Professor Arthur Hartkamp

Nor are academics trapped in a narrow-minded concentration on the new Code. Of course, there is a keen attention for the new regulations, and part of academic writings is devoted to their interpretation. But there is at least as much interest as there has always been for the case law of the Supreme Court. Finally, it is gratifying to note a remarkably increased interest for comparative law, first kindled by the work on the new Civil Code and subsequently stimulated by the European unification movement and by recent undertakings such as the principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts. It is my firm belief that the future interplay between judges, legislators and academics in the Netherlands will increasingly be inspired by international developments.

This Heap of Good Learning: The Jurist in the Common Law Tradition
by Professor Peter Birks QC, FBA

"But when I saw That many Parts of Our Common and Statute Laws were Disused or Abrogated; That the Noeties in Pleadings and Practice were less'd by Statutes or New Inventions; I Entertained Hopes that Now It might not be Impossible to Sort, or put in some Order, this Heap of Good Learning; and that a General and Methodical Distribution, Preparatory to a more Large and Accurate Study of Our Laws, might now be made, as well as an Institute of Civil or Canon Law, or of the Laws of Other Nations; which were Once too Heap'd up together without Beginning or End, before they were unravel'd and rescued from their first Confusion and Intricacy."  

Authority in interpretation of the law naturally derives from learning combined with good judgment and discretion in its deployment. Paul, Papinian and Ulpian were great men in their day, but, amongst lawyers, they owed their authority to their learning in the law. Today everyone with a problem in contract turns to Professor Treitel, to the man himself if they are lucky enough to have that opportunity, but otherwise to his books. The reason is the same. Nobody knows more. In the Roman system this natural foundation of authority was very little interfered with. Those who believe that the emperor took to putting a star on foreheads of chosen jurists, allowing them to answer ex auctoritate principis, will be minded to deny this, at least in part. If that is what happened, an element of artificiality did enter into the structure of authority after the collapse of the republic. For who was to say that the man with the star was indeed the most learned in the law?

In our law it is somewhat different. Combining the functions of adjudication and interpretation, the common law has always put its

jurists on the bench. If we stop the clock before Blackstone wrote the Commentaries,9 we will find ourselves in a world in which the judges had no competitors. There was virtually no learned literature of the common law outside the law reports. The most learned in the law became judges, and they uttered through the cases. An element of artificiality was of course built in from the beginning. No more than it would guarantee the grant of the imperial jus respondents, learning would not, in itself, make you a judge.

Nowadays the artificiality is more pronounced. The reason is that there has been a huge growth of learned literature outside the cases, which is as much as to say in the number of jurists who are not judges. We have reached the 112th volume of the Law Quarterly Review. In the years since 1884 the law library has been transformed. This transformation has passed some important subjects by, for there are those, such as civil and criminal procedure, which have been killed dead by the pernicious division between academic and vocational learning, or, more precisely, by their allocation to the vocational stage and thus to institutions which have repudiated the obligation to conduct research and write. But all those which have escaped that fate have been enriched by rigorous extra-forensic literature and, much as in all the other sciences, all are now in a certain sense dominated by the professoriate, by teams of professors (not necessarily cooperating) and by their books. This would be true even if there were no superstars, no Trenches, Goodees, Cornishes or Craigs. Despite this transformation of the very nature of the common law, the history of our system commits us to an artificial differentiation between the binding authority of the cases and the merely persuasive authority of the other literature. And the artificiality goes one step further. The same judge whose utterances bind in the law reports is merely persuasive in the Law Quarterly Review or between the hard covers of a leading textbook. In the midst of these and other artificialities we also know that, when the chips are down, they count for less than their articulation suggests to the new law student. The ultimate reality is that the law library is one body of learning and bears on difficult problems as one body of learning. The artificialities in the structure of authority tend to melt away.

9 Sir William Blackstone, first Vinerian Professor in Oxford and first ever professor of the common law at any university, published The Commentaries on the Laws of England from 1765 to 1769. The four volumes found their origin in his lectures.
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sented by counsel. However, I hope I shall be forgiven for putting the success story on one side and taking the opportunity to deal with one matter which the revolution in our law library seems to have left behind.

The Roman jurists did not go in for theory. They did not even devote much energy to the very practical kind of theory which has made Gaius immortal. Gaius was exceptional in his interest in rational classification. He worked out, and in his Institutes presented, a method of organizing the whole law in a coherent manner, so as to give a systematic overview, not just a random or alphabetical list. Gaius succeeded, if we may borrow Blackstone’s famous metaphor, in constructing a general map of the law and in marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities. Some three hundred years later, in the early 1500s, the commissioners through whom the Emperor Justinian worked produced what was essentially a second edition of Gaius’s Institutes. Gaius’s own text was lost. It was not rediscovered until modern times, in 1816, just after the battle of Waterloo and the end of the Napoleonic wars. But Justinian’s Institutes has some claim to be the most influential secular book in the history of western civilization. It has formed the minds of lawyers to this day, and it has shaped the codes which, in most civilian countries, have largely displaced the old law common.

