Property I
Fall 2012
Professor Colette Routel
Tuesday (2:00 - 2:50 p.m.) & Friday (10:00 - 11:50 a.m.)

COURSE INFORMATION & SYLLABUS

Professor Contact Information
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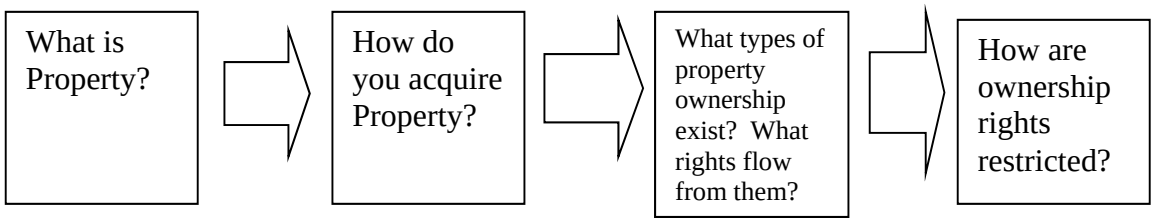
Office Hours: Thursday 4 – 6 p.m. (*except* on Oct. 25th and College holidays)

Course Overview: Property I is the introductory course in basic property law. The course begins with a study of the meaning of the term "property" (including the distinction between real and personal property), and the means of acquiring property other than by voluntary transfer (e.g., acquisition by conquest, capture, find, and adverse possession). The course then exposes students to the system of estates, future interests, and various types of co-ownership (e.g., tenants in common, joint tenancy, landlord-tenant). A visual representation of the organization of Property I and Property II is as follows:



Course Materials. The required textbooks are PROPERTY (7TH ed. 2010), by Dukeminier, Krier, et al., and A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER (3rd ed. 2007), by Peter T. Wendel. You must purchase the correct editions of these books. If you buy them on-line they will cost a combined $200 new (which is much cheaper than in the bookstore). While this is expensive, you will use the same textbook in Property II next semester. Additional reading materials will be posted on the Blackboard page for this course.

Prior to the first day of class you must read John Humback, WHOSE MONET? AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM (2007). This book is intended to level the playing field and ensure that no matter what you studied at the undergraduate level, you are ready for law school. This reading is *in addition* to the reading listed later in the syllabus for your first class session.

While in law school, you will need a good law dictionary. BLACK'S LAW DICTIONARY (9th ed. 2009) is probably the best law dictionary on the market today; you can save a good deal of money by buying a used copy of the 7th or 8th edition of this book through an on-line bookseller such as amazon.com. You should already have a good general dictionary and a good grammar book that you can consult whenever you are writing.

I strongly suggest that you refrain from purchasing or using commercial outlines or other study aids for this course. Purchasing these materials will not only be a waste of money, but worse yet, they may well give you incorrect information about a rule or principle.

Class Preparation. I expect students to be prepared for each and every class. Preparation for class means that you have read (not skimmed) the assigned material at least twice, briefed each of the main cases, and thought about the questions contained in the notes. You should be spending *no less than* nine hours preparing for Property I each week. This is the bare minimum amount of time that it will take for you to complete the assignment properly.

Your case brief should have five separate sections: (1) facts (a brief summary of the salient facts of the dispute, including identification of the parties); (2) procedural history (in what court is the case currently pending, how did it get there, and who won in the lower court(s)); (3) issue (the legal question(s) that is presented by the case); (4) holding (the rule of law that the court announces or applies); and (5) reasoning (how and why the court arrived at the holding). Case briefs should be approximately 1-2 pages long. They should be thorough enough that you do not need to consult the text of the opinion again after completing them, but short enough to quickly find the answers to questions that I pose in class. You should write the case brief using your own words except when you want to quote the court for a particular reason.

Many upper-level students will claim that you do not need to brief cases. You must ignore this advice. As I will describe in more detail later in the semester, your final exam will test your case briefing and outlining skills in a direct way.

Attendance. The American Bar Association mandates that all accredited law schools require regular and punctual class attendance. Consequently, I will pass around an attendance sheet before each class. Absent extraordinary circumstances, you may not miss more than three class sessions or your grade will be adversely affected. Please note that signing or initialing an attendance sheet for any of your classmates, for any reason, is a violation of the honor code and will result in a failing grade for the course.

Grading. Your grade in this class will be determined by your performance on the following assessments: (1) a mid-term examination (25%); (2) a short-answer exam on estates/future interests (15%); and (3) a final examination that will consist of multiple-choice questions (30%) and a separate take-home exam (30%).

Your class attendance and participation in the classroom may result in your grade being adjusted upward or downward. Classroom participation is measured by both quality and quantity, although the former is far more important. Quality class participation can take many forms, including asking good questions during class, volunteering answers during class discussion, or correctly responding to direct questions. Class attendance and participation can bump a student's course grade up or down by one step (e.g., from a "B" to a "B+").

