



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property Law

Volume 2
Number 1 *2014 Student Articles Edition*

Article 2

2014

J.R.R. Tolkien Goes to Law School: Exploring Property Law Jurisprudence Through the Hobbit and Lord of the Rings Trilogy

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Colin P. Benton, *J.R.R. Tolkien Goes to Law School: Exploring Property Law Jurisprudence Through the Hobbit and Lord of the Rings Trilogy*, 2 Tex. A&M J. Real Prop. L. 25 (2014).

Available at: <https://doi.org/10.37419/JPL.V2.I1.2>

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J.R.R. TOLKIEN GOES TO LAW SCHOOL: EXPLORING PROPERTY LAW JURISPRUDENCE THROUGH THE HOBBIT AND THE LORD OF THE RINGS TRILOGY

By Colin P. Benton[†]

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I. INTRODUCTION

“Among the most misunderstood aspects of law and order are property rights.”¹

-Thomas Sowell

“[O]ne can learn a great deal of jurisprudence from the works of literature”²

-Richard A. Posner

For the last several decades, legal scholars have used works of literature to gain a fuller understanding of the nature and purpose of law.

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The author would like to thank the following people for their support: Sarah Benton, John & Diane Benton, Doug Groothuis, Rick Maes, and Ryan Kearns.

1. THOMAS SOWELL, *BASIC ECONOMICS* 422 (4th ed. 2011).

2. RICHARD A. POSNER, *LAW AND LITERATURE* 21–22 (3d ed. 2009).

This field of study is known as Law and Literature.³ Proponents of this new discipline of legal scholarship endeavor to use literature as a unique lens through which legal issues can be studied, understood, and applied.⁴ However, some Law and Literature detractors either question the legitimacy of this new academic project outright, or at least require more convincing.⁵ Indeed, even among Law and Literature supporters, there is a wide spectrum of opinions regarding the nature and purpose of Law and Literature.⁶

This Article offers J.R.R. Tolkien's classic stories, *The Hobbit* and *The Lord of the Rings Trilogy*, as useful for Law and Literature scholarship because they have a large audience of all ages, who have either read them in books or seen them as movies. Their widespread popularity makes these stories an effective way to introduce and inspire many to the property law jurisprudence that permeates the texts. While Tolkien's literature has not been traditionally utilized for Law and Literature purposes, there are several issues of property law jurisprudence that can be elucidated through Tolkien's writings.

This Article begins by briefly assessing the debate regarding the efficacy of Law and Literature, proposes Tolkien's literature as a legitimate means of stimulating an interest in property law jurisprudence, and concludes by exploring a variety of property law issues using Tolkien's literature as the background material facts.

II. LAW AND LITERATURE: A BRIEF OVERVIEW

A. *Introduction to Law and Literature*

Law and Literature is an academic pursuit built on the premise that "literature can teach lawyers, judges, and legal scholars basic things about how the law does operate, and how it should . . ."⁷ While the roots of Law and Literature can be traced decades earlier, there was an explosion of Law and Literature legal scholarship in the 1980s, and that trend has continued.⁸ This is not to say all legal scholars have signed on to Law and Literature without trepidation. Indeed, many in the legal academy have wrestled with the legitimacy of this sub-discipline and the role it should play in legal scholarship, if any.⁹ Some

3. See JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); see also Bruce L. Rockwood, *Preface to Critic of Institutions-9*, *Law and Literature Perspectives* 1 (Bruce L. Rockwood ed. 1996).

4. See, e.g., Rockwood ed., *supra* note 3.

5. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* (1988).

6. See *infra* note 15.

7. BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 257 (6th ed. 2012).

8. See WHITE, *supra* note 3; see also BIX, *supra* note 7 ("Benjamin Cardozo . . . wrote an article [in 1925] on the literary styles of judicial opinions . . .").

9. See generally Gary Minda, *Law and Literature at Century's End*, 9 *CARDOZO STUD. L. & LITERATURE* 245 (1997).

scholars are ambivalent about the efficacy of Law and Literature.¹⁰ Still other scholars have embraced Law and Literature with enthusiasm, recognizing that literature may help us understand depths of the law not yet understood.¹¹

Perhaps the high-water mark for the Law and Literature debate came in the United States Supreme Court's opinion of *Plaut v. Spendthrift Farm, Inc.* in which Justices Antonin Scalia and Stephen Breyer clashed over how to best appropriate the Robert Frost poem, "Mending Wall."¹² Justice Scalia referenced "Mending Wall" to support the proposition that in a government with separated powers, "Good fences make good neighbors."¹³ Justice Breyer disagreed with Scalia's application of the poem, and responded, "One might consider as well [Frost's] caution, for he not only notes that 'something there is that doesn't love a wall,' but also writes, 'Before I built a wall I'd ask to know / What I was walling in or walling out.'"¹⁴ While opinions regarding who had correctly applied Frost varied, this Supreme Court opinion provided a tacit legitimacy to Law and Literature in a way it did not previously enjoy. Nevertheless, in the wider context of legal scholarship, Law and Literature is still a relatively new discipline with a diversity of opinions regarding the nature and purpose of Law and Literature.¹⁵

B. *Theories of Law and Literature*

Law and Literature has typically been appropriated in two ways: law-as-literature, and law-in-literature.¹⁶ Law-as-literature frames the practice of law essentially as "the mastery of texts, whether of cases, statutes, or the Constitution."¹⁷ Pace legal positivism, the practice of law is necessarily an endeavor to interpret and contextualize language, as "the ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct."¹⁸ This view that law-as-literature is helpful in the interpretation of language is un-

10. See, e.g., POSNER, *supra* note 5, at 13 ("The publication since 1984 of five books on law and literature attests to the rapid growth of the field. But is it a healthy, balanced, and fruitful growth? I have some doubts.").

11. See generally Minda, *supra* note 9.

12. *Plaut v. Spendthrift Farms, Inc.* 514 U.S. 211, 240, 245 (1995); see also Linda Greenhouse, *Justices Rule that Congress Overstepped Bounds: Scalia and Breyer Trade Quotes from 'Mending Wall'* N.Y. TIMES (Apr. 19, 1995), available at <http://www.writing.upenn.edu/~afilreis/88v/frost-scalia.html>.

13. *Plaut*, 514 U.S. at 240.

14. *Id.* at 245 (Breyer, J., concurring).

15. See, e.g., RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 3 (Columbia Univ. Press, 1992) ("While Law and Literature now commands the attention of a growing number of academics and practitioners, no unifying manifesto or program has as yet been announced.").

16. See generally Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); see also Minda, *supra* note 9.

17. Levinson, *supra* note 16, at 374.

18. *Id.*

derscored by many Supreme Court decisions,¹⁹ as well as the canons of construction that aid statutory interpretation.²⁰ While there is a significant disagreement with respect to how one ought to interpret statutory language,²¹ there is little debate that this view of law-as-literature is a legitimate one. As Gary Minda notes, “The law-as-literature perspective has been quite popular in legal studies throughout the 1980s mainly because it has served to show how literary activity is an integral part of the central activity of law—i.e., the interpretation of legal texts (case opinions, statutes, and regulations).”²²

While law-as-literature is generally considered useful, the law-in-literature perspective received more of a mixed response. Law-in-literature has typically “attempted to show how the stories in the classics of Western literature might offer lawyers and judges important lessons about the nature of law lessons which are missing in the official reported stories of the cases.”²³ While this early incarnation of law-in-literature was well-received, its recent manifestations have been more controversial. Perhaps co-opted as part of the wider postmodernist project that dominated English departments for the latter half of the twentieth century, the classical literature of “Dickens, Kafka and Melville [was] being edged-out by authors like Derrida, Foucault, Heidegger and Wittgenstein as Law and Literature scholars explored the meaning of law’s language as a cultural and literary artifact.”²⁴ Thus, law in literature began a shift “beyond the Great books of Western literature to the critical texts of literary theory, structuralism, post-structuralism, deconstructionism and the like to aid them in their literary translations of legal texts.”²⁵ This shift blurred the lines between law-as-literature and law-in-literature, and stigmatized Law and Literature as a meaningless academic exercise, as devoid of meaning as the very texts that the postmodern literary critics purported to deconstruct.²⁶ Indeed, the postmodern literary agenda is so entrenched in Law and Literature that there is currently a movement afoot to go even “beyond law and literature in the traditional sense to a new literary study of language as cultural discourse.”²⁷ Before going down this path, law-in-literature proponents would be wise to remember the late Christopher Hitchens observation that “[t]he

19. *Id.*

20. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 202 (Robert C. Clark ed., 2d ed. 2010).

21. See, e.g., *Id.*

22. Minda, *supra* note 9, at 246.

23. *Id.* at 245.

