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## Response

John Finnis

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## RESPONSE

JOHN FINNIS

THESE reflections on observations and arguments in the eight papers, generously and perceptively contributed by friends and colleagues, are arranged in roughly the chapter order of *Natural Law and Natural Rights* (“NLNR”). Though it has some adventitious features, that order also has sufficient explanatory merits for me to follow it twenty years later in *Aquinas: Moral, Political and Legal Theory*.

### I

The first chapter of *NLNR* is first for a reason that I have just called adventitious, that is to say suggested not by the order of explanation or of questions in their own right, but by the academic situation of late twentieth-century students of law, but also of politics, economics, sociology, or history. So far as concerned those wider disciplines, Leo Strauss and Eric Voegelin had each devoted the first chapter of major treatises to confronting the methodological situation and attempting a root and branch critique of the methodological argumentation of the great master of early twentieth-century social theory, their quasi-compatriot (but universally relevant) Max Weber, whose argumentation had perceptibly influenced, directly or indirectly, the intellectual leader of legal philosophical work in the third quarter of the twentieth century, H.L.A. Hart. But neither Strauss nor Voegelin had succeeded in articulating a clear, tight, and adequate critique. So my own Chapter One was intended to supply what was still missing.

It had another intention, too. Studying and teaching the masters of legal philosophy self-styled positivist, Bentham, Austin, Kelsen, Hart and Raz, had impressed me with a conclusion that I express forcefully in that chapter in relation to Bentham, Austin, and Kelsen, and more gently and with qualifications, but still definitely enough, in relation to Hart and Raz. The self-image of these thinkers is, as Michelle Dempsey’s paper has recalled for us, as border police, “persnickety” (as she says: they might prefer rigorous) about distinctions, say between law and non-law, or between purported legal obligation, validly predicated legal obligation, and moral obligation, and always concerned to identify and denounce sloppiness of thought—the sloppiness they see in the Western legal and philosophical tradition’s inter-twining of law with justice in terms such as *Recht* or “right”, and see most deplorably manifested in the tag “an unjust law is not a law”. To me it seemed, and seems, that this self-image was a conceit, and that these theorists were, in varying measures, stumbling back and forth across boundaries with a lot of, well, sloppiness both about the character of their

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own theoretical enterprises and about the meaning of terms and statements they held up for criticism or ridicule. Some of their stumbling is the subject-matter of chapter II's survey of misleading images of and objections to traditional Western legal theory. But some of it provides the material for chapter I.

We could restate some important parts of chapter I's argument and substantive thesis by taking up one of Michelle Dempsey's diagrams, the one depicting (and responsive to) the piece of paper that her students used to meet on the road and that cheerily asserted to them that it was "a law". "Hi! I'm a law." Positivists, as she says, are proud to be attentive to the grounds available to verify or falsify that paper's claim to be a law, and to be insistent that those grounds can include only social facts such as enactment on a given date by a given authority with power to do so and acting on correct procedures—and nothing as sloppy as a claim to be inherently just. The borders they are patrolling are the boundaries of, say, our legal system, as it exists at a given place on a given day and hour. No impostors or illegals *here*. But of course this is not work for a theorist, but for a lawyer competent in the laws of that time and place, whether as a practitioner or scholar in that time and place, or as a practitioner or scholar in some foreign place, or as a historian of that time and place—a kind of local historian. And accordingly, as Dempsey has recalled, the criteria (border-criteria) employed by these professionals and scholars will differ from time to time and place to place, and—job done—take their own place in the vast rubbish-heap of true social facts accumulating through history. Border-patrolling of that kind has no theoretical content. Nothing comes into view worth calling theory or theorizing or philosophizing until we raise a different kind of question about borders.

The obvious question is: why have borders? Why have the kind of thing about which appropriate people—scholars, practitioners, or students—would be well advised to raise questions of authenticity, membership, and so on? In particular, why have the kind of thing—say, a law, or a contract, or a judicial sentence of execution—about which it is important to ask is it valid or invalid, and important that that question be answerable only Yes or No, and not "well, in some respects Yes and in other respects No"? Or if you don't like Why questions, pose them in a wrapped-up, "conceptual" way by asking What is it for there to be a border between the legal and the non-legal? What is it for there to be law, such that questions of validity, membership, authenticity, obligatoriness, etc., have legal answers which are distinct from, and might be at cross-purposes with, answers that one might give in the absence of this kind of social institution?

