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Private law theory and taxonomy: reframing the debate

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1. Introduction

Over the past half-century, theoretical debates about private law in England and the commonwealth have increasingly come to be about taxonomy. In its broadest sense, taxonomy refers to three things. Firstly, it refers to the selection of sets of ideas, categories and concepts used to describe and order the subject of study. Is private law better understood as being about contract, tort and restitution, or about labour relations, trade relations, financial relations and consumer relations? Secondly, it refers to the basis on which we constitute and give content to these concepts and categories. Do 'risk', 'distribution' and 'policy' influence the question of whether a duty of care exists? Thirdly, it refers to the relationship between the various categories, concepts and ideas we use to describe the area of study. How does the category 'contract' relate to the category 'unjust enrichment'? Should the fact that a situation can be brought within the former category mean that it should be excluded from the latter category?

Virtually all recent debates in private law in these jurisdictions relate to one of these three matters. The positions taken, too, tend to involve the same two opposing camps. On one side are theorists who we term 'interpretivist', a label accepted by some of the most prominent members of this school[1] (though by no means all) as well as some at least of their opponents.[2] There are significant differences amongst these theorists – who include private law scholars such as Stephen Smith[3] and Allan Beever – but they share in common a preference for categories based on high-order, 'timeless' principles that are normatively justifiable and of general applicability; a methodology that uses these as the basis for generating lower-order rules to determine the results in particular contexts; and a suspicion of 'policy' as a means of avoiding proper analysis of the principles and rationale of the law.[4] In jurisprudential terms, they take inspiration from the work of Peter Birks on logic, taxonomy and structure in private law.[5] The school also has a loose connection with the thinking of

[*] University of East Anglia and Newcastle University respectively.
[1] A Beever and C Rickett 'Interpretivism and the Academic Lawyer' (2005) 69 MLR 320
[2] See eg S Hedley 'The Shock of the Old: Interpretivism in Obligations' in C Rickett and R Grantham (eds) *Structure and Justification in Private Law* (Hart Oxford 2008) 205
[3] S Smith *Contract Theory* (OUP Oxford 2004)
[4] A Beever 'Policy in Private Law: An Admission of Failure' (2006) 25 UQLJ 287, 294-297
[5] PBH Birks *Unjust Enrichment* (2nd edn Clarendon Press Oxford 2005)

Ronald Dworkin,[6] although some within the School explicitly reject him for a more positivist outlook.

On the other side are theorists we term 'contextualists'. Members of this camp, such as Steve Hedley[7], Stephen Waddams,[8] and Hanoch Dagan[9] also differ on important points, but they too share a range of characteristics. Their work tends to focus on categories such as "the family home",[10] which are smaller, more contextual, and have significant room for policy. Their approach to individual cases likewise focuses heavily on the factual context of the case, and relatively less on the high-order principles involved. Although they do not deny the existence of categories like contract or restitution – indeed Hedley wrote a textbook on restitution[11] - they deny the value in over-theorising or over-generalising the nature of these categories, and tend to be less interested in seeking to eliminate overlaps between categories. Hedley, for example, accepts no single normative explanation of contract and has described the law of contract as "too vast and complicated for such generalisations".[12] In constructing his own taxonomy in a 1988 article[13] he lists a diverse range of interests that the law protects, such as personal dignity and land. Whilst Dagan has a different approach, the linking commonality is that he too argues for a focus on local policies and norms.[14] In jurisprudential terms, their work typically has a connection with legal realism.

Yet, as we show in this article, despite the intellectual energy with which the debate has been conducted, it has been flawed by two fundamental mistakes, which have led to the opposing camps talking past each other. The first of these relates to the purpose of legal taxonomy. The importance of classification comes from the fact that the operation of private law requires judges and jurists to separate incidents that carry legal consequences from incidents that do not, and incidents that carry one type of consequence from those that carry another type. Legal categories and concepts seek to assist with this process, and taxonomies have been controversial precisely because they would alter the outcomes of future cases. Despite this, little attention has been paid to the question of how legal taxonomies are actually used. As we show in Part 2, this is regrettable. How we build a taxonomy depends on why we build a taxonomy, and a focus on this question produces an

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[6] Hedley (n 2) 206-207;See D Sheehan 'Implied Contract and the Structure of Unjust Enrichment; in P Giliker (ed) *Re-Examining Contract and Unjust Enrichment* (Brill Leiden 2007) 185 for an argument that the Birksian grid and by extension the interpretivist project can more easily be defended from a Dworkinian outlook.

[7] S Hedley, 'Contract, Tort and Restitution: Or On Cutting the Legal System Down to Size' (1988) 8 LS 137

[8] S Waddams *Dimensions of Private Law* (CUP Cambridge 2004)

[9] See eg H Dagan *The Law and Ethics of Restitution* (CUP Cambridge 2005) where although he accepts the existence of the area, he provides some radical reinterpretations based on different values that do, or should underlie the area.

[10] H Dagan 'The "Craft" of Property' (2003) 91 California L Rev 1519, 1535-1558 (in the US marital context); in England see A Hayward 'Family Property and the Process of "Familialisation" of Property Law' (2012) 24 CFLQ 284, 302-303 arguing that the family home (in a non-marital context) has been hived away doctrinally from normal rules about resulting and constructive trusts

[11] S Hedley *A Critical Introduction to Restitution* (Butterworths London 2001); see also S Hedley *Restitution: Its Division and Ordering* (Sweet and Maxwell London 2001)

[12] S Hedley 'Unjust Enrichment: The Same Old Mistake' in A Robertson (ed) *The Law of Obligations: Connections and Boundaries* (UCL Press London 2004) 73, 79; PS Atiyah *An Introduction to the Law of Contract* (5th edn Clarendon Press Oxford 1995) 40, cf S Smith *Atiyah's Introduction to the Law of Contract* (6th edn Clarendon Press Oxford 2006) Ch 2

[13] Hedley (n 7) 150-168

[14] H Dagan 'The Realist Conception of Law' (2007) 57 UTLJ 607, 657-658

approach to the construction and use of legal categories that differs in significant respects from the approaches that currently dominate private law theory.

The second mistake is even more far-reaching, and relates to the manner in which legal concepts are used in contemporary private law.[15] Theorists from all sides frame their categories in conceptual terms, but have tended to misuse concepts. Some theorists treat concepts as plain facts (Birks was one) or in terms of definition (Hart for example), and those interpretivists influenced by positivism also tend to think in definitional terms or in terms of "meaning". This is wrong. We argue in part 3 that common law legal concepts are ideal types – they are purely theoretical representative constructs and not real world facts at all. We draw on theories of concepts to argue that this means that understanding a concept requires us to examine not just the concept itself, but also the circumstances and cases to which the concept applies. Both the "intension" and the "extension" of a concept are relevant in a way that private law theorists have not generally recognised.

To work in terms of intension and extension has one further implication. In the final part, we argue the concepts used in law change both in terms of their intension and their extension. This means that we cannot work with static concepts, but must have an understanding of concepts that is developmental, and builds in a sense of direction of development which reflect the theoretical claims we make about the law. Precisely how that is to be done is beyond the scope of this paper, but we indicate how the debate can be reframed in a more helpful and constructive manner.

2.   Taxonomies and hard cases

A. The purpose of taxonomy

The shape of a taxonomy depends on its purpose. The classification of animals according to the principles of the Jewish rules of *kashrut* or in the terms of the Animals Act 1971 bear little resemblance to the modern Linnaean classification. This does not mean that they are wrong – it simply reflects the fact that how we classify depends on why we classify. In much the same way, we may seek to classify the law for a range of purposes – dividing up the undergraduate curriculum, organising the work of the Law Commission, planning the order of a statute book or a legal encyclopaedia – each of which will lend itself to a different approach to classification.[16]

This point is not alien to legal theory, but the taxonomies that have been the subject of so much controversy in private law scholarship recently have a generally narrow focus. Their primary concern has been with the type of question that, in continental scholarship, is sometimes called *de sententia ferenda* – how the legal system should deal with an undecided issue. The debate around legal taxonomies has been closely connected to

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[15] In discussing the nature of concepts, this paper does not make any *general* epistemological claims about concepts or taxonomies. Our claim is not that concepts are *necessarily* as we describe them to be, in all legal systems and at all times: it is that they are currently so in private law in England and the commonwealth.