Office Hours. You will be confused at some point during the semester. When this happens, you should reread the material in your textbook and your class notes. Then, spend some time wrestling with the issue. You are in law school not to memorize rules and principles (after all, the law changes) but to learn how to "think like a lawyer," i.e., figure out what the law is and determine how it might be applied to the facts of your client's case.

If you have reread the material and spent time thinking about the issue, yet you are still confused, you should visit me during office hours. My office is Room 311. I will hold office hours almost every week on Thursday, from 4:00 – 6:00 p.m. This time will be open to any student on a walk-in basis. My door will remain open during these times; anyone can come by and ask questions without an appointment. Please do not wait until the end of the semester to come ask questions.

Laptop. Laptops, ipads, smart phones, and other devices that allow you to access the internet are not permitted in this class. There are three principal reasons for this ban. First, as a lawyer you will need to become a good note-taker. When you are meeting with a client, you will rarely have a computer in front of you. Unfortunately, many students do not learn how to take notes during law school because they are typing a verbatim transcript of the classroom discussions. I want you to learn this necessary skill. Second, in addition to failing to learn note-taking skills, students who take verbatim notes on their computers are not thinking in class. Law school is not simply about memorizing legal rules. If you do not listen and think during class you will not be learning the skills that you need to be a successful attorney. Finally, too many students who use laptops in class do so to surf the web, check email, and play video games. Doing any of these things during class is disrespectful to your professor, and is distracting to all of those students who sit around and behind you. Consequently, I have decided to institute a complete laptop ban in this year's Property course unless you have a documented disability that makes laptop use necessary or desirable. If you think you have such a disability, please contact Dan Thompson, Vice President of Student Affairs & Dean of Students.

Objectives for the Course. The objectives for this course are as follows:

1. Read, analyze and apply the holding and reasoning of a case to new factual situations.
2. Organize the holdings of a series of cases into a coherent body of law.
3. Articulate the legal rules relating to the acquisition of property, the different ownership interests one might acquire, the rights associated with property ownership, and the restrictions on those rights. Students should also be able to apply those legal rules to new factual situations.
4. Explain the underlying objectives of property law, contrast those objectives with the purposes of the tort law system, and evaluate whether those objectives are still sound, or should be modified.
5. Articulate the role that race played in the development of property law in this country and how contemporary property law is attempting to remedy this.
6. Compare and contrast one aspect of our property system with the same aspect in a foreign system.
7. Articulate various views on the theory of law (e.g., natural law, legal positivism) and explain how attorneys and judges would use those theories in a property case.

Assignments. Over the course of the year we will cover a substantial percentage of the casebook. We will not have time to discuss in class everything contained in the reading assignments, but students are responsible for all assigned materials.

INITIAL OUTLINE OF TOPICS AND ASSIGNED READINGS

Class	Topic	Objectives	Readings and Assessments
Week #1: Aug. 24th (2 hours)	Acquisition of Property: First Possession		Textbook pages 18-29 (*Pierson* & *Ghen*) *Japan v. [unnamed]*, 4 Daiha Keisha 378 (1925) (PDF) Jurisprudence readings on natural law (PDF)
Week #2: Aug. 28th (1 hour) Aug. 31st (2 hours)	Acquisition of Property: First Possession Acquisition of Property: First Possession vs. Discovery What is Property? What rights do property owners have?		*Geomet Exploration v. Lucky Uranium Corp.* (PDF) *Elliff v. Texon Drilling Co.* (PDF) Textbook pages 3-18 (*Johnson*) *Tee-Hit-Ton Indians v. United States* (PDF)
Week #3: Sept. 4th (1 hour) Sept. 7th (2 hours)	What is Property? What rights do property owners have?		*The Antelope* (PDF) *State v. Mann* (PDF) Jurisprudence readings on positivism (PDF) Textbook pages 70-85 (*Moore*)
Week #4 Sept. 11th (1 hour) Sept. 14th (2 hours)	Acquisition of Property: Find		Textbook pages 97-101 (*Armory*) & pages 107-116 (*McAvoy*) Textbook pages 101-107 (*Hannah*) Read/sketch out answer to practice exam problem
Week #5 Sept. 18th (1 hour)	Acquisition of Property: Adverse Possession		Textbook pages 116-134 (*Lutz*) *Nome 2000 v. Fagerstrom* (PDF)

Sept. 21st (2 hours)			Textbook pages 134-150 (*Mannillo*, *Kunto*) *Romero v. Garcia* (PDF)
Week #6 Sept. 25th (1 hour) Sept. 28th (2 hours)	Acquisition of Property: Adverse Possession Acquisition of Property: Gift		Textbook pages 151-164 Textbook pages 164-181
Week #7 Oct. 2nd (1 hour) Oct. 5th (2 hours)	Review Session **Mid-Term Examination**		No new reading
Week #8 Oct. 9th (1 hour) Oct. 12th (2 hours)	Types of Property Ownership: Consecutive Interests Estates and Future Interests		Possessory Estates pages 1-97 Possessory Estates pages 98-145; 158-71
Week #9 Oct. 16th (1 hour) Oct. 19th (no class - Fall Break)	Types of Property Ownership: Consecutive Interests Estates and Future Interests		Possessory Estates pages 173-205
Week #10 Oct. 23rd (1 hour) Oct. 24th 1 – 3 p.m. Review Oct. 26th (2 hours)	Types of Property Ownership: Consecutive Interests Estates and Future Interests **Exam on Estates and Future Interests**		No new reading
Week #11 Oct. 30th (1 hour)	Types of Property Ownership: Concurrent Interests Tenants in common, joint		Textbook pages 319-329

