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# How to Speak the Truth

**Timothy A.O.Endicott**·

Abstract

Some important problems in the theory of legal interpretation can be resolved with three techniques that John Finnis used in *Natural Law and Natural Rights* to address a methodological problem in jurisprudence: (1) *The analogy principle:* The application of a word such as "friendship" or "law" is not based on a set of features shared by each instance, but is based on similarities of a variety of kinds, seen by the people who use the words as justifying the extension of the word. (2) *The paradigm (or central case) principle:* You cannot understand a word like "friendship" or "law" without seeing what counts as a *good* instance of friendship or law. (3) *The context principle:* What counts as a good instance depends on the context in which the word is to be used, and on the concerns and purposes which justify the use of the word.

*Sapientis est non curare de nominibus*.[1]

So says Thomas Aquinas: the wise are not preoccupied with words. Yet words are remarkably useful techniques, and the use of language is an art. The wise need to master those techniques and that art—not only to articulate their wisdom, but to learn it in the first place. So language is of the first importance to lawyers and to legal philosophers: to speak the truth, you have to use words; in fact, you have to use words *well*.

Aquinas did not disagree with any of that; it is actually consistent with his point.[2] Language is essential for human understanding, yet it also offers endless possibilities for pointless quibbles, vain disputation, and equivocations of all kinds. Words are crucially important in a way, and not in the least important in another way. It can be surprisingly difficult to see the difference.

John Finnis began *Natural Law and Natural Rights* by explaining why legal philosophers need a sensitive understanding of the nature and uses of words. His argument can be extended. Lawyers need the same forms of understanding in order to use the language of

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[1] II Sent. D. 3 q.1 a.1 c; cited in John Finnis, *Aquinas* (Oxford: Oxford University Press,1998), 52.

[2] See Finnis ibid.

the law. Finnis's basic methodological principles in jurisprudence, I will argue, offer elements of an account of the relation between the law and the language that authorities use to make law and to state the law. Some important problems in the theory of legal interpretation can be resolved with the techniques that Finnis uses to address a methodological problem in jurisprudence. Those techniques are useful in jurisprudence because they are general principles of the meaning of words.

That is my argument in a nutshell; to unpack it I will outline the methodological problem in jurisprudence that Finnis identified, and the techniques he offered to address it (section 1, 2). Section 3 explains how those techniques can be (and are) used in legal interpretation. Section 4 addresses an apparent objection to the argument. General principles of legal interpretation have implications in turn for the general theory of law, and I will outline the implications of the proposed principles in section 5. My conclusion is that, in order to speak the truth –not only in jurisprudence, but in the practice of law and, in fact, generally— you need to be able to do what Finnis describes in Chapter 1 of *Natural Law and Natural Rights*.

## 1. "Selecting Concepts" –Can you *do* that?

The methodological problem that Finnis identifies is one of "selecting concepts" for a general theory of law.[3] The problem has a paradoxical air: it suggests that the theorist can pick and choose his or her concepts. But if law (for example) is a social practice, then the job of the theorist is not to select *a* concept, but to elucidate *the* concept that participants in the practice share. There is not a variety of concepts available for the choosing, but *one* concept—*of law*—that needs explanation. It seems that a theorist who wants to give an explanatory account of a human practice cannot invent new concepts. The task is to give an account of the concept that the people involved in the practice (including the theorist) already have. That is the implication of the approach that Hart took in his book *The Concept of Law*. His emphasis on the "internal" aspect of rules suggests that it is not up to the theorist to create concepts; the theorist needs to get a clear view of the shared concepts that are part of social life.[4]

Unless there is no single shared concept—no such thing as *the* concept of law—so that the theorist has to make something up. But if that is the case, the theorist is doomed! If there is no such thing as *the* concept of law, shared and understood among participants in legal practice, then there is no reason to think that other people engaged in the practice will understand the theorist's contrivance. If Finnis selects one concept, and another theorist selects another, they will be left without the conceptual equipment to agree or to disagree with each other, and theoretical debate will stymie itself.

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[3] *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 5 [I will refer to that book with page numbers in parentheses in the text]. Cf. the subtitle of the first section of the book: "The formation of concepts for descriptive social science", and cf. also "selection" (15) or "formation" (16) of concepts, "concept-formation" (17); "formation of general concepts" (18).

[4] *The Concept of Law* 2d ed. (Oxford: Clarendon, 1994); see in particular 89-91.

Yet Finnis is no sceptic about the concept of law, or about legal theory. And the methodological work in Chapter 1 of *Natural Law and Natural Rights* is patently intended to build upon and to take advantage of Hart's insights concerning the importance to the theorist of the internal point of view toward legal practice. Like Hart, Finnis wants to point out the salient features of law, not to expose the impossibility of legal theory. How do we reconcile that approach with the idea that the theorist has to "select concepts"?

The reconciliation lies in the purposes of the theorist, and in the nature of the subject-matter. That matter, being a complex variety of aspects of human practices, presents the theorist with a potentially bewildering task of deciding how to find or to impose an intelligible order or pattern. Since the practices are *human* practices, the subject-matter includes the participants' own categorizations and self-understandings, which will be reflected in the use of terms such as "law". *Those* parts of the subject-matter seem to offer the theorist a set of tools of classification that will serve the purpose of making it all intelligible. But as Finnis points out, the participants' "conceptions of law… are quite varied", and "the principles on which labels are adopted and applied… are not uniform" (4). So the theorist cannot bring order to the material simply by asking what the participants in the practice are disposed to call "law".