The institutional overview was not confined to civilian jurisdictions. The common law also used it. But it is being more and more forgotten. We now need to reawaken the organizing and systematizing spirit of Gaius. Despite the flourishing state of legal literature in the common law jurisdictions, those learned in our law, whether in the courts or in the universities, appear to have given up the challenge thrown down by Thomas Wood in 1722 that it might now be time ‘to Sort, or put in some Order, this Heap of Good Learning’.

This paper therefore has a very simple aim. It seeks to draw attention to the indifference of common lawyers to taxonomy. Halsbury encourages us to think of the law as an alphabetical list of subjects. University law schools advertise lists of courses. Precious

1 W. Blackstone, 1 Commentaries, 1.35.
2 This claim is discussed in more detail in P. Birks and G. McLeod, Justinian’s Institutes (Duckworth, London, 1981), 16-18.
underlies the modern structure of every modern civilian jurisdiction. And in fact, as we have already observed, the institutional scheme is not alien to our own legal thought. Though we have largely forgotten doing so, we have leaned on it heavily in the not very distant past.

It may be helpful to set out the institutional scheme in the form of a diagram and in a somewhat modernized version. There is not space to discuss all the ways in which the modernized version departs from the original, let alone to consider why those deviations have seemed necessary. All we want for this purpose is a scheme, recognizable to anyone brought up in a civilian system, through which to look at the disordered condition of our own law.

The most important differences from the Roman original are that the law of ‘things’ is described as the law of ‘rights’, so that the trichotomy ‘persons, things and actions’ has become the law of persons bearing rights, of the rights which they bear and of the procedures by which they realize and protect those rights. Then, within the law of things, the Roman line between corporeal and incorporeal things has been moved over, so that the main division is drawn between rights in rem and rights in personam, producing the rigid separation of PROPERTY and OBLIGATIONS. This ordering, separating property and obligations, is almost universally thought to be essential even though, apart from the numeros clausus point, the structure of the subsequent inquiry is similar in both cases: How do the rights arise? From what events? A third class of rights has been added. Many would say that there is no room for that. But, without engaging in argument about it, I will say that I include it in order to avoid having to categorize primary rights such as the right to physical integrity or the right to reputation or the controversial right to privacy as rights in rem or rights in personam.

At a lower level, the events which give rise to obligations are not as Justinian stated them. His Institutes says that every obligation arises from a contract, from a wrong, quasi from a contract or quasi from a wrong. The last two categories have been found to be taxonomic disasters. This modern version merely takes one nominate event, namely unjust enrichment, out of the miscellany of obligation-creating events beyond contract and wrongs. It is then content to leave a reduced but perhaps still large residual miscellany as its fourth category. It will be noticed that no attempt

\[
\begin{array}{|c|c|c|}
\hline
\text{PERSONS} & \text{RIGHTS} & \text{PROCEDURE} \\
\hline
\text{PRIVATE} & \text{PERSONAL} & \text{REM} \\
\hline
\text{OBLIGATIONS} & \text{PERSONAL} & \text{IN PERSONAM} \\
\hline
\text{PUBLIC} & \text{OBLIGATIONS} & \text{IN LAW OF OBLIGATIONS} \\
\hline
\text{OTHERS} & \text{OTHERS} & \text{OTHERS} \\
\hline
\end{array}
\]
is made to refer property rights, rights in rem, to that series of events or indeed to any other identified series of causative events. It would be logically possible, though it might be pedagogically inconvenient, to make the causative events absolutely dominant, pausing only to generalize 'contract': rights, of whatever kind, are born of consent, wrongs, unjust enrichment or other causative events. Whether one makes the division between property rights and personal rights before or after the division between causative events, it is a fact that all rights have to be understood by reference to the events which bring them into being. Property rights must be referred to the events from which they arise, and so also must personal rights (obligations).

The Seven Foundations

The professions' 1995 statement proposes that there are seven foundations of legal knowledge, or eight if one counts, as we shall not, the all-pervading skills gathered under the head of Legal Research. The seven foundations are stated in this way:

Obligations I
The foundations governing the formation and enforceability of contracts, together with their performance and discharge, including the remedies available to parties and the doctrine of privity. An outline of the law of restitution.

Obligations II
The foundations of tortious liability (including vicarious and joint liability) and the remedies in respect of torts (including damages). There should be a sufficient study of the major torts (such as negligence, nuisance, intentional interference with the person and defamation) to exemplify the application of the general principles and the defences, and to familiarise the student with the principal torts and their constituent elements.

