into place relatively quickly and uncontroversially, according to the same standard or standards that define ideal law.

(c) *Attributed Rules*. Third, the law to be classified may be a set of rules or principles attributed to prior legal decisions or existing legal rules. An attributed rule or principle is an explanation “abducted”¹⁴ by some future decisionmaker or observer from the facts and outcomes of judicial decisions (or from the factual predicates and prescribed outcomes of posited rules). Typically, the person formulating an attributed rule or principle seeks the best explanation that fits the data of legal material, according to some criterion of goodness.¹⁵ An attributed rule or principle, in other words, is a best-it-can-be representation of the pre-existing raw material of law.

Attributed rules and principles are not posited by the courts and legislatures that generate the decisions and rules from which they are drawn. Instead, their authors are the persons who abduce them from existing legal material. Attribution of this kind is not, in my view, a form of “interpretation.”¹⁶ I assume throughout this essay that the meaning of any rule (or other text) is determined by the intentions of its authors.¹⁷ Interpretation, accordingly, the process of

L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549 (1992); Lawrence On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462 (1987).

¹³Judge Richard Posner’s economic analysis of law might be viewed as a project of this kind. See Richard A. Posner, *Economic Analysis of Law* (6th ed. 2003).

¹⁴Abduction is the term Charles Peirce used to describe the process by which scientists move from observed data to tentative explanatory hypotheses. See Charles S. Peirce, *Philosophical Writings of Peirce* 150-56 (Justus Buchler, ed. 1955); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 *Harvard Law Review* 945-49 (1996).

¹⁵Ronald Dworkin’s description of “legal principles” follows this model. See Ronald Dworkin, *Law’s Empire* 254-58 (1986); Ronald Dworkin, *Taking Rights Seriously* 115-18 (1978).

¹⁶Cf. Dworkin, *Law’s Empire*, supra note 15, at 49, 228 (using the term *interpretation* in a special sense that refers to the insider’s perspective toward law).

¹⁷For full discussion, see Alexander & Sherwin, supra note 10, mss chs 5-8; Alexander & Sherwin, supra

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.

Like posited rules, attributed rules and principles can be general or 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.

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. The result is what Ronald Dworkin has called a “legal principle.”¹⁸ I shall have more to say in later sections about legal principles. For now, I shall simply repeat that a legal principle is not an interpretation of the intentions of prior authorities, but a construct generated by a later court or observer working from pre-existing legal materials.

(d) *Summary.* Legal taxonomy may operate on posited rules, ideal rules, or semi-ideal rules attributed to legal decisions. None of these is superior in and of itself. The choice of subject matter will depend, naturally enough, on the classifier’s method and purpose.

2. Criteria for Classifying Law

A second dimension in which legal taxonomies might differ is the criteria of classification: how are the categories of law defined?

(a) *Intuition.* Some have suggested that the facts that generate legal decisions differ in ways that can be grasped intuitively, at least by those who are well-trained in law.¹⁹ As a criterion for classifying legal decisions, however, intuitive similarity is probably illusory, and in

note 9, at 96-122.

¹⁸Dworkin, *Law’s Empire*, supra note 15, at 240-50, 254-58; Dworkin, *Taking Rights Seriously*, supra note 15, at 22-31, 115-18 (1978).

¹⁹See, e.g., Steven J. Burton, *An Introduction to Law and Legal Reasoning* 27-41 (1995); Anthony Kronman, *The Lost Lawyer* 109-62, 170-85, 209-25 (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).

any event unsatisfactory. Any two factual settings are like and unlike in an indefinite number of ways, and the only way to determine which similarities and differences should count is to refer to some purpose or principle that picks out certain of them as relevant to what is being decided.²⁰ For example, if a widely accepted moral principle holds that wrongdoers should not profit from their wrongs, this principle makes the gains a defendant received from wrongdoing a salient feature of his situation, while the clothes he wore at the time are of no consequence. Some such principles are so deeply internalized that what appears to be an intuitive judgment of similarity between cases may in fact be a rapid reference to a principle that makes particular common features of the cases important. This assumption - that, for purposes of legal analysis, analogies between cases are not simply facts to be perceived but depend on general propositions that identify important similarities - is an important premise in my analysis, which I shall refer back to at several points.

As a psychological matter, it may be possible to arrive at a judgment of similarity based on pattern recognition or a spontaneous emotional response to given facts.²¹ Law, however, is supposed to be a reasoned enterprise, and a scheme of classification that relies on mechanisms of this kind is not reasoned.²² It cannot be explained in terms accessible to others, and it provides not basis for distinguishing between correct and incorrect judgments. Thus, purely intuitive similarity, if it exists, is not a sound basis for legal classification.

(b) *Evolutionary History*. A more promising 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, common law rules have an evolutionary history.

²⁰At least, this is true of facts as they exist in the world, as opposed to factual summaries presented in judicial opinions. Melvin Aron Eisenberg, *The Nature of the Common Law* 84-87 (1988); Schauer, *supra* note 9, at 183-87; Brewer, *supra* note 14, at 962-65; Peter Westen, On "Confusing Ideas:" Reply, 91 *Yale L.J.* 1153, 1163 (1982).

²¹For discussion of incompletely reasoned, or "System I," responses in human psychology, see generally See, e.g., 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 Judgment* 1-6, 42-86 (1987); Steven A. Sloman, Two Systems of Reasoning, in *Heuristics & 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 *Psychological Review* 814 (2001).

²²I assume that reasoning entails conscious deliberation about choices in terms capable of articulation. See

For example, some rules and remedies were first developed by the English Chancellor, while others emerged in decisions of the King's Bench or Court of Common Pleas. For most purposes, however, common origin is not a sensible criterion for classifying modern law. Legal arguments that rely on the equitable origins of particular claims, or are traceable to medieval forms of action, are often discredited as anachronisms that ought to be purged from modern practice.

(c) *Formal Classification*. A formal taxonomy is one in which the contents of any category of legal materials are determined by the definition assigned to that category, and categories are arranged according to a set of structural rules determined by the taxonomer.²³ The governing structural rules might hold, for example, that the categories chosen should encompass all available legal materials;²⁴ that hierarchies should descend in an orderly manner such that all subcategories are in fact instances of the more general categories to which they belong;²⁵ and perhaps, as Peter Birks insisted, that categories should not overlap.²⁶ Presumably, legal categories also must be sufficiently tailored and determinate to provide a comprehensible description of the instances that fall within them.²⁷ The criteria for classification are formal,

Haidt, *supra* note 21, at 818.

²³I have borrowed the term “formal classification” from an excellent article by Peter Jaffey. See Jaffey, *supra* note 4, at 1015-17.

Birks' classificatory scheme follows this model. See *id.* at 1017-18. Another example of formal classification comes from Nicholas McBride. McBride argues that classification should “tell us all there is to know about our obligations in the most economical and accurate manner.” McBride, *supra* note 4, 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, 254-55 (2000) (defending Birks's taxonomic scheme, which Smith describes as giving “moderate” recognition to the law's own organizational “self-understanding”).