Let's call a theory that tries to do so a "dispositional theory of law". To elucidate the concept of law, a dispositional theory would ask how people are disposed to apply the concept of law. Such a theory would be doomed. The participants form their dispositions to use the word "law" in this way or that on the basis of judgments (or presuppositions) as to the point of using such a term. The theorist who does not make his or her *own* assessments will be faced with what Finnis calls "a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies" (17). The problem is not that a dispositional theory would pay too much attention to people's dispositions. The problem is that it would have no method for making sense of their dispositions.

That is the predicament that *requires* the theorist to do what Finnis calls "selecting concepts". Why doesn't this predicament demand a sceptical view—that a theory is necessarily the mere contrivance of the theorist? Finnis offers an answer. He asks if the need for evaluative work subjects descriptive jurisprudence to "every theorist's conceptions and prejudices about what is good". He answers "Yes", in the sense that there is no escaping the need for judgment, but "No",

> in so far as the disciplined acquisition of accurate knowledge about human affairs …is an important help to the reflective and critical theorist in his effort to convert his own (and his culture's) practical 'prejudices' into truly reasonable judgments about what is good… (17)

The possibility of learning from other people is not the whole the answer. We might say that the larger answer is simple: a good (descriptive) account of a human practice such as law needs to rest on evaluative judgments, but that principle does not support any kind of scepticism about legal theory, because it is not impossible for a theorist to make sound

evaluative judgments ("truly reasonable judgments about what is good"). And a good theory will be intelligible to other theorists and to people engaged in the practice, because it is possible for *them* in turn to understand (and to accept, or to reject) those judgments. I think we should conclude that Finnis's account of methodology in social science does not abandon Hart's "internal" approach, but in fact starts with that approach and makes an important advance on it.

What I have said about the necessity of evaluative judgments does not quite answer the puzzle I started with: isn't it the job of the theorist to elucidate *the* concept of law? Should we conclude that there is no such thing as *the* concept of law (so that Hart's book has a nonsensical title)? Finnis says some things that seem to support that view. He mentions "Hart's description ('concept') of law" (7), as if Hart's book ought to have been called *My Concept of Law*. And in a recent article Finnis writes,

> …despite the definite article ('the'), Hart's book… does not for a moment try to establish that there exists in some community, large or small, a concept of law which is entitled to be called 'the' concept of law. Hart might more accurately, if less elegantly, have called his book "A New and Improved Concept of Law".[5]

I think a title of that kind would not have been even a little bit more accurate. The reason is that *concept* is an analogical concept—in a sense of "analogical" that Finnis himself has developed, and which I will explore below. A concept is a technique of classification. Techniques vary extravagantly in their elaboration, structure and determinacy. To have a mastery of the concept of law, in one sense of the word *concept*, is to know the English language and to be able to distinguish between different senses of *law* (e.g. physical laws and the law of a state). It is that mastery that enables people (including legal philosophers) to talk to each other *about law*. And that concept of law is perfectly entitled to be called "the" concept of law. Mastery of the concept (in that sense of "concept") does not solve any philosophical problems—it is a mastery shared by people who disagree about the nature of law, and even about the nature of concepts.

In another sense, to have a mastery of the concept of law is to have a solution to all the problems of jurisprudence. There is no shared concept in that sense, and no human being has a full mastery of the concept in that sense.

But the title of Hart's book is perfectly accurate: the book is his attempt to identify the salient features of law in a way that claims to elucidate the concept of law—a technique of classification that we all share.

## 2. The Philosophical Device - Homonymy

Finnis's methodological problem arose not simply out of the variety of the phenomena, but also out of the ways in which participants in a social practice use words. They apply

[5] "Natural Law: the Classical Theory" [forthcoming in Coleman and Shapiro eds., *Handbook of Jurisprudence and Legal Philosophy* (Oxford: Oxford University Press)].

words to various instances on the basis of similarities or analogies which vary as their concerns and their judgments vary. Finnis develops his methodology on the basis of a "philosophical device" which Aristotle used to explain the analogical use of words: the identification of what Finnis calls "*focal meaning* (*pros hen* or *aph' henos* homonymy)" (9).

Two things are homonymous if we use the same word for them, but in different senses. Think of pale blue, an easy jog, and a feather: we call them all "light". Or think of a pig pen and a fountain pen. The two sorts of pen are *merely* homonymous—there is no rationale for the fact that we call them both "pens".[6] Pale blue and a feather are not *merely* homonymous, because it makes a certain sort of sense to call both "light".

Finnis appeals to Aristotle's point that people use the terms of any social science homonymously, just as they use the word "light" homonymously. Those terms are applied on the basis of a variety of similarities among instances –similarities made salient by the concerns that justify the application of the term. The legal theorist needs to bring order to such a pattern of use, by identifying the "central case" of a term in a way that pays attention to the concerns that justify the theorist's reflections (and give the theorist reason to theorize in the first place).

