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Legal Realism and the Taxonomy of Private Law

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Abstract

Legal taxonomy is frequently portrayed as a necessarily formalist (or doctrinalist) endeavor, which realists are likely to dismiss. This common wisdom is both mistaken and unfortunate. It is mistaken because realists should have a keen interest in the enterprise of legal categorization. Realists need not, to be sure, subscribe to the doctrinalist idea that the purpose of taxonomy is to organize the given terrain of legal rules. Rather, they can, and indeed should, reconstruct the role of taxonomy so as to incorporate their insights on the inherent dynamism of law and the important function of contextual normative analysis in the evolution of legal categories. This reconstruction implies that the main goals of legal categories are to consolidate expectations and to express the law's ideals with respect to distinct types of human interaction.

Recasting legal categorization in these terms dramatically changes the nature of the taxonomic enterprise. Rather than aiming to refine some eternal descriptive truths, legal taxonomy in its realist rendition is an ongoing enterprise that is constantly reinventing itself. Rather than seeking to transcend context, realist taxonomies are sensitive to context and seek to generate relatively narrow legal categories. Finally, rather than aspiring to produce a map of mutually exclusive legal categories, a realist legal taxonomy recognizes and accommodates substantial (although never overwhelming) overlaps between the various legal categories.

LEGAL REALISM AND THE TAXONOMY OF PRIVATE LAW

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ABSTRACT

Legal taxonomy is frequently portrayed as a necessarily formalist (or doctrinalist) endeavor, which realists are likely to dismiss. This common wisdom is both mistaken and unfortunate. It is mistaken because realists should have a keen interest in the enterprise of legal categorization. Realists need not, to be sure, subscribe to the doctrinalist idea that the purpose of taxonomy is to organize the given terrain of legal rules. Rather, they can, and indeed should, reconstruct the role of taxonomy so as to incorporate their insights on the inherent dynamism of law and the important function of contextual normative analysis in the evolution of legal categories. This reconstruction implies that the main goals of legal categories are to consolidate expectations and to express the law's ideals with respect to distinct types of human interaction.

Recasting legal categorization in these terms dramatically changes the nature of the taxonomic enterprise. Rather than aiming to refine some eternal descriptive truths, legal taxonomy in its realist rendition is an ongoing enterprise that is constantly reinventing itself. Rather than seeking to transcend context, realist taxonomies are sensitive to context and seek to generate relatively narrow legal categories. Finally, rather than aspiring to produce a map of mutually exclusive legal categories, a realist legal taxonomy recognizes and accommodates substantial (although never overwhelming) overlaps between the various legal categories.



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Introduction

The revival of academic interest in taxonomy is one of Peter Birks' most significant achievements and a key element of his distinguished legacy. Birks was passionate about taxonomy: "Better understanding of law," he wrote, "depends upon a sound taxonomy of the law." Without proper academic attention to taxonomy, he warned, "the common law will dissolve into incoherence." Birks' concerns about taxonomy were rooted in his endorsement of legal positivism. Legal taxonomy owes its significance, in his view, to its role in the facilitation of the learning and application of positive rules. In order to pursue these important purposes, legal rules should be properly organized because information "which cannot be sorted is not knowledge." ¹

This essay may be an unwelcome defense of the significance of legal taxonomy. It may be unwelcome because it starts from a very different jurisprudential premise than the one shared by most of the scholars interested in taxonomy who, like Birks, tend to be positivists. My jurisprudential commitments, which I present in Part I, are realist; and realism, at least in my understanding, is antithetical to legal positivism. The profound realist critique of legal positivism is, as will be shown, quite damaging to the positivist rationale of legal taxonomy. But legal realism, at least in the charitable reading I hope to offer here, does not look down on taxonomy. Quite the contrary: as I show in Part II, there are good (read: legal realist) reasons for considering legal taxonomy significant.

Identifying these reasons is important not only to show that realists can and should care about taxonomy, but also because it points to some prescriptions about the taxonomic enterprise that, unsurprisingly, are quite distinct from the way taxonomy is envisioned from a positivist (or doctrinalist) perspective. I present the preliminary elaboration of these prescriptions in Part III, in the spirit of Birks' call for a "taxonomic debate among scholars." Indeed, it was Birks who characteristically urged us to continue engaging in this question, hoping that "with vigorous debate, the best hypotheses available now will be modified or replaced." The realist program for legal taxonomy presented here, then, may not be unwelcome after all.

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¹ Peter Birks, Introduction, *in* ENGLISH PRIVATE LAW li (2000).

² Or formalists, which is actually not the same. *See* Ernest J. Weinrib, *The Juridical Classification of Obligations, in* THE CLASSIFICATION OF OBLIGATIONS 37, 37 (Peter Birks ed. 1997).

³ Contra Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 ETHICS 278 (2001).

⁴ Birks, *supra* note 1, at li.

I. LEGAL REALISM

I begin by briefly restating my understanding of the legacy of American legal realism.⁵ Rather than an account of intellectual history, the reconstruction that follows attempts to present a useful interpretation of legal realism, seeking to read realist texts in the best possible light and drawing from them a vision of law that is currently valuable.

The starting point of the realist account of law is its non-positivism. Although H. L.A. Hart's response to the realist claim of doctrinal indeterminacy is frequently presented as decisive, it is rather beside the point. Through his distinction between core and penumbra in any given norm,⁶ Hart effectively addressed the problem of rule indeterminacy. But the realist claim that pure doctrinalism is a conceptual impossibility is not based on the indeterminacy of discrete rules. For legal realists, the profound and inescapable reason for doctrinal indeterminacy is the availability of multiple, potentially applicable doctrinal sources. More precisely, the irreducible choice among rules competing to control the case, all of which can be expanded or contracted, together with the many potential ways of interpreting or elaborating any legal concept, means that legal doctrine always "speaks with a forked tongue" and that the judicial task is never one of static application.⁷

The realist claim concerning an inevitable gap between doctrinal materials and judicial outcomes evokes two major concerns: intelligibility and legitimacy. In other words, this claim opens up two questions. First, what can explain past judicial behavior and predict its future course? Second, and even more significantly, how can law constrain judgments made by unelected judges? How, then, can the distinction between law and politics be maintained despite the collapse of law's autonomy in its positivist rendition? The legitimacy prong of the realist challenge is particularly formidable because, as legal realists show, it is bolstered by the insidious tendency of legal doctrinalism to obscure contestable value judgments made by judges and to entrench lawyers' unjustifiable claim to an impenetrable professionalism.