Foundations of Criminal Law
The general foundations of criminal liability and a sufficient study of the major offences (such as homicide, non-fatal offences against

2. THE SPECIMEN OBSERVED

The historical dependence of the common law on the institutional map is immediately, albeit fitfully, apparent. But the first thing a civilian would want to do would be to reorder the list, or at least to ask upon what principle the order is based. It is clearly not the alphabet. The list passes from obligations to equity to European Union, thence to property and on to public law. It would be unprofitable to spend too long trying to crack the problem. There is no principle at all, unless we invent the principle of the heap. The list perfectly demonstrates the common law’s innocence of order and the prevailing indifference to it.

Public Law Foundations

The law is either public or private. If, first giving Diceyan warnings as to the common law’s difficulties with this division, we accept that public law includes all the law concerning the structure of the state and its relations with its citizens and with other states, then three of the Foundations belong or largely belong on the public side of the line. The foundation which is actually called Public Law should stand with Criminal Law and with at least the structural part of European Union. However, it is a complicating factor that in the description of that foundation the general inclusion of the substanti- 

ve law of the Union clearly imports a large quantity of private law. There are, of course, well-known arguments for distributing this foundation to others. The counter-argument is that, at least in the short term, law schools must be compelled to take special and hence separate notice of the European dimension of anything. However, we must not here pursue that debate. Impurities aside, we seem to have three units of public law. No two of those three are even juxtaposed.

Private Law Foundations

Subject to the mixed nature of the foundation called European Union, the separation of those three now leaves four private law foundations. It easy to pick out and reassemble the principal elements of the law of things or rights, most obviously Property and the double helping of Obligations. The remaining foundation, namely Equity and the Law of Trusts, has to be brought in here too, though more will have to be said of it below. Somewhat fixed by Equity, the observer might suggest an order which would run thus: Property, Obligations (O2), Equity.

Within the double unit of Obligations the civilian eye will easily detect the two principal categories of obligation-creating event. For Obligations I is nearly all described in terms of contract, and Obligations II is clearly tort. Under instruction the observer will also accept that we currently call our law of unjust enrichment by the response-oriented name of ‘restitution’. An outline of the law of restitution in Obligations I thus provides the third category of obligations. No reference is made to the fourth, namely ‘Other (Obligation-Creating) Events’.

What is not foundational?

One advantage of a shared system of classification is that it enables lawyers to see and reflect upon matter that does not appear. This is one aspect of the central advantage of an efficient system of classification, namely that it allows the lawyer to make a rapid review of the whole law in a way that an alphabetical list does not, much less a heap. It is, of course, not a criticism to find that something has been omitted from this particular document. The professions’ document is selective; it was never intended to be comprehensive, and there would have been shouts of pain if it had been. We are not concerned to criticise the scope of the document but only to demonstrate the intellectual advantage of having a map. Whatever form of legal utterance is in question, a good taxonomy lodged in the reader’s mind—or, as the French would say, in his formation—will reveal what is not being said or what has been missed out.8

8 At the 1995 Conference of the Society of Public Teachers of Law several speakers claimed to have diagnosed in the product of the law schools a deficiency which they called ‘stovepipe mentality’, the condition of being unable to move from one category to another. They prescribed an abolition of categories, a prescription previously recommended to the author by a senior member of the education office of the Law Society of England and Wales during the preparation of the 1995 document. One might as well abolish thought. The cure for ‘stovepipe mentality’ lies in the opposite direction, in making the categories and the relations between them explicit. Those who cover in the first available bolthole do so because they have no map.
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Here the civilian glass reveals that what the professions count as foundational are some parts of public law and some parts of the law of things (rights). From the former, there are large omissions: public international law, for example, is not foundational, nor is the law of taxation. On the private side of the line, they do not count any part of the law of persons as foundational, hence not the law relating to differences between natural and artificial persons, citizens and aliens, men and women, husbands and wives, parents and children, and so on. The decision to omit all of family law might cause the raising of the odd eyebrow, but this is not the place to do more than observe. Then, the professions do not count any of the law of actions as foundational, hence no mention is made of pleading or evidence or anything to do with procedures for protecting or realizing rights, unless perhaps one were to treat tracing, Mareva injunctions and Anton Piller Orders as small fragments within that third main division of private law.

Below the large divisions, one generally needs to know more than the bare outline of the taxonomy in order to pick up omissions; or, more accurately, one needs to know the smaller, subsidiary categories within the taxonomy. We have already noticed, however, that within obligations the event unjust enrichment, under the name ‘restitution,’ is to be studied only in outline, and the fourth, residual and miscellaneous category of obligation-creating events is not noticed at all. Within Property there is no reference at all to events which bring rights in rem into existence, until at the very end reference is made to registered conveyancing. This puzzles. The Institutes tells us that property rights have to be explained in terms of their creation and acquisition, in other words in terms of causative events. The civilian eyes have barely begun to screw up when they perceive a more startling omission. There is nothing said about property rights in things other than land. Hence it is not just modes of acquisition which are omitted, but all aspects of property in chattels and in money.