Aristotle outlines his idea of homonymy most explicitly in his account of another aspect of human affairs, friendship. Aristotle points out that, to understand friendship, you need to understand the value of friendship. But there are varieties of value, and corresponding varieties of friendship. Those varieties of friendship are not *merely* homonymous. They share the same name by reason of their relations to a *single, primary* form of friendship. Friends are valued because they are good in themselves, or because they are useful, or because they are pleasant; the primary form of friendship is that in which the friends value each other simply for themselves. Aristotle points out that it would be a philosophical mistake, a fallacy, to say that other sorts of friends are *not* friends at all: the features of the primary form of friendship are not necessary and sufficient features of friendship. And we will not fully understand friendship if we only look for a lowest common denominator that can be found in every case. Instead, other forms of friendship can be understood *as* forms of friendship on the basis of the similarities they bear to the primary form. And all the forms are homonymous by reason of such similarities.

Imagine a dispositional theory of friendship. It would be misshapen because of the distracting prejudices and biases that distort people's dispositions—so Aristotle says that the form of friendship that people are most disposed to recognize is that based on the usefulness of others.[7] What is more, a dispositional theory of friendship would actually be

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[6] Alternatively, we can say that they are not homonymous at all, because "pen" and "pen" are two *different* words. We do not need to resolve the linguistic question of the nature of a word; any plausible approach to the question will conclude that a word such as "light" is still a single word even if it is used homonymously. In fact, grammarians sometimes use the term "homonyms" to refer to words that are spelled the same and pronounced the same, but are *different* words—so that "pen" is homonymous but "light" is not. So "homonym" is a word that is used homonymously in Aristotle's sense.

[7] Eudemian Ethics VII, 2, 1236a 33.

incoherent. The dispositions that people have to apply the term "friend" are guided by the purposes (purposes that are more or less conscious, more or less articulate, more or less well-conceived) for which they are disposed to apply the term. A question of the form, "are people disposed to apply the term friendship to *this* relationship?" is of no use in an inquiry into what friendship is, if it is abstracted from the purposes for which people might use the term.

So to understand friendship, it is not enough to know what others do, and to explain friendship it is not enough to report what others do. You have to see the value of a *good* friend: "friendship" in its focal meaning refers to a relationship based on that value.

Two principles emerge from Aristotle's discussion of friendship: Finnis used those principles to make a breakthrough in the methodology of jurisprudence. I will argue that the same principles are basic elements of an account of how to apply the language of the law. But I think we should add a *third* principle, to make sense of the first two.

1. *The analogy principle:* The application of a word such as "friendship" or "law" is not based on a set of features shared by each instance, but is based on similarities of a variety of kinds, seen by the people who use the words as justifying the extension of the word.

2. *The paradigm (or central case) principle:* You cannot understand a word like "friendship" or "law" without seeing what counts as a *good* instance of friendship or law.

3. *The context principle:* What counts as a good instance depends on the context in which the word is to be used, and on the concerns and purposes which justify the use of the word.

Why do we need the third principle? Because Aristotle's example of friendship is potentially misleading. The special nature of that concept makes it especially attractive to understand the concept with respect to a single primary instance (in which the friends value each other for their own sake). The idea of such a primary instance is built into the label "*pros hen* ['by reference to one'] homonymy", which Finnis used when he borrowed the technique of homonymy (9) for his methodological purposes. But for the word "law" there is no such single primary—as Finnis points out, the word is used for the law of nature, sociological laws, laws of grammar (and he could have added, e.g., the law of gravity, laws of thought and Murphy's law). Aristotle's phrase "*pros hen [proton]*" (by reference to a single [primary] case), then, is potentially misleading.

Finnis is aware of the variability of central cases with context; in fact, he builds that idea into his central cases method, stating his "broad sense" of analogy as follows:

> …a term is analogical when its meaning shifts systematically (i.e. according to some principle or rationale) as one shifts from one context or use to another. (20)[8]

## 3. The legal device

I will argue that the philosophical device (which I take to be the combination of the three principles) is also a legal device. The same approach to the meaning of words applies by the same reasoning, not only to the central terms of legal theory, but to the terms that legislatures use to make laws, and that judges use to state the grounds of their decisions. So the three principles are also principles of the application of the language of the law, and basic elements of an account of the role of language in law. Finnis's methodological work offers some basic principles governing what rights and duties are created when lawmakers use words to confer rights and to impose duties.

The reasons for the applicability of the principles are similar to the reasons for Finnis's methodology. Recall the predicament of the theorist, who is faced (i) with a "newsreel"[9] or "vast rubbish heap" (17) of human practice, and (ii) with a variety of "incommensurable terminologies" that people have used in describing the practice. The theorist knows that the use of those terminologies is guided by analogies that the participants in the practice draw for various practical or theoretical purposes; no intelligible account of affairs is possible until the theorist stabilizes the terminology to some extent, and does so by reference to a reasoned understanding of the purposes for which the term is to be used.

Now compare the predicament of someone (say, a judge) called upon to give effect to the language of a statute. The judge may face a similar predicament to that of the theorist: there may be alternative possible ways of applying the language of the statute, based on a variety of analogies that participants in legal practice have drawn, or might draw, for various practical purposes. Then no useful understanding of the term's application is possible until the judge stabilizes the terminology to some extent, and does so by reference to a reasoned understanding of the purposes for which the term is to be used.