²⁴Birks, for example, was careful to include catch-all categories to cover legal materials not otherwise accounted for. See 1 Birks, *English Private Law*, *supra* note 1, at xlii; Birks, *Unjust Enrichment*, *supra* note 2, at 21-22; Birks, *Definition and Division*, *supra* note 5, at 19; Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1769.

²⁵This explains Birks' 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 5, at 20-21; Birks, *Unjust Enrichment and Wrongful Enrichment*, *supra* note 2, at 1768-69, 1771-72.

²⁶As described in earlier text, Birks argued 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 1780-81.

²⁷See McBride, *supra* note 4, at 71, 79 (listing, as one of six guidelines for classification of obligations, a requirement that obligations must not be “completely indeterminate”).

however, in the sense that neither the definitions of categories nor the manner in which categories are arranged corresponds to the higher-order justifications that support particular legal rules.

One difficulty with a classification scheme that aspires to be logical is that, assuming the subject matter is actual, rather than ideal, law, there is no reason to expect the body of existing legal rules to conform to the rules of logic. At least at lower levels of generality, legal materials developed by disparate authorities are likely to become tangled. To impose order on disorderly material, the taxonomer may need to compromise by adopting a less than perfectly logical scheme of categories, or a scheme that covers less than all the raw material. This problem may explain Birks' occasional reliance on "miscellaneous" categories of law.²⁸

A more substantial objection to formal classification is that taxonomy cannot be wholly formal without dissolving into nonsense. At best, logic can determine the relationships among categories of law; it cannot determine which features of the various raw materials of law are substantively important. Even formal taxonomy is a purposive activity, and the categories it establishes must track differences that matter for the purpose of the enterprise.

It does not follow, however, that legal materials must be classified according to *their* purposes. A minimal conception of the purpose of a legal system should be enough to support an orderly taxonomy of law. Suppose, for example, that the primary function of law is to settle disputes among members of a community whose activities conflict, and that classifying legal materials will advance the goal of settlement by making legal materials more accessible to those who must apply them or rely on them to plan their activities.²⁹ These assumptions provide a starting point for formal classification: the categories of law should correspond to the types of conflicts that typically result in grievances between individuals, or between individuals and the state. Thus, although any scheme of classification must inevitably be informed by the purposes of law, categories within the classification need not track the purposes of particular laws.

In a formal scheme of classification, the categories of law are descriptive rather than

²⁸See note 29 and accompanying text, *supra*.

²⁹On the settlement function of law, see Alexander & Sherwin, *supra* note 9, at 11-15; Eisenberg, *supra* note 20, at 4-7; Joseph Raz, *Ethics in the Public Domain* 187-92 (1994).

normative. I should pause here to clarify what I mean by *normative*. From the point of view of a person asserting a proposition, the proposition is normative if it expresses a reason for acting or deciding in a certain way. Consider, for example, the term unjust enrichment, which is shorthand for the proposition that one person should not obtain or retain value at another's expense, in circumstances deemed to be unjust. In a legal context, unjust enrichment is descriptive when used to describe a class of events; it is normative when used to describe a reason for courts to prevent or correct unjust enrichment when it occurs.

In addition to expressing a reason for action, a normative proposition also *provides* a reason for action for anyone who accepts it as true or otherwise authoritative. The reason for action provided by a normative proposition need not be conclusive, but it at least weighs in favor of a particular choice. In contrast, categories within a formal scheme of legal classification are normatively inert.

Because formal classification is descriptive, without normative implications, it naturally operates on the subject matter of actual posited legal rules. A formal taxonomy of ideal legal rules or attributed legal rules is logically possible, but unlikely in practice. The first step in such a project would be to determine ideal law or abduce attributed rules from existing legal material. These are active processes calling for the exercise of moral judgment. The second step, in contrast, would be a passive, non-normative categorization. This combination is not likely to appeal to taxonomers: the same scholarly interests and assumptions that lead a taxonomer to attempt to formulate ideal rules or extrapolate best-they-can-be legal rules from actual decisions will also tend to attract him or her to a normative framework for legal classification.

(d) *Reason-based Classification*. This leads to the main competitor to formal classification: classification of legal materials according to the principles or purposes that animate them. Any sound rule is an instantiation of broader purposes or principles, and any sound judicial decision either implements such a rule, or is itself based on a higher-order principle or purpose.³⁰ For example, certain judicial decisions and posited rules may reflect a principle that wrongful harm imposes a moral obligation of redress on the wrongdoer, or that losses should be charged to the party best able to avoid them in order to encourage due care.

³⁰See Schauer, *supra* note 9, at 54-55 (discussing the relationship between rules and their justifications).

Others may reflect a principle that promises should be honored, or that deterring breaches of promise will facilitate efficient exchange. In what I shall call a *reason-based* method of legal classification, these common justifying principles define the categories of law.³¹

A project of reason-based legal classification can proceed in three ways. First, the taxonomer can seek out the justifying reasons that in fact motivated judges and legislators in reaching legal decisions - that is, the stated or implied rationales for posited legal rules. These reasons then define the categories of law. The process is an interpretive one, in that only reasons actually accepted by the authors of legal materials qualify as rationales for the purpose of classification.³²

Assuming that a taxonomy that organizes legal materials according to the actual rationales of lawmakers is intended to be normative - that is, to guide future decisionmakers - the undertaking may be misconceived. The lawmakers in question may have chosen deliberately to posit limited, determinate rules. They may have assumed, in other words, that determinate rules would coordinate behavior more effectively than relatively indeterminate rationales, or that future decisionmakers would err less often if they simply followed the rules than they would if they attempted to adhere to the rationales behind the rules.³³ Alternatively, the authorities may have viewed their own rationales as tentative, and preferred to limit the positive effect of their decision to the terms of a comparatively narrow rule.³⁴

In any event, the actual rationales of past decisions are not likely to be a popular basis for legal classification, for several reasons. First, the resulting taxonomy will be incomplete. Judges and legislatures often do not furnish, or even contemplate, rationales that are sufficiently general

³¹Jaffey refers to this type of classification as “justificatory” classification. Jaffey, *supra* note 4, at 103-1015.

³²On interpretation, see note 17 and accompanying text, *supra*.

³³For fuller discussion of the reasons why rulemakers 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, *supra* note 9, at 53-95; Schauer, *supra* note 97, at 128-34; Larry Alexander, *The Gap*, 14 Harv. J.L. & Publ. Pol’y 695 (1991).