Nov. 2nd (2 hours)	tenancy, tenancy by the entirety		Textbook pages 330-347
Week #12 Nov. 6th (1 hour) Nov. 9th (2 hours)	Types of Property Ownership: Concurrent Interests Tenants in common, joint tenancy, tenancy by the entirety Types of Property Ownership: Concurrent Interests Landlord-Tenant Law (the Fair Housing Act)		Textbook pages 348-58 Handout on the Fair Housing Act (PDF) Textbook pages 431-38
Week #13 Nov. 13th (1 hour) Nov. 16th (2 hours)	Types of Property Ownership: Concurrent Interests Landlord-Tenant Law		Textbook pages 421-31 Textbook pages 438-459
Week #14 Nov. 20th (1 hour)	Types of Property Ownership: Concurrent Interests Landlord-Tenant Law		Textbook pages 459-69
Week #15 Nov. 27th (1 hour) Nov. 30th (2 hours)	Types of Property Ownership: Concurrent Interests Landlord-Tenant Law		Textbook pages 469-81 Textbook pages 482-508
Review Session TBA			

III. POSSESSION

Japan v. [no name provided]
4 Daiha Keishu 378 (June 9, 1925)
Supreme Court

Question on Appeal

Whether driving a wild badger to a cave and exercising *de facto* control over it constituted "capture" under the Hunting Law.

Summary

One who finds a badger in the wild, shoots it, chases it, drives it to a narrow rock cave and closes the cave with rocks so that the badger may not escape, exercises exclusive dominion and control over the animal to have “captured” the animal pursuant to the Hunting Law.

The original criminal indictment herein alleged that the defendant hunted two badgers (*tanuki*) using a fire arm in Tochigi Prefecture on March 3, 1924. This date was not within the hunting season for badgers. The defendant obtained a hunting license on January 28, 1924. On February 29, 1924, he found, shot, chased, and drove the two badgers into a narrow cave and closed the cave with rocks so that the badgers were not be able to escape. The defendant went home on that day and returned to the cave on March 3, 1924 and removed the rocks at the entrance to the small cave. The defendant’s hunting dog entered the cave and killed the badgers. At trial, the defendant stated the captured animals were not badgers but another kind of animal called "*mujina*." An expert witness stated that the fur of a badger and the fur of "*mujina*" are the same while they have different names.

With an intent to hunt, the defendant found the wild badgers, shot, chased, and drove them into a narrow cave and closed the cave with rocks so that they were not able to escape. This means that the defendant took steps to exercise exclusive dominion and control over the badgers that are necessary for the capture of badgers. The defendant utilized a natural cave and

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Holding

obtained exclusive dominion over the badgers. Therefore, the hunting season ended on February 29, 1924. Consequently, the defendant's capture was within the hunting season pursuant to Hunting Law Regulation Article 2-2, and the defendant's conduct is lawful. The act of causing his hunting dog to kill the badgers on March 3, 1924 did not constitute “capture” on that date. “Capture" had been accomplished on February 29, 1924 within the hunting season.

[The Court dismissed the indictment against the defendant and further stated that the Hunting Law was ambiguous as it outlawed hunting of badgers outside of the hunting season but not *mujina*. The Court found that only an expert in zoology would be able to distinguish a badger from a *mujina*. As the defendant had the intent to hunt a mujina, not prohibited by the Hunting Law, and not a badger, prohibited by the Hunting Law, the Court dismissed the indictment.]

NOTES

1. The *Badger Case* is a criminal law case, not a civil law case, where two parties are claiming possession of the same animal or object as in the famous American equivalent of *Pierson v. Post*, 3 CAI. R. 175, 2 Am. Dec. 264 (Supreme Court). However, the *Badger Case* does provide a view of the Japanese Supreme Court's view on the significance of possession and what conduct might be deemed possession.

2. In the *Badger Case*, would the outcome have been different if the badgers could have escaped but just didn't? Given the facts of the *Badger Case*, what would the outcome have been if Taro, a third party, happened upon the badgers in the cave, saw they were trapped and wounded, killed the badgers and made off with them? Would the hunter have been able to succeed in an action to recover the badgers against Taro?