Ricky and Angela Puhlhofer lived with their two-year-old and their baby in a bed and breakfast in London. They had one bedroom in a house, with no cooking facilities and no laundry facilities. They shared a bathroom with other guests. The double bed, the single bed, the baby's cradle and the dressing table left no noticeable floor space. They applied for housing under Britain's Homeless Persons Act 1977, but their local authority told them that they were not homeless. Section 1 of the Act defines people as "homeless" if

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[8] And recently he has written, "There is no suggestion… that to understand *any* term, one must identify one instance (or type of instance) as central or paradigmatic, and one meaning as focal. On the contrary, the identification of meanings as 'focal' and instances or types as 'central' is always *relative* to some viewpoint or specific line of inquiry or focus of interest, and so has a particular importance in the social sciences, insofar as their subject matter is constituted by what people have chosen to do." See "Natural Law: The Classical Theory", footnote 34.

[9] "Natural Law: The Classical Theory".

they have no "accommodation", and the local authority said that the Puhlhofers had accommodation at the bed and breakfast. The Puhlhofers challenged the decision on the ground, as the House of Lords put it, that they *were* homeless because they had "no 'accommodation' properly so called" (516).[10]

They lost. The House of Lords said that accommodation was different from adequate or reasonable or appropriate or decent accommodation, and declined the invitation to read any such evaluative consideration into the statute. The local authority had to determine whether the Puhlhofers had "what can properly be described as accommodation within the ordinary meaning of that word in the English language" (517).

At first glance, that decision may seem like bloody-minded English judicial literalism at its worst, and it may seem to run afoul of Aristotle's principles. If a word like "home" or "accommodation" is applied on the basis of various similarities among instances (the analogy principle), and if sense can be made of those similarities only by identifying a central case whose *value* can provide a standard of application (the paradigm principle), then it seems that the term "accommodation" cannot be applied on a reasoned basis without asking what counts as *good* accommodation, which is just what the House of Lords refused to do when it appealed to "the ordinary meaning… in the English language".

But in fact, the court's decision shows the Aristotelian principles at work. Lord Brightman said, "Clearly some places in which a person might choose or be constrained to live could not properly be regarded as accommodation at all; it would be a misuse of language to describe Diogenes as having occupied accommodation within the meaning of the Act." (517).

Why wouldn't Diogenes' barrel count as accommodation? It would not be improper to describe it that way simply because a barrel lacks what makes good accommodation good (any poor accommodation lacks that). It would be improper to call Diogenes' barrel "accommodation" because it *so radically* lacks what makes good accommodation good, that the point of using the word is lost. It makes sense for Lord Brightman to say that a barrel would not count as accommodation (even if Diogenes lives in it). But it only makes sense in light of a conception of the value of accommodation, an understanding of what counts as good accommodation. The difference between the Puhlhofers' room and Diogenes' barrel is a difference of degree—a difference in the degree to which each resembles a *good* home. The question whether you have accommodation is not the same as the question whether you have good accommodation. But both questions turn on evaluative considerations of the same kind. It is intelligible to call something "accommodation" at all only because of the important similarities it bears to good accommodation. An answer to the question of whether the Puhlhofers had accommodation is only intelligible in the light of an understanding of what counts as good accommodation.

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[10] *R.* v. *Hillingdon L.B.C. ex p. Puhlhofer* [1986] 1 A.C. 484 (HL).

So the Aristotelian principles for "formation of concepts" give basic elements of an account of the legal effect of the term "accommodation". The principles may seem to offer a theory of legal interpretation. But that would be a mistaken conclusion if, by "theory of interpretation", we mean a general account of the legal effect of language. There is no such thing as a theory of that kind, I think. If I am right, Finnis's methodology applies *very generally* to language; it would be an element in a sound theory of meaning, except that it shows that there is nothing like a "theory of meaning" in the sense of a general, explanatory account of the correct application of words. We would have such a theory of meaning if, for example, we could account for words as applying to just those objects that people are disposed to apply them to. But we have seen that such a theory faces fatal objections. The nature of those objections suggests that there is no other such theory waiting discovery: the basic principle of the homonymous application of words is a fundamentally non-theoretical principle. It is inconsistent with a general explanatory account of what makes words apply or not.[11]

The context principle is the reason why there is no such theory.

***The effect of the context principle***

There can be no general account of what counts as "accommodation" for legal purposes, because legal purposes vary. Consider a reason for thinking that *Puhlhofer* was a good decision. As the House of Lords said, the purpose of the Homeless Persons Act was to provide a "lifeline of last resort" for the homeless, and the Act ran alongside a scheme providing council housing to people whose housing was inadequate or too expensive. A higher standard of what counts as "accommodation" would have distorted that scheme by letting people with *badly* inadequate housing (like the Puhlhofers) jump the queue, ahead of people with less dramatically inadequate housing who had been waiting a long time. This is not merely a consequentialist argument, to the effect that letting the Puhlhofers succeed would have had bad effects on other people. It is an argument as to what *counts as "accommodation"* under the Act- a question that can only be answered (as the Aristotelian principles indicate) in light of the purpose for which the word is best understood to have been used.