[16] See JA Jolowicz 'Fact-based classification of law' in JA Jolowicz (ed) *The Division and Classification of the Law* (Butterworths, London 1970).

disagreements about whether particular outcomes would be desirable in particular types of case, or whether they would lead judges to consider irrelevant factors while ignoring relevant ones. The debate around unjust enrichment and equity in Australia is a particularly clear example of how differences as to taxonomy tend to reflect differing views as to what a court ought to or ought not to be swayed by. Similarly, the Birksian project to erect a law of unjust enrichment on English soil has been controversial at least in part because it opened the door to considering a range of factors that would not earlier have been considered relevant, and to granting remedies that would previously not have been available.

The connection between taxonomies and hard cases has important implications for our understanding of the form and subject of taxonomies. Hard cases manifest at least one of three types of epistemic uncertainty. Firstly, they may be characterised by a lack of clarity as to which sets of legal rules are the correct ones to apply (is a particular commercial dispute one in which we should applying rules from the law of trusts - as in a *Quistclose* trust for example - or should it be decided purely on the basis of the law of contract?). Secondly, hard cases may be characterised by a lack of clarity as to the precise content of a legal rule, standard or concept (what does 'common intention' mean in the context of the 'common intention' constructive trust?). Finally, they may reflect a lack of clarity as to the effect of applying a given set of legal rules, standards or concepts to a novel set of facts (can a 'without prejudice' draft evidence consent?).

In each case, however, the question relates not to a rule as such, but to the problem of subsuming a particular instance under the appropriate rule – a question which is, to put it in Kantian terms, one of judgment rather than deductive logic.[17] Taxonomies, in consequence, are concerned not simply with classifying rules but with shedding light on the factors which a judge should ignore in deciding a case, the factors he should take into account, the weight he should attach to these factors, and the effect of taking these factors into account – i.e., whether they tilt the balance in favour of the claimant or the defendant. A legal taxon is in consequence associated with a set of legally relevant factors. Classifying a case as belonging to one taxon rather than another affects the outcome by changing the factors that a judge is required to take into account in deciding the case, as well as the factors by which he is not supposed to be swayed. The classification of a legal issue as belonging to the domain of unjust enrichment rather than equity as traditionally conceived, or to equity rather than contract can change both who wins the case and what remedy the winner gets because matters that are relevant to considering whether a particular action or outcome is "against conscience" will not be relevant to considering whether they were within the terms of a contract.[18]

This has important consequences for how we conceptualise the form of taxonomic projects, in that it suggests that Birks' influential biological analogies only present a partial picture of legal taxonomy. Birks argued that a sequence such as terrestrial, arboreal, aquatic is wrong,

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[17] P Gruyer and A Wood (tr) I Kant *Critique of Pure Reason* (CUP Cambridge 1999) A132/B171.

[18] A historical example might be the retreat in the 1930s of the English courts from using trusts to provide relief to third parties in contracts, as a result of reclassifying the cases as purely contractual. See AL Corbin 'Contracts for the benefit of third parties' (1930) 46 LQR 12. Of course a Birksian would wince at the equity vs contract divide set up here.

because arboreal is also terrestrial.[19] Similarly, failing to distinguish between a wrong and an unjust enrichment will lead to analytical errors and drawing parallels that are superficial at best. Both Steve Hedley and Geoffrey Samuel have responded to this use of biological analogies,[20] but the deeper point is that the analogy is false because taxonomy in law, unlike biological taxonomy, is designed to affect and alter its subject matter. Biological taxonomies have no real implications for how the biosphere functions, because changing the manner in which an organism is classified does not change anything about the organism. Whether fungi are classified as a part of the plant kingdom or the animal kingdom, for example, does not affect the fungi themselves, or the manner in which they grow or evolve. This is not true of law, because taxonomy in law *is* about how we treat the subject of our taxonomy: we will, for example, remedy a breach through expectation damages once we classify it as contractual. That is a central reason for engaging in the process of taxonomy.

If we seek analogies outside the domain of law, therefore, prescriptive grammar is a better starting point than biology. A prescriptive grammarian, through classifying words and formulating rules in relation to how a category is to be used, is trying to influence the treatment of the subject of his taxonomy. A grammarian who classifies a noun as falling in the fourth declension (or argues that it should be treated as such) is telling her audience to use a different inflection in the ablative plural than they would have done if they thought it third declension. Likewise, in saying that a sentence should not be ended with a preposition, or that an infinitive should not be split by the insertion of an adverb, prescriptive grammarians are telling their audience that they should use language in a particular way. Critically, a prescriptive grammarian does not devise an 'ideal' system of rules of her own making: writing a prescriptive grammar is different from inventing a constructed language like Esperanto or Quenya, in that the prescriptive grammarian takes usage as her starting point, attempts to detect regularities in usage, and selects amongst competing usages in existing language to formulate a rule declaring one particular usage to be the one that most commends itself for wider adoption. As we will see in the next section, this has considerable implications for legal taxonomy.

B.   Descriptive, Developmental and Prescriptive Taxonomies

The analogy with grammar points to an important divide between ways of using taxonomies. A taxonomy may be intended to be purely *descriptive* – a snapshot in time of the law, akin to a descriptive grammar of a language at a particular point of time. Classification of the law for the organisation of a hypothetical *Everyman's Own Lawyer*, or an encyclopaedia of law, or a statute book, or the foundational subjects on the undergraduate curriculum, tends to reflect such an approach.

Alternatively a taxonomy can be constructed to be *developmental*. A key component of the distinction between developmental and descriptive taxonomies is that developmental taxonomies see the law as being in a process of change. Such taxonomies are therefore

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[19] Birks (n 5) 20

[20] S Hedley 'The Taxonomic Approach to Restitution' in A Hudson (ed) *New Perspectives on Property Law Obligations and Restitution* (Cavendish London 2003) 151, 153; G Samuel 'Can Gaius really be Compared to Darwin?' (2000) 49 ICLQ 297

dynamic rather than static, and are concerned *both* with the process of change *and* the current appearance of the law. They seek to capture not just the law as it is at this instant, but, unlike descriptive taxonomies, also the direction of its development.

Finally, a taxonomy can be constructed to be *prescriptive*. Prescriptive taxonomies distinguish themselves from developmental taxonomies in that they are not concerned with the process of legal change. They are, instead, used to 'correct' the law by pointing to the right answer in instances where they believe the law has gotten the answer wrong. Whilst these taxonomies go beyond mere description, they lack the dynamic dimension of developmental taxonomies. In other words they tell us what the right answer is, but not how we should get there.