³⁴At least in the context of judicial decisions, explicit or implicit reasons for decision may sometimes operate as posited rules themselves, if they were intended to govern future decisionmaking and are determinate enough to function as decisional standards. If they were not meant to have the force of rules, they operate simply as rationales, suggestive perhaps but not binding on future courts. Here too the process is interpretive: did the precedent court intend to establish a rule?

to serve as the basis for categories of law. Second, it may be difficult or impossible to construct a coherent taxonomic scheme. Rules posited by diverse authorities may be motivated by equally diverse, and often conflicting, rationales.³⁵

A second type of reason-based legal classification would identify ideal rationales for legal rules. In this case, the subject matter is, of course, a set of imagined rather than actual legal rules. The common principles that define the categories of law will be correct moral principles according to some understanding of right or good (taking into account whatever moral reasons there may be not to enforce morally in full through law). For example, a deontologist engaged in reason-based classification might sort ideal laws according to the different moral duties they enforced. A welfare economist might sort ideal laws according to general principles of efficiency, such as loss avoidance, minimization of transaction costs, efficient risk allocation, and creation of incentives for value-enhancing activity.³⁶

This is, of course, a daunting task, and any single taxonomer's view of the matter will be highly controversial. Moreover, taxonomy based on ideal rationales suffers from the same difficulty that affects taxonomy based on actual rationales: determinate legal rules may be more effective than more abstract legal principles in guiding actors and adjudicators. Rules can settle controversy, facilitate coordination, and prevent reasoning errors in a way that correct by indeterminate rationales cannot.³⁷ To the extent that determinate rules, applied without reflection on the justifying reasons that support them, produce better results, a generally available taxonomy based on the higher-order reasons for ideal law could undermine the effects of the system's ideal posited rules. In other words, the taxonomy is normative but esoteric: its normative contents are best confined to lawmakers kept out of the sight of adjudicators and actors. This leads to a variety of practical and moral problems, which I shall not attempt to address here.³⁸

³⁵A 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 decisionmakers.

³⁶Cf. A. Mitchell Polisky, *An Introduction to Law and Economics* ix-xii, 157-62 (identifying themes in law and economics)

³⁷See note 33 & accompanying text, *supra*.

³⁸See Alexander & Sherwin, *supra* note 9, at 86-91; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Pa. L. Rev. 1191, 1211-22 (1994). Not least of the practical difficulties is that in a system

The third, and most likely, form of reason-based classification of law defines legal categories by reference to the attributed rationales of legal rules. In Ronald Dworkin's terminology, the taxonomer identifies the *legal principles* that best explain various legal materials.³⁹ Common legal principles then serve as the criteria for classifying law.⁴⁰

Dworkin developed the notion of legal principles as a response to legal positivism.⁴¹ Courts, he argued, often rely on principles that are not posited rules, but are derived from pre-existing rules and decisions and are themselves part of the law. Specifically, legal principles are the morally best principles that meet a threshold requirement of "fit" with existing legal rules and prior judicial decisions.⁴²

Legal principles are not based on the intentions of prior lawmakers. The decisionmakers who first announced the rules and decisions on which a legal principle is based may have had in mind a different principle, or no principle at all. Instead, legal principles are formulated by later judges presiding over particular disputes. Ideally, the judge studies existing legal materials, formulates a principle or set of principles that meets the twin criteria of fit and moral appeal, then applies the principle to decide the pending dispute.⁴³

Although legal principles are drawn from existing rules and prior decisions, they are not required to conform perfectly to prior law. Beyond the necessary threshold of fit, flawed rules and precedents can be discarded to achieve the morally best possible principle.⁴⁴ Thus, assuming

that accepts the doctrine of precedent, adjudicators *are* lawmakers.

³⁹See Dworkin, *Law's Empire*, supra note 15, at 240-50, 254-58; Dworkin, *Taking Rights Seriously*, supra note 15, at 22-31, 115-18 (1978).

⁴⁰For a taxonomy of criminal law that follows this model at a high level or generality, see Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* 3-80 (offering a "deep descriptive theory" of the criminal law)

⁴¹See Dworkin, *Taking Rights Seriously*, supra note 15, at 22.

⁴²See Dworkin, *Law's Empire*, supra note 15, at 254-58; Dworkin, *Taking Rights Seriously*, supra note 15, at 115-18.

⁴³See Dworkin, *Law's Empire*, supra note 15, at 240-50.

⁴⁴See Dworkin, *Law's Empire*, supra note 15, at 230-31, 239-50, 255; Dworkin, *Taking Rights Seriously*, supra note 15, at 118-23.

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 & Ken Kress, *Against Legal Principles*, 82 *Ia. L. Rev.* 739, 756-57 (1997); Kenneth J. Kress, *Legal Reasoning and*

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. At the same time, legal principles are not ideal principles, because they must satisfy the threshold of fit.

A final point about 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 called a “dimension of weight.”⁴⁵ Different legal principles may compete; when this occurs the presiding judge gives each principle the weight it is due in the context of the case at hand.

In a taxonomy that classifies law according to common legal principles, the categories of law are necessarily normative: they both express and, if accepted, provide, reasons for legal decisionmaking. Legal principles do not describe the rationales for actual legal rules; nor are they rationales for ideal rules. Instead, they are constructs designed precisely to elaborate and enlarge the normative implications of posited law. A descriptive taxonomy based on legal principles, therefore, would be pointless, if not incoherent.

The conclusion that legal principles are inherently normative is consistent with Dworkin’s own analysis. In Dworkin’s picture of law, legal principles are the primary standards for judicial decisionmaking.⁴⁶ Moreover, beyond the required threshold of fit, judges are free to ignore recalcitrant rules and decisions. In effect, therefore, Dworkinian legal principles trump posited law.

Although a scholarly taxonomy based on legal principles is normative in character and intent, it obviously is not binding on judges. Legal principles are constructed case by case, as part of the process of decisionmaking. Nevertheless, taxonomers may hope that busy judges will adopt the off-the-rack principles they offer, particularly when they are presented as components of a comprehensive master scheme of law.

A classification based on legal principles, and perhaps any form of rule-based classification, is likely to violate the formal rules of classification put forward by Birks. Particular decisions or rules may reflect a combination of principles; therefore the content of

Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions, 72 California Law Review 369, 380-81 (1984)

⁴⁵Dworkin, Taking Rights Seriously, *supra* note 15, at 26-27.

legal categories will sometimes overlap. Principles may compete with one another, and their comparative weight may vary according to the context of adjudication; therefore legal categories will sometimes resist hierarchical ordering. As Dagan's analysis indicates, however, these matters of form are not of serious concern to a taxonomer interested in justifying, rather than describing, law.

(e) *Summary*. Of the methods of classification listed in this section, formal classification according to rules of taxonomic logic and reason-based classification are the only viable alternatives. Reason-based taxonomies are most likely to define the categories of law according to attributed rationales, or "legal principles."

3. The Purposes of Classification

Not surprisingly, both the subject matter and the method of legal classification depend on the purposes legal classification assumed to serve. There are two likely purposes - or more accurately, two types of purpose - for legal taxonomy: guiding the outcomes of adjudication and contributing to knowledge of and discourse about the law.