Legal realists answer this challenge by insisting on a view of law as a going institution distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and

⁵ For a fuller account, see Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J.* (forthcoming 2007).

⁶ See H.L.A. HART, THE CONCEPT OF LAW 123, 141-42, 144 (1961).

⁷ KARL L. LLEWELLYN, *Some Realism about Realism, in* Jurisprudence: Realism in Theory and in Practice 42, 70 (1962). *See also, e.g.*, Felix S. Cohen, *The Problems of Functional Jurisprudence, in* The Legal Conscience: Selected Papers of Felix S. Cohen 77, 83 (Lucy Kramer Cohen ed., 1960); Llewellyn, *id.*, at 58; Karl L. Llewellyn, The Case Law System in America 25, 45, 51 (Paul Gewirtz ed. Michael Alsandi trans. 1933, 1989); Karl L. Llewellyn, The Common Law Tradition: Deciding Appeals 77-91 (1960); Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950); Fred Rodell, Woe Unto You, Lawyers! 154, 160 (1939). *See also, e.g.*, Jerome Frank, Law and the Modern Mind 138 (1930).

⁸ See Anthony T. Kronman, Jurisprudential Responses to Legal Realism, 73 CORNELL L. Rev. 335, 335-36 (1988).

⁹ See RODELL, supra note 7, at 3-4, 6-7, 153, 157-58, 186, 189, 196, 198.

progress. They reject any conception of law that purports to dissolve these tensions, thereby obscuring at least one of the legal phenomenon's irreducible characteristics.

* * *

Although the realist conception of law finds room for both power and reason, it appreciates the difficulties of their cohabitation. Since Holmes' Path of the Law, 10 realists place coerciveness at the center of their conception of law. This preoccupation with coercion is justified not only by the obvious fact that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. More significantly, it is also premised on the institutional and discursive means that tend to downplay at least some of the dimensions of law's power. These built-in features of law – notably: the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, together with our tendency, as lawyers and even as citizens, to "thingify" legal constructs and accord them an aura of obviousness and acceptability – render the danger of obscuring law's coerciveness particularly troubling. 11 They explain the realists' wariness of the trap entailed in the blurring of law's coerciveness. This risk is particularly high with respect to private law, which structures our daily interactions and tends to blend into our natural environment.¹² Not surprisingly, then, legal realists focus their attention on exposing the contingency of the concepts and rules of property, contract, and tort law, in an attempt to expose the ways in which the law applies its power. 13

But realists also reject as equally reductive the mirror image of law, which portrays it as sheer power (or interest, or politics). They insist that law is also a forum of reason, and that reason poses real – albeit elusive – constraints on the choices of legal decision-makers, and thus on the concomitant exercise of state power. Law is never *only* about interest or power politics; it is also an exercise in reason-giving. Furthermore, because so much is at stake in reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious. Legal actors understand that reasons can justify law's coercion only if they are properly grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshalling the law for morally required social change.¹⁴

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¹⁰ See OLIVER W. HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167 (1920).

¹¹ See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 811-12, 820-21, 827-29 (1935); John Dewey, Logical Method and Law, in American Legal Realism 185, 191, 193 (William W. Fisher III et al. eds. 1993); Oliver W. Holmes, Law in Science and Science in Law, in Collected Legal Papers, supra note 10, at 210, 230, 232, 238-39. See also, e.g., See Robert Cover, Violence and the Word, in Narrative, Violence, and the Law 203 (Martha Minow et al. eds., 1992).

¹² See, e.g., Robert W. Gordon, Unfreezing Legal Reality: Critical Approaches to Law, 15 FLA. St. U. L. REV. 195, 212-14 (1987).

¹³ See, e.g., Cohen, supra note 11, at 814-18, 840; Louis L. Jaffe, Law Making by Private Groups, 51 HARV. L. REV. 212 (1937).

¹⁴ See K. N. Llewellyn, The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method, 49 YALE L.J. 1355, 1362-65, 1367-68, 1370, 1381-83, 1387 (1940). See also, e.g., Thomas W. Bechtler, American Legal Realism Revaluated, in LAW IN SOCIAL CONTEXT: LIBER AMICORUM HONOURING PROFESSOR LON L. FULLER 3, 20-21 (Thomas W. Bechtler ed., 1978); Harry W. Jones,

And yet, realists are also wary of the idea that reason can displace interest, or that law can exclude all force except that of the better argument. Realists claim that, because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution accounts for the realists' preference for value pluralism, as well as for their understanding of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences.¹⁵

Legal realists do not pretend they have solved the mystery of reason, or that they have demonstrated how reason can survive in law's coercive environment. Their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is nonetheless significant. Making this tension an inherent characteristic of law means that reductionist theories employing an overly romantic or too cynical conception of law must be rejected. This approach also steers us toward a continuous critical awareness of the complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power and the perpetuation of what could end up as merely group preferences and interests.

* * *

I turn now to the type of reasons realists invite into the legal discourse and thus introduce law's second constitutive tension.

The forward-looking aspect of legal reasoning in its realist rendition relies on both science and craft. Realists recognize the profound differences between lawyers as social engineers who dispassionately combine empirical knowledge with normative insights on the one hand, and, on the other, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Realists identify three families of fact-finding pursuits that are of some importance to law: investigating the hidden regularities of legal doctrine in order to restore law's intelligibility and predictability; studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy, and responding to the prevailing social mores – the conventional morality – in order to further stabilize the objectivity and legitimacy of law. ¹⁶ My prototype realists, however, reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable not only when evaluating empirical research, but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Regarding all three empirical avenues, legal realists insist

Law and Morality in the Perspective of Legal Realism, 61 COLUM. L. REV. 799, 801, 809 (1961); Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 295, 255 (1931).

¹⁵ See Holmes, supra note 10, at 181; Llewellyn, On the Good, the True, the Beautiful in Law, in Jurisprudence, supra note 7, at 167, 211-12; Hessel E. Yntema, Jurisprudence on Parade, 39 Mich. L. Rev. 1154, 1169 (1941).