24. *Id.*

25. *Id.*

26. See *infra* note 35.

27. Minda, *supra* note 9, at 247; see also Peter J. Hutchings, *Modern Forensics: Photography and Other Subjects* 9 CARDOZA STUD. L. & LITERATURE 229–243 (1997).

Postmodernists' tyranny wears people down by boredom and semi-literate prose."²⁸

C. *Supporters and Detractors*

The increased interest in Law and Literature has touched off a spirited scholarly debate regarding the efficacy of this new academic project.²⁹ The debate has become more pointed with the development of the law-as-literature and law-in-literature perspectives. Several pre-eminent legal scholars have staked out positions on each side of the debate, thus ensuring a conclusion settled by an adversarial system. Professor Richard A. Posner seems to occupy the role of leading critic of Law and Literature, while a variety of other scholars offer a robust defense of this burgeoning discipline.³⁰

The prolific judge and legal scholar Richard Posner has devoted an entire book to the topic of Law and Literature.³¹ Now in its third edition, Posner's assessment of Law and Literature pulls no punches: "I shall argue that *only rarely* can we learn much about the day-to-day operations of a legal system from works of imaginative literature even when they depict trials or other legal processes."³² Statements such as this cause many to consider Posner a staunch critic of Law and Literature.³³ However, Posner himself contends that "if the first edition of this book had rather a negative and even defensive character . . . that was more than 20 years ago and the negative tone was gone by the second edition."³⁴ Indeed, it seems that Posner's antipathy toward Law and Literature may be more properly understood as criticism of particular developments within Law and Literature, rather than opposition to the movement in principle. For example, Posner cites as problematic Law and Literature's incorporation of postmodern literary theory "that is making laughingstocks of English departments"³⁵ While Posner's concern with respect to the problems of postmodern literary theory is apt, it is worth noting that the Critical Legal Studies ("CLS") school has already adopted much of the postmodern's disdain for metanarratives and belief that all truth is

28. Quoted in Jonah Goldberg, *The Quote-Unquote Presidency*, NATIONAL REVIEW ONLINE (Mar. 15, 2014), <http://www.nationalreview.com/article/373397/quote-unquote-presidency-jonah-goldberg/page/0/2>.

29. See, e.g., POSNER, *supra* note 2, at 21 ("I shall argue that only rarely can we learn much about the day-to-day operations of a legal system from works of imaginative literature even when they depict trials or other legal processes."); see also POSNER, *supra* note 5, at 16 ("These attempted syntheses of law and literature are ingenious and provocative but do not convince me.").

30. See POSNER, *supra* note 2; see also POSNER, *supra* note 5.

31. See POSNER, *supra* note 2; see also POSNER, *supra* note 5.

32. POSNER, *supra* note 2, at 21 (emphasis added).

33. See generally ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (Martha Minnow, Michael Ryan, & Austin Sarat eds., 1993).

34. POSNER, *supra* note 2, at 6.

35. *Id.* at 10.

merely a social construct.³⁶ That is to say, if postmodernism in legal scholarship is Posner's problem, Law and Literature is hardly the only category of legal scholarship under its influence. Nevertheless, Posner's stance appears to have shifted from outspoken critic to a more sympathetic position.

Many scholars disagree with Posner's bleak (or formerly bleak) assessment of Law and Literature. Law and Literature professors at the University of Tennessee College of Law, Jerry J. Phillips and Judy M. Cornett confidently state that "there are many reasons to teach Law and Literature"³⁷ Indeed, Phillips and Cornett are so convinced of the importance of Law and Literature that they co-authored a textbook to demonstrate and "support [the] many ways of teaching Law and Literature."³⁸ Professor Bruce L. Rockwood waxes poetic in his optimistic perspective on Law and Literature: "Law and literature are like flint and steel over the kindling of our doubts and uncertainties in a rapidly changing modern, or postmodern, world. By knocking the flint of literature against the steel of the law, we can make some sparks that will illuminate our way to the future"³⁹ Professor Hilde Hein believes that the interdisciplinary approach of Law and Literature is not only useful, but perhaps necessary given the limitations of both law students and the study of law: "Approaching law through art enlivens the law even as it permits exploration of law's gaps and exclusions."⁴⁰ Therefore, Hein concludes, "I believe that insight into one area will also help us to understand the other."⁴¹ Finally, Gary Minda is optimistic that for Law and Literature, the best is yet to come: "This is where we are today; Law and Literature at century's end is *just coming to acknowledge* the full meaning and significance of what it means to translate the meaning of a text."⁴²

Despite these disagreements over the nature, purpose, and efficacy of Law and Literature, there is broad agreement that Law and Literature is useful for jurisprudence. While jurisprudence has undergone its own historical transformation, modern jurisprudence is "the study of the general and fundamental elements of a particular legal system, as opposed to its practical and concrete details."⁴³ Thus, even Posner himself concedes, "[O]ne can learn a great deal of *jurisprudence* from

36. For a critique of CLS see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (Marshall Cohen ed., 1993). For a critique of postmodernism generally see DOUGLAS GROOTHUIS, *TRUTH DECAY: DEFENDING CHRISTIANITY AGAINST THE CHALLENGES OF POSTMODERNISM*, 17-59 (2000).

37. JERRY J. PHILLIPS & JUDY M. CORNETT, *SOUND AND SENSE: A TEXT ON LAW AND LITERATURE* v (2003).

38. *Id.*

39. Rockwood ed., *supra* note 3, at 19.

40. Hilde Hein, *Law and Order in Art and Law*, in 9 *LAW AND LITERATURE PERSPECTIVES*, 113 (Bruce L. Rockwood ed. 1996).

41. *Id.* at 114.

42. Minda *supra* note 9, at 256 (emphasis added).

43. BLACK'S LAW DICTIONARY 984 (10th ed. 2014).

the works of literature”⁴⁴ John Fisher also supports the legitimacy of Law and Literature with respect to jurisprudence when he states, “The Law and Literature movement is . . . fundamentally a form of jurisprudence.”⁴⁵ Richard Weisberg further acknowledges, “Law and Literature actually began as a subcategory of jurisprudence.”⁴⁶ Therefore, as there is broad agreement regarding the efficacy of Law and Literature with respect to jurisprudence, this Article will use Tolkien’s works to specifically explore aspects of property law jurisprudence.

D. *The Literary Canon, Tolkien, and the Public Consciousness*

As previously alluded to, there is significant debate within Law and Literature regarding which literary texts should be used for Law and Literature.⁴⁷ Different legal scholars use a variety of criteria in determining the utility of studying a particular work of literature. However, several works are granted near universal legitimacy such as Charles Dickens’ *Bleak House*,⁴⁸ Franz Kafka’s *The Trial*,⁴⁹ and Fyodor Dostoevsky’s *Crime and Punishment*.⁵⁰ Indeed, this is not surprising as each of these works and their authors are traditionally within the Great Books literary canon and the pantheon of great authors. However, as discussed above, some proponents of Law and Literature explicitly reject the “Great Books” within the Western tradition—Shakespeare, Dickens, Melville, etc.—specifically because they view Law and Literature as part of the larger deconstructivist project, characterized by postmodernism and the Critical Studies approach.⁵¹ Richard Weisberg views this approach as misguided: “I do not think the case has been made for Law and Literature’s abandoning the canon”⁵² In support of the Great Books approach, perhaps in light of the logical deficiencies of postmodernism, Weisberg notes, “There is a reason why, these days, lawyers are furthering the return to the Great Books.”⁵³

While the question of Tolkien’s place in the Great Books discussion is an interesting one, the debate is superfluous to this Article. The

44. POSNER, *supra* note 2, at 21–22.

45. John Fischer, Note, *Reading Literature/Reaching Law: Is There a Literary Jurisprudence?* 72 TEX. L. REV. 135, 137 (1993).

46. WEISBERG, *supra* note 15, at 3.

47. *Id.* at 122.

48. CHARLES DICKENS, *BLEAK HOUSE* (1853); *see also* PHILLIPS & CORNETT, *supra* note 37, at 384–390.

49. FRANZ KAFKA, *THE TRIAL* (1925); *see also* PHILLIPS & CORNETT, *supra* note 37, at 344–350; *see also* POSNER, *supra* note 2 at 21.

50. FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (1866); *see also* PHILLIPS & CORNETT, *supra* note 37, at 379–384; *see also* POSNER, *supra* note 2, at 21.

51. *See* Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature, and Feminism* 99 YALE L. J. 1913, 1937 (1990).