That argument shows why there is no reason to expect a general account of the legal effect of the language that lawmakers use. What counts as "accommodation" depends (among other things) on the purpose and structure of a scheme of regulation using the term. The context principle means that, in different conditions, it would be right for a court to adopt a quite different, much higher or lower standard for what counts as accommodation. If a statute gives the Home Office a duty to provide asylum seekers with accommodation, for example, it would be right for a court to hold that the duty is not discharged if the Home Office gives a family of four a room like the Puhlhofers' room.[12]

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[11] Of course, *theory* is a word applied homonymously, and there are other senses of the word in which it makes perfect sense to speak of a "theory of meaning"- and to think of homonymy as a fundamental principle in the theory of meaning.

[12] In fact, the Immigration and Asylum Act 1999 c.33 provides support for asylum seekers who are "destitute", and destitution is defined to include the lack of "adequate accommodation" (see ss.94-96).

By contrast, consider the right in Article 8 of the European Convention on Human Rights, to respect for the "home". If the government claimed that it could snoop in Diogenes' barrel while he is out, it would be absurd if they could get away with it by making the very claim that makes sense in the *Puhlhofer* context—that "it would be a misuse of language to describe it as a home". His barrel would not even be *less centrally* a "home" for the purposes of the Convention. What counts as a misuse of language (*and* what counts as the "ordinary meaning" of a word in the English language) depends on the purposes for which the language is being used. So the analogy principle, the paradigm principle, and the context principle are principles of legal interpretation. What counts as an instance of, e.g., accommodation, can only be understood by reference to what counts as a good instance of accommodation, and what counts as a good instance depends on the context.

When I say that these are principles of legal interpretation, I do not mean that they always guide legal interpretation. In *Partridge* v. *Crittenden*, [1968] 1 WLR 1204, the defendant had advertised bramblefinches for sale in a newspaper. He was acquitted of the offence of "offering for sale" under the Protection of Birds Act 1954, on the ground that an advertisement was not an offer, but an invitation to treat. An "offer" in contract law is a communication which enables the offeree to conclude a binding contract by acceptance. Lord Parker CJ said that if advertisements were offers, advertisers could end up with a legal obligation to sell more goods than they had. Whatever the merits of the contract law analysis,[13] I think the court distorted its decision, by interpreting the word "offer" in the criminal prohibition as if it had to mean the same as it means when it is used in stating the doctrine of offer and acceptance in contract law. Aristotle could have decided *Partridge* v. *Crittenden* better, explaining the meaning of "offer" by reference to the purposes of the Protection of Birds Act, and holding that an offer for the purpose of the criminal prohibition does not have to be such a communication that an offeree could conclude a contract by accepting it. You cannot tell what the central case is until you take into account the context, so that the notion of an "offer" in contract law and the best interpretation of the word "offer" in the criminal prohibition may not even be related to each other as central case and secondary case. Although the uses of the word in the two contexts are related, there may not be a single case of an offer which is central in the same way in both contract law and criminal law. A central case of "offering for sale" under the Protection of Birds Act might be part of a transaction with no contractual force. That claim is consistent with what Finnis says—but we should remember not to put too much emphasis on Aristotle's notion of "*pros hen*" homonymy, which (so far as his brief and suggestive remarks go) really does presuppose that there is one central case by reference to which all the term's applications can be understood. Aristotle does not point out that you need an account of the purposes with respect to which an instance is to be identified as central. Finnis, however, does so;[14] his methodological principles need to be read in the light of this point.

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[13] But for a more enlightened American approach see *Lefkowitz* v. *Great Minneapolis Surplus Stores*, 86 N.W. 2d 689 (1957).

[14] See footnote 8, above.

Although you need to pay attention to context before you can apply a word rightly, there is no guarantee that courts will always do so, and when they do not, the legal position of the parties is determined by what they do. The court ought to have decided *Partridge* differently; but after (and because of) its decision, to advertise bramblefinches was *not* to offer them for sale under the Protection of Birds Act. So the three principles I have identified are principles of good legal interpretation, not facts about what judges do or are likely to do, and not necessarily principles that tell you the legal effect of the language of statutes or constitutions or other instruments. But because they are such important principles of interpretation, a legal system that persistently ignored them would be badly off. You might say that it would not really achieve the rule of law, because it would be insensitive to the principles that are needed to make sense of the law as ruling the life of the community.

Note, incidentally, that this conclusion means that a dispositional theory of what counts as "accommodation" (a theory saying that what counts as accommodation depends on what people are disposed to call "accommodation") would be doomed. It would be an *incoherent* theory, unless restricted to dispositions of people to apply the term in the relevant context, for the appropriate purposes. And then it would be a *bad* theory, unless restricted to the dispositions of people who make sound judgments of the purposes that are to be pursued in a particular context, and make sound judgments as to what it takes to pursue those purposes well. You cannot even say whether Diogenes had a home or not (as a matter of mere description, never mind whether it was a good place) without being able to do what Finnis says a theorist needs to do with theoretical terms. You cannot speak the truth without knowing the meaning of your words, and you do not know the meaning of your words unless you can make the evaluative judgments that are needed to use language analogically. Speaking the truth is not generally mysterious or impossible, because it is not generally mysterious or impossible to make those judgments. And, of course, you do not need a philosopher to help you, and you do not even need to do philosophy to make those judgments. A philosopher of language cannot help you to speak better, or to speak the truth- except, if he or she is a good philosopher, to speak the truth about language.