¹⁶ See respectively, for example, Joseph W. Bingham, *What is the Law?*, 11 Mich. L. Rev. 1, 17 (1912); John Henry Schlegel, American Legal Realism and Empirical Legal Science chs. 2 & 4 (1995); Benjamin N. Cardozo, The Nature of the Judicial Process 105-06, 108 (1921).

that neither science nor an ethics that ignores the data of science offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments. ¹⁷

Because law affects people's life dramatically, these social facts and human values must always inform the direction of legal evolution. Legal reasoning necessarily shares this feature with other forms of practical reasoning, but the realist conception of law also emphasizes that legal reasoning is, to some extent, a distinct mode of argumentation and analysis. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues, while still aware of their possible abuse. The procedural characteristics of the adversary process as well as the professional norms that bind judicial opinions, notably the requirement of a universalizable justification, provide a unique social setting for adjudication. These procedural characteristics establish the accountability of law's carriers to law's subjects and encourage judges to develop what Felix Cohen terms "a manyperspectived view of the world" that "can relieve us of the endless anarchy of oneeyed vision," a "synoptic vision" that is "a distinguishing mark of liberal civilization." Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments ensures lawyers a unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category. ¹⁹

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The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, hence my third constitutive tension. Law's inherent dynamism implies that the legal positivist attempt to understand law statically by sheer reference to verifiable facts, such as the authoritative commands of a political superior or the rules identified by a rule of recognition, ²⁰ is hopeless. In the realist conception, law is "a going institution"; it is, in John Dewey's words, "a social process, not something that can be done or happen at a certain date." As a going institution, law is structured to be an "endless process of testing and retesting"; thus understood, law is a great human laboratory continuously seeking improvement.²¹

This quest "for justice and adjustment" in the legal discourse is invariably constrained by legal tradition. Law's past serves as the starting point for contemporary

¹⁷ See Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 45 (1934); Cohen, *supra* note 11, at 75-76; William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 151-52 (1993).

¹⁸ Felix S. Cohen, *Field Theory and Judicial Logic*, *in* THE LEGAL CONSCIENCE, *supra* note 7, at 121, 125-26. *See also*, *e.g.*, LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 46-47, 132; LLEWELLYN, *American Common Law Tradition and American Democracy*, *in* JURISPRUDENCE, *supra* note 7, at 282, 308-10.

¹⁹ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 73-74, 159 (1928). *See also, e.g.*, LLEWELLYN, *A Realistic Jurisprudence: The Next Step, in* JURISPRUDENCE, *supra* note 7, at 3, 27-28, 32; Walter Wheeler Cook, *Scientific Method and the Law, in* AMERICAN LEGAL REALISM, *supra* note 11, at 242, 246.

²⁰ See respectively JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 14 (H.L.A. Hart ed., 1954) (1832); HART, *supra* note 6, at 107. *See also* JOSEPH RAZ, THE AUTHORITY OF LAW 40 (1979).

²¹ John Dewey, *My Philosophy of Law, in MY PHILOSOPHY OF LAW 73, 77 (1941). See also, e.g.*, Karl L. Llewellyn, *My Philosophy of Law, id.*, 183, 183-84; Max Radin, *My Philosophy of Law, id.*, at 285, 295.

analysis, and not only because it is an anchor of intelligibility and predictability. Legal realists always begin with the existing doctrinal landscape because it may (and often does) incorporate valuable though implicit, and sometimes imperfectly executed, normative choices. In other words, since the adjudicatory process so uniquely combines scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, its past yield of accumulated judicial experience and judgment deserves respect. Although legal realists do not accord every existing rule overwhelming normative authority, they do obey Karl Llewellyn's "law of fitness and flavor," whereby the instant outcome and rule always think "with the feel" of the case law system as a whole, and "go with the grain rather than across or against it." 22

Indeed, realists celebrate common law's Grand Style, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice." They thus insist that law, or any specific segment of legal doctrine, can be properly understood only if we regain the realist appreciation of law's most distinctive feature: the uneasy but inevitable accommodation of power and reason, science and craft, and tradition and progress.

II. THE FUNCTIONS OF TAXONOMY

Contemporary friends of legal taxonomy emphasize the usefulness, indeed the inevitability, of classification for the purpose of gaining knowledge of law. With Birks, they insist that "[t]here is no body of knowable data which can subsist as a jumble of mismatched categories. The search for order is indistinguishable from the search for knowledge." Thus, for example, Stephen Smith, a proud defender of the legal taxonomy project in its doctrinalist rendition, argues that "[t]o make good decisions courts need to distinguish like from unlike; to understand the law scholars need to do the same thing. When lawyers and scholars argue about how a case should be decided, or about the meaning of a particular rule, they are in large part arguing about how to classify the case or the rule."

Insofar as these claims stand for the proposition that reasoning in general, and thus legal reasoning more particularly, must rely on certain concepts that necessarily involve some classificatory work, they are indeed undisputable truisms. But both Birks and Smith go further than this. Birks engaged in, and Smith vehemently defended, a specific and indeed particularly doctrinalist method of classification, resorting to "the sort of categories that judges use when deciding cases, that legislators employ when making law, and that lawyers use when arguing before courts. In other

²² LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 36, 38, 190-91, 217, 222-23; LLEWELLYN, CASE LAW, *supra* note 7, at 77; LLEWELLYN, *Law and the Social Sciences, in* JURISPRUDENCE, *supra* note 7, at 357, 361-62; Llewellyn, *The Normative, supra* note 14, at 1385.

²³ LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 37-38. *See also* CARDOZO, *supra* note 16, at 179; RONALD DWORKIN, LAW'S EMPIRE 400-13 (1986).

²⁴ Birks, *Preface*, in ENGLISH PRIVATE LAW, supra note 1, at xxxi-xxxii.

²⁵ Stephen A. Smith, Taking Law Seriously, 50 U. TORONTO L.J. 241, 244 (2000).

²⁶ See, e.g., Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 710 (1989); Peter Jaffey, *Classification and Unjust Enrichment*, 67 MODERN L.REV. 1012, 1013 (2004); Weinrib, *supra* note 2, at 54.

words, these are categories such as 'tort,' 'contract,' 'unjust enrichment,' 'equity,' and so on."²⁷ Recourse to existing doctrinal categories fits well with the perception of taxonomy as a means for gaining knowledge. If indeed, as doctrinalists like to claim, the taxonomy of the law is analogous to cartography, if legal classification is on a par with mapping,²⁸ it makes perfect sense to take the existing legal terrain as the fixed data that need to be organized.