Taxonomies constructed by legal realists – and therefore some at least of our contextualist theorists – are usually developmental. Realists see the law as responding to the same social trends that drive social change. The law is not static, and the categories used in analysing the law must therefore be able to account for and shed light on the direction in which it develops. As the normative underpinnings of different areas respond to social change, so too do the bases of legal categories. Realists, accordingly, orient their categories around identifying the values and goals (often conflicting) that underlie or are implicated in the development of the law, exploring the choices between these which the legal system reflects, and their implications for a given type of case. Atiyah's argument about reorienting contract around reliance[21] is a classic, albeit unsuccessful, example. The result, as Dagan puts it, is that the realist taxonomic enterprise is "both backward and forward looking, constantly challenging the continued validity and desirability of the normative underpinnings of existing legal categories."[22]

Resistance to developmental taxonomies comes principally from the classificatory work of positivist-influenced interpretivists.[23] Many such theorists are happy to accept the charge that formalist positivist taxonomies tend to be purely descriptive.[24] Smith[25] says that a theory of law can be historical, descriptive, prescriptive or interpretive.[26] Historical analyses examine the law as history – for example, an explanation of contract as reflecting the changing forces of production in the eighteenth and nineteenth centuries.[27] A descriptive analysis says the law is x. A prescriptive one provides an account of an ideal law, saying, "It doesn't matter that it's x - it ought to be y." An interpretivist analysis, by contrast, is in his account one which enhances our understanding of the law by highlighting its significance or meaning, by identifying the important features of the law and by identifying connections

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[21] PS Atiyah *Promises Morals and the Law* (OUP Oxford 1981)

[22] H Dagan 'Legal Realism and the Taxonomy of Private Law' in C Rickett and R Grantham (eds) *Structure and Justification in Private Law* (Hart Oxford 2008) 147, 161

[23] G Samuel 'Is Legal Knowledge Cumulative?' (2012) 32 LS 445, 461. Some interpretivists such as Steve Smith adopt a position closer to an inclusive positivism which accepts the role of morality in hard cases. Smith (n 3) 13-15

[24] E Sherwin 'Legal Positivism and Taxonomy' in C Rickett and R Grantham (eds) *Structure and Justification in Private Law* (Hart Oxford 2008) 103, 123

[25] Smith (n 3) 4

[26] Ibid 4-5

[27] Ibid 4

between them but, as Smith himself concedes,[28] the difference between descriptive and interpretive theories is one of degree not kind because interpretivists, too, theorise about the law and what it actually is. Other interpretivists are more explicitly prescriptive. Allan Beever and Charles Rickett, for example, in their review of Stephen Waddams' book[29] argue that what is important is not why a judge decided the way he did, not what his reasons were, but what they should have been.[30] This suggests that their methodology and taxonomies based on it are statically prescriptive.

This is problematic, because only developmental taxonomies are capable of being used for the purposes the classificatory project claims to pursue. Descriptive taxonomies are of little use in hard or controversial cases – which, as discussed in the previous section, are the main focus of classificatory projects – because they shed little light on the epistemic uncertainty that characterises these cases: It is only once a case has been decided that we can comfortably describe it. Somewhat less obviously, a purely prescriptive taxonomy, too, is of limited use in hard or controversial cases. The implicit basis upon which interpretivist theorists advance prescriptive taxonomies appears to be that such a taxonomy classifies the law according to the 'right answer', which the courts would have arrived at had they only gone about the task appropriately.

Talk of a "right answer" suggests a link with Dworkin . Hercules looks at the cases that seem relevant to the scenario he has before him, and see which cases fit – are consistent with – the hypotheses he has. The process of justification entails his examining those solutions which meet a minimum fit requirement to see if they are morally justified results. As with realist approaches, Hercules' is backwards looking in terms of fit, but forward looking in terms of creating an attractive framework for future judges, thus rendering the approach dynamic and developmental. The combination of these two standards of assessment leads to Hercules' identifying a single correct answer.[31] Both contexualists and Dworkin hold that legal rules not only enable judges to decide cases, but also constrain them from being unduly influenced by their own preferred position in situations where morality and principle are contested. Dworkin's account places at its heart the special institutional morality that is generated by accreted legal practice in a system;[32] he describes legal rights as those that can be enforced in a court,[33] distinguishing them from purely moral rights. Contextualist accounts place emphasis on the policies that form part of the relevant legal system, and on what Llewellyn called the court's "sense of the situation".[34] Contextualists and Dworkinians agree that these constraints are not absolute, but are nevertheless real and fundamental to the legal system, although they may disagree as to how the constraints actually operate. Thus realists do not, in rejecting the suggestion that rules lead to a single right answer,

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[28] Ibid 6; Dagan has suggested that "doctrinalist taxonomies" as he calls them are primarily descriptive; Dagan (n 22) 160; Dworkin's theory has elements of description and prescription according to K Kress 'The Interpretive Turn' (1987) 97 Ethics 834

[29] Waddams (n 8).

[30] Beever and Rickett (n 1) 327

[31] Eg R Dworkin *Taking Rights Seriously* (Duckworth London 1978) 290

[32] R Dworkin *Law's Empire* (HUP Cambridge Mass 1986) 407-409

[33] Ibid 405-406

[34] K Llewellyn 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed' (1949) 3 Vanderbilt L Rev 395, 396

mean that rules are ineffectual. Rather, they hold that that their effect is to identify a number of potentially correct or good decisions, one of which the judge then selects.

The absence of a dynamic dimension to prescriptive taxonomies leads to their being less grounded in existing law than developmental taxonomies are; a prescriptive taxonomist is far readier than a developmental taxonomist to reject the reasoning by which a court arrives at its decision, because a prescriptive taxonomist's concern is not so much the interpretation that the courts put on the law, or the processes by which actual courts deciding new cases engage with the materials provided by past cases, as it is what the law should be. The result is a view of the role of the jurist and taxonomist that is in many ways closer to the Franco-civilian model of a person who expounds the law with some reference to what courts say, but without regarding the courts as the ultimate founts of the law: logic, rationality and philosophical or normative reflection are as important as case law is, and jurists constructing prescriptive taxonomies sometimes favour the latter over a consistent position taken in the case law. A particularly egregious example is Birks' description of the entire law of knowing receipt as in effect misconceived. A knowing receipt claim comes about where a trustee misappropriates trust property which finds its way into a third party's hands and the trust beneficiary wishes to sue despite the defendant's having himself spent the money.[35] In his last book Birks said that

> One consequence of the long failure to recognise the law of unjust enrichment is a misguided intuitive resistance to the strict liability it requires... this error... is the only possible explanation of the fact that as against a recipient out of possession those who have only equitable title behind a trust have been confined to a fault-based claim.[36]

This is perfectly adequate if taxonomy is intended to principally contribute one perspective to a law reform project – for example, to inform the work of the Law Commission – but it is insufficient for the purposes which the taxonomy project claims to pursue. It is not credible to expect that the Supreme Court will throw over all the case law on knowing receipt and introduce a strict liability unjust enrichment claim in its place.[37] Taxonomies that seek to be useful for purposes other than law reform must not only prescribe an ideal answer, but also chart a path by which the legal system gets from its current position to the proposed position. Birks appeared to reject the idea that he needed to do any such thing, saying that "history could not justify the muddle it had made",[38] thus implying that some clean break needed to be made. Yet a taxonomy must not only do chart the path to the right answer, it must do so in a way that retains the distinction between the views of a situation taken by the legal system, and those which an individual judge deciding without the law might be inclined

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[35] On knowing receipt, see G Virgo *The Principles of Equity and Trusts* (OUP Oxford 2012) 677-697
[36] Birks (n 5) 156; Birks may well not have accepted the interprevitist label, but many that do expressly acknowledge a debt to his way of doing things.
[37] The High Court of Australia refused to do so in *Say-Dee Pty Ltd v Farah Constructions Ltd* [2007] HCA 22, (2007) 236 ALR 209. For discussion see D Sheehan 'Disentangling Equitable Personal Liability for Receipt and Assistance' [2008] RLR 41; K Low 'The Use and Abuse of Taxonomy' (2009) 29 LS 355, 366-368; K Low 'Recipient Liability in Equity: Resisting the Siren's Lure' [2008] RLR 96
[38] Birks (n 5) 157

to take. Doing this requires looking beyond logic and rationality,[39] and manifesting a far stronger notion of grounding than prescriptive taxonomies typically have.