Chapter Seven

Natural Law Theory and John Finnis

We take it for granted that the laws and legal system under which we live can be criticised on moral grounds: that there are standards against which legal norms can be compared and sometimes found wanting. The standards against which law is judged have sometimes been described as "a [the] higher law". For some, this is meant literally: that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature or consideration of nature. For others, the reference to "higher law" is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law: on one hand, that not everything properly enacted as law is binding morally; on the other hand, that the law, as law, does have moral weight—it should not be simply ignored in determining what is the right thing to do. (If the law had no intrinsic moral weight, why would we need to point to a "higher law" as a justification for ignoring the requirements of our society's laws?)

Traditional Natural Law Theory

The approach traditionally associated with the title "natural law" was connected with arguments for the existence of a "higher law", elaborations of its content, and analyses of what should follow from the existence of a "higher law" (in particular, what response citizens should have to situations where the positive law—the law

enacted within particular societies—conflicts with the "higher law").[1]

While one can locate a number of passages in the classical Greek writers that express what appear to be natural law positions,[2] the best-known ancient formulation of a natural law position was offered by the Roman orator Cicero.

Cicero (106–43 BC) was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say that Cicero merely offered an elegant restatement of already established Stoic views). Cicero offered the following characterisation of "natural law":

> "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment."[3]

In Cicero's discussions of law, we come across most of the themes traditionally associated with natural law theory (although, as might be expected in the first major treatment of a subject, some of the analysis is not always as systematic or as precise as one might want): natural law is unchanging over time and does not

[1] Some of the modern writers who are sometimes associated with natural law, like Lon Fuller and Ronald Dworkin, have approaches far outside the tradition described in this chapter. Both Fuller and Dworkin are discussed in later chapters.

[2] These include passages in Plato, *Laws*, IV, 715b ("enactments, so far as they are not for the common interest of the whole community, are no true laws") and Aristotle, *Nicomachean Ethics*, V, 7:1134b18–1135a5, as well as Sophocles, "Antigone", 450–460.

[3] Cicero, *Republic*, III.xxii.33.

differ in different societies; every person has access to the standards of this higher law by use of reason; and only just laws "really deserve [the] name" law, and "in the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true."[4]

Within Cicero's work, and the related remarks of earlier Greek and Roman writers, there was often a certain ambiguity regarding the reference to "natural" in "natural law": it was not always clear whether the standards were "natural" because they derived from "human nature" (our "essence" or "purpose"), because they were accessible by our natural faculties (that is, by human reason or the human conscience), because they derived from or were expressed in nature, that is, in the physical world about us, or some combination of all three.

As one moves from the classical writers on natural law to the early Christian writers, aspects of the theory necessarily change and therefore raise different issues within this approach to morality and law. For example, with classical writers, the source of the higher standards is said to be (or implied as being) inherent in the nature of things, while with the early Christian writers, there is a divine being who actively intervenes in human affairs and lays down express commands for all mankind—although this contrast overstates matters somewhat, as the classical writers referred to a (relatively passive) God, and the early Christian writers would sometimes refer to the rules of nature as expressing divine will. To the extent that the natural law theorists of the early Church continued to speak of higher standards inherent in human nature or in the nature of things, they also had to face the question of the connection between these standards and divine commands: for example, whether God can change natural law or order something which is contrary to it, a question considered by St Ambrose and St Augustine (among others) in the time of the early Church and by Francisco Suarez hundreds of years later.

The most influential writer within the traditional approach to natural law is undoubtedly St Thomas Aquinas (1224–1274). However, the context of Aquinas' approach to law (its occurrence within a larger theological project that offered a systematic moral

[4] Cicero, *Law*, II.v.11–12.

system) should be kept in mind when comparing his work with more recent theorists.

Aquinas identified four different kinds of law: the eternal law, the natural law, the divine law, and human (positive) law.[5] For present purposes, the important categories are natural law and positive law.

According to Aquinas, positive law is derived from natural law. This derivation has different aspects. On some occasions the natural law dictates what the positive law should be: for example, natural law requires that there be a prohibition on murder. At other times, the natural law leaves room for human choice (based on local customs or policy choices)[6]: thus while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 or 65 miles per hour, are probably matters in which either choice would be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second, Aquinas refers to as the "determination" of general principles (*determinatio*).[7]

As for citizens, the question is what their obligations are regarding just and unjust laws. Positive laws which are just "have the power of binding in conscience".[8] A just law is one which is consistent with the requirements of natural law—that is, it is "ordered to the common good", the law-giver has not exceeded its authority, and the law's burdens are imposed on citizens fairly. Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust[9]; but what is the citizen's obligation in regard to an unjust law? The short answer is that there is no obligation to obey that law. However, a longer answer is warranted, given the amount of attention this question usually gets in discussions of natural law theory in general, and of Aquinas in particular.