Legal realism upsets this seemingly straightforward program. For legal realists, as noted, law is a doctrinal system in movement: as the shape of legal doctrine "is made and remade as its narrative continues to unfold . . . even apparently surprising lurches can be integrated seamlessly." Therefore, law cannot be understood merely by reference to its static elements (its existing rules); understanding the doctrinal materials at any given moment as the things to be classified misses the inherent dynamism of the law. This means that the analogy of legal taxonomy to cartography is mistaken and even misleading. Cartography assumes stability in the geographical features to be mapped; it implies that there is "a fixed and immutable topography 'out there' waiting to be accurately charted." But law is constantly changing. Therefore, "no map is ever likely to be produced that can, at one and the same time, explain the past and act as a means for predicting the future."

The doctrinalist version of legal taxonomy is not only misguided because it fails to account for the dynamism of law. It is also perilous, because it contributes unduly to one of the most important risks of legalese identified by realists: the "thingification" of legal concepts.³¹ To be sure, using legal concepts is unavoidable. As Cohen argued, however, this innocuous practice is risky because of the lawyerly tendency to essentialize contingent legal categories as if they somehow transcend human choice and represent a non-modifiable part of our natural or ethical environment.³² This risk is serious because, as I have hinted above, such thingification is one of the main sources of the unwarranted immunity of too many parts of the law from proper justification. This risk is particularly high with respect to private law, which structures our daily interactions and tends to blend into our natural environment.³³ Not surprisingly, then, legal realists focused on exposing the contingency of the concepts and rules of property, contract, and tort law, in an attempt

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²⁷ Smith, *supra* note 25, at 246.

²⁸ See, e.g., Birks, supra note 1, at xxxv.

²⁹ DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 18 (1998). *See also id.*, at 15-16; Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 242, 248 (1986).

³⁰ STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 12-13, 226 (2003); Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 942-43 (1924); Geoffrey Samuel, *Can the Common Law be Mapped?*, 55 U. TORONTO L.J. 271, 286, 290, 295 (2005).

³¹ See supra note 11 and accompanying text.

³² See Cohen, supra note 11,at 11-12, 820. See also Joseph Bingham, What is the Law?, 11 MICH. L. REV. 1, 12 (1912); Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 COLUM. L. REV. 16, 51 (2000)

³³ See, e.g., Robert W. Gordon, Unfreezing Legal Reality: Critical Approaches to Law, 15 FLA. St. U. L. REV. 195, 212-14 (1987).

to expose the hidden ways in which law applies its power.³⁴ Geoffrey Samuel is thus right on target when he criticizes the project of doctrinalist legal taxonomy, which confusingly treats "[c]ontracts, torts, ownership, rights or whatever" as "phenomena waiting to be observed and rationalized by independent observers." Because, in fact, these "are notions created by a particular group of 'scientists' who in effect impose them on social reality," taxonomic hypotheses in law cannot be verified (or falsified) by correspondence to external facts. The taxonomic scheme we use in law does not merely organize our legal knowledge.³⁵ Rather, our legal taxonomy necessarily participates in our construction of that knowledge and thus in the ongoing evolution of law.³⁶

* * *

Realists, as noted, dispute the cogency of doctrinal legal taxonomy and, furthermore, warn against its overly conservative potential implications. This position is at times mistaken for an advocacy of ad hoc judgments and thus a dismissal of the significance of legal classifications, rendering the title of the next section of this essay – realist taxonomies – an ostensible oxymoron. But legal realism (at least if charitably interpreted³⁷) in fact rejects the dubious nominalistic approach to law and recognizes the importance of legal categories and thus of legal taxonomy.³⁸

Legal realists acknowledge that law's use of categories, concepts, and rules is unavoidable³⁹ and even desirable, and that in most cases many legal reasoners should

³⁴ Cohen's critique about the "thingification" of property is a prime example. Courts justify the protection of trade names on the grounds that, if people create a thing of value, they are entitled to protection against deprivation because a thing of value is property. "The vicious circle inherent in this reasoning," explains Cohen "is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a device depends upon the extent to which it will be legally protected." This flawed legal reasoning obscures the coercive and distributive effects of law. What courts actually do in these cases is to establish "inequality in the commercial exploitation of language," thus creating and distributing "a new source of economic wealth or power." Traditional legal discourse shields these decisions from normative critique and is thus tantamount to "economic prejudice masquerading in the cloak of legal logic." Unchecked, law may serve "to perpetuate class prejudices and uncritical assumptions which could not survive the sunlight of free ethical controversy." *See* Cohen, *supra* note 11, at 814-18, 840. *See also* Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 212 (1937).

³⁵ Contra Peter Birks, Equity in the Modern Law: An Exercise in Taxonomy, 26 MELBOURNE U.L. REV. 1, 9 (1996).

³⁶ Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate*, 24 Ox. J. LEGAL STUD. 335, 341, 362 (2004). *See also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 3, 4, 8 (1990); WADDAMS, *supra* note 30, at 2-3, 14-15, 21-22, 226-27; Feinman, *supra* note 26, at 663; Pound, *supra* note 30, at 937-38; J.E. Penner, *Basic Obligations, in* THE CLASSIFICATION OF OBLIGATIONS, *supra* note 26, at 91, 91; Samuel, *supra* note 30, at 286. *Cf.* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE 85-87 106-09 (1989) (comparing Kelsen's conceptualism to Hart's empiricism).

³⁷ As the text implies, a small minority among realists does endorse nominalism. *See, e.g.*, RODELL, *supra* note 7, at 169-174, 201-202.

³⁸ Cf. Andrew Altman, The Legacy of Legal Realism, 10 LEGAL STUD. FORUM 167, 171-72 (1986); Todd D. Rakoff, The implied Terms of Contract: Of 'Default Rules' and 'Situation Sense', in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 216 (Jack Beatson & Daniel Friedmann eds., 1995).