It is this that makes it plausible to say that a more explicit link with Dworkin would improve interpretivist thinking. Dworkin's emphasis on keeping faith with the past, and on developing the law by putting cases in the best possible light, makes his approach explicitly dynamic and developmental, unlike the statically prescriptive method that characterises private law interpretivism. This dynamic dimension allows theorists to move the law in a direction that is more philosophically or morally justifiable, without having to declare centuries of case law 'wrong' as prescriptive approaches do. Interpretivists would then be able to maintain the greater importance of principles and rights over more context dependent factors, while also being more grounded in the past applications of concepts and principles.

3.   Concepts and Taxonomies

How, then, do we construct a developmental taxonomy? What sort of things might it include? What are the bases of its taxa? The taxonomic divide in the common law world is usually portrayed as being between 'conceptual' taxonomies which tend to focus on the philosophical or moral principles underlying the law, and hence appeal to broad, 'timeless' categories – contracts, wrongs, property – on the one hand, and 'contextual' taxonomies which focus on the social context of the law and the adaptation of the law to social change, and hence tend to appeal to more socially grounded categories. This description, however, misrepresents the real nature of the divide. As Twining pointed out at the very start of the modern debate, the categories – "employment", "power", "vulnerability" – that form the basis of contextual taxonomies are every bit as conceptual as those that form the basis of interpretive categories.[40] The debate is, rather, about the nature of the concepts we use, how we derive their content, and how we apply them to decide what sets of things fall within the bounds of a concept and what do not. The first question then is how do we construct the concepts we use? The first subsection of this part aims to answer this question and to describe the way in which the sub-parts of a concept interrelate. The second subsection looks at how that understanding impacts of the development of our taxonomies.

A.   The Construction of Concepts

   (i) Individuating Concepts

We individuate concepts in order to define and distinguish one from another. At the heart of the interpretivist approach lies an approach to individuating concepts[41] that seeks to understand (and hence individuate) them in terms of their meaning[42] or "significance". It is

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[39] Sheehan (n 20) 211-212
[40] W Twining 'Ernie and the centipede' in Jolowicz (n 16) 23
[41] That is, specifying that in virtue of X object A differs from all other objects, including those with which it shares characteristics. W Davis 'Concepts, Individuation, Possession Conditions and Propositional Attitudes' (2005) 39 Noûs 140
[42] See eg Beever and Rickett (n 1) 328

this approach – looking for some inherent quality of the concept that separates it from other concepts – that divides the interpretivist approach from the contextualist approach. Contextualists do not worry so much about their being some inherent quality about a concept, because they are more interested in its application in particular circumstances.

This still does not tell us what a concept is. For our purposes it seems helpful to say that we can define a concept by way of what it contains.[43] The concept of estoppel for example will contain a notion of representation, a notion of detriment, and a notion of reliance. Those three (at least) notions come together and interact in a given way. They are the sub-concepts that make up estoppel. Although representation turns up elsewhere in the law – false representation might be part of the concept of deceit – the interaction of the sub-concepts in estoppel is unique to estoppel. We can define a concept as a unique collection or interrelationship between sub-concepts or ideas. Atomic or irreducible concepts, if they exist, cannot be individuated in this way, but it may be that we can question whether this type of legal concept exists. For Dworkin at least the process of interpretation never ends, and, if so, the process of individuation never (in principle) ends.[44]

There is therefore an important philosophical difficulty with the claimed approach of interpretivism in looking at the "meaning" or "significance" of a concept. A theory of concepts and a theory of language and meaning are different.[45] *Words* have meanings; *concepts* do not. Rather, they have referents, or things they designate. We have, therefore, to distinguish between a concept's *intension* – the set of conditions that a thing must satisfy to fall under the concept – and its *extension* – the sets of things that are designated by the concept or 'fall under' the concept. Thus, returning to our estoppel example, the intension is the interrelationship of the three sub-parts – reliance, representation and detriment. The extension is the set of factual scenarios in which I find myself estopped. Two concepts may share one, but not another. Frege gave the example of the names for the planet Venus. "Morning Star" and "Evening Star" clearly do not mean the same thing, but in conceptual terms designate the same thing.[46] They have the same extension, but not the same intension. Specifying a concept, therefore, requires engaging both with its intension and its extension, because it is not possible to say whether a concept expresses a given predicate or referent merely from extensional information as two concepts may have the same extension but different intension;[47] it seems harder to say that two can have the same intension, but different extensions; however, we still need to engage with both as different principles and rationales will have different weight, as we see later, in different factual circumstances. The extension tells us much about the proper construction of the intension. It is, as Frege points out, misleading to look at the intension without considering the extension.

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[43] Davis (n 41) 142

[44] R Dworkin *Justice for Hedgehogs* (Belknap London 2011) 161-163; R Dworkin 'Judicial Discretion' (1963) 60 Journal of Philosophy 624, 632

[45] E Margolis and S Laurence 'The Ontology of Concepts: Abstract Objects or Mental Representations?' (2007) 41 Noûs 561

[46] G Frege 'On Sense and Reference' in P Geach and M Black (eds) *Translations from the Philosophical Writings of Gottlob Frege* (Blackwell Oxford 1952) 57.

[47] A Gupta and N Belnap 'A Note on Extension, Intension and Truth' (1987) 84 Journal of Philosophy 168, 168

Legal taxonomies are therefore concerned with both intension and extension. Yet interpretivists are more inclined to examine the intension and contextualists the extension. We see this in the way realist accounts of concepts tend to minimise the internal component of intension. This seems to be true, at least to some extent, whatever our variant of realism. For Llewellyn legal concepts were "refreshed with the concrete facts of daily practice" and the importance of context was to deal with the inherently indeterminate nature of concepts.[48] This concentration on one or the other contributes to our failure to communicate. All classificatory systems in law seek to explain the basis of the categories they construct, whether those categories are called 'contract', 'tort' and ''restitution';[49] or 'labour', 'land', 'chattels' and 'money';[50] or 'human need' and 'interest-conflict';[51] or 'commercial transactions', 'consumer transactions', 'individual finance' and 'industrial finance',[52] and so must engage with intension. They must also engage with the factual circumstances covered by a given taxon – in other words, with extension. The role of intension and extension in the individuation of a concept underlines the sterility of the distinction between 'conceptual' and 'fact-based' taxonomies. To the extent any taxonomy will need to deal with both intension and extension, it will need to have room for both types of category.

(ii) Ideal Types

How, then, do we go from extension to intension? Much of the debate about taxonomy has appeared to assume, implicitly and probably without conscious thought, that the concepts that are used to constitute legal categories ('tort') should represent 'normal' or 'typical' instances of the underlying phenomena ('wrongs'). This might be described in Weberian terms as an average type. An average type isolates those phenomena that exist in the greatest number of cases and if possible allows us to arrive at a mean and thus find a reasonably accurate depiction of the typical case.[53] The concepts from which legal taxa are constructed, however, not only radically simplify the multifaceted phenomena they represent, but do so in a way that means they do not depict, or even seek to depict, 'typical' or 'normal' instances of their object. They depict, rather, what Weber termed 'ideal types' of that object. Ideal types are purely mental constructs that model certain aspects of social reality and help us to explain particular historical conditions, but which do not exist in pure form.[54]

An ideal type's relationship to empirical reality is problematic in every case.[55] Weber pointed out that every object treated as an instance of an ideal type will deviate from the ideal. The perfect charismatic leader, for example, does not exist. Nevertheless, Weber argued that ideal types were profoundly useful, because they made it possible for researchers to

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[48] L DiMatteo 'A Theory of Interpretation in the Realm of Idealism' (2006) 5 DePaul Business and Commercial L Rev 17, 34

[49] eg AS Burrows 'Contract, Tort and Restitution - A Satisfactory Division or Not' (1983) 99 LQR 217

[50] Hedley (n 7) 137

[51] J Narain 'Classification of Law: A Realist View' in Jolowicz (n 5) 46-48

[52] Jolowicz (n 5) 9

[53] D Shivakumar 'The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology' (1996) 105 Yale LJ 1383, 1401-1403

[54] M Weber *The Methodology of the Social Sciences* (Free Press New York 1969) 90

[55] Ibid 103

"analyse historically unique configurations… by means of genetic concepts."[56] Perfect competition, for instance, is an ideal type which models human behaviour in circumstances that have never and will never exist,[57] but that is what gives it its utility.