(a) *Guidance for Courts*. Legal scholarship typically aspires at least in part to guide and edify courts in their task of resolving disputes.⁴⁷ Accordingly, a legal taxonomer might undertake to classify law in the hope of supplementing, improving, or supplanting the decisional standards available to courts. A comprehensive taxonomy of law, it might be thought, can provide grounds for analogical decisionmaking in cases not covered by posited rules, and perhaps also for distinguishing or overruling rules that are out of line with the body of law. In this way, taxonomy will contribute to the consistency of judicial decisions, ensure that like cases are treated alike, add to the stability of law, and impose constraint on judges.⁴⁸

A taxonomy that aims to guide, improve, and stabilize judicial decisionmaking must be

⁴⁶See *id.* at 23-24, 29-39.

⁴⁷Guidance may take the form of proposed legislation or of standards for common law or constitutional adjudication.

⁴⁸Birks suggested that taxonomy would both contribute to legal knowledge and promote consistency in judicial decisionmaking. See Birks, *English Private Law*, *supra* note 1, at xlvi, xlviii; Birks, *Definition and Division*, *supra* note 5, at 34-35; Birks, *Equity in the Modern Law*, *supra* note 5, at 4-5. For reasons to be developed, however, his own taxonomic method does not seem well suited to the guidance of courts.

reason-based and normative. It must classify legal rules and decisions according to the common reasons that support them. The scheme of classification must also be presented to courts, and accepted by courts, as a source of decisional guidance, independent of the particular laws it classifies.

Of course, any taxonomy is likely to influence decisionmaking. The categories by which a reasoner organizes his or her subject matter almost certainly shape the reasoner's conclusions.⁴⁹ Thus, even a formal taxonomy that makes no reference to reasons for decision in particular areas of law will perform a gatekeeping role, pointing the reasoner in certain directions and blocking others. Yet, the effect of a formal taxonomy differs from that of a reason-based taxonomy that classifies according to actual, ideal, or attributed rationales. A formal taxonomy does not direct decisionmaking by furnishing decisional standards; the judge rather than the taxonomer, is the responsible decisionmaker. A reason-based taxonomy, in contrast, assembles principles that purport to identify the correct outcome in most if not all cases. Thus, a reason-based taxonomy *guides* decisionmaking; a formal taxonomy does not.

I have already noted that there are several possible ways to define reason-based categories of law. The taxonomer can sort posited rules according to the rationales that actually motivated their authors. To the extent that actual rationales are missing, undetectable, or not intended as standards for future decisionmaking, however, a taxonomy of this kind will be substantially incomplete. It is not, therefore, a promising source of guidance.

Alternatively, the taxonomer can imagine a set of ideal legal rules and sort them according to the higher-order rationales that justify them. In this case the higher-order principles that define legal categories are naturally normative. Yet there are good reasons why a designer of ideal laws would not wish to make these principles generally available, and would prefer instead that judges and actors follow determinate posited rules. I shall assume, therefore, that this form of taxonomy, while it might assist courts in their role as rulemakers, does not otherwise contribute to the guidance of courts.

The natural candidate for a normative, decision-guiding taxonomy, therefore, is a reason-

⁴⁹See generally Lakoff & Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*, supra note 22; Lakoff & Johnson, *Metaphors We Live By*, supra note 22; Margolis, supra note 22.

based taxonomy based on Dworkinian legal principles: principles that are abduced from preexisting rules and decisions and deemed to be the morally best principles consistent with a threshold proportion of those rules and decisions. Classification based on legal principles, it might be thought, will promote consistency, like treatment, stability, and constraint in judicial decisionmaking by enabling courts to reason by analogy.⁵⁰ Assuming, as I have argued, that courts cannot simply perceive meaningful similarities between past and present cases, legal principles provide the means for identifying relevant points of likeness. The threshold requirement of fit means that the principles governing analogical reasoning, and therefore the decisions that result from analogical reasoning, are constrained by the body of pre-existing rules and decisions. A legal taxonomy that identifies the various legal principles immanent in the body of law and assembles them in a coherent scheme will make the decisions of judges who adopt the scheme consistent and stable, over time and across subject matter.

In fact, there are several reasons to doubt that a taxonomy based on legal principles will lead to consistency in judicial decisionmaking. Most obviously, judges are not bound to follow legal principles constructed by a scholarly taxonomer of law. Formulation of legal principles is, in theory, a process of intensive deliberation case by case. In the hands of many individual judges, the principles that result may vary widely.

One source of disunity is the moral dimension of the process: legal principles are the morally best principles that conform to a certain proportion of legal materials. Yet, several different sets of principles - perhaps many different sets - may meet the threshold requirement of fit. In the absence of perfect moral consensus, judges will reach different conclusions about which is the morally superior set.

⁵⁰For explanations and defenses of analogical reasoning, see Burton, *supra* note 19, at 25-41); Levi, *supra* note 19, at 1-6; Raz, *supra* note 9, at 201-06; Sunstein, *supra* note 11, at 62-100; Lloyd L. Weinreb, *supra* note 19; Brewer, *supra* note 14, at 925, 925-29, 962-63; John F. Harty, The Result Model of Precedent, 10 *Legal Theory* 19 (2004); Grant Lamond, Do Precedents Create Rules?, 11 *Legal Theory* 1 (2005). See also 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).

For more skeptical views, see, e.g., Alexander & Sherwin, *supra* note 10, mss. ch. 3 at notes 4-51; Alexander & Sherwin, *supra* note 9, at 125-35; Richard A. Posner, *The Problems of Jurisprudence* 86-98 (1990); Schauer, *supra* note 9, at 183-87; 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).

Another potential source of variance is the tightness of fit between legal principles and existing rules and decisions. A requirement that legal principles conform to all preexisting law would prevent correction of past mistakes, and might result in a nonsensical set of principles.⁵¹ Short of perfect fit, however, it is not obvious how much conformity to existing rules and decisions is required, or even how one is to think about the problem. The right degree of fit might depend on the extent to which existing materials, combined with common assumptions about their rationales, have generated public expectations that future legal decisions will follow a certain course. Alternatively, the right degree of fit might depend on a sense of what is required to establish coherence, or to promote the mysterious virtue Dworkin refers to as *integrity* in law.⁵² At best, these are vague standards that give decisionmakers substantial discretion to reject or discard rules and decisions of which they disapprove.⁵³

The requirement of fit is further complicated by the effect of new decisions. New decisions add new material to the existing body of law. As this occurs, the threshold of fit will move, the pressure to conform to older material will decrease, and the morally best allowable set of principles will change accordingly.⁵⁴

Of course, judges might voluntarily adopt a well-designed taxonomy based on legal principles. Judges are pressed for time and inexperienced in many subjects; at the same time, they are likely to feel a professional obligation to reason by analogy from past decisions, at least in the absence of governing rules. If so, a prestigious taxonomy of high-order legal principles standing ready for adoption might command substantial loyalty. If, in addition, the body of law evolves slowly enough that the taxonomer's principles remain viable over time, unevenness at the point of formulating principles will not be a problem.

Still, consistent decisionmaking may not follow. Recall that legal principles are not rules, providing definitive answers in cases that fall within their terms. Legal principles are general

⁵¹See Larry Alexander, *Constrained By Precedent*, 63 S. Cal. L. Rev. 1, 34-37 (1989) (outlining potential contradictions in a result-based model of precedent).