³⁹ The unavoidability of using categories in thinking about law follows, of course, from the unavoidability of using categories in thinking in general.

simply follow rules.⁴⁰ (This is why realists take pains to improve rules, relying on empirical data, normative commitments, and situation sense.) In other words, a "rule-oriented realism" is not a contradiction in terms,⁴¹ as long as we remember that the (limited) stability of rules at any given moment relies on, and is thus contingent on, a convergence of lawyers' background understandings and not on the determinacy of the doctrine as such.⁴²

Furthermore, most realists do not subscribe to the problematic strategy of rule-sensitive particularism, which allows judges to depart from rules whenever the outcome of the particular case at hand so requires, while taking into account both substantive values and the value of preserving the rule's integrity. Alther, they merely argue that, at least some legal actors, notably judges of appellate courts, should occasionally use new cases as triggers for an ongoing refinement of rules. These are opportunities to revisit the normative viability of existing rules *qua* rules and to re-examine the adequacy of legal categorization.

I return to this last point in the next section but, before that, I still need to explain why legal realists should think of the taxonomy of private law not merely as a necessary pursuit but also as one that is worthwhile, indeed laudable. In other words, while legal realists resist any attempt to essentialize law's existing categories, they acknowledge their potentially desirable role.

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Legal realists do not dismiss law's existing categories; quite the contrary. For realists, these categories are and should be the starting point of any analysis of legal questions. They assume (until proven wrong) that the current categorization incorporates valuable although implicit, and sometimes imperfectly executed, normative choices. This conservative assumption derives not only from the pragmatic reality that existing rules cannot be abandoned completely, but also from a recognition that existing categories represent an accumulated judicial experience that is worthy of respect. This respect follows from the realist celebration of the common law's commitment to continuity, discussed in Part I. It also derives, even more specifically, from the important functions realists ascribe to legal categories, which I discuss below.

Each legal category (or sub-category) targets, in its own way and with respect to some intended realm of application, a set of human values that can be promoted by its constitutive rules. As such, legal categories consolidate people's expectations

⁴⁴ See Thomas C. Grey, Freestanding Legal Pragmatism, 18 CARDOZO L. REV. 21, 26 (1996); Thomas C. Grey, The New Formalism 12 (Stanford Law Sch., Stanford Pub. Law & Legal Theory Working Paper Series, Working Paper No. 4, 1999), available at <a href="http://papers.ssrn.com/paper.taf?abstract<uscore>id=200732t">http://papers.ssrn.com/paper.taf?abstract<uscore>id=200732t. See also DWORKIN, supra note 23, at 252-53. I discuss the relationship between the realist conception of law and Dworkin's conception of law as integrity in Dagan, supra note 5, at § IVB.

⁴⁰ Rules authoritatively settle disputes, thus securing the moral benefits of coordination, expertise, and efficiency. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 12-15 (2001). *See also, e.g.*, Frederick Schauer, *The Generality of Law*, 107 W.VA. L. REV. 217, 224-34 (2004).

⁴¹ But cf. Emily Sherwin, Rule-Oriented Realism, 103 MICH. L. REV. 1578 (2005).

⁴² See ALEXANDER & SHERWIN, supra note 40, at 32-34.

⁴³ Contra Sherwin, supra note 41, at 1591-94.

⁴⁵ For an elaborate discussion in the context of property law, see Hanoch Dagan, *The Craft of Property*, 92 CALIF. L. REV.1517 (2003).

regarding core types of human relationships so that they can anticipate developments when entering, for instance, a common interest community, or, for that matter, invading other people's rights. Thus, a set of fairly precise rules must govern each legal category of this type so as to enable people to predict the consequences of various future contingencies and to plan and structure their lives accordingly. Furthermore, legal categories also serve as a means for expressing law's normative ideals for these types of human interaction (think, for instance, of crimes [as opposed to torts], or of marriage or contract). For this reason, legal taxonomy performs a significant expressive and cultural function. Both roles – consolidating expectations and expressing law's ideals – require some measure of stability: to form effective frameworks of social interaction and cooperation, law can recognize a necessarily limited (and relatively stable) number of categories. For the community of t

These functions of legal taxonomy explain the distinctions between private law and other parts of the law, the distinctions between the various fields within private law, and the more minute distinctions between sub-categories within these fields. Exploring these differences in any detail is surely far beyond the scope of this short essay, but a brief sample will hopefully suffice for a sketchy demonstration of these points.

Consider first the distinction between private law and public law. As many realist and post-realist authors have shown, the private-public distinction is far from airtight and, more significantly, is by no means natural or conceptually inevitable. For realists, as noted, ,this continuity between private law and public law means that private law should not be immune from a distributive analysis either, and that private lawyers, like their public brethren, should (also) invariably consider the distributive implications of the rules they advocate or apply. Good reasons still remain, however, for retaining the separate ways in which the law constructs horizontal as opposed to vertical social interactions. Some of our most important normative commitments (to freedom-enhancing pluralism and to individuality-enhancing multiplicity) justify adhering, and indeed facilitating, some such differentiation between the private and the public in order to fracture and multiply human authority. Furthermore, fundamental principles of democratic governance justify imposing on public authorities particularly demanding obligations of trust, which are inappropriate with respect to most (although not necessarily all) private actors. The private-public

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⁴⁶ As should be clear by now, a realist approach does not undermine law's predictability; in fact, it reinforces it. At least relative to the hopeless indeterminacy of pure doctrinal analysis that, as noted, is caused first and foremost by the multiplicity of doctrinal sources, a contextual normative inquiry can secure a much more stable, and thus predictable, legal equilibrium. See, e.g., K.N. LLEWELLYN, THE BRAMBLE BUSH 48 (1930, 6th prtg. 1977); LLEWELLYN, COMMON LAW TRADITION, *supra* note 7, at 19-61, 178-255; MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN 39-40, 76 (1997).

⁴⁷ This prescription of standardization is particularly acute with regard to the expressive role that mandates limiting the number of legal categories because law can effectively express only so many ideal categories of interpersonal relationships.

⁴⁸ I believe that an analysis analogous to the one I offer regarding the private-public distinction applies to the distinction between private law and criminal law. *Cf.* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U.L. REV. 453, 479-82 (1997).

⁴⁹ See, e.g., HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1977); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. Rev. 741 (1999).

⁵⁰ See Don Herzog: Happy Slaves: A Critique of Consent Theory 156, 166-68, 173-75 (1989).

distinction serves as a means for entrenching these expectations and the ideals for which they stand.