52. WEISBERG, *supra* note 15, at 122.

53. *Id.*

utility of a particular work of fiction in using Law and Literature to learn jurisprudence is unrelated to whether or not Tolkien is in the literary canon (although it seems clear that Tolkien's literature has made the cut).⁵⁴ Of far greater importance is the widespread societal pervasiveness and enjoyment of the literary work. That is, it matters more for the purposes of this Article that many people read and enjoy Tolkien, rather than whether Tolkien's work is canonical or useful for a postmodern agenda.

John Ronald Reuel Tolkien was a twentieth century English writer and philologist, who is best known for his fantasy epics, *The Hobbit* and *The Lord of the Rings*.⁵⁵ Tolkien chaired the Department of English Language and Literature at Oxford University, and his professional activities included a position as Assistant Lexicographer for the New Oxford English Dictionary.⁵⁶ Despite his publisher's low expectations for *The Lord of the Rings*,⁵⁷ Tolkien's literature has been generally lauded since *The Hobbit* was first published in 1937. Indeed, several polls in 1999 rated *The Lord of the Rings Trilogy* as the greatest book of the twentieth century.⁵⁸ Moreover, Tolkien has been described as "the most influential author of the [twentieth] century."⁵⁹ *Time Magazine* named *The Lord of the Rings Trilogy* third on its list of the best novels from 1923–2005.⁶⁰ The box office success⁶¹ and critical acclaim⁶² of the film adaptation of *The Lord of the Rings Trilogy* and the current film adaptation of *The Hobbit* into respective three-part films, have further cemented Tolkien's stories into the public consciousness.⁶³

54. See, e.g., Richard Lacayo, *ALL-TIME 100 Novels*, TIME MAGAZINE (Jan. 6, 2010), http://www.time.com/time/2005/100books/the_complete_list.html.

55. *JRR Tolkien Biography*, TOLKIENSOCIETY.ORG, <http://www.tolkiensociety.org/author/biography/> (last visited Aug. 8, 2014).

56. *Id.*

57. See, e.g., COLIN DURIEZ, *THE J.R.R. TOLKIEN HANDBOOK* 11 (1992) ("[H]is publishers were convinced that *The Lord of the Rings* might well make a financial loss for them.").

58. Andrew O'Hehir, *The Book of the Century*, SALON (June 4, 2001), http://www.salon.com/2001/06/04/tolkien_3/.

59. TOM SHIPPEY, *J.R.R. TOLKIEN: AUTHOR OF THE CENTURY* (2002).

60. Lacayo, *supra* note 54.

61. Brett Pulley, *'Hobbit' Heirs Seek \$220 Million for 'Rings' Rights (Update 1)*, BLOOMBERG (July 15, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aiAEIATGLREU> ("The three films based on Tolkien's fantasy epic—2001's 'The Lord of the Rings: The Fellowship of the Ring'; 'The Lord of the Rings: The Two Towers' in 2002; and 'The Lord of the Rings: The Return of the King,' released in 2003—have generated almost \$3 billion in worldwide box-office receipts, and another \$3 billion from DVDs, merchandise and other sources . . .").

62. See, e.g., Sharon Waxman, *'Lord of the Rings' Dominates the Oscars; Final Film of Trilogy Sweeps 11 Categories; Sean Penn and Charlize Theron Get Top Acting Awards*, N.Y. TIMES (Mar. 1, 2004), <http://www.nytimes.com/2004/03/01/arts/lord-rings-dominates-oscars-final-film-trilogy-sweeps-11-categories-sean-penn.html>.

63. Indeed, the films and their licensed progeny have been so successful that Tolkien's estate has filed two separate lawsuits to seek compensation; see, e.g., Claudia Eller & Rachel Abramowitz, *Warner Bros. Settles Lawsuit Over 'Lord of the*

While it is difficult to quantify the overall societal pervasiveness and impact of a literary work, there do seem to be objective indicators that one could use: film royalties, book royalties, merchandise royalties, and critical acclaim all seem to indicate broad societal appeal.⁶⁴ Additionally, one could further study (and someone possibly has) the rate at which Tolkien's books are checked out at libraries, the number of college courses that significantly address Tolkien, and other creative ways an author's influence on society can be quantified. Given the sustained critical acclaim and popularity of Tolkien's literature, this Article will proceed on the assumption that *The Hobbit* and *The Lord of the Rings Trilogy* are legitimate for Law and Literature purposes.

E. A Modest Proposal

As explained above, Law and Literature is a growing body of scholarship that has mixed reviews with respect to its utility. Indeed, even Law and Literature apologists find it difficult to agree on the exact direction this discipline needs to take, and such ambiguity continues to serve as fodder for its critics.⁶⁵ However, there is broad agreement that Law and Literature is useful for purposes of jurisprudence. Thus, the purpose of this Article is as a means for anyone—legal scholars and professors, law students, and lay people—to begin to *learn* and *understand* issues in property law jurisprudence through J.R.R. Tolkien's well-known and beloved stories.

The final reason that this Article attempts to frame Tolkien's literature through the lens of property law is to provoke within an individual an interest in property law jurisprudence where such interest did not previously exist. The corollary to provoked interest is additional exploration, study, and eventually competence or even expertise in property law. That is, the purpose of this Article is quite modest: *introduce*, *provoke interest*, and *begin to learn* all connote this Author's posture regarding what this Article can actually accomplish. Finally, lest any veteran, curmudgeon, legal scholars, and practitioners forget, this Author hastens to remind them that many successful legal professionals' first interest in law was piqued by the likes of Atticus Finch, Perry Mason, and Jack McCoy. In the same way these fictional characters did, Tolkien's literature, if properly framed, may have the ability to inspire an interest in the law. If law is indeed a noble profession, I say the more the merrier. Here is hoping this Article leads to more.

Rings' Licensing Payments, L.A. TIMES (Sept. 9, 2009), <http://articles.latimes.com/2009/sep/09/business/fi-ct-hobbit9>; see also Pulley, *supra* note 61.

64. Waxman, *supra* note 62; see Pulley, *supra* note 61.

65. POSNER, *supra* note 2, at 7.

III. PROPERTY JURISPRUDENCE IN TOLKIEN'S LITERATURE

A. Introduction

While it is not within the realm of a traditional literary analysis, it would not be inappropriate to suggest that property, including its nature and uses, is a dominant theme throughout Tolkien's *The Hobbit* and *The Lord of the Rings Trilogy*.⁶⁶ This analysis would certainly be acceptable in the context of Law and Literature scholarship. Though it is doubtless there are more, this Article addresses several theoretical considerations related to property law jurisprudence—that is, the “bundle of sticks”—that Tolkien covers, as well as briefly surveys several legal property issues that play a significant role throughout Tolkien's literature. The property issues are: (1) acquisition by creation or occupancy; (2) acquisition by finding, including lost, mislaid, and abandoned property; (3) forfeiture of property obtained through criminal activity; and (4) *inter vivos* gifts.

This next section begins by examining how Tolkien addresses the theoretical foundations of property ownership, or, the “bundle of sticks.” Then, four property issues will be considered by identifying a legal issue as presented by Tolkien's literature and the relevant common law property rule, analyzing the content from Tolkien and the common law rule, and predicting the likely legal outcome of the Tolkien scenario.

B. Tolkien and the Bundle of Sticks

In one edition of *The Lord of the Rings*, the publisher, Ballantine Books, summarized Tolkien's story this way:

J.R.R. Tolkien's *The Lord of the Rings*—of which this book is the first part—is a chronicle of the great War of the Ring . . . At that time, the One Ring . . . *had been held* for many years by the hobbits, *but was eagerly sought* by the *Enemy who made it* . . . Out of the struggle to *possess and control* the One Ring . . . there arose a war . . . The Fellowship of the Ring begins the story of . . . the flight of Frodo—*unwilling heir* to the One Ring—from his own land [. . .] [and] of the great Council at which it was decided that the *Ring must be destroyed* . . . [Frodo and his companions must] *return* the Ring to Mordor . . . and . . . *destroy it* . . .⁶⁷

This excerpt nicely identifies several key theoretical property law issues that permeate Tolkien's epic stories.

66. See, e.g., DURIEZ, *supra* note 57, at 206–08; see also Christina Sterbenz, 6 *Laws from 'Lord of the Rings'*, BUSINESS INSIDER (June 17, 2013), <http://www.businessinsider.com/law-in-the-lord-of-the-rings-2013-6>; Ilya Somin, *Property Law in the Lord of the Rings*, VOLOKH CONSPIRACY (Mar. 30, 2008, 2:45 AM), <http://www.volokh.com/posts/1206859543.shtml>.