To *such* questions about borders, the questions which positivist legal theory actually offers to answer, it seemed to me that the great masters of positivism had answers which were mostly just loose thinking in the guise of dogmatic stipulative definitions posing as "real" or explanatory definitions—answers which, at best, as in Hart and Raz, were both inexplicit

about the method they were rightly following in their critique of their predecessors' dogmatism, and inattentive to the method's implications. It seemed to me, further, that their claim to be value-free, "purely descriptive", in their theoretical method—the claim which was another large part of their self-image as positivists—was simply false; and consequently that the evaluations which they were importing, under the counter, to make sense of their definitional claims (their border demarcating) and to defeat rival positivist claims, were uncritical in what they affirmed and arbitrary in their overlooking or denying of other evaluative grounds for answers precisely to the very questions they were tackling—and at any rate were evaluations which ought to be brought up into the light of day for critical discussion.

Perhaps now, while we are thinking about borders and their demarcation, is the time to take up the challenge by John Gardner that Dempsey quotes and says remained unanswered. It has two parts. The first sets the scene:

Finnis criticizes some "legal positivists" for focusing all their attention on the limit cases of law at the expense of attention to the central case, and thereby offering incomplete theories of law.

But isn't this a purely imaginary scene? Where have I ever criticized any positivist for focusing attention on the limit cases of law at the expense of attention to the central case? When I criticize legal positivists for offering incomplete theories of law, it is for failing to provide any adequate justification for their account of the limits of law, to be aware of the need for such justification, and to notice that no adequate answer to questions about whether there are limits and how they are established can be given without attention to the varying viewpoints from which some cases are central, some are limit cases, and some are beyond the limits. Gardner has quite misidentified the critical situation. Then he goes on:

But the criticism can be turned on its head and aimed back at Finnis himself. There can be nothing resembling a theory of law—a complete explanation of law's nature—that includes only treatment of law's central case and shows no parallel interest in . . ."the limits" of law.<sup>1</sup>

In short, he is saying, a theory like mine deals only with law's central cases and shows no "parallel" (?) interest in "the limits of law". But that phrase "limits of law", which Gardner rightly encloses in scare quotes, is ambiguous in the ways that I have started to address above. It may, first, signify the set of notions of law we use to insist upon clear boundaries between the legally valid and invalid. If that is the issue, then only a theory like mine, which interests itself in the reasons of justice and efficiency—reasons subsumable under the broad notions of common good, coordina-

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1. John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 14 (2007).

tion problem, government (or rulership) and authority—reasons why there should be such boundaries and boundary-making concepts or institutions, only such a theory is responsive to questions about the limits of law. But the phrase “limits of law” might also, second, refer to the notion that there are limits to, and non-central instances of, the very concept of law as a kind of social institution or as a kind of reason for action. And again, this is precisely the notion that is the theme of chapter I, and that is stressed with tiresome repetitiveness in the page or two immediately following and commenting upon my definition of law on pp. 276–77. I do not claim to have provided authoritative theoretical accounts of limit cases of law such as *custom* (238–45) or *international law* (238–45) or *post-revolutionary constitutions* (246–52) or *laws addressed to sovereign rulers* (252–54, 275–76). But as those who have to their cost laboured through chapter IX could testify, my interest in the limits of law, in this sense, and in *these kinds of limit cases* is not only parallel to but is actually deployed in promoting an understanding of the central cases of law, and precedes and in some respects exceeds in length my treatment of the central case. And if we turn, thirdly, to a final meaning and set of referents of “limits of law”, the cases where law by its injustice in substance or motivation or mode of origin or application crosses the boundaries of legitimacy or obligatoriness (direct or collateral), that too has been the subject of lively if incomplete attention by my theory of law, at a time when theories of law calling themselves positivist treated the whole issue as outside the boundaries of a theory of law.