This applies equally to legal concepts such as 'contracts'. Seen in purely naturalistic terms, every contract differs from every other in important ways, with the result that a completely specified category 'contract' would be infinitely complex. In factual terms, every contract will possess a mix of the elements rival theories have emphasised as being the constitutive essence of the category, including 'promise',[58] 'consent',[59] 'reliance',[60] 'regulatory framework'[61] and 'projection of uncertainty into the future.'[62] In selecting one of these as the primary point around which one organises a theory of contract, the researcher asserts the peculiar significance of that characteristic for the legal system in determining how to deal with a particular factual problem that has arisen.

This last point is of particular significance. There is no inherently correct way of building an ideal type. Every ideal type is a synthesis of "one-sidedly emphasised viewpoints" which create a utopian (or dystopian) depiction of the type. Very varied criteria can be and have been applied by theorists of differing persuasions to select the characteristics used in constructing an ideal view of a particular phenomenon.[63] The pertinent consideration is not whether the resulting constructs are "accurate" depictions of the normal or typical contract, or tort, or other obligation. As ideal types, they cannot be. The question is, instead, whether the characteristics used in constructing a particular ideal type make it suitable for the purposes to which it is applied. What are the consequences of highlighting certain factors while omitting others? The concept itself – for example, 'contract' or 'free consent' – cannot justify this choice, because the concept is the *result* of this choice. The justification must, therefore, be sought in factors that are independent of the concept. Birks's work illustrates the pitfalls of ignoring these issues. Birks treated his categories – particularly the events which in his grid taxonomies were things that happened leading to responses, what the law did about the things that happened – as plain facts on the ground.[64] As Samuel has pointed out they cannot just be facts, but normative interpretations of the facts simplified to identify the things we consider most relevant.[65] This has a special significance to law. The legal concern with questions *de sententia ferenda* makes the question of whether a particular instance deviates from an ideal type particularly important. If free bargaining is a property of contract as an ideal type, and if a new type of interaction that has a contractual form does not display free bargaining, this absence could have significant implications for we whether should even put it in the "contract" category. But this is not an issue with which we can deal,

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[56] Weber (n 54) 93

[57] Shivakumar (n 53) 1399

[58] C Fried *Contract as Promise: A Theory of Contractual Obligation* (HUP Cambridge Mass 1982)

[59] R Barnett 'A Consent Theory of Contract' (1986) 86 Columbia L Rev 299

[60] Atiyah (n 12)

[61] TT Arvind 'Contract Transactions and Equity' in L DiMatteo, Q Zhou, S Saintier, K Rowley (eds) *Commercial Contract Law: Transatlantic Perspectives* (CUP Cambridge 2013) ch 7

[62] I MacNeil *The New Social Contract: An Inquiry Into Modern Contractual Relations* (Yale UP New Haven 1980)

[63] Ibid 90-91

[64] See Sheehan (n 6) 190

[65] G Samuel 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 OJLS 335, 339

unless we recognise that the very category 'contract' as an ideal type is the result of, and embeds, normative evaluation.

B. Evaluating concepts

Why, then, is the interpretivist account of concepts resistant to recognising the evaluative decisions that underlie the creation of an ideal type such as 'contract'? Viewing legal concepts as ideal types points to another issue with the interpretivist understanding of concepts.

Underlying the Birksian and much of the interpretivist view of taxonomy is the belief that every concept within a system must be independent of every other concept within that system. One concept may be a subset (or sub-concept) of another, but two concepts cannot overlap and this lay at the heart of the grids that Birks so often drew in his taxonomic work. 'Yellow' is out of place in a classification that contains 'carnivore, herbivore' because both carnivores and herbivores can be yellow.

McMeel described Birks as an academic jurist in the Roman law tradition.[66] He was the closest thing English law had to a *iurisconsult*, and the continental positivist tradition represented by the *iurisconsults* was strongly Leibnizian. Leibniz believed that law was geometric.[67] As such his and Birks' views have parallels as the latter's insistence on discrete, non-overlapping categories and the importance of his famous grids likewise indicates a geometric view of law. For Leibniz, concepts existed and were eternally static, their proper domains merely needed to be delineated. The positivist tradition on the continent rejected the idea that the law was rooted in right reason, but continued to accept the geometric paradigm. The result, as Kahn-Freund described,[68] was an understanding of law that saw it as being unchanging in terms of its moral or normative imperatives. Its social functions change as society changes, as does the use to which it is put, but its normative core remains constant.

The result is problematic. Interpretivists acknowledge, for instance, that a number of different systems of rights or obligations could emerge from the fundamental principles they outline. Nevertheless, they do not explain why we have ended up with the set we have. Yet it is this question that is central to the goals which taxonomic projects claim to pursue. Logic cannot get us from principle to rule to outcome,[69] nor can simple axiomatic principles, nor can criterial definition. A semantic understanding of 'reasonable' or 'fair' or 'just' is never going to have enough content to do the work it is asked to do. To attribute the descent to reflection, as Stevens does,[70] is accurate enough but of little use unless it is accompanied by an

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[66] G McMeel 'What Kind of Jurist was Peter Birks?' [2011] RLR 15; Birks, never having really engaged with theoretical jurisprudence (Sheehan (n 6) 194), would not have described himself as Leibnizian; this is avowedly a reconstruction of his views.
[67] MH Hoeflich 'Law and Geometry: Legal Science from Leibniz to Langdell' (1986) 30 AJLH 95, 100
[68] O Kahn-Freund 'Introduction' in A Schwarzschild (tr) K Renner *The Institutions of Private Law and their Social Functions* (Routledge London 1949) 1, 2
[69] Sheehan (n 6) 211-212
[70] R Stevens *Torts and Rights* (OUP Oxford 2007) 329-337; Stevens seems to accept this when he suggests that his (short) account will seem naïve to any familiar with the rights literature at 329

account of the *content* of the reflections in question. What is needed to enable ideal type concepts to operate in a developmental manner is an element of evaluation. Some interpretivist accounts, like Smith's, recognise an evaluative moral element..[71] Typically, however, such accounts – unlike realist accounts – do not seek to explain how this evaluation works in practice, or why it has produced the patterns of rights we see in our legal system. In contrast, both Dworkin, who Smith rejects, and inclusive legal positivism, to which Smith seems closer in orientation, provide ways in which moral reasoning can be introduced into and constrain legal reasoning in hard cases, which an interpretivist could use.[72]

C.   From Concepts to Taxonomy

So far, we have reached the point that legal concepts are not average or typical types: they are "ideal types" in Weberian terms. As such, in order to make sense of private law concepts, we need to consider the intension – the relationship between their sub-parts – and their extension – the fact scenarios to which they apply. Turning concepts into taxonomies involves much the same procedure on a larger scale.   Remember that we defined taxonomies in the introduction to be partly about setting out the interrelationship between principles and concepts, and we defined concepts to be interrelationships of sub-concepts. The categories by which we taxonomise are also concepts which have sub-concepts and sub-categories, and considering their interrelationship, too, is a matter of both intension and extension. There is, in consequence, never a choice between 'contextual' and 'conceptual' categories. Taxonomies must include both.