⁵²See Dworkin, *Law's Empire*, *supra* note 15, at 225-58.

⁵³See Dworkin, *Law's Empire*, *supra* note 15, at 255 ("different judges will set [the threshold of fit] differently"). See also note 48 and accompanying text, *supra*.

⁵⁴See Alexander & Kress, *supra* note 44, at 756-57); Kress, *supra* note 44, at 380 (1984)

standards of varying strength, which judges must weigh in context when they compete.⁵⁵ This leaves considerable room for variable application even when the principles themselves are widely accepted.

Moreover, when courts treat legal principles as operative standards for decision, posited rules cease to determine the outcomes of disputes. Rules are part of the data from which legal principles are drawn, but the process of adjustment entailed in constructing legal principles allows courts to disregard recalcitrant rules, and in any event legal principles, not rules, are the primary locus of law.⁵⁶ As a consequence, decisionmaking according to legal principles means loss of the consistency that results from decisionmaking according to rules.

The potential for inconsistent application of principles is exacerbated by the difficulty, if not impossibility, of assigning weight to competing legal principles. Legal principles are not correct moral principles; their content is shaped by the requirement of fit with existing materials, some of which are sure to be mistakes. Thus, when legal principles conflict, the question for the judge is what moral weight to assign to principles that are, by hypothesis, morally flawed. Correct moral principles cannot provide the answer, because the question itself makes no moral sense.⁵⁷

A further consideration is that, to the extent that legal principles do produce consistent decisionmaking, consistency comes at a cost. Because legal principles incorporate errors in the body of existing rules and decisions, the set of decisions they yield will be inferior to the set of decisions that would result from correct moral reasoning. A similar criticism can be made of any legal rule: rules are imperfect instantiations of the principles and purposes they are designed to implement; therefore they will sometimes produce results that are mistaken when judged in comparison to perfect reasoning according to those principles and purposes.⁵⁸ Yet, given the vagaries that affect the definition and application of legal principles, determinate rules are much

⁵⁵See Dworkin, *Taking Rights Seriously*, supra note 15, at 26-27.

⁵⁶See note 44 and accompanying text, supra.

⁵⁷See Alexander & Kress, supra note 42, at 761-64.

⁵⁸See Schauer, supra note 9, at 31-34, 48-54.

more likely than legal principles to provide coordination and constraint.⁵⁹ Given the imperfection of actual human decisionmaking, this can more than compensate for the errors entrenched in rules. In contrast, legal principles replicate error but lack the capacity of rules to coordinate and protect expectations.⁶⁰ Accordingly, a legal taxonomy that classifies non-ideal law on the basis of common legal principles will have at best a modest effect on the consistency and stability of judicial decisionmaking, at the risk of perpetuating error.

Whatever contribution a taxonomy of legal principles may make to consistency, like treatment, stability, and constraint in adjudication, a formal taxonomy does not serve these ends. Formal legal categories are neither intended to guide, nor capable of guiding, judicial decisionmaking: they are normatively inert. It might be thought that any sorting of law into classes will facilitate analogical reasoning, by capturing potential similarities among cases. At the risk of excessive repetition, however, analogies are meaningless without the assistance of some general justifying principle that identifies similarities as relevant or irrelevant to the outcome of a dispute.⁶¹ Analogies can be based on correct moral principles or (for better or worse) on legal principles; but without the support of a principle of some kind, they are intuitive, inaccessible to reason, and perhaps incoherent. The purpose of formal taxonomy, therefore, cannot be to guide judicial decision-making in the absence of posited rules.

(b) *Facilitating Legal Thought and Communication.* A different, and considerably more modest, purpose for objective for legal taxonomy is to facilitate legal analysis and communication of legal ideas by organizing the body of law in accessible categories. A comprehensive formal classification of law provides a vocabulary and grammar that can make law more accessible and understandable to those who must use and apply it.⁶² It assembles legal

⁵⁹See Alexander and Sherwin, *supra* note 9, at 13-15; Schauer, *supra* note 9, at 137-66. On the coordination value of rules, see, e.g., Tom D. Campbell, *The Legal Theory of Ethical Positivism* 6, 50, 53, 58 (1996); Heidi M. Hurd, *Moral Combat* 214-21 (1999); Raz, *supra* note 9, at 49-50; Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 *Journal of Legal Studies* 165, 172-86 (1982).

⁶⁰See Lawrence Alexander & Michael Bayles, *Hercules or Proteus: The Many Theses of Ronald Dworkin*, 5 *Social Theory and Practice* 267, 271-78 (1980); Alexander & Kress, *supra* note 44, at 753-54.

⁶¹See note 20 and accompanying text, *supra*.

⁶²Birks spoke somewhat derisively of information storage, suggesting that the best tool for storage is alphabetization. 1 Birks, *supra* note 1, at xlvi. But in fact, information storage is quite important, and a sensible classification scheme makes it much easier to store and retrieve legal information.

materials in a way that allows observers to view the law as a whole.⁶³ This in turn makes it easier for lawyers to argue effectively about the normative aspects of law, for judges to explain their decisions, and for actors to coordinate their activities in response to law.

Viewed in this way, legal classification is more akin to linguistic taxonomy than to taxonomy in the natural sciences. We sort words into categories - verbs, nouns, adverbs - to help us coordinate our use of language, think more clearly, and improve our grasp of the subject matter we reflect on and discuss. Of course, language is purely conventional, while legal rules are supposed not merely to establish conventions but to establish the conventions that will best serve social ends and protect shared values.⁶⁴ Legal taxonomy, however, can be understood as concerned primarily with the conventional aspects of law rather than its moral virtue. Taxonomy, on this view, is a tool for critical analysis of law, not the conclusion of critical analysis.

Facilitating legal thought and communication is a modest objective for taxonomy, consistent with a formal rather than justificatory method of classification. In a formal classificatory scheme, the categories of law are not designed to furnish rationales for decisionmaking. Overall, the scheme aspires to order, clarity, and descriptive accuracy, and remains indifferent to the normative content of the law. It contributes only indirectly to judicial decisionmaking, providing judges with an enhanced vocabulary and a frame of reference for ordering their thoughts, but not with standards of decision.

(d) *Summary*. There are two primary reasons for undertaking a taxonomy of law, which shape the enterprise of legal classification in substantially different ways. First, legal classification may be conceived of as a guide for common-law decisionmaking. Assuming that the starting point for taxonomy is existing rather than ideal law, the taxonomer's task is to formulate a set of legal principles, meaning the morally best principles consistent with a threshold proportion of existing law. Legal materials are classified according to the legal

⁶³Along these lines, Birks said that “[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.” *Id.* at xlviii.