The phrase *lex iniusta non est lex* ("an unjust law is not law") is often ascribed to Aquinas, and is given as a summation of his

[5] St Thomas Aquinas, *Summa Theologiae* in *The Treatise on Law* (R. J. Henle trans. and ed., Notre Dame: University of Notre Dame Press, 1993), Question 91.
[6] Aquinas, *Summa Theologiae*, Question 95, art. 2, corpus.
[7] *ibid.* A similar distinction is drawn in Aristotle, *Nicomachean Ethics*, V, 7:1134b18–1135a5.
[8] Aquinas, *Summa Theologiae*, Question 94, art. 4, corpus.
[9] *ibid.* Question 96, art. 4, corpus.

position and the natural law position in general.[10] This view is at least somewhat misleading on several counts. Aquinas never used the exact phrase above, although one can find similar expressions: "every human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law"[11]; and "[unjust laws] are acts of violence rather than laws; as Augustine says, 'A law that is unjust seems not to be a law' ".[12] (One also finds similar statements by Plato, Aristotle, Cicero, and St Augustine—although, with the exception of Cicero's, these statements are not part of a systematic discussion of the nature of law.)

Another question goes to the significance of the phrase. What does it mean to say that an apparently valid law is "not law", "a perversion of law" or "an act of violence rather than a law"? Statements of this form have been offered and interpreted in one of two ways. First, one can mean that an immoral law is not valid law at all. John Austin interpreted statements by the English commentator Sir William Blackstone (*e.g.* "no human laws are of any validity, if contrary to [the law of nature]"[13]) in this manner, and pointed out that such analyses of validity are of little value. Austin wrote:

> "Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity."[14]

Although one must add that we should not conflate questions of power with questions of validity—for a corrupt legal system might

[10] A good discussion on "*lex iniusta non est lex*", its meaning in general and its significance in Aquinas' work can be found in Norman Kretzmann, "*Lex Iniusta Non Est Lex*: Laws on Trial in Aquinas' Court of Conscience' (1988) 33 *American Journal of Jurisprudence* 99.
[11] Aquinas, *Summa Theologiae*, Question 95, art. 2, corpus.
[12] *ibid.* Question 94, art. 4, corpus.
[13] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–1769), I.41.
[14] Austin, *The Province of Jurisprudence Determined*, p. 185, quoted in Hart, "Positivism and the Separation of Law and Morals", 616.

punish someone even if shown that the putative law was invalid under the system's own procedural requirements—we understand the distinction between validity under the system's rules and the moral worth of the enactment in question.

A more reasonable interpretation of statements like "an unjust law is no law at all" is that unjust laws are not laws "in the fullest sense".[15] As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "she's no lawyer" or "he's no doctor". This only indicates that we do not think that the title in this case carries with it all the laudatory implications it usually does. (It may well be that, for our purposes, knowing that this doctor is not competent is the most important fact; however, the fact that he does have the required certification is not thereby negated or made entirely irrelevant.) Similarly, to say that unjust laws are "not really laws" may only be to point out that they do not carry the same moral force or offer the same reasons for action that come from laws consistent with "higher law". This is almost certainly the sense in which Aquinas made his remarks,[16] and the probable interpretation for nearly all proponents of the position.

However, this interpretation leaves the statement as clearly right as the prior interpretation was clearly wrong. One wonders what the source of controversy was.

To say that an unjust law is not law in the fullest sense is usually intended not as a simple declaration, but as the first step of a further argument. For example: "this law is unjust; it is not law in the fullest sense, and therefore citizens can in good conscience act as if it was never enacted; that is, they should feel free to disobey it." This is a common understanding of the idea that an unjust law is no law at all, but it expresses a conclusion that is controversial.

[15] Finnis traces the notion to Aristotle's notion of "focal meaning" and Max Weber's concept of "ideal types": see Weber, *The Methodology of the Social Sciences*, pp. 90–106; Aristotle, *Eudemian Ethics*, VII, 2:1236a16–30; *Nicomachean Ethics*, VIII, 4:1157a30–1157b3; *Politics*, III, 1:1275a33–1276b4.

[16] Elsewhere, Aquinas wrote: 'But even an unjust law retains some semblance of the nature of law, since it was made by one in power and in this respect it is derived from the Eternal Law": Aquinas, *Summa Theologiae*, Question 93, art. 2.

There are often moral reasons for obeying even an unjust law: for example, if the law is part of a generally just legal system, and public disobedience of the law might undermine the system, there is a moral reason for at least minimal public compliance with the unjust law. There is a hint of this position in Aquinas (he stated that a citizen is not bound to obey "a law which imposes an unjust burden on its subjects" if the law "can be resisted without scandal or greater harm"), and it has been articulated at greater length by later natural law theorists (most recently by John Finnis,[17] as discussed below).

Aquinas' theory is in some ways more the structure of an ethical system than the full ethical system itself. For most of us, little practical guidance for difficult moral questions can be found from the advice, "good should be done and sought and evil is to be avoided".[18] However, Aquinas offers few prescriptions on particular moral issues more specific than that. The assumption may have been that the teachings of the Church and the holy books, combined with the reflections of a wise person,[19] would be sufficient to fill in the content of the moral system.

In the period of the Renaissance and beyond, discussions about natural law were tied in with other issues: assertions about natural law were often the basis of or part of the argument for individual rights and limitations on government; and such discussions were also often the groundwork offered for principles of international law.