67. J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* (Ballantine Books 1965) (1954) (emphasis added).

If asked to describe property law, many property law professors, as well as most law students, will begin by talking about a bundle of rights, or what is also known as “the bundle of sticks.”⁶⁸ The bundle of sticks is a metaphor that property professors commonly use to introduce law students to the theoretical considerations that run throughout the corpus of property law.⁶⁹ The metaphor works by comparing various property interests in real or personal property to a bundle of sticks. In that sense, it is possible for multiple parties to each have a legal interest in a piece of property just as it is possible for multiple parties to each have one stick out of the whole bundle.⁷⁰ The fact that several people can have multiple sticks in the same piece of property is what gives rise to many legal actions regarding real and personal property. The bundle of sticks typically consists of the following interests: ownership, possession, the right to transfer, usage or control, division, exclusion, and destruction.⁷¹ While there is some debate regarding the legitimacy of the bundle of sticks metaphor, Professor Richard Epstein suggests, “[T]he bundle of rights normally associated with the concept of property, far from being randomly and fortuitously put together, actually coheres and forms the basis of huge portions of the terrain of the ordinary common law.”⁷² Assuming that the bundle of sticks is actually a helpful metaphor, this Article will discuss three of these rights in relation to Tolkien’s literature: (1) ownership; (2) possession; and (3) destruction of property.

1. Ownership

The concept of property ownership is of such importance that it is often expressed not simply as one of the sticks, but as the entire bundle.⁷³ Frank Hall Childs defines property ownership as the “dominion over things, the right to deal with them in some particular manner to the exclusion of others, to use, to enjoy, and to dispose of them.”⁷⁴ As part of the bundle of property rights, an individual may both own real or personal property, and yet not possess or control said property: “Ownership is distinct from possession.”⁷⁵ Indeed, when contractual

68. See JESSE DUKEMINIER ET AL., PROPERTY 83 (Vicki Bean et al. eds., 7th ed. 2010); see also Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007) (“Whatever its faults or inadequacies, the bundle of rights is the dominant legal paradigm for the courts and the theory of property that is taught to American law students.”); but see generally Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1518 (2003).

69. See *United States v. Craft*, 535 U.S. 274, 278–79 (2002).

70. See Johnson, *supra* note 68, at 254.

71. *Id.* at 253.

72. Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL’Y 2, 3 (1990).

73. Johnson, *supra* note 68, at 247.

74. FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 121 (1914).

75. *Id.*

and policy considerations are involved, the owner of the property may not even be able to transfer, exclude, or even destroy his own property.⁷⁶ Simply put, “The right to acquire, use, and transfer property is not unlimited.”⁷⁷ Still, in property law jurisprudence, ownership matters. For example, in legal actions involving found property, it is only the true owner of the personal property that has superior claim against the finder.⁷⁸ Thus, the concept of property ownership is of first importance with respect to the bundle of sticks.

Just as ownership is primary regarding the bundle of sticks, it is primary in Tolkien’s literature. In *The Fellowship of the Ring*, the wizard Gandalf recounted a detailed history of the One Ring (“Ring”) to Frodo Baggins, now in possession of the Ring.⁷⁹ Frodo became repulsed upon learning about the wretched creature Gollum, and he lamented that his uncle, Bilbo Baggins, did not simply kill Gollum when he had the chance.⁸⁰ Gandalf responded that pity and mercy were the virtues that prevented Bilbo from killing Gollum, and he concluded with this comment: “Be sure that [Bilbo] took so little hurt from the evil, and escaped in the end, because *he began his ownership of the Ring so. With Pity.*”⁸¹ According to Tolkien, the issue of ownership of the Ring was connected with Bilbo’s *possession* of the Ring.⁸² Additionally, when Gandalf tells Bilbo, “I was professionally interested in *your* ring,” he is acknowledging that Bilbo is the current owner of the Ring.⁸³ Gandalf made a similar statement to Frodo after Bilbo gave the Ring to Frodo: “*Your ring* is shown to be that One Ring by the fire-writing alone”⁸⁴ These references are frequent in Tolkien, and they all relate to the property right of ownership with respect to the Ring.

2. Possession

Possession is another important concept in the bundle of property rights. Particularly with respect to lessor-lessee agreements, someone other than the true owner can possess property. Possession can be defined as, “The right to exclusive physical control of the thing owned.”⁸⁵ Epstein argues that the possession stick has a powerful, yet “negative impulse” because the right to possess if left alone would only lead “up to a grand blockade [where] I could stop everybody else

76. See *infra*, Part III.B.3.

77. CHILDS, *supra* note 74.

78. See RAY A. BROWN, *THE LAW OF PERSONAL PROPERTY* 26 (3d ed. 1975), *quoted in* DUKEMINIER ET AL., *supra* note 68, at 98.

79. TOLKIEN, *supra* note 67, at 78–95.

80. *Id.* at 92.

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* at 59 (emphasis added).

84. TOLKIEN, *supra* note 67, at 88 (emphasis added).

85. JOHNSON, *supra* note 68, at 253.

from doing anything with the property that I owned, but there would be nothing else that I could do with the property myself.”⁸⁶ The concept of possession is also important when two or more individuals claim title to the same thing.⁸⁷ Therefore, while ownership is a theoretical concept of first importance in property law, possession is a close second, especially with respect to property value.

Throughout *The Hobbit* and *The Lord of the Rings Trilogy*, the issue of possession, with respect to the Ring, is ubiquitous. Tolkien scholar Colin Duriez supports this understanding when he states that “Tolkien explores *power in relation to possession*” and “[p]ower is a unifying theme”⁸⁸ For example, Gandalf indicated that Bilbo’s ownership of the Ring began when he first possessed the Ring.⁸⁹ In the Prologue to *The Fellowship of the Ring*, Tolkien recounts the history of the Ring, and he mentions that Gollum “*possessed* a secret treasure that had come to him long ages ago, when he still lived in the light: a ring of gold that made its wearer invisible.”⁹⁰ In a heated exchange between Gandalf and Bilbo, Gandalf admonishes Bilbo to let go of the Ring for the last time: “Go away and leave [the Ring] behind. *Stop possessing it.*”⁹¹ Finally, there is even a more philosophical exchange regarding possession of the Ring between Gandalf and Frodo, after Gandalf had explained the true nature and origin of the Ring. Gandalf warned Frodo that “it would utterly overcome anyone of mortal race who possessed it. *It would possess him.*”⁹² While Gandalf’s philosophical warning lacks legal resonance, it does underscore the ubiquity and importance of possessing the Ring in Tolkien’s literature.

3. Destruction of Property

A century ago Frank Hall Childs stated, “Personal property may cease to exist, or at least to have any value, by its destruction, which may result from accident, *or from intention through human agency.*”⁹³ However, today there is some debate regarding the right of owners to destroy their own property.⁹⁴ The venerable *Black’s Law Dictionary* became part of this debate when it changed its definition of *owner* from the sixth to seventh edition.⁹⁵ Specifically, the sixth edition contained the definition of *owner* as:

86. Epstein, *supra* note 72.

87. Childs, *supra* note 74, at 164.

88. Duriez, *supra* note 57, at 206 (emphasis added).

89. Tolkien, *supra* note 67, at 92.

90. *Id.* at 32 (emphasis added).

91. *Id.* at 61 (emphasis added).

92. *Id.* at 76 (emphasis added).

93. Childs, *supra* note 74, at 430 (emphasis added).

94. See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

95. Strahilevitz, *supra* note 94, at 783.

The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, *even to spoil or destroy it, as far as the law permits*, unless he be prevented by some agreement or covenant which restrains his right.⁹⁶

The seventh edition, instead, chose to define *owner* as, “One who has the right to possess, use, and convey something; a proprietor.”⁹⁷ Interestingly, the seventh edition omitted language indicating that the owner has the right to destroy his own property.⁹⁸ The recently released tenth edition of *Black’s Law Dictionary* also omits language indicating a property owner’s right to destroy.⁹⁹ Lior Jacob Strahilevitz asserts that as a policy matter, courts are increasingly likely to remove this stick from the property owner’s bundle: “When asked to resolve cases where one party seeks to destroy her property, courts have reacted with great hostility toward the owner’s destructive plans.”¹⁰⁰ This further illustrates how it is helpful to think of property interests as a bundle of sticks or rights, and that even owners in possession of their property are not simply free to do *whatever* they want with their property.