⁶⁴See Alexander & Sherwin, *supra* note 9, at 11-15 (discussing the settlement function of law and the importance of lawmaker expertise in realizing shared values); Raz, *supra* note 9 at 70-80 (discussing the “normal justification of rules”).

principles they represent, and these principles in turn serve as standards for analogical decisionmaking in new cases and for distinguishing otherwise applicable rules. Given the active role of the taxonomer in formulating legal principles, there is no reason why the subject matter of classification should be limited to posited rules. Consistent with the enterprise, the taxonomer can define his or her raw material as including attributed as well as intended rules.

Second, legal classification can be conceived of as a means of increasing our understanding of law and facilitating legal communication. Taxonomy helps those who use and apply law to understand and debate the law by providing a common vocabulary and grammar for law. This type of taxonomy is formal rather than reason-based, arranging determinate legal categories according to rules of taxonomic structure. Identification of categories is informed by basic assumptions about the functions of a legal system, but the categories do not themselves track or establish normative principles. In a normatively passive taxonomy of this kind, the natural choice of subject matter is actual legal rules, interpreted in light of the intentions of the authorities who posited them.

The first form of taxonomy - a reason-based taxonomy designed to influence judicial decisionmaking - is familiar and attractive to American scholars. It forms a part, if not the whole, of many secondary legal materials.⁶⁵ Formal classification seems passive and uncreative. Laboring to avoid an overlap between categories seems unambitious, if not petty. Reason-based classification contributes purposively to the development of law: it promises to make law not just clearer but better. I have suggested, however, that the supposed benefits of a reason-based classification, and particularly a classification based on legal principles, may be illusory. Legal principles invite judges to decide cases according to norms that are both vague and imperfect.

⁶⁵For example, the typical format of the American Law Institute's *Restatements* combines "black letter" sections that set forth posited rules, or what I have called attributed legal rules, with comments that identify more general principles drawn from the rules. See, e.g., Restatement (Second) of Contracts Ch. 6, Introductory Note (explaining that "the law of contracts supports the finality of transactions lest legitimate expectations be disappointed," subject, however, to "the notion of unexpected extreme hardship" and "the notion of an unexpected material imbalance in the exchange"). The black letter sections themselves may also state what appear to be legal principles. See Restatement of Restitution §1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.") Cf. Restatement (Third) of Restitution §1 and comment b (Discussion Draft 2000) (stating that "[a] person who is unjustly enriched at the expense of another is liable in restitution to the other," but suggesting in comments that the black letter statement should not be taken as an operative standard for decision).

They may also lead judges to proceed less cautiously than they might if they understood themselves to be acting on their own best moral judgment.

C. Taxonomy and Legal Positivism

Formal taxonomy can fairly be associated with legal positivism.⁶⁶ I believe this association is correct. The connection between them, however, requires some explanation.

For present purposes, I shall ignore the theoretical fine points of legal positivism and assume that for a positivist, law consists of rules posited by authoritative sources.⁶⁷ In cases not governed by posited rules, no law applies and judges must exercise their best judgment, all-things-considered, to resolve the cases that come before them.⁶⁸ That is to say, they must engage in moral and empirical reasoning, seeking wide reflective equilibrium between initial judgments and plausible justifying principles.⁶⁹

In this view of law, there is no room for legal principles. The posited rules that make up law may include legislation and rules announced in judicial opinions, explicit rules and rules implicit in the explanations given for judicial decisions, and rules of varying degrees of generality and determinacy. They must, however, be intended to operate as rules for future decisionmaking, by authors recognized as authoritative within the legal system.

Legal principles are not posited rules: they are norms abduced case by case from the data of prior decisions and pre-existing rules and used to support analogical decisionmaking in cases not covered by rules. Nor are legal principles correct moral principles of the type that positivist

⁶⁶See Dagan, *supra* note 4, mss. at 1.

⁶⁷See generally Hart, *supra* note 12, at 77-107.

⁶⁸See generally *id.* at 121-33.

⁶⁹Wide 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, 578-82 (Cambridge: Belknap Press 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 probably is 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).

judges apply in the absence of rules: they are imperfect *legal* principles drawn from the body of legal materials in place at the time.⁷⁰ On a positivist understanding of law, therefore, a taxonomy of law that sorts legal materials according to common legal principles is of no use in guiding the decisions of courts.

Setting aside the possibility of a normative taxonomy appended to ideal legal rules, it follows that, for a positivist, legal classification is a descriptive enterprise. Its function is not to direct future decisionmaking but only to enrich the vocabulary of law, organize legal thought, and facilitate legal communication. Formal taxonomy, however, has significant benefits from a positivist point of view. Most obviously, better communication means easier access to the rules, better-informed debates about their application, and more effective criticism of rules that appear misguided from a moral point of view.⁷¹

Formal taxonomy may also be helpful in the absence of posited rules. When no rule applies, the positivist judge must exercise moral judgment to decide the case at hand. In a legal system that recognizes common law rules as binding precedents, the judge may also act as rulemaker for future cases - a role that similarly calls for moral judgment.⁷² In either case, prior decisions and “analogous” rules do not constrain the judge’s moral reasoning. Yet, a review of prior decisions may provide judges with concrete examples for use in testing tentative decisional rules, and in this way assist the process of reasoning to reflective equilibrium. A formal taxonomy that sorts prior decisions according to recurring features of disputes can direct judges to decisions that might be useful for this purpose.

For example, suppose a dispute arises over ownership of a fallen meteor, between the owner of the land where the meteor fell and the person who saw it fall, tracked it to the spot

⁷⁰See text at note 44, *supra*.

⁷¹Nothing in legal positivism dictates that judges must follow posited rules. The obligations of judges in regard to rules is a question of authority, and the system may well confer authority on judges to overrule prior rules and announced new ones. See Alexander & Sherwin, *supra* note 9, at 151-56; Alexander & Sherwin, *supra* note 10, mss. ch. 2, text at notes 65-68; Eisenberg, *supra* note 20, at 104-05. Whether and in what circumstances judges should have these powers is, of course, a difficult question.

⁷²On the difficulties affecting judicial reasoning when judges act as rulemakers, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. ? (forthcoming 2006); Emily Sherwin, *Judges as Rulemakers*, 73 U. Chi. L. Rev. ? (forthcoming 2006) Jeffrey J. Rachlinski, *Bottom-Up and Top-Down Decisionmaking*, forthcoming, 73 U. Chi. L. Rev. ? (2006)

where it landed, and took possession.⁷³ No posited rules govern the case. The judge is considering a decision in favor of the possessor on the ground that rewarding possessors will promote the capture of meteors and contribute to science. At this point, the judge (or lawyers arguing the case) might consult a descriptive taxonomy for help in locating other cases involving, in descending order of generality, claims of ownership, claims of ownership to unowned things, and claims of ownership to unowned things discovered on privately owned land. Finding this last category to be of manageable scale, the judge might then study prior decisions within it and discover a variety of fact situations suggesting that rewarding finders could cause problems of trespass or intrusive exploration by employees and guests. The prior cases, although in no way binding, might lead the judge to reconsider the outcome of the meteor dispute, or to posit a narrow rule that rewards only those who take possession of unowned objects while legitimately on the land of an absentee owner.