As we know, it has subsequently been announced by theorists like Gardner himself, and Leslie Green, and now it seems Joseph Raz, that *of course* a theory of law includes all these issues, and has only a little corner reserved to the old thesis about law being identified exclusively from social-fact sources—a proclamation which would have been regarded by Kelsen and Hart as a rank betrayal of positivism and of the whole enterprise of descriptive, value-free social science. In substance, all current theories descending from Hart, such as Raz’s, Gardner’s and Green’s, are more accurately labeled natural law theories, though one must immediately add that for want of frank recognition of this, they tolerate more gaps and tangles in their accounts than a sound philosophical theory can afford to have.

As Michelle Dempsey rightly says about Raz and Julie Dickson, and helpfully shows, “they simply have no basis upon which to pick out what is important about law if they don’t first attend to what is good for human beings . . . and appreciate that law (in its central case) is the kind of thing that is good for humans.” Raz, for one, has the resources to do all this, and does it, but haltingly and to some extent unsystematically. But *pace* Dempsey’s diagram of the bus journey, I don’t think that, in order to pick out the salient features of law, one has to start with a theoretical effort to respond to the big issues of moral philosophy, basic goods and practical reasonableness, and so forth. Our law, and the whole tradition in which it

is embedded, both contain plenty of articulated evidence of what is salient in law. So a philosophical method could, like Aristotle's, start with these undemonstrated sayings of the wise and common sayings among the more or less wise. But the vindication of the sayings and of the selection of salient features will in the end have to get back to first principles of the kind explored in chapters III, IV and V and then deployed on the long way up to law through chapters VI, VII, VIII and IX to chapter X.

A word about "evaluation." I have never been able to make much sense of Julie Dickson's distinction between direct and indirect evaluation, and have been content to observe about it that it draws an arbitrary line and amounts to a distinction between complete and incomplete evaluation, with an unexplained preference for the incomplete over the complete. But we should observe that there is evaluation in all the four broad kinds and domains of subject matter or matrix of disciplined human inquiry, reflection and discourse.<sup>2</sup> In the domain of natural sciences and metaphysics, where we ask about realities that are what they are independently of our thought, there is evaluation of items for their correspondence or lack of correspondence to their type or natural kind, where being defective or being a good specimen has to do with the statistically typical, or with the absence or presence of features relevant to reproduction and/or survival, or with criteria drawn from another domain such as human purposes or needs. In the domain of logic, where we ask about how to make our thought orderly and apt for truth-finding, evaluation is in terms of propositional clarity and cross-propositional coherence, of argumentative validity, and of explanatory elegance, or again in terms drawn from another order such as rhetorical persuasiveness. In the domain of techniques, arts, technologies, which in *NLNR* I inconveniently put third rather than (like Aquinas) fourth, evaluation is for efficiency for purpose, in a broad sense of efficiency which includes, perhaps non-centrally, the goodness of a good play of a game that has no other purpose. Law exists partly in this domain, but primarily in the domain that Aquinas, and all my work subsequent to *NLNR*, puts third in the list and calls *moral*, where we ask about what makes choices and actions good, not least the choices and actions that go into law-making and the choices and actions that laws aim to regulate.

In all four domains, to evaluate is to state or imply a reason for ranking one item above or below or alongside another,<sup>3</sup> within the domain.

2. See JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 20–22, Index s.v. (1998) (four types of order, science, theory); JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 136–39, Index s.v. (2d ed. 2011) (order).

3. Patrick Brennan said that the New Natural Law Theory holds that there is no naturally known hierarchy among the basic goods. But our position is different. There is no naturally known hierarchy precisely of *value*. But there are important, naturally known hierarchies among them. *For example*: The good of practical reasonableness rules over the others—not because it is more valuable than them, but because such rule is what it is about (is the substance of this good!)—and the good of friendship subordinates to itself the other goods (basic

Twist and turn as one may, the reasons we have for evaluating our choices and actions, if they are not in the first order (as physically possible or impossible, carbon-light or smoky, and so forth, or in the second order (as coherent or incoherent), or in the technical order as efficient or inefficient), are going to be in terms of the principles of practical reason in the open-ended non-technical domain of human life as a whole—that is, they are going to be practical reasons which form up into moral reasons. The only question is whether they are developed reasonably, or are confused by mistakes such as Hume’s denial that practical reason can have any first principles, Kant’s denial that there are any first principles besides the good of being reasonable, Bentham’s confusion of efficiency in technical contexts with reasonableness in the open horizon of human existence, Nietzsche’s repudiation of all rational requirements and exaltation of an emotional quasi-aesthetic, and so forth.