The culmination of *The Lord of the Rings Trilogy* takes place in *The Return of the King*.¹⁰¹ Frodo and his traveling companion Sam Gamgee, the remnants of the original fellowship, have finally made it to Mordor, with the intention of destroying the Ring by casting it into the “Cracks of Doom in the depths of Orodruin, the Fire mountain”¹⁰² As the story builds to its climax, Frodo is at the Cracks of Doom, when Gollum surprises him.¹⁰³ Gollum’s all-consuming desire for the Ring would not be denied, and in a final effort to regain control of the Ring, he bit off Frodo’s finger with the Ring still on it before falling into the Cracks of Mount Doom destroying the Ring once and for all.¹⁰⁴

Indeed, the destruction of the Ring is not simply the culmination of the story, but the very impetus. Speaking to Frodo in *The Fellowship of the Ring*, Gandalf states that there is only one way to break the power of the Ring and prevent it from falling into the hands of Sauron: “[F]ind the Cracks of Doom, in the depths of Orodruin, the

96. BLACK’S LAW DICTIONARY 1105 (6th ed. 1991), *quoted in* Strahilevitz, *supra* note 91 (emphasis added).

97. BLACK’S LAW DICTIONARY 1130 (7th ed. 1999), *quoted in* Strahilevitz, *supra* note 91.

98. *Id.* at 1130–31.

99. BLACK’S LAW DICTIONARY 1280 (10th ed. 2014).

100. Strahilevitz, *supra* note 94, at 784.

101. J.R.R. TOLKIEN, *THE RETURN OF THE KING* (HarperCollins 5th ed. 2011) (1955).

102. TOLKIEN, *supra* note 67, at 94.

103. TOLKIEN, *supra* note 101, at 943.

104. *Id.* at 946.

Fire-mountain, and cast the Ring in there, if you really wish to destroy it”¹⁰⁵ Frodo’s reply left no doubt as to his intentions: “‘I really do wish to destroy it!’ cried Frodo. ‘Or, well, to have it destroyed.’”¹⁰⁶ Indeed, it was Frodo’s desire to destroy the Ring that began the great quest on which the entire *Lord of the Rings Trilogy* is premised. While the bundle of property rights may not always include the right to destroy, the destruction of the Ring was central to Tolkien’s story, and destroying the Ring was a legitimate goal in its literary context.

C. Acquisition by Creation

Both *The Hobbit* and, more so, *The Lord of the Rings Trilogy* are centered on the One Ring (“Ring”), but these stories focus exclusively on the claims to the Ring in its present state of existence.¹⁰⁷ Tolkien, however, does provide an account of the origin of the Ring. In *The Fellowship of the Ring*, Frodo, upon learning about the power of the Ring, expressed his trepidation to Gandalf: “‘This ring!’ He stammered. ‘How, how on earth did it come to me?’”¹⁰⁸ This prompted Gandalf to provide a brief history of the Ring, beginning with “Sauron the Great, the Dark Lord.”¹⁰⁹ In explaining Sauron’s plan to consolidate power by obtaining the Ring, Gandalf stated, “He only needs the One; *for he made that ring himself, it is his*, and let a great part of his own power pass into it”¹¹⁰ Later in the conversation, Frodo was increasingly distressed by the Ring’s power and checkered history, and he expressed a desire to simply destroy the Ring.¹¹¹ This prompted a degree of amusement from Gandalf followed by an explanation and demonstration of how it was *nearly* impossible to destroy the Ring.¹¹² Gandalf concluded by stating, “[N]or was there ever any dragon, not even Ancalagon the Black, who could have harmed the One Ring, the Ruling Ring, *for that was made by Sauron himself*.”¹¹³ Appendix B in *The Return of the King* also identifies c. 1600 of the Second Age as the date when “Sauron forge[d] the One Ring in Orodruin.”¹¹⁴ Tolkien clearly identifies Sauron as the creator of the Ring in these passages. Moreover, Gandalf’s admission that “it is his” indicates Sauron is indeed the Ring’s rightful owner.

A legal issue here is whether any subsequent possessors of the Ring could prevail in an action against Sauron. The notion that one can acquire property through creation or occupancy is “the first general

105. TOLKIEN, *supra* note 67, at 94.

106. *Id.*

107. *See infra*, Part III.D–F.

108. TOLKIEN, *supra* note 67, at 81.

109. *Id.* at 81.

110. *Id.* (emphasis added).

111. *See infra*, Part III.B.3.

112. TOLKIEN, *supra* note 67, at 93–94.

113. *Id.* at 94 (emphasis added).

114. TOLKIEN, *supra* note 101, at 1083.

mode of acquiring title to personal property.”¹¹⁵ As Horace E. Smith states, acquisition by occupancy “is primal,” and “[o]ccupancy is generally regarded as the first known method of acquiring exclusive title to property.”¹¹⁶ D.F. Libling argues that this principle is deeply embedded in the common law:

Any expenditure of mental or physical effort, as a result of which there is created an entity, whether tangible or intangible, vests in the person who brought the entity into being, a proprietary right to the commercial exploitation of that entity, which right is separate and independent from the ownership of that entity.¹¹⁷

From this understanding, some legal scholars extrapolated that Libling’s theory of a creator’s right trades on John Locke’s understanding that “you own the fruits of your labor in consequence of having ‘a property in your own person.’”¹¹⁸ While this Article focuses on the common law rules that govern property, Locke’s Labor Theory of Property is often considered a principle of natural law.¹¹⁹ Pace some contemporary legal scholars, it was classically understood that common law is derived from natural law.¹²⁰ Harkening back to a “State of Nature,” Locke reasoned that one ought to possess the fruits of one’s own labor because it is an individual’s work created the thing possessed, thus connecting labor and ownership.¹²¹ Although Locke’s Labor Theory is often discussed today in the context of intellectual property, his understanding of property acquired through creation undergirds the entire corpus of personal property at common law. While “the fruits of your labor are *not* always yours alone to exploit, and you do *not* always have full rights of property in your own person,” it is a settled rule of common law that one generally owns the fruits of one’s labor.¹²²

Here, the facts from Tolkien clearly indicate that Sauron the Great, or the Dark Lord, is the creator of the Ring. Gandalf readily admits

115. HORACE E. SMITH, A TREATISE ON THE LAW OF PERSONAL PROPERTY 52 (1893).

116. *Id.*

117. D.F. Libling, *The Concept of Property: Property in Intangibles*, 94 L.Q. REV. 103, 104 (1978), *quoted in* DUKEMINIER ET AL., *supra* note 68, at 56.

118. DUKEMINIER ET AL., *supra* note 68.

119. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION, *Of Property*, Chapter V (J.W. Gough, 1948).

120. WILLIAM C. SPRAGUE, BLACKSTONE’S COMMENTARIES: ABRIDGED Sec. II, 3 (Callaghan & Co., 9th ed. 1915).

121. *Supra* note 119, at 15 (“Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but him. The Labour of his Body and the Work of his Hands, we may say, are properly his. Whatsoever, then, he removes from out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men.”).

122. DUKEMINIER ET AL., *supra* note 68, at 56.

so multiple times.¹²³ While neither *The Hobbit* nor *The Lord of the Rings Trilogy* takes place during the period in which Sauron created and possessed the Ring,¹²⁴ there is no dispute that Sauron created the Ring, and as such, is the Ring's true owner. Applying common law principles, Sauron would prevail in an action against any of the subsequent possessors of the Ring, unless some intervening event had taken place such as abandonment or assignment of the Ring.¹²⁵ In any action between any of the subsequent possessors (Isildur, Déagol, Gollum, Bilbo, or Frodo), none could claim a right to possession under a theory of occupancy. Instead, the dispute would involve subsequent possessors of property.¹²⁶

D. Acquisition by Finding

After Bilbo Baggins gifted Frodo the Ring, Gandalf explained to Frodo the significance of the Ring.¹²⁷ This explanation caused Frodo to become distressed regarding the great power behind the Ring, and the evil of those who sought to possess the Ring. Frodo could finally take no more as he exclaimed, "I wish [Bilbo] had not kept the Ring. I wish *he had never found it . . .*"¹²⁸ Here, Frodo is referring to *The Hobbit* when Bilbo first came upon the Ring after he fell into orc mines in the depths of the Misty Mountains.¹²⁹ Gandalf also claimed, "Behind that, there was something else at work, behind any design of the Ring-Maker. I can put it no plainer than by saying that Bilbo was *meant* to find the Ring, and *not* by its maker."¹³⁰ Here, Gandalf acknowledged the existence of a "Ring-Maker," Sauron, and yet he claimed that Bilbo was meant to find and possess the Ring.¹³¹

To further solidify that the Ring was indeed found, in the Prologue to *The Fellowship of the Ring*, Tolkien actually titled the section describing how Bilbo came upon the Ring as, "Of the *Finding* of the Ring."¹³² Here, a legal issue to explore is whether Gollum would prevail in an action against Bilbo. To do so, it must be determined where and how Frodo found the Ring, and whether the Ring was lost, mislaid, or abandoned by Gollum when Bilbo found it.