To make use of a legal taxonomy in this way, the judge must determine which descriptive categories are likely to contain pertinent examples. To some extent, a tentative decisional rule may do this. When it does not, or when the judge has not yet formulated a tentative rule, the judge may need to rely on intuitive, or incompletely reasoned, judgment of similarity. In this context, however, the dangers of intuitive analogizing are minimal. The purpose of the analogy is not to determine the outcome of the present case, but only to locate raw material for moral reasoning.⁷⁴ In formulating the decisional rule that will ultimately decide the case, the judge is free to ignore prior decisions that appear on reflection to be morally unlike the case at hand, or morally wrong. The deciding judge retains full responsibility, and, importantly, a sense of full responsibility, for the outcome of the dispute.

Formal taxonomy might contribute in another way to decisionmaking in the absence of rules, although this contribution is somewhat speculative. One of the considerations that enter into moral reasoning is reliance on prior decisions: if actors have altered their behavior in the reasonable expectation that future judicial decisions will take a certain course, this becomes a

⁷³See *Goddard v. Winchell*, 86 Iowa 71, 52 N.W. 1124 (1892).

⁷⁴See Alexander, *supra* note 50, at 66-68 (explaining the differences between analogical reasoning in law and reasoning to reflective equilibrium).

reason to decide accordingly.⁷⁵ It is possible that in certain areas of life, particularly those in which actors attend closely to law, a pattern of decisions may emerge that, even in the absence of a posited rule, creates expectations about future decisions.⁷⁶ If so, a formal taxonomy of law, updated to reflect emerging patterns, might alert judges to the possibility of reliance.

Thus, formal taxonomy of law is consistent with legal positivism, and may be useful from a positivist point of view. In contrast, a reason-based taxonomy, designed to guide and constrain judicial decisionmaking, runs contrary to the positivist assumption that only authoritative rules have the status of law.

D. Unjust Enrichment

The notion of unjust enrichment helps to illustrate both the difference between reason-based and formal legal taxonomy and the possible dangers of a reason-based method. Unjust enrichment has a long history in the civil law, and surfaced in American scholarship more than 100 years ago.⁷⁷ In 1937, Warren Seavey and Austin Scott published the first Restatement of Restitution, which identified unjust enrichment as the common theme of a variety of legal and equitable claims, and established 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

⁷⁵See Eisenberg, *supra* note 20, at 10-12; Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 55-58, 568-72 (William N. Eskridge, Jr. & Phillip P. Frickey, eds., 1994); Schauer, *supra* note 9, at 137-45, 155-58; Stephen R. Perry, *Judicial Obligations, Precedent and the Common Law*, 7 *Oxford Journal of Legal Studies* 215, 248-50 (1987). Without more, an the argument that future judicial decisions should conform to past judicial decisions in order to protect expectations of consistency is circular, because it assumes a practice of consistent decisionmaking. There is, however, a significant general social interest in coordination of human activities through law, and the existence of this interest makes it reasonable for actors to expect that judges will in fact decide consistently. See Hart & Sacks, *supra* note 89, at 155; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 62-63 (1946); Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 *Legal Theory* 27, 33, (2005).

⁷⁶This might be the case, for example, if lawyers were in the habit of speculating about the course of law on the basis of Dworkinian legal principles and communicating their conclusions to clients.

⁷⁷See 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 *Ox. J. Legal Studies* 297 (2005).

⁷⁸Restatement of Restitution §1 (1937); see Warren A. Seavey & Austin W. Scott, *Restitution*, 213 *L.Q. Rev.* 29 (1938)

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 when Dawson and Palmer retired from the scene. As noted, interest in restitution and unjust enrichment has spiked in recent years, particularly Commonwealth countries.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 scholars interested in unjust enrichment has been the role it plays in judicial decisionmaking. Some have understood unjust enrichment as a legal principle of the Dworkinian kind - a normative principle drawn from existing legal materials, which provides and should provide courts with a standard of decision in all cases that fall within its scope.⁸² On 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.⁸³

Alternatively, some have treated unjust enrichment as a formal category of law.⁸⁴ On this

⁷⁹See, e.g., John P. Dawson, *Unjust Enrichment: A Comparative Analysis* (1951)[hereinafter Dawson, *Unjust Enrichment*]; I-IV George E. Palmer, *The Law of Restitution* (1978 & Supp. 1998); John P. Dawson, *Restitution Without Enrichment*, 61 B.U.L. Rev. 563 (1981).

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

⁸¹Restatement (Third) of Restitution and Unjust Enrichment (currently comprising Discussion Draft (2000); Tent. Draft No. 1 (2001); Tent. Draft No. 2 (2002); Tent. Draft No. 3 (2004); Tent. Draft No. 4 (2005).

⁸²Commentary that can be read this way includes: Dan B. Dobbs, *Law of Remedies*, §4.1(2), at 557-58 (2d ed. 1993) (characterizing unjust enrichment as “the fundamental substantive 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 George E. 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”).

⁸³A 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, 2001 *Wis. L. Rev.* 695, 700-02, 773-75; Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 *Tulane L. Rev.* 605, 607-10 (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.

⁸⁴See, e.g., Birks, *Introduction to Unjust Enrichment*, *supra* note 2, at 18-25; Dagan, *The Law and Ethics of Restitution*, *supra* note 2, at 12-18, 25-33; Birks, *Definition and Division*, *supra* note 5, at 21; Kull, *supra* note 1, at 1195-96; Emily Sherwin, *Restitution and Equity*, 79 *Tex. L. Rev.* 2083, 2108-12 (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).

view, unjust enrichment is not a decisional principle authorizing courts to grant relief, but rather an event that occurs in law. In certain instances deemed to be unjust, courts permit plaintiffs to recover defendants' gains.

These different understandings of unjust enrichment run parallel to the two primary methods of legal classification described above - reason-based taxonomy and formal taxonomy. In a reason-based taxonomy of law, the legal category of unjust enrichment links new cases of unjust enrichment analogically to prior cases of unjust enrichment. The implication is that, once it is established that a defendant was enriched at a plaintiff's expense, the court should grant relief unless some other principle operating within the scheme of law favors the defendant and carries greater weight in the context of the case. In a formal taxonomy, the legal category of unjust enrichment describes a class of rules and decisions holding defendants liable to plaintiffs, all marked by the feature of unjust enrichment. The existence of this class of cases says nothing, one way or the other, about whether a courts should grant relief in a new case of unjust enrichment.

As a description of something the law does, unjust enrichment is accurate, although the moral overtones of the word "unjust" may make it a poor choice of terms. Courts certainly have recognized legal claims based on a defendant's receipt or retention of value in circumstances that are deemed, for one reason or another, to be unjust. Moreover, some of these claims do not fit within other commonly recognized categories such as tort and contract.⁸⁵ One example is a claim for return of money paid by mistake.⁸⁶

As a reason-based legal category, unjust enrichment is unlikely to add to the consistency and stability of judicial decisionmaking. "Unjust" is a completely open-ended term describing any act or circumstance deemed to violate the requirements of morality. Practically, therefore, a principle instructing courts to correct unjust enrichment gives judges unlimited discretion to order a transfer of wealth in any dispute involving a gain to one party at another's expense.⁸⁷ Yet there is no evident reason why courts should exercise greater discretion when responding to

⁸⁵See Kull, *supra* note 2, at 1192.