By the same token, there are good (read: realist) reasons for the division of private law into separate fields. There are, for example, important and rather fundamental normative distinctions between contracts and torts: at least from the viewpoint of the important value of human autonomy the purposes of contracts and torts are distinctly different. Contracts are usually understood as conventional frameworks of voluntary promises, which the law enforces in order to allow people to promote their own goals by using other people (or their resources) without immorally using these people. By contrast, from an autonomy perspective, tort law focuses mainly on prescribing rules of action and of liability that reconcile the competing claims of liberty and security in fair ways. Hence, whereas contract law consolidates expectations and expresses ideals regarding cooperative human interactions, tort law performs similar tasks with respect to conflicting human interactions.

Finally, the internal categorization of each private field of law also obeys this legal realist logic. Property law, for example, is divided into different property institutions that parse the social world into distinct types of human interaction with respect to given categories of resources. Some property institutions govern arm's-length relationships between strangers (or market transactors), and are accordingly structured along the lines of the Blackstonian conception of property as "sole despotic dominion":⁵⁴ they are atomistic and competitive, and they vindicate people's negative liberty. Other property institutions, such as marital property, deal with intimate relationships and are therefore dominated by a much more communitarian view of property, in which ownership is a locus of sharing. Finally, many other property institutions governing relationships between people who are neither strangers nor intimates, such as landlords and tenants, members of the same local community, neighbors, and co-owners, lie somewhere along the spectrum between atomistic and communitarian norms. In all these cases, both autonomy and community are of the essence and ownership thus implies both rights and responsibilities.⁵⁵

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⁵¹ Even the economic analysis of the law, which is of course preoccupied with another important value – social welfare – acknowledges the difference between contract law and tort law. While the former is aimed, in this view, at maximizing the welfare of contractual parties, the latter is preoccupied with minimizing the costs of accidents and the costs of their prevention. *Compare, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) *to* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

⁵² See Charles Fried, Contract as Promise: A Theory of Contractual Obligation 7-17 (1981); Daniel Markovitz, Contract and Collaboration, 114 Yale, L.J. 1419 (2004).

⁵³ See Dan B. Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury 8-9 (2d ed. 1993); Arthur Ripstein, Equality, Responsibility, and The Law 6 (1999); Gregory Keating, Rawlsian Fairness and Regime Choice in the Law of Accidents, 72 Fordham L. Rev. 1857, 1862–1870 (2004). There are, to be sure, other accounts of the role of autonomy in torts. Thus, for example, Ernest Weinrib insists that corrective justice is the regulative principle of torts (and more generally of private law). See Ernest J. Weinrib, The Idea of Private Law (1995). But Weinrib too sees important distinctions, with significant remedial consequences, between contracts and torts. See Ernest J. Weinrib, Punishment and Disgorgement as Contract Remedies, 78 Chil-Kent L. Rev. 55 (2003).

⁵⁴ 2 WILLIAM BLACKSTONE, COMMENTARIES 2.

⁵⁵ See Dagan, supra note 45, at 1559-60.

III. REALIST TAXONOMIES

Having recovered the value that realists place on legal taxonomy, my remaining task is to consider the main attributes of the taxonomic enterprise in its realist rendition. As the discussion that follows demonstrates, realist taxonomies are different from their doctrinalist counterparts in three key features.

Proponents of the doctrinalist taxonomic venture believe, as noted, that legal taxonomy provides the best way of understanding law's "organizational claims" and, therefore, of the law itself.⁵⁶ This view is deficient because, like the very project of doctrinal legal taxonomy, it assumes that taxonomy is exogenous to "law's self-understanding" and that legal classifiers merely describe, rather than affect, the legal landscape. This quietist assumption is of course exactly what legal realism challenges as wrong and misleading.

The first and most fundamental distinctive feature of the realist taxonomy of law, therefore, is its relative dynamism. Llewellyn, for example, invites lawyers to rethink law's received categories because, while legal classification cannot be eliminated, "to classify is to disturb" and hence "obscure some of the data under observation and give fictitious value to others." For this reason, classifications "can be excused only in so far as [they are] necessary to the accomplishing of a purpose." And because purposes may change, "the available tradition of categories" should be periodically reexamined. Rethinking legal categorization is important for a further reason, namely, because it may help expose otherwise hidden and sometimes unjustified legal choices of inclusion and exclusion.

To avoid the pitfalls of essentializing the existing legal taxonomy, realists refuse to accept the existing legal categories as a given, and call instead for an ongoing (albeit properly cautious) process of identifying the human values underlying these categories and rethinking the legal rules that best promote them. The appeal to the prevailing legal taxonomy is never the end of the legal analysis, because invoking these categories always involves, at least potentially, some tinkering with their content as well as their boundaries. In other words, the realist approach takes the values underlying legal categories and not only the existing doctrinal content of these categories as part and parcel of the legal analysis, and thus makes these values an object of ongoing critical and constructive inquiry. The realist taxonomic enterprise is thus both backward and forward looking, constantly challenging the continued validity and desirability of the normative underpinnings of existing legal categories, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually examined normative goals. 60

3111th, *supra* note 25, at 247-30

⁵⁶ Smith, *supra* note 25, at 249-56.

⁵⁷ LLEWELLYN, A Realistic Jurisprudence: The Next Step, supra note 19, at 27.

 $^{^{58}}$ Cf. Don Herzog, Poisoning the Minds of the Lower Orders 18 (1998).

⁵⁹ *Cf.* Jaffey, *supra* note 26, *passim* (although Jaffey mistakenly believes that each "justificatory category" should necessarily have one "common underlying principle or justification"); Weinrib, *supra* note 2, at 37-38, 55 (although Weinrib is, of course, not a legal realist).

⁶⁰ Here, we must rely on the vague notion of "promoting" to capture the complex ways in which law can facilitate human values. The normative analysis recommended by legal realism seeks to capture law's material effect on people's behavior, its expressive and constitutive impact, and the intricate interdependence of the two effects. *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000).

At times, such an account helps to fill gaps in the law by prescribing new rules that bolster and vindicate these goals even further. At other times, it points out "blemishes" in the existing categories, rules that undermine the most illuminating and defensible account of such a legal category that should be reformed so that the law may live up to its own ideals. This reformist potential may yield different types of legal reforms. In some cases, the reform is quite radical: the abolition of a legal category or an overall reconstruction of its content. In others, more moderate options are in order, such as restating the doctrine pertaining to a legal category in a way that brings its rules closer to its underlying commitments, in the process removing indefensible rules, or adjusting one given category to the various social contexts in which it may be situated.