There is a useful analogy with Dworkin, whose views on this point are not wholly alien to either the realist tradition,[73] or the interpretivists' view. Hercules, faced with a novel or hard case starts with rules, 'ascends' to principles, and then 'descends' back to the specific case. The first of these, which Dworkin refers to as theoretical ascent, is straightforward, and relates to intension.[74] It is easy to look at the law of contract and say that there is a principle there – part of the intension of 'contract' – of 'voluntary consent', even if we disagree about its precise scope and implication. As we engage in the process of theoretical ascent, the concepts become much more general, and their intension simpler than that of more specific concepts. Estoppel for example has more to it than the higher-order reliance principle – simply and obviously because one of the components of the estoppel-concept is the reliance-concept.[75] Descent, in turn, is not merely a matter of reflection: as we descend we are using the context in which the higher order principle (intension-statement) is to apply in working out its extension. Hercules descends by deducing a lower level (more concrete) principle from the higher, and examining how consistent that lower level principle is with

[71] Smith (n 3) 9

[72] On inclusive legal positivism and the moral norms in judicial decisions see eg J Coleman 'Beyond Inclusive Legal Positivism' (2009) 22 Ratio Juris 359; K Einar Himma 'Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism' (2005) 24 Law & Philosophy 1, 2; W Waluchow *Inclusive Legal Positivism* (OUP Oxford 1994) 140-141

[73] Dagan (n 14) 658-659; SW Smith 'Right Answers and Realism: Ronald Dworkin's Theory of Integrity as a Successor to Realism' (2013) 64 NILQ 507

[74] R Dworkin *Justice in Robes* (Belknap Press London 2007) 25

[75] E Peel (ed) *Treitel's Law of Contract* (13th edn Sweet and Maxwell London 2011) 136-140

other higher-level principles and other uncontroversial lower-level principles. The process is dynamic: in hard cases there is likely to be some oscillation up and down.

The contextual element to this goes beyond the simple sense that extension, as the set of real world problems to which the concept applies, is per se wholly contextual. In Dworkin's theory, principles and the rights derived from them are trumps, but not absolute trumps.[76] Sometimes other things outweigh them. Principles have weight[77] and compete against each other; their comparative weight will depend on context,[78] and the existence of local priority demands as much. The extension of the cause of action in duress therefore in turn affects the intension of the unjust enrichment category-concept, or the intension of the consumer law category-concept to the extent that the complaint might be about hard-selling. Concepts and contexts are symbiotic, feeding off each other, and it is only by combining them that Hercules forms a picture of the legal system.

The realist approach to taxonomy, similarly, intrinsically gives space to multiple sets of factors. This does not, however, mean that it consists of sets of overlapping taxonomies. A better way of conceptualising the realist approach is to think about it as two (or multiple) axes, rather than two different sets of overlapping taxonomies. As with Hercules, one axis might represent the categories in which legal rules are expressed, while the other represents contextual factors.[79] They might, for example, capture, respectively, the nature of the parties' dealings and the impugned act (Consensual? Contract. Wrongful? Tort.), and the nature of the relationship between the parties (Manufacturer-consumer? Labourer-Employer?). Each of these points to various considerations that are relevant but the precise combination of relevant considerations comes from the combination of both axes.

There are clear points of agreement between this and Dworkin's approach. Dworkin says hardly anything about the nitty-gritty of private law, although he does have an extensive discussion of his method in the context of damages for emotional distress in *Law's Empire*,[80] but at the heart of his view of adjudication and democratic legitimacy is the question of whether a policy is deontological or consequentialist/context specific.[81] The general principles and justifications used in a process of theoretical ascent may equally be drawn from different areas of law, much as in realist accounts. Equally, although consequentialist goal-based policies can only be introduced for the first time by legislation, a court can legitimately interpret many statutes in a particular factual area which have broadly similar

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[76] Dworkin (n 31) 92-93

[77] Ibid 26-27

[78] Sherwin (n 24) 115

[79] In principle, it is possible to come up with as many axes as one might like – sector of (defendant's) activity, type of relationship between claimant and defendant, type of relationship between defendant and impugned act, type of relationship between defendant and harm suffered, and so on. At some stage, however, the creation of more axes runs into diminishing returns. The two discussed here are simply intended as general examples. Others might be more relevant in specific instances or as specific instances of the application of these two general axes.

[80] Dworkin (n 32) 238-254

[81] On which see A Robertson 'Constraints on Policy Based Reasoning in the Law' in A Robertson and TH Wu (eds) *The Goals of Private Law* (Hart Oxford 2009) 261

consequentialist policies as creating new generalisable rights affecting the development of judge-made law.[82]

From Dworkin's perspective, therefore, one might describe a category like consumer law as a multi-dimensional object which has a location on a policy/consequentialist axis around paternalism and spreads on the contract/tort direction along another axis. These overlaps are unsurprising and Dworkin himself has said that the best interpretation of an area might appeal to principles that are independent and competing.[83] Contract is another such object that spreads along a deontological/principle axis as far as autonomy and pacta sunt servanda, but reaches round to the consequentialist axis to limit some of the implications of this. Similarly, in deciding the limits of duress and the types of pressure claimants must learn to live with, we must decide what duress is for.[84] Are we interested in the effect on the claimant? What does it mean (at a higher level) to say his intention is vitiated? Are we more interested in what the defendant did? Does that make a difference to deciding the case before us? From a realist perspective having thought about these matters we can then adjust our rules and their application to make a better rule; for Dworkin to the extent that the decisions reflect different social mores, or could not have been given by a single consistent political official we must either reconcile them or dismiss some as wrong, and develop the law incrementally.

This is not to deny the existence of practical differences. Dworkin will be more inclined to attach weight and precedence to higher order concepts and principles; this is a function of his view of rights as trumps,[85] his conception of theoretical ascent and the need to always ask whether the reasons a judge or litigant employs justify one side or the other having a *right* to win.[86] This method of seeing what different principles require and a concentration on their purpose and underlying rationale and the means by which they interact should be attractive to the interpretivist. Even the moral nature of the evaluative exercise is not, as we have seen, alien to all interpretivists. A contextualist and realist will be inclined to be less context-invariant and have more and smaller sub-categories. Equally contextualists might be disposed to viewing the values and goals underlying different areas of law as being incommensurable.[87] Dworkinians and interpretivists in contrast will not. But these are in practical terms issues of detail, and a far cry from the virtually unbudgeable disagreement that has characterised the debate so far.

4.   Taxonomising shifting concepts

Developmental taxonomies raise one final issue to which virtually no attention has been paid in the taxonomic debate, namely, how taxonomies should deal with changes in the meaning attached to concepts by the legal system or, more generally, to legal change and evolution.

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[82] One example of this might be the proposal by the Law Commission in 1992 that the factors taken into account in various regulatory frameworks governing (eg) solicitors, accountants etc, be absorbed into the factors taken into account by courts in deciding if these defendants have breached their fiduciary duties or not. See Law Commission *Fiduciary Duties and Regulatory Rules* (LCCP no 124 1992) 220-224

[83] Dworkin (n 32) 268

[84] See generally AS Burrows *The Law of Restitution* (3rd edn OUP Oxford 2011) ch 10

[85] Dworkin (n 31) 90-94

[86] Ibid 104

[87] Dagan (n 14) 659; Dagan (n 22) 161

The nature of this problem is somewhat easier to see if we return to the analogy with prescriptive grammar. The work of the Sanskrit grammarian Pāṇini is almost a perfect linguistic analogy of the idealised legal taxonomy. Pāṇini's grammar formulated a set of rules and classifications for Sanskrit which covered almost *every single* word, for every single tense, declension, mood, number and person that existed, in a manner that left no room for exceptions or irregular forms – every single form, even those that most other linguists would consider irregular, was covered by a rule based on an articulated principle. Yet the only reason Pāṇini could complete a taxonomy was because he was taxonomising a language with a view to freezing it in a particular state. His system would never have to cope with sound shifts, or new words, because the purpose of his activity was to *prevent* those shifts or words by setting the language in stone.