⁸⁶See Restatement (Third) of Restitution and Unjust Enrichment §6 (Tent. Draft No. 1, 2001).

⁸⁷See Sherwin, *supra* note 84, at 2106-07.

gains than they do when responding to losses. Thus, as a normative principle or - what amounts to the same thing - a taxonomical category designed to support analogical reasoning, unjust enrichment invites an unwarranted degree of judicial variation within one category of the law.

Unjust enrichment also brings to light the uncertain moral status of legal principles. The principle that one person should not be unjustly enriched at another's expense may be the most morally attractive principle capable of explaining an otherwise disparate set of cases in which courts have required defendants to give up gains. It provides a common explanation for, among other things, 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 an order for restitution between unmarried ex-cohabitants;⁹⁰ and an order for restitution of the value of restorative work from a mortgagee who did not solicit the work but obtained its benefit and also collected insurance on the property restored.⁹¹ In each case, the outcome is based on a notion of justice.

Yet, the moral foundation of a generalized claim of unjust enrichment is debatable. A claim to compensation for losses focuses on the position of the claimant: its primary objectives are to affirm the claimant's rights and to correct, as far as possible, the claimant's loss of welfare.⁹² In contrast, 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 his. The claim is comparative, and the objective is at least as much to reduce the defendant's welfare as to improve the position of the claimant.⁹³ In cases of wrongdoing, a reduction in the defendant's welfare might be justified on retributive grounds;⁹⁴ but not all claims

⁸⁸See Restatement (Third) of Restitution and Unjust Enrichment (Tent. Draft No. 1 2001).

⁸⁹Restatement of Restitution §187 (1937); see Dworkin, *Taking Rights Seriously*, supra note 15, at 23, 28-29.

⁹⁰Restatement (Third) of Restitution and Unjust Enrichment §28 (Tent. Draft No. 3 (2004); see Dagan, *The Law and Ethics of Restitution*, supra note 2, at 165-83; Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. Colo. L. Rev. 711 (2006).

⁹¹See *Kossian v. American National Insurance Co.*, 254 Cal. App. 647 (1967).

⁹²See e.g., *Dobbs*, supra note 81, at §1.1, at 3; Douglas Laycock, *Modern American Remedies: Cases and Materials* 15-16 (3d ed. 2002).

⁹³See Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U.L. Rev. 1443, 1459-60.

⁹⁴For discussion and defense of the moral value of retribution, see, e.g., Robert Nozick, *Philosophical Explanations* 374-80 (1981) (explaining retribution as a necessary to connect the wrongdoer to moral values); Jean Hampton, *The Retributive Idea*, in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 111, 122-47 (1988)

of unjust enrichment involve wrongdoing, and in any event, legal responses to unjust enrichment typically are not measured according to culpability, as retributive responses must be. The motive behind a claim of unjust enrichment is more akin to resentment or envy, prompted by the defendant's comparative advantage.⁹⁵

The ethics of resentment are controversial. For some, resentment and its companion, retaliation, are natural human responses to wrongdoing and injustice.⁹⁶ For others, they are futile sentiments: diminishing another's position cannot rehabilitate one's own, even when the other's advantage is unjust.⁹⁷ If, in fact, resentment is human nature, there may be practical reasons for a legal system to grant relief in at least some cases of unjust enrichment, in order to encourage legal rather than extra-legal recourse. But the *moral* status of a general decisional principle supporting legal claims based on unjust enrichment is open to doubt.

This is not to suggest that instances of legal relief that might be included in a descriptive category of unjust enrichment are morally suspect. Some of these are easily justifiable on moral grounds. Restitution of mistaken payments, for example, rests on the premise that the claimant did not intend to transfer property to the defendant. Accordingly, if we assume that private property rights are morally defensible, and if we assume also that the defendant did not reasonably and detrimentally rely on the claimant's mistake, restitution vindicates the moral values associated with property rights.⁹⁸

More controversially, there may be reasons to adjust the legal holdings of cohabitants following a break up. Yet the reason for granting relief cannot be that one party has been

(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, 482-86 (1968) (explaining retribution as a balance of moral accounts).

⁹⁵See Dawson, *Unjust Enrichment*, supra note 79 at 5 ("Marx made it appear that the gains received by economic groups other than labor – particularly by owners of land and other capital assets – were unjustified by their contribution to the economic product and in the long run were taken by labor"); Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 *Emory L.J.* 153, 175-90 (1996) (associating unjust enrichment with envy); Sherwin, supra note 93, at 1454-65.

⁹⁶See Jeffrie Murphy, *Hatred: A Qualified Defense*, in *Forgiveness and Mercy*, supra note 94, at 88, 89-95.

⁹⁷See Jean Hampton, *Forgiveness*, in *Forgiveness and Mercy*, supra note 94, at 63-64.

⁹⁸See Jaffey, supra note 4, at 1024. On the moral foundations of private property, see generally Lawrence C. Becker, *Property Rights: Philosophical Foundations* (1977); Stephen R. Munzer, *A Theory of Property* (1990); Jeremy Waldron, *The Right to Private Property* (1988).

unjustly enriched at the other's expense. Instead, a court inclined to allow such a claim must explain why, in the circumstances of cohabitation, negotiation over property rights should not be required, and voluntary transfers should not be treated as gifts.⁹⁹ Again, unjust enrichment may be useful as a descriptive category of law, but it is both unworkable and potentially dangerous when viewed as the operational "legal principle" underlying a class of rules and decisions.

Conclusion

I have identified two primary methods of legal classification: formal classification and reason-based classification. Formal classification 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.

Reason-based classification, at least in its normative versions, claims the more ambitious purpose of guiding, and improving the quality of, judicial decisionmaking. In fact, however, a project of reason-based taxonomy is unlikely to promote judicial virtues of consistency, like treatment, stability, and constraint. A taxonomy assembling the higher-order principles that explain and support an ideal code of legal rules can be useful from a law-making perspective, but may do more harm than good if presented as a source of guidance for judges. This is because judges operating under an ideal set of determinate legal rules are likely to reach the best decisions by following the letter of the rules rather than the principles behind them.

A taxonomy assembling legal principles drawn from existing legal materials is a confused enterprise. This type of taxonomy is designed to guide decisionmaking but in fact leaves ample room for unconstrained and inconsistent application of principles. To the extent it does constrain, it constrains judges to construct and apply morally imperfect legal principles rather than correct moral principles in deciding cases.

⁹⁹See Dagan, *The Law and Ethics of Restitution*, *supra* note 2, at 165-83; Sherwin, *supra* note 93, at 718-30.