Has this matter been included elsewhere? It has not, except so far as it is covered, more or less by chance, in the jurisdictionally determined category of Equity and Trusts. Stocks and shares and paintings and money, and all other forms of wealth other than land, are brought into consideration there, but only to the extent that they are the subject of trusts and other equitable rights. But even a common lawyer will appreciate, once the systematic civilian has drawn attention to this curiosity, that to include the equitable contribution to the law of property in assets other than land, while excluding the common law, is to invite an audience to listen to the sound of one hand clapping.

Intersecting categories

It is necessary at this point to recall yet again that this is not an exercise in trying to determine what the professions should or should not prescribe as obligatory subjects of study. The purpose is only to illustrate, from one serious pronouncement upon our law, our astonishing indifference to orderly organization. We have just seen that, uncorrected by such university jurists as they consulted, the professions, not by design but simply by the habit of not thinking through the relationship between categories, have invited students only to the dark side of the moon of personal property. That point took us into Foundations of Equity and the Law of Trusts. If we stay there for one moment we will see that the inclusion of this category causes difficulties across the board.

The problem arises because, not surprisingly a century and quarter after the Judicature Acts, there survives in this list no category called Common Law. Let us confine attention to private law and, more narrowly to the law of things or rights. Just as happens in all our law schools, the law of private rights, so far as it is represented in this statement, is committed to a distinction between proprietary and personal rights (i.e. property and obligations) and then, albeit fitfully, to a division by causative events. But that commitment, fragmentary and subliminal as it is, competes with a quite different division according to jurisdictional origin: all the law derives either from the royal courts of common law or from the court of chancery and the lesser courts of equity. This competing division is expressly represented in the statement only as to one limb, namely Equity. The consequence is that the foundation called Equity must and does cut across the others, as a category of animals determined by colour must cut across categories determined by eating habits: all animals are herbivores, carnivores, omnivores, yellow or of other kinds. A child of eight can spot the intellectual trap.

We have seen that the failure to reflect on the likely consequences of dealing in intersecting categories produces in relation to personal property a situation of near absurdity in which equity is
in and common law out. More generally, this intersection of Equity and other foundations perfectly expresses our failure to think in a coherent series of categories. Thus, notwithstanding there being a double allocation to the law of obligations (rights in personam, personal claims), the word 'obligation' expressly appears twice under Equity, for there are trustees' obligations and there are fiduciary obligations to be considered under that head. And there is more. There is a line for 'imposition of personal liability to account as a constructive trustee'. This looks different. The language is different. But in fact a personal liability to account as a constructive trustee is no more than an obligation recognized by equity which comes into existence other than by consent. There are obligations recognized by the common law which come into existence other than by consent, as where they arise from wrongs, unjust enrichment or miscellaneous other events. These personal liabilities to account are of the same kind, only equitable. Evidently, therefore, but surprisingly and unannounced, Obligations I and Obligations II are not intended to represent the whole field of obligations.

That is not the end of it. The study of contract in Obligations I will inevitably include, inter alia, the study of the remedy of specific performance, the supplementation of the doctrine of consideration by detrimental reliance (estoppel), the setting aside of contracts on many grounds, including 'unconscionability'. Yet these matters are repeated under Equity, though, curiously, innocent misrepresentation and undue influence are not, as less generically within 'equitable rights'. The intersection of categories entails repetition. Obligations I includes restitution (unjust enrichment). Anyone teaching that subject without its equitable component would be wasting the students' money. Non-express trusts, not all of them but many of them, belong in the law of restitution. Obligations II is obligations arising from torts or, we might think, from wrongs. But breaches of trust and breaches of fiduciary duty are wrongs too. They figure under Equity. The statement tacitly accepts the historical restriction of 'tort' to the common law. And so do most law schools.

So long as we spoke in terms of contract and tort we had to look hard to see the anomaly, but, now that we once again see contract and tort as subsets of obligations when obligations are divided by their causative events, we ought to spot at once and in full daylight the fact and the danger of our defective taxonomy. A category of jurisdictional origin cannot be fitted into or sit beside a classification, or a fragment of a classification, which is based on types of right, subclassified by causative event, no more than a classification of animals by colour can fit into a classification of animals by eating habits.

The reader will be tempted to explain the list by saying that it assumes the distinction between equity and common law as categories of jurisdictional origin. It only mentions one limb of that distinction, but it assumes that all will understand that the other private law foundations are all common law, as though it had first said that rights were either legal or equitable and had then proceeded to deal with each jurisdictionally determined category separately. There is no hope down this path. We have already seen that in relation to chattels the common law has been omitted altogether. And nobody construing the law relating to property in land would understand that only the common law side was contemplated in that foundation. The same of contract in Obligations I. Nobody would dream of saying that the equitable contribution to the law of contract must be contemplated as excluded from contract and belonging under Equity and the Law of Trusts. There is no intellectual order, merely a heap of historically determined subjects.