In overview: it is normally a mistake to try to evaluate the discussions of writers from distant times with the perspective of modern analytical jurisprudence. Cicero and Aquinas were not concerned with a social scientific analysis of law, as many modern advocates of legal positivism could be said to be. The early natural law theorists were concerned with what legislators and citizens and governments ought to do, or could do in good conscience. It is not that these writers (and their followers) never asked questions like "what is law?" However, they were asking the questions as a starting point for an ethical inquiry, and therefore

[17] Finnis, *Natural Law and Natural Rights*, pp. 359–362.

[18] Aquinas, *Summa Theologiae*, Question 94, art. 2, corpus.

[19] Cf. *ibid.* where Aquinas distinguishes propositions which are self-evident to all and those that are self-evident only to the wise.

one should not be too quick in comparing their answers with those in similar-sounding discussions by recent writers, who see themselves as participating in a conceptual or sociological task.

JOHN FINNIS

John Finnis' work is an explication and application of Aquinas' views (at least, of one reading of Aquinas, a reading advocated by Germain Grisez, among others): an application to ethical questions, but with special attention to the problems of social theory in general and analytical jurisprudence in particular.

For Finnis, the basic questions are the ethical one, "how should one live?", and the meta-ethical one, "how (by what procedure or analysis) can we discover the answer to ethical questions?" These ethical and meta-ethical questions are primary; legal theory for Finnis is best understood as a small if integral part of the larger scheme of things.

Finnis' response to these basis questions involves, among other things, the claim that there are a number of separate but equally valuable intrinsic goods (that is, things one values for their own sake), which he called "basic goods". In *Natural Law and Natural Rights*, Finnis lists the following as basic goods: life (and health), knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion (Finnis' list of basic goods changed somewhat in later writings). These are "intrinsic" goods in the following sense: one can value, for example, health for its own sake, but medicine only as a means to health. If someone stated that she was buying medicine, not because she or someone she knew was sick or might become sick, and not because it was part of some study or some business, but simply because she liked having a lot of medicine around, one might rightly begin to question her sanity.

At this level, we can only distinguish the intelligible from the unintelligible. We *understand* the person who is materialistic and greedy, however much we disapprove of that approach to life. The greedy person is seeking the same basic goods we are. Much of what is conventionally considered morality occurs in Finnis' theory at the second level of discussion: the principles for how we should deal with and combine the quest for various intrinsic goods.

Finnis describes the list of basic goods, and other aspects of his moral theory, as "self-evident", but he does not mean this in the sense that the truth of these propositions would be immediately obvious to all competent thinkers. Part of what makes a proposition self-evident is that it cannot be derived from some more fundamental proposition; thus, self-evident is here the opposite of provable.[20] (However, while self-evident propositions cannot be proven, they can be supported by consistent observational data and by dialectical arguments.) Also, it is not the case that everyone will be equally adept at reaching these "self-evident" conclusions: those of substantial experience, who are able and willing to inquire deeply, may be better able to discover the self-evident truths than would others (Aquinas at one point wrote of propositions which are only self-evident to the wise[21]).

Because there are a variety of basic goods, with no hierarchy or priority among them, there must be principles on how to choose when the alternatives promote different goods. (This is one basis for contrasting Finnis' position with utilitarian moral theories, under which all goods can be compared according to their value in a single unit, *e.g.* promoting happiness.) On a simple level, we face such choices when we consider whether to spend the afternoon playing soccer (the value of play) or studying history (the value of knowledge). The choice is presented in a sharper form when we must choose whether to lie (choosing against the value of knowledge), in a situation where we believe that lying would lead to some significant benefit or avoid a greater evil. Morality offers a basis for rejecting certain available choices, but there will often remain more than one equally legitimate choice (again there is a contrast with utilitarian theories, under which there would always be a "best" choice).

For Finnis, the move from the basic goods to moral choices occurs through a series of intermediate principles, which Finnis calls "the basic requirements of practical reasonableness". Among the most significant, and most controversial, is the prescription that one may never act directly against a basic good (as lying is an

[20] See Robert George, "Recent Criticism of Natural Law Theory" (1988) 55 *University of Chicago Law Review* 1371 at 1386–1393 (explaining and defending this aspect of Finnis' argument).

[21] Aquinas, *Summa Theologiae*, Question 94, art. 2, corpus.

action against knowledge or torture an action against life (and health)), regardless of the benefit one believes will come from taking that path.[22] In other words, the ends never justify the means where the chosen means entail a harming of a basic good.