## 4. An Objection?

This whole argument may seem to face a glaring problem, which I will call "the objection".

The paradigm principle is the principle that you cannot understand and use a word like "friendship" or "home" or "law" without seeing what counts as a *good* friend, or a good home, or a good law. The objection is that such a principle can only apply to a word for something good. All instances of some words are bad –think of "murder". It must be right to say that you cannot fully understand "friend" unless you know the value of a *good* friend, but it would be absurd to say that you cannot fully understand "murder" unless you know the value of a good murder. Moreover, there are many words whose instances are not particularly good or bad just in virtue of their being paradigm instances: think of

colour terms, or words for quantities or textures or spatial location—all of which are used homonymously. Think of categorical terms like "action" or "condition" or "state"—all of which are used homonymously. An action may be good or bad, and it does not become less truly an action if it is bad, or even if it is radically bad.

So we may say that because friends and homes are good things, even not-so-good friends and inadequate homes can (only) be identified as such by their resemblances to good friends and good homes. But we cannot generalize. You can only identify murders if you understand just what is *bad* about central cases. And you can identify actions as actions without making *any* judgment as to what counts as a good action. Because we cannot generalize, we have come up with no general principles of legal interpretation. What is more, Finnis's methodology in jurisprudence is suspect, because it only begs the question if it assumes that "law" is like "friend" or "home" (central instances of which are good) rather than like "murder" (central instances of which are evil), or "action" (central instances of which may be good or bad without being more or less central).

This seemingly dramatic array of objections to the paradigm principle is a healthy reminder of the variety of words, and a warning against the temptation to overgeneralize. But fortunately, it is not actually any objection to my argument at all. There are two reasons.

First, the purported objection accepts the need for evaluation in determining the application even of words such as "murder". You need to understand the evil of the crime in order to have a grasp of the nature of murder (and of the application of the word). In order to distinguish it from manslaughter, and from various forms of justified homicide, you need to understand not only that it is a very bad thing, but also what is specifically bad about it. You need to be able to see, for example, whether killing to put a human being out of their misery *deserves* to be described as "murder", and whether an unintentional killing done in the course of a felony *deserves* to be called "murder". Those forms of judgment are evaluative, just as the forms of judgment needed in the *Puhlhofer* case were evaluative. So the paradigm principle needs to be stated carefully, but no objection to that principle lies in the fact that law uses words such as "murder" to characterize liability for wrongs.

Secondly, there is no objection to the paradigm principle in the fact that the instances of categorical words such as "action" (and other sorts of words) are neither good nor bad merely in virtue of being instances. Lawmaking has purposes, and there is no way to make sense of an act of legislation except as an action directed to achieve some purpose. Legislation is directed to achieve something. It never restricts itself to categorical terms such as "action"; it necessarily uses terms such as "home" and "offer" to identify the goods that it is designed to attain or the ills it is aimed against. I do not at all mean to say that all laws necessarily pursue good purposes. But laws can only be understood as laws if they are understood as being directed towards purportedly good purposes. All legal systems use purposive words like "home", and not merely categorical words like "action".

So my argument—that the three principles are general principles of legal interpretation—is safe from the objection. The objection only shows that the paradigm principle needs to be stated carefully (and, no doubt, in a more elaborate form than I offered above). Is Finnis's methodology in jurisprudence similarly safe from the objection? That is a harder and more interesting question which I will not try to answer here. But I will try to say what the question is.

Right from Chapter 1 Finnis's book defends a form of natural law theory, by arguing that the evaluative judgments needed to make sense of legal practice (and to elucidate the concept of law) must be those of the person who makes sound moral judgments. That person, according to Finnis, sees how legal ordering promotes the good of a community (and thereby sees the value of law). As the objection suggests, those claims would merely beg the question if they were based on a mere presupposition that "law" is a word for something good (like "home"), rather than a word for something bad or indifferent (like "murder" or "action").

Finnis does not beg the question. Instead of assuming that law is a good thing, his whole book argues that legal ordering is distinctively valuable to a community in a way that concerns the practically reasonable person. The question is whether law *in virtue of being law* is good for a community; Finnis offers an answer to that question. So he does not beg the question, but he answers it in a controversial way.

To understand the controversy, it may help to distinguish two forms of value: what we might call specific value, and non-specific value. Specific value makes something a good instance of a category. Non-specific value makes it a good thing. Even murder has its specific value—what makes the killing of Thomas Becket a good example of a murder—though no murder has any non-specific value.[15] Think again of the word "offer", in the context of contract law. Offers, you might say, are neither good nor bad in themselves—they have no general non-specific value. The specific value of an offer is effectiveness in the communication of a proposal that can be accepted. So an unclear communication, or the clear communication of an equivocal proposal may count as an offer, but only more or less peripherally, and only in virtue of its resemblance to clear and unequivocal offers (which are central cases of "offer"). And a radically unclear or incoherent communication is no offer at all.

The non-specific value of an offer is that it is worth accepting. An offer may be a paradigm offer (a very *good example* of an offer) without being a good offer. An offer of sale is a bad offer if the price is too high. But it is no less truly an offer.