The same taxonomic problem of intersecting categories recurs, on a more restricted scale, in relation to the contextual category of the law of the European Union: all the law about the EU. A contextual classification is as alien to a classification by rights and events as is a classification by jurisdictional origin. Hence, some of the matter listed under European Union belongs also and equally in Public Law and some - the substantive law of the Union - intersects with private law categories, some of which are present in this list while others are not mentioned at all.

3. MORE PARTICULAR DEFECTS

This part picks from the professions' 1995 statement four specific illustrations of taxonomic carelessness, again merely as examples of the indifference of the entire common law thinking machine to the elementary requirements of intellectual orderliness. We have
hitherto noticed the failure of the list to present its subjects in a coherent order and its failure to take notice of the intersecting nature of the categories which it uses. What follows is of the same kind but on a somewhat smaller scale.

(1) An outline of the law of restitution

Obligations I requires the aspiring lawyer to learn the bare bones of restitution. By the law of restitution we mean to identify the law of unjust enrichment. It may seem a matter of indifference whether it is called one thing or the other, but in fact we cannot continue to call our law of unjust enrichment the law of restitution. There are good reasons why, when Professors Scott and Seavey made the Restatement of Restitution in the 1930s they preferred the remedial orientation of 'restitution'. 'Unjust enrichment' and 'unjustified enrichment' irritated common law judges, as being invitations to redistribute wealth according to abstract principles of justice, the very last thing that any judge would wish to do at any time, let alone in the aftermath of the Bolshevik revolution. However, this fear, always unreal, has abated, not because the fear of communism and revolution has died down, but because it has at length been realized that the language never extended any such invitation. The word 'unjust', it is now accepted, initiates an inquiry into the state of the law in the cases and statutes. It has nothing to do with abstract speculation about distributive justice. There is now no doubt that we do have, as Scott and Seavey saw, a law of restitution of, and because of, unjust enrichment. But we must move to calling it the law of unjust enrichment.

Professor Burrows, now a Law Commissioner, wrote an important, and justly famous, article under the title: 'Contract, Tort and Restitution: A Satisfactory Division or Not?' The argument shows that the substance of the division is not only satisfactory but necessary. But the form, as expressed in the trichotomy of the title, is wholly unsatisfactory. For one thing, we cannot do without the residual misclassification. For another we cannot do with a classification

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8 Restatement of Restitution (American Law Institute, St Paul, 1937). Scott and Seavey were the reporters responsible for the work. See A. W. Scott and W. A. Seavey, 'Restitution' (1930) 54 LQR 29.

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This Heap of Good Learning which starts with causative events and then suddenly turns a corner into types of response. Contract, and all the contracts, such as sale, hire, partnership and agency, are events which happen in the world and give rise to rights. Tort, and all the specific torts, such as defamation, battery, false imprisonment, are likewise events which trigger rights. Restitution does not fit, for restitution is a response made by the law to an event or a purpose pursued by the law because of an event. And the event is, generically, unjust enrichment. As sale is to contract and species to genus, so mistaken payment is to unjust enrichment.

The statement that rights arise from contract, tort and restitution is of the same kind as as the proposition that birds are seed-eaters, insect-eaters, yellow, or of other kinds. My canary is yellow and eats seeds. It counts twice. There may seem to be two birds. There is only one. The same simple trap can catch the law. Let us consider a claim for the money received by a wrongdoer through his wrong. In United Australia Ltd v. Barclays Bank Ltd it was held that, the language of waiver of tort notwithstanding, when a plaintiff brings an action for the money received by a wrongdoer through his wrong, rather than to recover his own loss, his cause of action remains the wrong. What he is seeking is a gain-based remedy, rather than the more familiar loss-based award. Some people say that we should not call that gain-based claim 'restitutionary'. They would prefer to call it a claim to disgorgement, confining 'restitution' to 'giving back' and excluding 'giving up'. Unless we go down that route, United Australia tells us that there are claims to restitution which arise from wrongs. And there is no doubt about it. In the field of intellectual property, for example, it has been recognized by statute that an account of profits lies for breaches of copyright and infringement of patent, as it does, without statute, for the tort of passing off. But (overlooking the ineptness of 'arise from') if obligations arise from contract, tort, restitution and other events, the restitutionary award for a wrong threatens, like my canary, to count twice. The cause of action is the wrong. But does it not also belong under Restitution in column 3? It does not, because 'restitution' is there an inept synonym for autonomous unjust enrichment, where the word 'autonomous' is added precisely to show that, in column 3, 'unjust enrichment' is a genus of causative event distinct
from and independent of the events named in the other three columns. "Tort or restitution?" is a bad question. There can be restitution triggered by a tort. Just like the canary, the United Australia claim struggles to be counted twice, but only because the cages have been ineptly labelled.