Other intermediate principles listed in *Natural Law and Natural Rights* (the list changed somewhat in Finnis' later writings) include that one should form a rational plan of life, have no arbitrary preferences among persons, foster the common good of the community and have no arbitrary preferences among the basic goods.[23]

Law enters the picture as a way of effecting some goods (social goods which require the co-ordination of many people) that could not be effected (easily or at all) without it, and as a way of making it easier to obtain other goods.[24] Thus, the suggestions Finnis makes about law and about legal theory are in a sense derived from his primary concern with ethics. As to questions regarding the obligation to obey the law, Finnis follows Aquinas: one has an obligation to obey just laws; laws which are unjust are not "law" in the fullest sense of the term and one has an obligation to comply with their requirements only to the extent that this is necessary to uphold otherwise just institutions.[25]

Given that Finnis' starting point is so different from that of the legal positivists, it is surprising to discover some similarities in their theories.[26] These similarities occur because even though Finnis' theory might be seen as primarily a prescriptive account—a theory of how we should live our lives—certain descriptive elements are necessarily assumed.[27] First, if one if going to ask what implications

[22] Predictably, within this approach, much turns on characterisation of an action. Harming another person in self-defence would likely be justified on the ground that the purpose of the action is to defend one's own life (the basic good of "life/health"); the harm to one's attacker is but a side-effect, even if one that is foreseeable or inevitable.

[23] Finnis, *Natural Law and Natural Rights*, pp. 100–127.

[24] *ibid.*, pp. 260–264.

[25] *ibid.*, pp. 354–362.

[26] Finnis elsewhere discussed the ways in which a natural law theorist can affirm, more or less on the terms offered, nearly every "dogma" associated with modern legal positivism. See Finnis, "The Truth in Legal Positivism", pp. 203–205.

[27] One could also offer historical reasons for the similarities. Finnis was H. L. A. Hart's student at Oxford, and Joseph Raz was first a classmate and has more recently been a colleague of many years.

morality has for law, one must first understand what "law" is. Secondly, it is part of Finnis' project to consider which proposals within various aspects of legal regulation are foreclosed and which allowed by our general ethical theory.[28] Further, Finnis believes that a proper ethical theory is necessary for doing descriptive theory well, as valuation is a necessary and integral part of theory construction.[29]

Like Hart, Finnis emphasised the need to use an "internal point of view" in analysing a legal system[30] and, like Joseph Raz, Finnis believes that our understanding of legal systems should centre on the fact that law affects our reasons for action.[31] As noted earlier, regarding the "internal point of view", Finnis makes an important amendment to Hart's approach. He argues that, in deriving legal theory, one should not take the perspective of those who merely accept the law as valid (Hart appears to include even those who accept the law as valid for prudential reasons); the theory should assume the perspective of those who accept the law as binding *because* they—correctly—believe that valid legal rules create (prima facie) moral obligations. The difference may seem minor, but it means crossing a theoretically significant dividing line: between the legal positivist's insistence on deriving theory in a morally neutral way and the natural law theorist's assertion that moral evaluation is an integral part of proper description and analysis. Finnis' approach to descriptive theory, unlike Hart's, requires the theorist to judge the moral merits of the legal system(s) being described, and it is just the propriety or necessity of such moral evaluations in the process of descriptive theory which has been the dividing line in recent times between legal positivism and natural law theory.

[28] See, *e.g.* Finnis, *Natural Law and Natural Rights*, pp. 169–173 (property law), 188–192 (bankruptcy).

[29] *ibid.* pp. 6–18.

[30] *ibid.* pp. 3–13.

[31] *ibid.* pp. 12–13. Also like Raz, Finnis believes that values (and value choices) are incommensurable, and that this has important consequences for legal theory and moral theory. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 321–366; John Finnis, "On Reason and Authority in *Law's Empire*" (1987) 6 *Law and Philosophy* 357 at 370–376; "Natural Law and Legal Reasoning" (1990) 38 *Cleveland State Law Review* 1 at 7–9; "Concluding Reflections" (1990) 38 *Cleveland State Law Review* 231 at 234–241.

A similar difference or change can be seen in comparing Raz's practical reasoning approach to law and Finnis' approach. For Raz, what is central is that law *purports to* create moral reasons for action; for Finnis, what is central is that, under certain conditions, law *does* create moral reasons for action. The difference may seem slight, but it is also significant.

NATURAL LAW AND LEGAL POSITIVISM

Jurisprudential debate concerning the nature of law is often thought of as a long-running battle between two schools of thought: the rival camps of "natural law" and "legal positivism". The natural law tradition has always emphasised law's groundedness in justice and the common good, while legal positivism has tended to emphasise law's basis in authority. Each tradition contains a great deal of complexity, however, and the idea of some simple single issue that divides the two camps is deeply misleading. To begin sorting out some of the complexity, a certain historical perspective is necessary.

The main (classical) tradition of natural law theory stems from Aristotle and Aquinas, and its principal modern exponent is

Finnis. Indeed, one of the central claims of this tradition is succinctly explained by the opening passage of Finnis's book, *Natural Law and Natural Rights*:

> "There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy."

This type of natural law theory begins by seeking to understand what is good for human beings (what counts as human flourishing); such inquiry establishes that human goods can be realised only in community, but the existence of community requires the co-ordination of human conduct. To order human conduct in appropriate ways it is necessary to have laws that are established and enforced by authority. Human communities will require conventions that establish certain authoritative sources of law. We cannot, however, understand the real nature of law by simply describing the existence of such institutions of enactment and enforcement. To understand law's nature we must understand how law is the answer to a problem set by "practical reasonableness": we must understand how certain human goods "can be secured only through the institutions of human law". When we have understood the problem, and seen how law is the solution, we have understood law's nature.