Does Finnis's methodology support his natural law theory in the way that he claims in Chapter 1? We might say that it does, if and only if the promotion of the common good is part of the specific value of law, and not merely part of its non-specific value.

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[15] Note, incidentally, that even the instances of a categorical word like "action" (which have no intrinsic non-specific value) have specific value. In the case of "action" that value is the effectively intentional involvement of the actor—which makes joining-the-army a *better example* of an action than staying-on-the-sofa, and makes being-hit-by-a-meteorite not an action at all.

Before deciding whether the promotion of the common good is part of the specific value of law, it is very important to see that the mere fact that law does not always promote the common good does not answer the question. Supplying the living needs of a family is part of the specific value of a home, and yet there are inadequate homes. So the fact that law can be bad does not defeat natural law theory (in the way that Hart seems to have thought). Perhaps we could say that the paradigm principle applies to what we might call *purposive* words—words like "law" or "home". Law and homes have purposes, and we can only understand the word "law" or the word "home" if we see the purpose of law or of a home. Grant merely that the *purpose* of law is to promote the common good and, it seems, the objection fails as an objection to Finnis's methodology.

But we should not be too quick. Instances of some purposive words can be *very* bad at just what (in virtue of belonging to the category) they ought to be good at, and still be paradigms of the category. Think of "politics" or "government" or, to make the point more concrete, "political platform". A political platform can be radically bad at what political platforms ought to be good at—without losing its character as a political platform. The purpose of a political platform is internally related to the purpose of law: a platform is partly a proposal for action including making (and enforcing, and applying) law. And a political platform does not become less truly a political platform, when it includes proposals for political action that hinder or abandon what is good.

Of course, a platform *can* be bad in such a way that it is not a platform at all. In Britain, the Official Monster Raving Loony Party campaigns on a platform that has at various times included votes for pets, lowering the boiling point of water, and a ban on broadcasting the sound of doorbells and telephones on television.[16] The party's "platform", you might say, is not a platform at all. But that is not simply because it makes *bad* proposals for governmental action. It is because it is not seriously put forward as a way to run public life. The Raving Loony "platform" lacks the *specific* value of a political platform. The fact that a political platform is not for the common good does not in itself make it any less truly a political platform (any more than the fact that the price is too high makes an offer less truly an offer).

What about law? Is its specific value distinct from the non-specific value of promoting the common good? We can start by saying that the specific value of law includes conformity to the requirements of the rule of law. The law will not be 'legally in good shape', as Finnis puts it (270), if it is not prospective, open, clear, and stable. If it is to be law at all, it must have the characteristics that it needs if it is actually to regulate the public life of the community. Does a legal system have any non-specific value in virtue of meeting those requirements? That is the question that needs to be answered in order to decide whether Finnis's methodology supports his natural law theory.

I will not try to answer that question here, but I want to point out that the question is difficult and contentious because of a complication in the relation between the specific

[16] See http://www.omrlp.com.

value and the non-specific value of the instances of a purposive concept like "law". It may seem that the relation is simple: recall the example of offers. An offer has specific value if it clearly communicates a proposal for action capable of acceptance; it has non-specific value if it is worth accepting. The complication is that an offer may be such a bad offer that it is absurd—and then, *precisely because of* its lack of non-specific value, it begins to lose the specific value of an offer. You might say that an "offer" of five dollars for the Hope Diamond is no offer at all. The specific and non-specific value of offers are distinct (because there are bad offers that really are offers), but they are related (because there are "offers" that are not genuine offers *simply in virtue of being radically bad* offers). The complication even affects the relation between the specific and non-specific value of political platforms: a political platform stops being a political platform if it is *so radically* contrary to the good of the community that it is *absurd* to put it forth as a proposal for the community's action.

This complication shows the potential for controversy about Finnis's methodology: it is obvious that the law of a community can be unjust. Hart thought that that easy insight debunks natural law theory. But if the specific value of law is to regulate the life of the community, then that value is distinct from the non-specific value of law, but it is not unrelated. Just in virtue of regulating the life of a community, law cannot, e.g., be a technique for the mere extermination of the community. There are certain forms of non-specific value that law cannot lose without losing its specific value.

Just on the basis of these points, I think we can conclude that natural law theory should not claim that the law of a community can never work injustice (Finnis does not claim that). But no legal theory should claim, e.g., that law can have any content, or that no evaluative judgments need be made in distinguishing law from other social phenomena. Even these conclusions are controversial. And they leave ample room for controversy over the relation between the specific and the non-specific values of law.[17]

## 5. Back to the theory of law

I have argued that we can draw on Finnis's methodology in the theory of law, to clarify the way in which the language of the law should be (and often is) understood and interpreted. Of course, any such clarification has implications in turn for the theory of law.

You may think, in fact, that natural law theory has just won its battle with legal positivism. If you cannot tell what accommodation *is* without evaluative reasoning, then you cannot identify the law (that is, you cannot tell what legal rights and duties people have) without evaluative reasoning. So much for the positivist "sources thesis":

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[17] For a new contribution to the controversy (arguing that the value judgments that legal theorists need to make are judgments of importance and are not necessarily moral judgments), see Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart, 2001), esp. Chapter 3.