The objection might be made that Scots law has inherited from Viscount Stair the habit of obligating according to their purpose and effect, reducing to a lower level the reference to causative events. Thus restitution, repetition, compensation, and relief are all familiar categories. Does not this show that a system can deal in categories of response, distinguished according to a particular remedial aim? Why should it not do so? Of course, a system can proceed in this way. The real danger arises when the categories are mixed. Given a firm commitment to one or other basis of classification, the argument must then be about efficiency. Which is the more efficient taxonomy? This is not the place to argue the point, but it seems to me that the commitment of Scots law to this basis of classification has not been firm enough, and that, firm or not, its experience shows that it is a kind of classification which is inefficient and not very accessible. These points are not for now. The only point which matters is that classifications which turn corners, because the categories change their base, set dreadful intellectual traps.

(2) Negligence, nuisance, intentional interference with the person and defamation

Obligations II is, as we have seen, the law of tort. As described, it comes close to saying that the student must study the major torts enough to become familiar with the major torts. On the way it makes an illustrative list. "There should be a sufficient study of the major torts (such as negligence, nuisance, intentional interference with the person and defamation)." Even this short illustrative list reveals that our law of tort has something rotten in its foundations. It is built on a bent taxonomy.

Three of the torts mentioned are conceived as infringements of protected interests. This is obvious in relation to intentional interference with the person, pretty obvious in relation to defamation

12 Stair, Institutions, 1.7-8; cf. Enskie, Institutions, III.1.10-11.
shall be no liability for negligence, and a decision that there shall be liability for negligence is a decision that there is no public interest cutting down the liability for defamation in these contexts. There is only one wrong, just as there is only one canary.

The law of tort raises very difficult problems of analysis and of policy. It cannot be right to exacerbate those problems by seeding the whole discussion with the intellectual traps which arise from criss-crossing categories. We ought to have decided long ago whether we wanted tort organized by bases of liability or by interests infringed or according to some other single principle.

(3) Equitable wrongs

In the Foundation of Legal Knowledge called the Foundations of Equity and Trusts the professions make mention of fiduciary obligations and accountability as a constructive trustee, also of the obligations of trustees. We have already noticed this in drawing attention to the difficulty of having a double unit of the law obligations which still leaves obligations outstanding in other categories. The professions’ statement does not identify by name any equitable wrongs, but breach of trust, breach of fiduciary duty, abuse of confidence, and knowing assistance are all by implication present behind the words which are actually used.

There are great dangers in separating one family of wrongs from those which, by chance, happen to have grown up in the common law and acquired the name ‘torts’. The simplest form of trouble is the lop-sidedness which is illustrated at the moment by knowing assistance. If someone knowingly assists a breach of trust, our law, drawing on equity precedents, is perfectly sure that that person commits an actionable wrong. If the same acts and intents operate to assist a common law wrong, the confidence dissipates. There is certainly no wrong under that name in the common law. Hence, the question becomes whether there is the same thing in effect, under

15 Of a contrary opinion is J. D. Davies, who thinks that classification is merely a convenience for the teacher and the text-writer and can so easily produce artificiality: J. D. Davies, ‘Rescission and Equitable Wrongs’ in F. D. Rowe ed., Commentaries on Law, Essays on Contract in Honour of Guenter Treuf of (Sweet and Maxwell, London, 1961), 135, p. 76. However, what is at stake is not expediency or elegance but clear thinking in the courts and, ultimately, the capacity of the courts to decide like cases alike.

other language; and, if so, under what language. Equivalent results can be constructed. But the lop-sidedness is absurd, and fraught with the probability of erratic decision-making.

More sinister is the possibility of developing a parallel law of tort, in which difficult policy decisions are taken differently and difficult analyses are worked through by alternative methods. Plaintiffs are already exploiting the mine of fiduciary obligations to achieve ends which the common law has decided are out of reach. Already, it is being said that the analysis of causation and remoteness may proceed in equity on different lines from those used at common law. If French or German law differs from English law, the differences can be instructive. If English law differs from English law, alarm bells ought to ring. We do not allow different judges to go their own way; nor is the law allowed to be applied differently on Wednesdays. An equitable origin is not in itself a reason justifying a difference from the common law.