Pāṇini's grammar therefore tells us that the only way a taxonomy can be perfect is if we start off by knowing all the answers, and having the ability to permanently fix these answers as the right ones. This is manifestly not true of legal cases. An important characteristic of a hard case is that the correct legal outcome is at the very least a matter of vigorous argument yet to be concluded. We have *opinions* or *beliefs* about how this is to be done with varying degrees of certainty, but because unlike Pāṇini's grammar nobody has conveniently classified a novel case as a class 2 noun or a class 4 noun, there is no authoritative source to which we can go to look up the answer. To deal with this, a legal taxonomy must provide guidance in relation to how *both* the intension and the extension of a concept evolve over time. Let us take an example. We regularly seek support for our positions in 19th century or even 18th century case law; yet we know for absolute historical certainty that an 18th century lawyer meant something rather different by contract than we do today. Indeed, given that the forms of action were alive and well, most of the time he would not have cared much, being more interested in whether assumpsit covered the case. At what point do we say the concept changed into something else? And how can we build the possibility of such shifts in the content of a concept into taxonomies, as we must do if they are to be developmental?

There are significant weaknesses in both contextualist and interpretivist approaches to this question. Realists, as we have seen, have heavily contextual understandings of concepts. The result is that realists see not just the extension but also the intension of a concept as being a type of evaluative framework which is socially and empirically grounded. As a result, they accept that the normative basis of legal concepts shift as society changes. This is foundational to most variants of realism – it was the basis of the Scandinavian realist emphasis on identifying the 'social evaluations' underlying concepts,[88] and is fundamental to the 'new legal realism' that has emerged in the United States in recent years.[89]

This is because classical American realists tended to view concepts in the empiricist tradition of Hume and Locke. Concepts for those theorists are frameworks our reasoning creates, by identifying points that our mental representations – the ideal types in Weberian terms – of certain things have in common with our mental representations of certain other things (hence, 'vehicle', 'book', 'computer', 'injustice', 'wrongfulness', etc.). In the Lockean

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[88] AV Lundstedt *Obligationsbegreppet I: Fakta och Fiktioner* (ABL Norblads Bokhandel, Uppsala 1929) 107 – 127; AV Lundstedt, 'Har rättsvetenskap behov av rättsideologi?' in *Festskrift tillägnad Thore Engströmer* (Almqvist & Wiksells Boktryckeri, Uppsala 1943) 107-142

[89] On which see V Nourse and G Shaffer 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 Cornell L Rev 61

empiricist tradition, there is nothing essential about a mental representation – they can change. This means that the question of the content of a legal concept is always an empirical question, to be answered by looking at what it stands for in the legal system. As the representations of transactions on which the legal system is built change, so will the concepts in which the law is expressed or discussed, and the categories to which particular rules or situations are assigned. So, for example, Blackstone does not deal substantively with contracts in his *Commentaries*, instead discussing them in passing as a means of transferring rights. To a realist, this poses no problem – all that happened was a slow shift in the representation of the underlying transactions within the legal system. As the understanding of transactions became less social and more economic, the old categories of assumpsit, master and servant, and so on into which the subject of contracting was divided faded away, to be replaced by a uniform category of contract. It is in this sense that concepts are both not autonomous and socially determined; given an empiricist understanding of concepts it would be a contradiction in terms to say otherwise. This is also the reason why realist categories tend to be anchored in concepts that are more *evidently* linked to social facts and circumstances. To the extent any concept derives its content from empirical facts, the more direct the link between a concept and the social facts to which it refers, the more reliable our engagement with it.

Scholars using approaches related to interpretivism seem in contrast to identify with the Kantian tradition in philosophy – indeed Ernest Weinrib[90] and Lionel Smith[91] do so explicitly. Kant disagreed with the Lockean idea that fundamental categories are abstracted from the experience of our senses. Instead, Kant argued that they were a product of our understanding, but only yielded knowledge in the realm of empirical experience. In Kant's telling, therefore, it is the concept of an object that keeps our knowledge from becoming an entirely arbitrary collection of raw sensory stimuli. The idea of concepts as products of our understanding makes it easy to see why interpretivists, Dworkin, and positivists tend to prefer timeless conceptual categories and classificatory bases that are relatively *delinked* from society. For Dworkin we can see this in his argument against an empiricist view. In *A Matter of Principle* he suggests for example that the right answer thesis cannot hold if we believe truth needs to be demonstrated from "hard facts"; on a strictly empiricist metaphysical view there is no right answer, but slavery is (he says) still wrong just because it is, irrespective of whether that is known or not. It is a "moral fact", but not a "hard" or empirical one, and one delinked from society at any given point in time.[92] We can see the same type of assumption in the Leibnizian framework of Birks' thought. Concepts there are static and – like in this Kantian telling – delinked from any given society. Equally, the Kantian view also explains why such theorists can hold categories – for example, 'unjust enrichment' - to have subsisted in a dormant state for centuries. From a Kantian perspective if we lack empirical experience of the circumstances in which the law of unjust enrichment is triggered, our categories will not yield knowledge because categories cannot yield knowledge of things

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[90] See E Weinrib *The Idea of Private Law* (HUP Cambridge Mass 1995)
[91] LD Smith 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115. Lionel Smith, it should be noted, has not adopted the label 'interpretivist', but does nevertheless argue for closely related positions, in particular in relation to corrective justice.
[92] R Dworkin *A Matter of Principle* (HUP Cambridge Mass 1985) 137-138

in themselves. As a result, we will only have a collection of raw sensory stimuli; but this does not mean that the category itself has does not exist.

The failure to recognise that interpretivist and contextualist taxonomies build on radically different understandings of concepts has led to a number of egregious failures to communicate. An example is Smith's *Contract Theory*, which says nothing at all about relational contract theory. The book suggests that this is because relational contract theory is not a theory of contract law.[93] To a theorist who adopts an empiricist understanding of concepts, this is very literally unintelligible. 'Promises' (a theory Smith does discuss) and 'projections of uncertainty into the future' (the relational conception of contract) are simply two different mental representations of what contracts are. Each leads to a very different understanding both of the legal category labelled 'contracts', and of the choices and goals upon which the rules of law in that category are based, but the only essential difference between them as ways of constituting the category is that the conception of contracts as 'promises' builds on a Kantian understanding of the nature of concepts, whereas the conception of them as projections of uncertainty is much more empirically derived. To reject the latter, then, is to proceed on the implicit basis that *only* theories that build on a Kantian or idealist understanding of concepts can be theories of law – which, when asserted without further justification, amounts to assuming one's conclusion.

But this gap has deeper consequences when it comes to accounting for the way in which concepts change. The law often develops internally, through extending and refining concepts. Realists struggle to account for this or to work it into their theories of law, as shown by historians' responses to Grant Gilmore's thesis in relation to contract[94] and Atiyah's *Rise and Fall of Freedom of Contract*, both of which were shown to have missed continuities in the law of contract.[95] That concepts can sometimes be autonomous in the way they develop is hard to reconcile with a predominantly empirical theory of concepts. The inability to deal with the factual autonomy which concepts seem to show is a well-known shortcoming of realist accounts of the law, and explains why many realists abandon concepts altogether, and discuss the law in consequentialist terms. The problem, however, is that judicial decision-making in the common law is not a purely consequentialist process and judges do engage in significant amounts of close conceptual reasoning. In Australia for example estoppel has been extended incrementally through processes of conceptual reasoning so it is now possible to obtain compensation to the value of the promise made and relied on by the claimant,[96] which leads to another conceptual question concerning the boundary with contract.

This is also true, albeit to a lesser extent, of the work of those realists, such as Waddams, who do engage with concepts and doctrine, but whose starting point in setting out suggested categories, or routes to applying those categories, differs considerably from current doctrine. This is not to deny the very considerable value of this body of work in its own right.