This approach suggests that law's nature is to be understood by reference to what Finnis sees as its "focal" instances, where law serves the common good. Situations where the institutions of law are employed as instruments of oppression and injustice are real enough: but they are to be understood by the way in which they diverge from (and resemble) the "focal" cases where law serves the common good. They are degenerate instances of law, and will be inherently misleading if taken as a guide to the general nature of law.

The "classical" tradition of natural law stemming from Aristotle and Aquinas began to meet stiff opposition in the seventeenth century, for reasons that played a large part in our discussions earlier in this book. Aristotelian political and jurisprudential thought centred upon notions of excellence and "the good": political and legal institutions were to be comprehended and evaluated by their capacity to foster human flourishing. Post-Reformation Europe, however, appeared to lack the shared notions of the good that such an approach might seem to presuppose. Forms of political thinking began to emerge

that sought to entrench a distinction between the juridical realm of justice and rights (on the one hand) and the ethical realm of virtue, excellence and the good (on the other).

Two of the most important figures in this development were Grotius and Hobbes. Both of them rejected (wholly or in part) Aristotelian approaches, while both of them invoked notions of natural law that avoided reliance upon a shared notion of excellence or the good. Yet, in spite of these similarities, Grotius is thought of as one of the major figures in the natural law tradition, while Hobbes is often thought of as an originator of legal positivism.

Grotius regards law as the set of principles defining individual rights. Such rights are not derived from some notion of the common good, but are (in effect) domains of self-ownership, within which one may order one's own actions.[1] One has a right to advance one's own interests, but only provided that the rights of others are not infringed.[2] Actions that encroach upon the legitimate domain of another are violations of right. The picture presented by Grotius is therefore one of a realm of non-overlapping rights: when one acts within the scope of one's rights, one cannot, in doing so, be violating the rights of others.

The position of Hobbes is quite different. Hobbes *contrasts* "right" and "law", saying that they differ as much as do "obligation" and "liberty': for "Right consisteth in liberty to do or forebear; Whereas Law determineth, and bindeth to one of them."[3] For Hobbes, rights are inherently conflicting: each person in the state of nature has a right to everything, "even to one another's body."[4] Law for Hobbes is necessary to make social order possible, but in doing so it does not fulfill the requirements of any underlying structure of rights: it simply restricts or abrogates rights. For Grotius, on the other hand, rights indicate the possibility of a non-conflictual social order; positive law should trace out the content of non-conflicting rights, and it presents a systematic structure in so far as it reflects that order.

When Hobbes is thought of as a legal positivist it is because and in so far as he emphasises the need for authority to establish rules that create boundaries between otherwise conflicting

1 *De Iure Belli ac Pacis* 1.1.5.
2 Grotius, *op. cit.*, 1.2.1.6.
3 Hobbes, *Leviathan* Chap.14.
4 *loc. cit.*

interests. For Hobbes it is the authority of the legislator that makes a rule a law, and not the justice or reasonableness of the rule. Grotius does not deny the need for law-making authority, but he thinks that law should properly embody and reflect an ordering of rights (as non-overlapping domains of liberty) that is prior to and independent of legislative authority. Thus, for Grotius, law embodies principles of moral reason, and is not a product of authority alone.

Like the exponents of the classical, Aristotelian, tradition, both Grotius and Hobbes are offering prescriptive arguments. That is to say, their arguments are meant to have a bearing upon what we ought to do. The point is to demonstrate that law has a certain moral authority (in virtue of its connections with human flourishing, or with our pre-existing rights, or in virtue of the need to discipline the clash between conflicting interests).

Modern legal positivism, of the kind we will examine in the next chapter (on Hart), is somewhat different. Modern legal positivists do not see themselves as offering a prescriptive argument about law's moral authority. They are trying to offer a way of understanding law's nature that sets on one side all moral issues. In effect they are saying that to understand law's nature is one thing, to evaluate it as morally good or bad is another. Once we have (under positivist guidance) "clarified" our "concept" of law, we will be better placed to think clearly about such issues as the moral authority of law and our obligation (if any) to obey: but legal positivism of Hart's type is not itself intended to propose answers to such questions.

This suggests a very fundamental contrast between the long tradition of philosophical reflection upon law (Aristotle, Hobbes, etc) and the narrower and more antiseptic approach of modern positivists. The great classics of the philosophy of law viewed law as an expression of human nature and the human condition; an understanding of law's nature formed for them but one element in a broader moral and political philosophy. Many modern legal theorists, by contrast, have seen their enterprise as one of "conceptual clarification" the object of which is to provide us with a more transparent, systematic, and univocal set of concepts in terms of which substantive moral and empirical questions can be better formulated and addressed. If legal theory is conceived in this way, there is room for scepticism about its value, and (as we shall see) theorists such as Dworkin have voiced such scepticism.