123. TOLKIEN, *supra* note 67, at 81, 94.

124. See TOLKIEN *supra* note 101, at 1083 (The One Ring was created in the Second Age whereas *The Hobbit* and *The Lord of the Rings Trilogy* take place in the Third Age).

125. See *infra* Part III.D.

126. *Id.*

127. See *supra* Part III.C.

128. TOLKIEN, *supra* note 67, at 93 (emphasis added).

129. See J.R.R. TOLKIEN, *THE HOBBIT*, 76 (Ballantine Books revised ed. 1982) (1937).

130. TOLKIEN, *supra* note 67, at 88.

131. For a look at Tolkien's use of providence, see DURIEZ *supra* note 57, at 208–12.

132. TOLKIEN, *supra* note 67, at 32 (emphasis added).

One of the classic cases regarding lost personal property is *Armory v. Delamirie*.¹³³ In *Armory*, a son of a chimney sweeper found a rare jewel while cleaning the home of a customer.¹³⁴ After the boy took the jewel to a local goldsmith to be appraised, the goldsmith's apprentice attempted to keep the jewel after learning about how valuable it was.¹³⁵ In its holding, the *Armory* court articulated a common law rule that the title of the finder is good as against the whole world but the true owner.¹³⁶ However, if the dispute is between the landowner and the finder, "the landowner will win if the finder was trespassing at the time she found the object."¹³⁷ Thus, title of the finder is good against the whole world but the true owner, provided the finder was not trespassing when she found the object.

Another significant case that addressed personal property found on the real property of another is *Hannah v. Peel*.¹³⁸ In *Hannah*, a soldier in World War II found a brooch while staying at another's home during the war.¹³⁹ The homeowner was not living there at the time.¹⁴⁰ The *Hannah* court, which entered a judgment for the soldier, articulated the following rules: "A man possesses everything which is attached to or under his land. Secondly . . . a man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else."¹⁴¹

Here, Bilbo found his Ring during an accidental fall into the depths of the Misty Mountains. As it happened, Bilbo ended up encountering Gollum *near* his home. In a conversation with Gandalf, Bilbo states, "[The Ring] is my own. I found it. It came to me . . . It is mine, I tell you. My own."¹⁴² Tolkien's account provided that Bilbo found the Ring in an area outside of Gollum's property.¹⁴³ Since Bilbo did not find the Ring while on Gollum's property, the rule from *Hannah* does not apply. Therefore, the *Armory* rule controls, and Bilbo would have a right to the Ring against everyone but the Ring's true owner. The legal issue now becomes whether the Ring was *lost*, *misplaced*, or

133. *Armory v. Delamirie*, 1 Strange 505 (King's Bench 1722), *quoted in* DUKEMINIER ET AL., *supra* note 68, at 98.

134. *Id.*

135. *Id.*

136. RAY A. BROWN & WALTER B. RAUSHENBUSH, *THE LAW OF PERSONAL PROPERTY* 26 (Callaghan & Co., 3d ed. 1975), *quoted in* DUKEMINIER ET AL., *supra* note 68, at 98.

137. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, & PRACTICES* 96 (5th ed. 2010).

138. *Hannah v. Peel*, 1 K.B. 509 (U.K.), *quoted in* DUKEMINIER ET AL., *supra* note 68, at 101–02.

139. *Id.* at 102.

140. *Id.*

141. *Id.* at 106.

142. TOLKIEN, *supra* note 67, at 59.

143. TOLKIEN, *supra* note 129, at 76, 79 ("Actually Gollum lived on a slimy island of rock in the middle of the lake.").

abandoned by Gollum when Bilbo found it, and whether Gollum was indeed the Ring's true owner.

1. Lost, Mislaid, and Abandoned Property

Of all of the property law issues, lost, mislaid, and abandoned personal property may be the most significant throughout the narrative. For example, in *The Hobbit*, the Ring was discovered by Bilbo in the Misty Mountains,¹⁴⁴ and there would be a genuine factual dispute as to whether Gollum lost or mislaid the Ring.¹⁴⁵ After Bilbo and the thirteen dwarves reached the Misty Mountains, Bilbo was separated from the group, and he ended up tumbling into the black orc mines, deep in the Misty Mountains.¹⁴⁶ As Bilbo lay there after his fall “he groped in vain in the dark, he put his hand on the ring, lying on the floor of a tunnel. He put it in his pocket.”¹⁴⁷ Tolkien tells us that, “Trying to find his way out, Bilbo went on down to the roots of the mountains, until he could go no further. At the bottom of the tunnel lay a cold lake far from the light, and *on an island of rock in the water lived Gollum.*”¹⁴⁸ Tolkien, who interestingly never goes as far as to grant title to Gollum, instead states, “[Gollum] *possessed* a secret treasure that had come to him long ages ago . . . a ring of gold that made its wearer invisible.”¹⁴⁹ After Gollum's encounter with Bilbo ended poorly for Gollum, “He slipped away, and returned to his island . . . far off in the dark water. There, he thought, lay his ring.”¹⁵⁰ Tolkien concludes, “But the ring was not on the island; *he had lost it . . .*”¹⁵¹ As the theme of Providence runs throughout Tolkien's work, it is also interesting that Gandalf tells Frodo, “[The Ring] *abandoned* Gollum.”¹⁵²

At common law, courts divide personal property into lost, mislaid, and abandoned property:

Property is *lost* when the owner accidentally misplaced it; it is *mislaid* when the owner intentionally left it somewhere—and then forgets where she put it; it is *abandoned* when the owner forms an intent to relinquish all rights in the property. Property that has been lost or mislaid may subsequently be *abandoned* if the owner intends to give up any claim to the property.¹⁵³

Horace E. Smith asserts that “[a]t common law, to goods lost by the owner and unreclaimed, or designedly abandoned by him, the finder

144. *Id.* at 76.

145. *See id.* at 80–87.

146. *Id.* at 65–68.

147. TOLKIEN, *supra* note 67, at 32.

148. *Id.* (emphasis added).

149. *Id.* (emphasis added).

150. *Id.* at 33.

151. *Id.* (emphasis added).

152. TOLKIEN, *supra* note 67, at 88.

153. SINGER, *supra* note 137, at 95.

acquires title by occupancy.”¹⁵⁴ However, the former owner must have “completely relinquished the chattel before a perfect title will accrue to the finder.”¹⁵⁵ *Michael v. First Chicago Corp.* articulated the common law rule that “[a] finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property.”¹⁵⁶ While this general rule is correct as far as it goes, it does not go far enough, so different jurisdictions consider additional factors, such as if the property was found in a public or private place.¹⁵⁷

Courts distinguish between when an object is considered lost or abandoned and un-reclaimed, and when it is considered mislaid. *Lost* property:

[M]ay be defined as that which the owner has involuntarily parted with through neglect, carelessness, or inadvertence. There is a presumption of abandonment obtaining until the owner appears and claims the property, that gives the right as legal possessor to the finder, the presumption being disputable by the rightful owner.¹⁵⁸

Property is considered *mislaid* when “the owner intentionally places where he can again resort to it, and then forgets.”¹⁵⁹ When mislaid property is found on the land of another, it “is presumed to be left in the custody of the owner or occupier of the premises upon which it is found, and it is generally held that the right of possession to mislaid property as against all except the true owner is in the owner or occupant of such premises.”¹⁶⁰ In order for a property to be considered *abandoned*, courts have determined two elements must be present: “[T]he law demands proof both of an owner’s intent to abandon the property and of some affirmative act or omission demonstrating that intention.”¹⁶¹ The owner’s intent to abandon and the subsequent affirmative act or omission require fact-dependent analyses.

Here, Tolkien is clear that Gollum “had lost [the Ring].”¹⁶² Tolkien states that Gollum “kept [the Ring] hidden safe in a hole on his island, except when he was hunting or spying on the orcs of the mines.”¹⁶³ Bilbo found the Ring in the orc mines, above Gollum’s island where he kept the Ring hidden.¹⁶⁴ Additionally, it is part of the record that

154. SMITH, *supra* note 115, at 58.

155. *Id.*

156. *Michael v. First Chicago Corp.*, 487 N.E.2d 403, 409 (Ill. App. Ct. 1985).

157. DUKEMINIER ET AL., *supra* 68, at 109.

158. J.E. Keefe, Jr., Annotation, *Rights in Respect of Lost, Mislaid, and Abandoned Property as Between the Finder and Person Upon Whose Property it is Found*, 170 A.L.R. 706 § 2 (1947).

159. *Id.* at 3.

160. *Id.*

161. *Hoelzer v. City of Stamford, Conn.*, 933 F.2d 1131, 1138 (2d Cir. 1991).