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[93] Smith (n 3) 8
[94] R Austen-Baker 'Grant Gilmore and the Strange Case of the Failure of Contract to Die after All' (2002) 18 JCL 1; G Gilmore *The Death of Contract* (Ohio State UP 1974)
[95] PS Atiyah *Rise and Fall of Freedom of Contract* (Oxford Clarendon Press 1979); See e.g. John Baker's review in (1980) 43 MLR 467
[96] *Sidhu v Van Dyke* [2014] HCA 19

However, it falls short in terms of assisting in answering questions *de sententia ferenda*, and in dealing with shifts that reflect a level of conceptual autonomy.

The interpretivists' Kantian approach faces an equally significant problem. The interpretivists, as we have seen, take a static view, holding that there is a right answer logically inherent in the immanent principles and rationales behind the law. It was "true" for Birks that knowing receipt should not be fault-based. The lawyer's job is to get the law closer to that true position, worked out on the basis of static Leibnizian concepts and the rational deduction of logical boundaries between them. Whilst Birks said that taxonomies should always be kept under review, the Leibnizian basis of his work suggests that this was because of the possibility of logical error in our taxonomy rather than historical shifts.[97] This implies that we cannot deal with shifts save by saying we had not previously properly grasped the concept; we have not grasped, say, that unjust enrichment demands knowing receipt be strict liability not fault-based. In a legal context, Birks's argument was that those whose understanding of the concept of knowing receipt was that it entailed strict liability have a better grasp or mastery of the concepts than those who understand the action as fault-based. Such an understanding is obviously inadequate as the basis of a developmental taxonomy, and it is also inadequate to facilitate the engagement with Dworkin that interpretivism needs as Dworkin does not distinguish between a concept and our grasp of it; a theory of legal concepts is no more than a theory of our understanding of law for him.[98] .

How, then, can we build an understanding of change into our very understanding of concepts? Hegel's theory of concepts provides one possible direction that should, at the least, be attractive to interpretivists. For Hegel the teleology of a thing is the notion of a sense of purpose inherent in the thing itself. The purpose is its essence, its most profound characterisation;[99] the necessary structure of things manifests itself in a vision of the universe[100] as the unfolding of an inner purpose. The all-embracing purpose inheres in the Universe itself – it is an internal and not an external purpose, and it is posited in order to fulfil the Concept.[101] This can be drawn out as a parallel with a developmental taxonomy, or developmental aspects of concepts (which are derived from and help to derive the Concept) within those taxonomies. Hegel[102] suggests a metaphor of the flower, whose purpose is immanent throughout the life of the flower from seed to pollination, but which goes through different stages of life. For Hegel conceptual content arises from the process of applying concepts – the determinate content of a concept is unintelligible apart from the process of development. For Brandom this provides an analogy with the law.[103] He explains that for

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[97] And he admitted as much, saying that we must always be on alert for the possibility of error and inaccuracy See PBH Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWALR 1, 4

[98] Nothing more fine grained than our understanding of a concept can ever play any part in formulating propositions of law. C Peacocke *A Study of Concepts* (MIT Press Cambridge Mass 1992) 5

[99] C Taylor *Hegel* (CUP Cambridge 2005) 321

[100] Ibid 325

[101] Ibid 328; the Concept is derived from both being and essence but is reducible to neither. S Houlgate 'Why Hegel's Concept is not the Essence of Things' (2004) 3 Cardozo Public Law, Policy and Ethics Journal 31, 32

[102] Discussed by T Wartenberg 'Hegel's Idealism: The Logic of Conceptuality' in E Beiser (ed) *Cambridge Companion to Hegel* (CUP Cambridge 2006) 102; Taylor (n 99) 111

[103] R Brandom 'Some Pragmatist Themes in Hegel's Idealism' (1999) 7 European Journal of Philosophy 164, 179-181

Hegel it is for later users of the concept to decide whether earlier applications were correct on the basis of still earlier applications. The common law is nothing more than a sequence of applications of concepts to facts. Decided cases exercise authority over present ones by virtue of the fact that the reasons that a judge may take into account are contained in prior cases or inferentially related to those reasons. Brandom argues for a negotiation between two poles of reciprocal Hegelian authority – what the content is for the past judges, and for the present judges.[104] There is an analogy between Dworkin's idea of law and the Concept in that both entail the development of an autonomous self-contained system, which, as we said earlier, is both backwards-looking and forward-looking. An interpretivist should find this attractive because of the concentration on considerations inherent or immanent in the law, and self-contained within an autonomous system. Whichever view is taken, however, will require them to engage with concepts properly and continually re-evaluate the categories they use rather than assuming their timeless perfection.

Realists and contextualists will reject this idea because of their view on the inherently indeterminate nature of concepts, but they may find greater value in returning to early realism. DiMatteo has argued that Llewellyn's work had a conceptual track with parallels to Dworkin, and Llewellyn did indeed engage closely with shifting concepts.[105] Corbin's influential treatise on contract law, which provided distinctively realist accounts of core legal concepts such as consideration and estoppel, is an even clearer example. From a methodological point of view, though, the Scandinavian realists, who saw concepts as embedding social evaluations, and recognised that these evaluations changed over time, provide an even more promising starting point. Either way, however, more attention will need to be paid to the task of relating the context of the law back to the language in which the law is expressed, and to considering how legal concepts constrain and shape the manner in which the law responds to changing circumstances.[106]

5. Conclusion

Over the last twenty years, private law theory has become boxed into silos. Allan Beever and Charles Rickett have even claimed that anyone not following their method is not doing law. Whilst this is a truly extra-ordinary claim, the discussion in this article explains both why they make it, and why it is misconceived. Beever's position on the incommensurability of policy with principle[107] is particularly telling: if we assume that policy and principles can never be balanced, we have to get rid of one or the other. In truth, however, a view that principles and rights are important, and that we need to take account of their reach and interaction, does not imply such an extreme conclusion. Nor does an insistence that context matters imply that only consequences matter and that principles are so much hokum. The mistake

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[104] See on the connection between Dworkin's theory and ideas of authority P Jaffey 'Authority in the Common Law' (2011) 36 Australian J of Legal Philosophy 1

[105] DiMatteo (n 48) 18, 46

[106] For one recent example of a contextualist treatise that does precisely this, see R Merkin and J Steele *Insurance and the Law of Obligations* (OUP Oxford 2013).

[107] Beever (n 4) 294-297

has been to take legitimate disagreements over the *extent* to which context is relevant, and turn them into battlegrounds of principle. Only by looking more closely at what legal categories are for, and how they change over time, can we really make progress.

And progress is necessary, because the issues underlying the taxonomy debate are of growing importance to the common law. In this article, we have argued that taxonomy – for instance whether misuse of private information should be seen as tortious or equitable, and what if anything should turn on that – cannot be done through definition or deterministic logical reasoning, but turns equally on questions of purpose (what purposes it serves to classify the wrong as a tort), context (the types of circumstances and relationships in which the action is invoked) and history (the implications of the action originating in equity rather than in case). A static view of legal categories and their content is based on a misunderstanding of the nature of legal concepts and their use in the common law.

This matters not just to the question of demarcating the boundary between contract and unjust enrichment, but to the far more fundamental question of the boundary between obligations and the administrative state. It is beyond question that the role of the administrative state, and the categories of cases with which its agencies are directly concerned, have shifted very considerably over the twentieth century. Yet little consideration has been given to how this affects the position of the law of obligations, save when cases like *Marcic v Thames Water*[108] have forced the issue. This is inadequate. Dealing with the spectacular growth of regulation, and the role of obligations in a legal system increasingly dominated by administrative and regulatory bodies, requires a new understanding of the categories into which we classify the law, which neither interpretivism nor realism have been able to provide.

This article has set out a tentative outline of how we might achieve such an understanding. Much more work now needs to be done. Too much time over the past twenty years has been spent attacking the other side without appreciating that the antagonists are engaged in the same project, with the result that private law theorists are all too often fighting the battles of the past.

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[108] [2003] UKHL 66, [2004] 2 AC 42