The reason we welcome the wrong of abuse of confidence is that we are sure that it is filling a gap left by the common law which we want filled. It does not matter whether we remind ourselves of its equitable origins or not. It is essential that we always have that conviction about equitable wrongs and the analyses associated with them. Are the differences really wanted? The only way to answer that question is to keep comparing the common law position and the alleged equitable addendum. That cannot be done if the wrongs are kept in different packets. A simple example is provided by the equitable account of profits. If the account of profits (equity) is kept right out of the books on damages (common law) it can be made to seem completely anomalous unless and until the court is somehow put into equitable mode. In common law mode a court will say that profits of wrongs are never awarded; in equitable mode it will assume that an award of profits is absolutely normal.

(4) Express, resulting and constructive trusts

When we study obligations, we ask what events bring them into existence. When we study property rights, we do the same, pausing


first to enumerate the recognised kinds of rights in rem. The law of
trusts poses two kinds of problem. One is that trusts really add
nothing to rights in rem and rights in personam, property rights and
obligations. For a trust is a relationship which supposes some of
both. We may put that problem on one side. The other is that when
we think about trusts we use a terminology which averts our eyes
from the very inquiry which we most want to make, namely that
same inquiry as to the facts which bring trusts into being.
Justinian did the same when he said that obligations, such as do
not arise from contract or wrongs, arise quasi from contract or
quasi from wrongs. The ‘quasi’ terminology hides the true facts,
merely telling us not to look for a contract or a wrong. Similarly
with trusts, we know that they can arise by consent (express declar-
ation) but as for such trusts as do not arise expressly, we only know
two bits of gobbledegook, that they are resulting or constructive.
These words turn out to tell us, so far as they tell us anything at all,
something entirely negative, namely that in non-express trusts the
intentions of the parties play no part at all (constructive trusts) or a
minor role in rebuttal of presumptions (resulting trusts). Mean-
while all we actually want to know is the facts on which non-express
trusts do arise. We might at this stage apply a presumption that the
events from which trusts arise will resemble those which give rise
to obligations and property rights when obligations and property
rights are not combined together in the particular manner which
produces what we call a trust. Do trusts arise from consent? We
know they do. Do they arise from wrongs? Do they arise from
unjust enrichment? And do they arise from any other events?
If we do not ask those questions, but pretend instead that trusts
is a law unto itself,” we will never avoid contradiction with the law
of rights in personam (obligations) and rights in rem (property
rights). The contradictions will happen because (a) trusts are rights
in rem and in personam and therefore are not capable of being
sealed up in a container of their own, (b) all such rights have to be
explained in terms of the events which bring them into being, and
(c) if we search for those facts in the case of trusts in language
quite different from the language which we use elsewhere we will

17 Justinian 3.1.
16 Which seems to be the spirit of Westdeutsche Landesbank Girozentrale v.

This Heap of Good Learning

inevitably come up with groupings of facts which, semantically and
perhaps also substantially, contend with the categories of facts
which are used in relation to other rights. And the end will be that
we have built two tunnels through the same hill, a pointless and
wasteful labour.

4. WHAT IS TO BE DONE?

Judges can encourage or discourage, but this is not really a judicial
responsibility. It belongs to the law schools. If diktats from the
educational bureaucracy of the professions currently exacerbate
the problem, the law schools have only themselves to blame for
tolerating intellectual disorder for so long and advertising syllabi in
which each subject appears as an island in an archipelago. ‘What is
to be done?’ therefore becomes, ‘What are the universities to do?’
Legal philosophers ought not to think taxonomy beneath them.
Where Jurisprudence, in the sense of legal philosophy, is taught,
legal taxonomy ought to be taught. But in many law schools Juris-
prudence is not taught, or only to a very few enthusiasts and only
towards the end of their tour of the archipelago. And most legal
philosophers are now engaged exclusively on supposedly larger
and higher problems. Nevertheless, just as Darwin would have
achieved nothing if he had been indifferent to taxonomy, so those
who care deeply about legal rationality must take seriously the
need to eliminate the traps and fallacies latent in careless clas-
sification. Some responsibility must therefore lie with those who
profess to be philosophers of law.

It falls to all teachers of law to explain where their subjects fit in
the order of the law as a whole. Yet the task cannot be done unless
legal education prepares both the teachers and the taught to expect
it to be done and to participate in the debate. The way Justinian
saw it was that the first year lawyers in the university law school
should be taken up to a high place and made to look down on the
law below, so as to see how it all fitted together. That is to say, in
their first year they should be taken through the whole law, quickly,
to familiarize themselves with its main features and understand the
interrelation of the different subjects. That is the taxonomic pur-
pose for which the Institutes was produced. It provided the map of
the law.
The mind which had internalized that map would later always know where it was, however dark and dense the detail of the immediate subject-matter. In the same way, and equally important, that same mind, looking not at the law but at raw life and the problems thrown up by it, would know how to relate that raw material to the law, how to review the law in order to find the solution to problems thrown up, unlabelled, by life. It is difficult for a lawyer to analyse a real live problem against an alphabetical list or a random collection of legal topics. A heap can be turned over, knowledgeable friends can be called in to help identify things that turn up. A rational map of the law is much more useful. It directs analysis, and it provides a means, as we have seen, of checking whether any possibility has been accidentally omitted. Far from locking people into categories, a good taxonomy enables the lawyer to move over them with confidence. Anti-formalism, so far as it has been anti-taxonomic, has handicapped the diagnostic capacity of many legal minds. Justinian's educational system was calculated to build in the necessary sense of structure from the beginning.