The realist approach to taxonomy is thus an exercise in the kind of legal optimism so typical of the common law tradition. Rather than an attempt just to understand the existing legal terrain, it simultaneously aims to explain and develop legal categories in a way that accentuates their normative desirability while remaining attuned to their social context.

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A second important characteristic of the realist taxonomic blueprint, which is again antithetic to the doctrinalist tenor, ⁶³ is a strong preference for relatively narrow categories. Thus, Llewellyn finds wholesale legal categories (such as contracts or property) "too big to handle," since they encompass too "many heterogeneous items." He thus recommends "[t]he making of smaller categories – which may either be subgroupings inside the received categories, or may cut across them." By employing these narrow categories, lawyers can develop the law while "testing it against lifewisdom." Again, the claim is *not* that "the equities or sense of the particular case or the particular parties," should be determinative; rather, it is that decision making should benefit from "the sense and reason of some significantly seen *type* of lifesituation."

The realist celebration of the traditional common law strategy of employing narrow legal categories, each covering only relatively few human situations, follows directly from the realist commitment to assure that law indeed serves life. As Herman Oliphant noted, this strategy "divide[s] and minutely subdivide[s] the transactions of life for legal treatment," with the desirable result of a significant "particularity and minuteness in the [legal] classification of human transactions." Narrow categories, Oliphant explained, help to produce "the discrimination necessary for intimacy of treatment," holding lawyers and judges close to "the actual transactions before them"

⁶² For some examples for these different outcomes in the context of property law, see Dagan, *supra* note 45, at 1563-64.

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⁶¹ See Ronald Dworkin, Taking Rights Seriously 118-23 (1977).

⁶³ See Peter Birks, Definition and Division: A Mediation on Institutes 3.13, in THE CLASSIFICATION OF OBLIGATIONS, supra note 2, at 1, 34-35; Weinrib, supra note 2, at 40.

⁶⁴ LLEWELLYN, *A Realistic Jurisprudence*, *supra* note 19, at 27-28, 32; LLEWELLYN, *Some Realism*, *supra* note 7. *See also*, *e.g.*, William W. Fisher III, *The Development of American Legal Theory and the Judicial Interpretation of the Bill of Rights, in* A CULTURE OF RIGHTS 266, 275 (Michael J. Lacey & Knud Haakonssen eds. 1993).

⁶⁵ LLEWELLYN, *The Current Recapture of the Grand Tradition, in JURISPRUDENCE, supra* note 7, at 215, 217, 219-220.

and thus encouraging them to shape law "close and contemporary" to the human problems they deal with. Only where legal taxonomy adheres to the injunction of creating narrow categories does it facilitate one of the most distinct comparative advantages of lawyers (judges) in producing legal norms – their "battered experiences of . . . brutal facts," namely: their daily and unmediated access to actual human situations and problems in contemporary life. When law's categories are in tune with those of life so that an "alert sense of actuality checks our reveries in theory," lawyers uniquely enjoy "the illumination which only immediacy affords and the judiciousness which reality alone can induce."

Indeed, our lives are divided into economically and socially differentiated segments, ⁶⁷ and each such "transaction of life" has some features that are of sufficient normative importance, that is, that gain significance from the perspective of some general principle or policy that justifies a distinct legal treatment. ⁶⁸ If law is to serve life, it should tailor its categories narrowly and in accordance with these patterns of human conduct and interaction so that it can gradually capture and respond to the characteristics of each type of cases. ⁶⁹ Only in this way can law preserve the legitimacy of adjudication that partly relies, as may be recalled, on the fact that *legal* normative analyses are always situated in specific human contexts.

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Finally, the third important distinction between the doctrinalist and the realist approaches to legal taxonomy relates to the possible relationships between different legal categories. Doctrinalists regard legal categories as necessarily autonomous and mutually exclusive, so that "the classified answer to a question must use categories which are perfectly distinct one from another." Because the project of legal taxonomy is for them analogous to the project of classifying natural features of our world, they see the idea of some overlaps between categories as seriously misguided. For the doctrinalist, the test of success for a legal taxonomy is precisely its success in generating a scheme where different categories, governed by differing principles, "stand in splendid isolation from one another in legal discourse." The

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⁶⁶ Oliphant, *supra* note 19, at 73-74, 159. *See also* Fisher, *supra* note 64, at 272-73, 275. Joseph Raz's analysis of the distinguishing cases phenomenon brings home a similar point. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 183-97 (1979).

 $^{^{67}}$ See Peter Berger et. al, The Homeless Mind: Modernization and Consciousness 63-82 (1973).

⁶⁸ See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Elizabeth Anderson, *Pragmatism*, Science, and Moral Inquiry, in In the Face of Facts 10, 17 (Richard Wightman Fox & Robert B. Westbrook eds. 1998).

⁶⁹ See Dagan, supra note 45, 1558-65; Roy Kreitner, Fear of Contract, 2004 WISC. L. REV. 429, 461-78; Rakoff, supra note 38, at 219, 222, 225; Frederick Schauer, Prediction and Particularity, 78 B.U.L. REV. 773 (1998); Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. CAL. INTERDISC. L.J. 389, 415-19 (1994).

⁷⁰ See Peter Birks, Unjust Enrichment and Wrongful Enrichment, 79 Tex. L. Rev. 1767, 1794 (2001)

⁷¹ See id., at 1781 ("[i]t is no more possible for the selected causative event to be both an unjust enrichment and a tort than it is for an animal to be both an insect and a mammal.")

⁷² See Weinrib, supra note 2, at 39.

ideal taxonomy for doctrinalists is one that builds high walls of autonomy between legal categories, defines one normative "core" per field, and jealously safeguards the boundaries between distinct legal fields.