162. TOLKIEN, *supra* note 67, at 33.

163. *Id.*

164. *Id.* at 32.

Gollum would go out spying on the orcs, and this was the only time he would take the Ring off his island home.¹⁶⁵ Therefore, it is not likely that the Ring was intentionally placed in the tunnel where Bilbo found it, and there is no evidence that Gollum had simply forgotten where he last set down the Ring. Instead, it is likely that the Ring was simply dropped by Gollum during one of his orc-watching excursions. Indeed, Frodo specifically asked Gandalf, “[W]hy didn’t [Gollum] get rid of [the Ring], or go away and leave it?”¹⁶⁶ Gandalf responded, “A Ring of Power looks after itself. It may slip off treacherously, but *its keeper never abandons it*.”¹⁶⁷ Gollum certainly thought he lost the Ring, or as he called it, “Precious”: “‘Where is it? Where iss it?’ Bilbo heard [Gollum] crying. ‘Losst it is, my precious, lost, lost! Curse us and crush us, my precious is lost!’”¹⁶⁸ Thus, while it could be argued that the Ring was mislaid, it is more likely that Gollum lost the Ring.

After falling into the Misty Mountains, Bilbo discovered the Ring in a tunnel, above the “island of rock in the water” where Gollum lived.¹⁶⁹ That is to say, the Ring was not discovered on the property of Gollum. If Bilbo had discovered the Ring on the property of Gollum, then it would need to be determined if he was a trespasser, and *Hannah* would apply. However, because the Ring would likely be considered lost personal property, found by Bilbo, and not on the property of Gollum, the rule from *Armory* controls; Bilbo would prevail against everyone except the true owner of the Ring. Therefore, Gollum’s own means of obtaining possession of the Ring need to be scrutinized to determine if he is in fact the Ring’s true owner. If Gollum is the true owner, he would prevail in an action against Bilbo to reclaim his lost Ring. However, if Gollum is not the Ring’s true owner, Bilbo would prevail.

E. *Property Obtained through Criminal Activity*

Tolkien’s literature has been lauded in large part due to the depth of history and detail he created regarding Middle Earth. This included chronologies, genealogies, and even an Elvish language.¹⁷⁰ Tolkien even included some details of the legal customs of hobbits: “[Bilbo’s will] was, unfortunately, very clear and correct (according to the legal customs of hobbits, which demanded among other things seven signatures of witnesses in red ink).”¹⁷¹ While Tolkien did discuss some hobbit political mores with respect to municipalities and

165. *Id.* at 33.

166. *Id.* at 87.

167. TOLKIEN, *supra* note 67, at 87 (emphasis added).

168. TOLKIEN, *supra* note 129, at 82.

169. TOLKIEN, *supra* note 67, at 32.

170. *See* TOLKIEN, *supra* note 101, at Apps. A-F.

171. TOLKIEN, *supra* note 67, at 66.

governmental structure,¹⁷² Tolkien never provided a fully developed legal system. However, this Article assumes that Middle Earth was a common law jurisdiction, and that includes criminal activity. Therefore, the next legal issue is to determine whether Gollum obtained the Ring through criminal activity, and how that would affect any legal action brought by Gollum seeking the courts to help him regain the lost Ring.

The story regarding how Gollum came upon the Ring was passed down from Gandalf to Frodo in *The Fellowship of the Ring*.¹⁷³ One day Gollum was out on a river at Gladden Fields with his friend, Déagol, when they parted company.¹⁷⁴ Gollum went to look around the riverbanks, while Déagol took the boat out to fish.¹⁷⁵ Déagol hooked a fish so large that he was pulled into the water.¹⁷⁶ As Déagol was dragged to the bottom of the river, he spotted and grabbed a shiny object in the riverbed.¹⁷⁷ The shiny object was the One Ring. Sméagol witnessed Déagol's discovery, and he immediately suggested to Déagol that the Ring would be a fine birthday present for Sméagol.¹⁷⁸ When Déagol demurred, Sméagol "caught Déagol by the throat and strangled him, because the gold looked so bright and beautiful."¹⁷⁹ Gandalf confirmed the criminal nature of Sméagol's action by stating, "No one ever found out what had become of Déagol; *he was murdered* far from home, and his body was cunningly hidden."¹⁸⁰ He later reiterated, "The murder of Déagol haunted Gollum."¹⁸¹ According to Appendix B: "The Tale of Years" in *The Return of the King*, the year of 2463 in the Third Age, is described as, "About [the] time Déagol the Stoor finds the One Ring, and is murdered by Sméagol."¹⁸² Tolkien's record is clear that Gollum obtained the Ring by committing the criminal act of murder.

Murder is the killing of another human being with malice aforethought.¹⁸³ Malice aforethought is "a fixed purpose or design to do some physical harm to another that exists before the act is committed, and it may be shown by proof that the defendant, without justification or excuse, intended to kill the victim, or to do the victim grievous bodily harm."¹⁸⁴ Malice is considered present "when an unlawful homicide has been committed with the intention unlawfully to take

172. *Id.* at 29–32.

173. *Id.* at 78–95.

174. *Id.* at 84.

175. *Id.*

176. TOLKIEN, *supra* note 67, at 84.

177. *Id.*

178. *Id.*

179. *Id.* at 85.

180. *Id.* (emphasis added).

181. TOLKIEN, *supra* note 67, at 89.

182. TOLKIEN, *supra* note 101, at 1087.

183. 40 AM. JUR. 2D *Homicide* § 36 (2014).

184. *Id.*

away the life of a fellow human being, or with awareness of the danger and a conscious disregard for life.”¹⁸⁵ The distinction between first and second degree murder is that while second degree murder only requires malice aforethought, first degree murder requires evidence of premeditation.¹⁸⁶

As previously discussed, the common law is derived from principles of natural law.¹⁸⁷ According to *Riggs v. Palmer*, it is considered a maxim of natural law that, “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”¹⁸⁸ In *Riggs*, a grandson, Palmer, killed his grandfather after he discovered that his grandfather was going to disinherit him.¹⁸⁹ Although the plain language of New York’s controlling Statute of Wills would still have allowed Palmer to take under his grandfather’s will, the *Riggs* court held that, “[One] shall not acquire property by his crime, and thus be rewarded for its commission.”¹⁹⁰ While this case has been criticized for its problematic method of statutory interpretation, the common law maxim supporting the decision remains valid.

Another relevant legal doctrine is that “before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands.”¹⁹¹ Also known as the *Clean Hands Doctrine*, this principle dictates that “the equitable powers of . . . court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage.”¹⁹² However, this doctrine is limited in that it does not “close [the] doors because of plaintiff’s misconduct, whatever its character, that has no relation to anything involved in the suit.”¹⁹³ Instead, one who seeks equity from courts must have clean hands in “immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.”¹⁹⁴ Thus, the *Clean Hands Doctrine* is designed to prevent courts from becoming “abetter[s] of iniquity,” with respect to the specific issue before the court.¹⁹⁵

The *Clean Hands Doctrine* would likely bar Gollum from bringing an action seeking a court to grant relief by returning the Ring to him. Gollum first obtained the Ring through the unlawful, indeed criminal,

185. *Id.*

186. *Id.*

187. SPRAGUE, *supra* note 120.

188. *Riggs v. Palmer*, 115 N.Y. 506, 511 (N.Y. 1889).

189. *Id.* at 508–09.

190. *Id.* at 514.

191. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244 (1933).

192. *Id.* at 245.

193. *Id.*

194. *Id.*

195. *Id.*

act of murder. Therefore, Gollum could not then use the courts to retrieve the Ring from Frodo. Even if Gollum did make it to court, he would not be found to have title to the Ring because it would offend the common law principle that one should not obtain property from his crime and thereby benefit from its commission. Here, Gollum obtained the Ring by strangling Déagol. Gandalf's account alleged that Gollum "caught Déagol by the throat and strangled him, because the gold looked so bright and beautiful."¹⁹⁶ This was likely done with malice aforethought as Gollum clearly wanted to do Déagol harm and take his ring. However, there does not appear to be premeditation, so Gollum's offense would be second degree murder. Under the rule in *Riggs*, Gollum would have to forfeit the Ring. Just as Palmer was prevented from taking under his grandfather's will in *Riggs*, Gollum should be prevented from murdering Déagol, and then profiting by gaining title to the Ring. Indeed, if Gollum were allowed to keep the Ring, he would be directly "acquiring property by his own crime."¹⁹⁷ Therefore, it is likely that Gollum is not the Ring's true owner because he obtained the Ring through a criminal act.