> All law is source-based. …A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.[18]

We can only decide whether the Puhlhofers had "accommodation" for the purpose of the Homeless Persons Act 1977 by evaluating the place where they live as *better* at achieving the purposes of accommodation than Diogenes' barrel was. So we cannot identify the content of the law without resort to evaluative reasoning.

It may seem that a legal positivist can rescue the sources thesis by saying that judges need to make such evaluative judgments only in borderline cases for the application of legal language—and that, as a legal positivist might say, they have discretion in those cases.[19] But no: even the application of "accommodation" in a clear case relies on evaluative judgments. The White House is a clear case of accommodation; still, the word "accommodation" only applies to it *because* it satisfies the evaluative tests that justify the use of the word "accommodation". The sources thesis seems to be contradicted even in the clearest cases of the application of laws stated in descriptive language.

But there is a genuine debate, which natural law theory cannot win so easily. That should be apparent from the facts (i) that Finnis actually accepts the sources thesis, and draws on Raz's work on authority and on the exclusionary nature of legal reasons (233-4, 255), and (ii) that Raz agrees that any theory of law must be based on evaluative judgments or presuppositions –the point on which my argument is based.[20]

Recall the distinction between specific value and non-specific value, and it will be easier to see why the need for evaluative judgment in applying descriptive language does not defeat the sources thesis. Even colour terms can only be applied on the basis of judgments of specific value. To judge whether the word "red" applies to the colour of a traffic light (to judge, that is, whether the light is red), is to make a judgment as to whether the colour of the light is *sufficiently* similar to paradigms of redness to *deserve* to be called "red".[21] But just to put it that way shows that the sources thesis is safe: the consideration that the light was red is still a source-based consideration. The point is not simply that it is easy to judge whether a light is red enough to be called "red". The point is that that evaluative judgment is not the sort of evaluative judgment that Raz excludes in his sources thesis, because it is not the sort of evaluative judgment that authorities claim to exclude. Both the questions "is the light red?" and "does the law require me to stop when the light is red?" can be answered without making any judgment as to whether it would be good to stop, or whether it would be good for the light to require it. It is just

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[18] That is Joseph Raz's formulation of the sources thesis, in "Authority, Law and Morality", published in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 194-195. Raz defends the thesis in that essay.

[19] As Hart suggests in *The Concept of Law*, 130-132.

[20] See Joseph Raz, "Intention in Interpretation", in Robert P.George, ed., *The Autonomy of Law* (1996) at pp.260-262, where Raz rejects the notion that a theory of interpretation must be value-free.

[21] And the judgment that the red of a stop light is a paradigm of redness is itself an evaluative judgment. Any judgment that an object is a paradigm is a judgment that the object is *useful* as a standard of comparison in the use of a term.

because those questions can be answered without such reasoning, that the law is capable of claiming authority. And it is only because it is capable of claiming authority that it is capable of carrying out the valuable coordinating function that legitimizes some claims of authority. My argument only shows that identifying source-based considerations requires evaluative reasoning, not that Raz is wrong to identify law as a set of source-based considerations.

It may seem that the problem for Raz is worse than that, because law does not only use tests such as redness (which can be applied without any evaluation that relates to the purposes of the law), but also gives, e.g., rights to housing for people who lack "accommodation", and prohibits "offering" bramblefinches for sale. The content of such rights and prohibitions can only be identified by engaging in evaluative judgment as to how the purposes of the law ought to be conceived. *That* form of evaluation, you may say, can only be carried out by engaging in the very same form of reasoning that, in Raz's theory, law excludes.

It is certainly true that, in order to decide what the sources have directed (and thereby, in Raz's terms, to identify the existence and content of a law), you need to understand the sense in which a word like "accommodation" or "offer" is used. But the existence and content of the rights in the Homeless Persons Act can still be identified without judging whether the local authority ought to give the Puhlhofers housing, or whether there ought to be any legal right to housing at all. This important point (which "legal positivists" have emphasized) remains: in English law, there was no legal right to housing for persons who had no accommodation, until Parliament *acted* to provide it. Parliament might not have provided a right to housing. Moreover, if the institutions of the law had been prepared to treat Diogenes' barrel as accommodation, then *because of that social fact*, it would have been false to say that Diogenes had a *legal* right to accommodation. Even if I am right to say that the court in *Partridge* v. *Crittenden* misinterpreted the Protection of Birds Act, it would be false to say, after that decision, that a vendor of bramblefinches might be liable for making an "offer" even if its action would not have counted as an offer in contract law. Courts in any jurisdiction may or may not make the (basically) sound evaluative judgments that Lord Brightman made, and because law is systematic, the courts' decisions determine legal rights and obligations.

There are, after all, different types of evaluative judgments. Raz's explanation of the nature of law is not undermined by the fact that evaluative judgments are necessary in order to identify the content of the law, as long as it is still possible for legal directives to have the exclusionary force that, in his theory of authority, they claim. Raz's theory is not undermined as long as the court in *Puhlhofer* can decide whether there is a legal right to accommodation, without answering the evaluative question, "should there be a right to accommodation?" And indeed the court can do so. But it needs to ask the related question: "what is the relevant sense of 'accommodation' for the purposes of this Act?"