By contrast, realist taxonomies live comfortably with some degree of overlap between categories. Realists are not alarmed or embarrassed by overlaps because they are not impressed by the doctrinalist claim that overlaps are conceptually impossible. They highlight the confusion resulting from the presupposition of this claim, namely, that the endeavor of legal classifiers is exogenous to the object's character. They insist that, once this presupposition is set aside, complete autonomy becomes a rather extreme condition and should not, in any event, be the test of taxonomical success.⁷⁴ Quite the contrary: in most cases some overlaps are perfectly acceptable, even desirable. In justifying and framing principles for one area of the law, explains Bruce Ackerman, "lawyers often find that principles governing [another area] are relevant to their problem." Therefore, it should not be surprising to identify some relationships of dependence between legal categories, either through the subordination of one to the other or, as is probably more frequently the case, through mutual reciprocity, so that "either can be invoked as a source of argument in a lawyer's evaluation of the other."⁷⁵ This seems a straightforward proposition for realists, emanating from the mundane observation that life is messy and that different contexts, while distinct in some senses, often raise overlapping normative concerns.⁷⁶

Indeed, reciprocity, rather than autonomy, seems to be the name of the taxonomic game. Thus, for example, there are important continuities between the underlying concerns and methodologies of contract law and those of torts: the canonical tort law search for the cheapest cost avoider is frequently translated into an analysis that prescribes contractual defaults by attaching liability to the party who is the least cost bearer. At times, torts scholars helpfully use a contractarian approach (looking, to be sure, to a hypothetical contract behind some veil of ignorance) to justify an existing or suggested tort doctrine. Correspondingly, some doctrines, such as product liability law, resist easy pigeonholing into either contracts or torts. Rather, the lack

⁷³ Bruce A. Ackerman, *The Structure of Subchapter C: An Anthropological Comment*, 87 YALE L.J. 436, 439 (1977).

⁷⁴ See WADDAMS, supra note 30, at 226-27; Ackerman, supra note 73, at 439; Samuel, supra note 30, at 282-84.

⁷⁵ Ackerman, *supra* note 73, at 439. *Cf.* WADDAMS, *supra* note 30, at 110, 112, who confuses in this context governing principles and legal categories.

⁷⁶ See Feinman, supra note 26, at 689

⁷⁷ See also WADDAMS, supra note 30, at 1-2, 7.

⁷⁸ See, e.g., ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 19 (2d ed. 1993).

⁷⁹ For two very different examples, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988); Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857 (2004).

⁸⁰ See, e.g., 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY 1xxvii (3d ed. 1994).

⁸¹ See Grant Gilmore, The Death of Contract (1974).

⁸² See also Hanoch Dagan, Property and the Public Domain, 17 YALE J.L. & HUMANITIES 84, 90 n.26 (2005) ("Similarly to the unavoidable relationship of reciprocity between marital property law and other areas of both family law and property law, the law of creativity is rightly allied not only with

of clear doctrinal boundaries separating these fields and the multiple overlaps in the system simply reflect the realist discount of the aesthetic appeal of doctrinal autonomy and the realist welcome of cross-boundary borrowings whenever they can facilitate the contextual normative analysis of law. 83

Some may worry that overlaps destroy the point of taxonomy: once a legal category lacks the strong coherence of principle envisioned by the ideal of doctrinal autonomy, it is no longer helpful. This worry, however, is exaggerated. To be sure, a degree of overlap that destroys any possibility of sensibly producing normative, and thus doctrinal, recommendations about any given legal category would indeed take the bite out of the taxonomical project. But the realist case for accommodating (indeed celebrating) overlaps does not take this extreme position, and this chaotic predicament is definitely not the only alternative to strict doctrinal autonomy. Some overlaps between legal categories need not destroy the common denominators, the family resemblances holding together the rules of any given legal category. As long as these common denominators are thick enough to yield sufficiently robust normative (and thus doctrinal) recommendations, holding on to the legal category is (realistically) justified.

CONCLUSION

Legal taxonomy is frequently portrayed as necessarily a formalist (or doctrinalist) endeavor, which realists are likely to dismiss. This common wisdom is both mistaken and unfortunate. It is mistaken because realists should have a keen interest in the enterprise of legal categorization. Realists need not, to be sure, subscribe to the (doctrinalist) idea that the purpose of taxonomy is to organize the given terrain of legal rules. Rather, they can and indeed should reconstruct the role of taxonomy so as to incorporate their insights on the inherent dynamism of law and the important function of contextual normative analysis in the evolution of legal categories. This reconstruction implies that the main goals of legal categories are to consolidate people's expectations and to express law's ideals with respect to distinct types of human interaction.

fields of law that deal with speech, culture, and learning, but also with the more traditional areas of property law.")

⁸³ See HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 34 (2004).

⁸⁴ This is the claim of some unjust enrichment skeptics who argue that the failure of unjust (or unjustified) enrichment to serve as the guiding principle of the law of restitution implies that there is no good reason to retain (or revive) restitution as an important legal category. *See, e.g.*, Peter Jaffey, *Two Theories of Unjust Enrichment, in* UNDERSTANDING UNJUST ENRICHMENT 139 (Mitchell McInnes et al. eds., 2005). This claim frequently presents property, contract, and tort law as legal fields that provide the strong coherence of principle that restitution lacks, concluding that it is better to think of restitution as an element of one or more of these fields. *See, e.g.*, Steve Hedley, *Unjust Enrichment: A Middle Course?*, 2 Ox. U. COMM, L.J. 181, 194-95 (2002).

⁸⁵ Cf. Kit Barker, Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons, in UNDERSTANDING UNJUST ENRICHMENT, supra note 84, at 79; Feinman, supra note 26, at 678, 699.

⁸⁶ For an example, dealing with the law of restitution, see DAGAN, *supra* note 83, at *.

⁸⁷ Or worse, to present as subject to constant renegotiation between competing power-wielding lawyers. *See* Hugh Collins, *Legal Classifications as a Production of Knowledge System, in* THE CLASSIFICATION OF OBLIGATIONS, *supra* note 2, at 57, 68.

Recasting legal categorization in these terms dramatically changes the nature of the taxonomic enterprise. Rather than aiming at the refinement of some eternal descriptive truths, legal taxonomy in its realist rendition is an ongoing enterprise constantly reinventing itself. Rather than seeking to transcend context, realist taxonomies are sensitive to context and seek to generate relatively narrow legal categories. Finally, rather than aspiring to produce a map of mutually exclusive legal categories, a realist legal taxonomy recognizes and accommodates substantial (although never overwhelming) overlaps among the various legal categories.