F. *Inter Vivos Gifts*

The opening of *The Fellowship of the Ring* begins at the Shire with birthday party preparations by and for the eccentric hobbit, Bilbo Baggins.¹⁹⁸ Following the party, Bilbo left the Shire for good, but not before he conveyed his house and much of his property to his nephew and heir, Frodo.¹⁹⁹ Most importantly, Bilbo transferred the Ring to Frodo. Tolkien includes the fact that such a gift was executed within the legal custom of hobbits: "[Bilbo's will] was, unfortunately, very clear and correct (according to the legal customs of hobbits, which demand among other things seven signatures of witnesses in red ink)."²⁰⁰ It is also noteworthy that while Frodo is indeed Bilbo's nephew, Bilbo had also adopted Frodo as his heir, again within the legal custom of hobbits.²⁰¹ The legal issues regarding Bilbo's transfer of the Ring to Frodo are to determine whether this was an *inter vivos* or *causa mortis* gift, and whether it is a valid transfer so that Frodo had legal ownership of the Ring following the transaction.

Childs defines a gift "in its broadest sense, [as] a transfer of property, services, or rights without consideration."²⁰² The common law separates lifetime gifts into *causa mortis* gifts and *inter vivos* gifts.²⁰³

196. TOLKIEN, *supra* note 67, at 85.

197. *Riggs*, 115 N.Y. at 511.

198. TOLKIEN, *supra* note 67, at 43–69.

199. *Id.* at 61.

200. *Id.* at 66.

201. *Id.* at 21 ("But in the days of Bilbo, and of Frodo his heir . . ." (emphasis added)).

202. CHILDS, *supra* note 74, at 289.

203. DUKEMINIER ET AL., *supra* note 68, at 173–74.

Specifically, “A gift *inter vivos* is a voluntary, actual, and immediate transfer of a thing by one living person to, or for, another living person.”²⁰⁴ A *causa mortis* gift is one “made in contemplation of and in expectation of immediate approaching death”²⁰⁵ Courts have typically been more rigid in their application of *causa mortis* gifts than *inter vivos* gifts due to policy reasons associated with wills formalities,²⁰⁶ and because a *causa mortis* gift is essentially a will substitute. However, the modern trend of relaxing wills act formalities has loosened the application of *causa mortis* standards.²⁰⁷

Here, the record indicates that Bilbo’s gift followed hobbit legal custom.²⁰⁸ While Bilbo was advanced in age (he had just celebrated his “eleventy-first” birthday²⁰⁹), his conveyance of the Ring to Frodo does not appear to be in contemplation of immediate approaching death. Indeed, Bilbo indicated to Gandalf that, upon leaving the Shire, he planned to execute his plan of taking a holiday, which included traveling to see mountains and writing his book.²¹⁰ This is hardly the plan of a one who believes his death is “immediate and approaching.” Therefore, this is likely to be considered an *inter vivos* gift, and not a *causa mortis* gift.

Gruen v. Gruen was a classic case that articulated the common law rules of *inter vivos* gifts.²¹¹ In *Gruen*, a son brought a claim against his stepmother to recover a painting that she possessed. The son alleged his late father gave him title to the painting, but the father retained possession until his death in 1980.²¹² The stepmother contended that the gift was testamentary and invalid because it failed to comply with will formalities.²¹³ In its decision, the *Gruen* court articulated the following rules regarding *inter vivos* gifts: “First, to make a valid *inter vivos* gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.”²¹⁴ That is, for a valid *inter vivos* gift, there must be: (1) Donative intent; (2) Delivery; and (3) Acceptance. The legal question then becomes whether or not evidence in the record supports that this gift met all three elements for a valid *inter vivos* gift.

It is likely that Bilbo possessed the requisite donative intent to make this a valid *inter vivos* gift. With respect to donative intent,

204. SMITH, *supra* note 115, at 125.

205. DUKEMINIER ET AL., *supra* note 68, at 173.

206. See SMITH *supra* note 115, at 134.

207. DUKEMINIER ET AL., *supra* note 68, at 173.

208. TOLKIEN, *supra* note 67, at 66.

209. *Id.* at 43.

210. *Id.* at 49.

211. *Gruen v. Gruen*, 496 N.E.2d 869, 871 (N.Y. 1986).

212. *Id.*

213. *Id.*

214. *Id.* at 872.

courts have held that “the intention of the grantor . . . may be manifested by mere acts and words or both combined.”²¹⁵ Here, Gandalf asked Bilbo, before leaving for a long holiday, whether he planned to leave the Ring to Frodo. Bilbo responded, “Well, er, yes, I suppose so”²¹⁶ As Bilbo was about to leave, he discovered that the Ring was actually still in his pocket. This prompted him to say himself, “Yes after all, why not? Why shouldn’t it stay there?”²¹⁷ Despite Gandalf’s best efforts to persuade him, Bilbo seemed to conclude that the Ring would stay with him permanently: “I shall keep it, I say.”²¹⁸ This touched off a heated exchange between Bilbo and Gandalf with neither backing down. However, Bilbo finally relented, as Gandalf admonished him to, “Stop possessing it. Give it to Frodo, and I will look after him.”²¹⁹ Bilbo responded, “Very well . . . [The Ring] goes to Frodo with all the rest.”²²⁰ Although Bilbo required some convincing from Gandalf, in the end he manifested both the requisite words and actions to demonstrate donative intent.

It is also likely that Bilbo’s delivery of the Ring was sufficient to satisfy the second element of the *inter vivos* gift analysis. For *inter vivos* gifts, “The delivery must be as perfect as the nature of the property, and circumstances and surroundings of the parties will reasonably permit, and hence it may take one of the three forms recited.”²²¹ Here, Bilbo asked Gandalf to deliver the Ring to Frodo: “You had better take [the Ring] and deliver it for me. That would be the safest.”²²² But Gandalf refused, and instead advised Bilbo to “[p]ut it on the mantelpiece. It will be safe enough there, till Frodo comes.”²²³ When Frodo arrived at the house, Gandalf told him that Bilbo left a packet for him: “Frodo took the envelope from the mantelpiece, and glanced at it, but did not open it.”²²⁴ After Gandalf told Frodo about the envelope’s contents, Frodo exclaimed, “The Ring! . . . Has he left me that?”²²⁵ Bilbo’s delivery of the Ring—leaving it on the mantle, and having Gandalf tell Frodo about it—represents a constructive delivery of the Ring. Therefore, it is likely that Bilbo’s gift met the delivery element of a valid *inter vivos* gift.

Finally, it is likely that Frodo accepted Bilbo’s gift of the Ring. Acceptance “may be actual or implied and may also be evidenced by words and conduct, need not be contemporaneous with delivery, but

215. *Estate of Davenport v. Comm’r.*, 184 F.3d 1175, 1187 (10th Cir. 1999).

216. TOLKIEN, *supra* note 67, at 59.

217. *Id.*

218. *Id.* at 60.

219. *Id.* at 61.

220. *Id.*

221. *Speaker v. Keating*, 36 F. Supp. 556, 563 (E.D.N.Y. 1941).

222. TOLKIEN, *supra* note 67, at 61.

223. *Id.*

224. *Id.* at 63.

225. *Id.*

may be manifested subsequently.”²²⁶ Here, Frodo stated, “The Ring! Has [Bilbo] left me that? I wonder why. Still, it may be useful.”²²⁷ As previously discussed, Gandalf would soon cause Frodo to question whether he wanted to keep the Ring.²²⁸ However, at this time, it seems Frodo had accepted the Ring (albeit more casually than he probably should have). Therefore, Frodo’s action of acknowledging and accepting the Ring from Bilbo would likely meet the third element for a valid *inter vivos* gift, granting Frodo title to the Ring.

IV. CONCLUSION

J.R.R. Tolkien’s *The Hobbit* and *The Lord of the Rings Trilogy* are not simply popular and captivating fantasy epics, they can also be a helpful tool for exploring issues in property law jurisprudence. To reprise Tolkien, there is indeed an “applicability of fantasy.”²²⁹ Moreover, legal scholars can remain agnostic as to the legitimacy of Law and Literature, and still recognize Tolkien’s works may provoke within a colleague, practicing attorney, law student, or lay person an increased interest in law generally, and an issue within property law more specifically. Thus, the approach taken in this Article is best thought of as a first step in property law rather than a final destination (the same goes for Tolkien’s literature). If law is, as is often suggested by its practitioners, a noble profession, those within its ranks must have the confidence to both recognize and celebrate its manifestations throughout society—even when they are found in unlikely places, or perhaps even on an unlikely journey.

226. *Speaker*, 36 F. Supp. at 564.

227. TOLKIEN, *supra* note 67, at 63.

228. *Id.* at 76–81.

229. DURIEZ, *supra* note 57, at 9.