So long as the basic Roman law course remained in place, English lawyers were never left without a map. In effect the Institutes continued to do for us what Justinian intended them to do for the cupidis legum inventus, the young eager for the study of the law, in the great law schools of Constantinople and Beirut. In throwing out Roman law, the law schools of common law jurisdictions have failed to think through the various goods that that study was doing. They have therefore failed to put in place new means to those old ends. There is an enduring debate about what ought best to be taught by way of an introduction to law. For my part I have no doubt at all that the best introduction is still Justinian's Institutes. Even now it best provides the bird's eye view. It gives entry to every legal system in the western tradition. At the same time it should go without saying that, just as beginners should look down at that map, so they should also be taught to view it with vigilant scepticism. Inert acceptance is no good to anyone. What is needed is a keen taxonomic awareness and a continuing debate. The Institutes is merely the best starting point.

If the book itself is rejected, its content must nevertheless somehow be communicated. There ought to be a place in the syllabus, and an early place since this matter is needed when beginners are indeed laying the foundations of their legal knowledge, in which

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law students become acquainted with the history of legal classification, from the Institutes of Gaius and Justinian to the modern civil codes. In its early paragraphs this paper drew attention to the importance of the Maccabean lecture given more than a decade ago by Lord Goff. The most recent Maccabean, given in November 1995 by Professor Peter Stein, was devoted precisely to the history of the struggle for intellectual order in the law. That lecture could, given the chance, play an important role in enabling every lawyer both to have a map of the law and to continue the taxonomic debate. Nobody thinks that the Institutes got the taxonomy exactly right, and Professor Stein's story is partly the story of attempts to improve on the Roman original. It may not be possible to draw the map perfectly and permanently right. The crucial thing is that the legal mind, individual and national, must have a department of critical taxonomy.

There must be a map. And the map must always be regarded as highly suspect. The suspicion must, however, be directed to improvement, not destruction. In the absence of this taxonomic awareness the law cannot but be a heap of good learning. So what? So what if it is just a heap? Unfortunately law which is intellectually disorderly is also law which is unrepeatable and unpredictable. Where the law is 'Heap'd up together without Beginning or End' intellectual accidents cannot be avoided and, more often than is inevitable, people will win cases they ought to lose and lose cases they ought to win. Intellectual order and a high quality of justice go hand in hand.

Our habit has been to celebrate experience in preference to logic, historical continuity in preference to systematic coherence, but in the fluid and fast-moving world of 'In Search of Principle' we can no longer take secret pride in these priorities. It is not at all fashionable to insist on the autonomy of law and legal science. Yet, however much the law opens up to other disciplines, it will never escape the special responsibilities which set it apart from
them and profoundly colour the nature of its peculiar rationality, namely the duty day by day to decide difficult cases, the obligation to give convincing reasons for those decisions, and the requirement of justice that like cases be decided alike. In a changing world in which sheer authority counts for less and less in the absence of the legitimation which derives from tight reasoning, common lawyers cannot hope to discharge those responsibilities if they persist in regarding careful taxonomy as an artificial and faintly distasteful obsession of those too clever and too theoretical lawyers from civil law jurisdictions.

1 In European Community law, it is difficult to find a triangular relationship between legislation, case law and academic writing. The main problem is the relationship between the political institutions and the Court of Justice, or, to put it in different terms, between the legislative and the judicial branch of the Community. Academic writing followed the Court’s case law, rather than paved the way for it. It may be true that, among lawyers, there are more signs of a prevailing opinion at a European level than among politicians; but, generally speaking, this opinion is not very critical of the performance of the courts. Perhaps, that reveals more about the distinguishing features of lawyers than about those of the European Community.

2 In speaking about ‘legislative and judicial’ bodies of the Community, one seems to assume that comparisons between national legal systems and the institutional system of the Community can be usefully made. That is, however, the first question which needs to be addressed. For does not the comparison imply that the European Community, or now the European Union, is considered as a state-like entity, rather than as an international organization with some particular characteristics of its own?

In order to avoid debates on political philosophy, we might as well look at the evidence, that is, at literature aimed at comparing the Community system to national legal systems. Some authors have indeed tried to make these comparisons, but they have done so with varying degrees of success. At one end of the scale, we find the doctoral thesis of Koenraad Lenaerts on courts and the Comm...