A note, finally, about the last part of Michelle Dempsey’s paper, concerning positivism’s “critical turn.” From the last step in my argument in chapter I—a step that I am pleased that she has focused upon (for it is all too often, as by Julie Dickson, quite neglected)—her paper draws an inference whose conclusion she attributes to me. *Because* the central case of the legal viewpoint is the viewpoint of those of us for whom it is a matter of overriding importance (and a moral ideal and a demand of justice) that law should come into being and then be maintained, as law with which there is a presumptive moral obligation to comply, *it follows* (she has me inferring) that for those of us who share that view of law’s place in the human scheme of things the law—our law—is presumptively morally obligatory: the person with the legal point of view “will view legal obligation as at least presumptively a moral obligation”, and she observes that this inference helps itself to the premise that our actual laws are just or at least worthy of obedience. But the remainder of my characterization of the central case of the legal viewpoint, in that very sentence,<sup>4</sup> is in terms of

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goods) in their merely self-regarding significance and implications (again, not by superiority of value but by virtue of its content, concerning precisely the good of a common good of the friends which subsumes their individual good into a higher viewpoint which they can share).

4. See NATURAL LAW & NATURAL RIGHTS, *supra* note 2, at 14. *NLNR* reads:

If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation (and thus as of “great importance”, to be maintained “against the drive of strong passions” and “at the cost of sacrificing considerable personal interest”), a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist’s description.”

Id. (citing H.L.A. HART, *THE CONCEPT OF LAW* 169, 173–74 (2d ed. 1994)).

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what *should be* the case, as a matter of “moral ideal”<sup>5</sup> and demand of justice, not about what is the case at some particular time and place. I can certainly go along with the view that laws and legal systems are all too often instruments of oppression and injustice. But I cannot recommend, *at large*, the viewpoint of “the skeptical and vigilant law reformer”, as a substitute for the legal point of view as I portrayed it. It can be the case, and I think in that even in these corrupt times, it is by and large the case (in our political communities), that there are vastly many laws which had better not be reformed and which had better be complied with, applied, and enforced without skepticism but rather with commitment—since if they are not so applied, it will be the vulnerable who unjustly suffer. Virtually everything you consider yours to possess and count on in the future is little more than a tissue of contractual and other legal entitlements—unless you are relying on bars of gold, shotguns and a gang of ruthless associates. And if you are subject to legal proceedings, what you should hope for is fidelity to laws of evidence and procedure and not *ad hoc* law reforms made on the run by skeptical judges and jailers. But that is here and now. There is not the slightest presumption, according to my theory or according to the sentences highlighted by Dempsey, that we do in fact live in a central case of a legal system rather than in radically corrupted Potemkin systems such as Hitler’s or Stalin’s.

Those were men interested only in an “indirect”, that is, incomplete, evaluation of law—as an instrumentality salient for the opportunities it afforded for the bending of its content, genesis, and administration to the demands of the interests of their party and gang and their supporters, as a technique of deception and confusion parasitic on the prestige of earlier or historic legal orders somewhat closer to the central case. And while we are thinking of those dark times, we can recall that only a few years earlier Max Weber had identified the central case of governance as precisely the *legal-rational*, and had admitted that governance and law of that type cannot *reasonably* be regarded as legitimate, and therefore fully functional on its own terms, except by the body of ethical-rational thought that, in line with the tradition, he called natural law [*Naturrecht*].<sup>6</sup>

## II

One of the misleading images of Western moral and legal theory that chapter II of *NLNR* tried to shatter is that that theory seeks to “derive” its moral norms “from facts”. So section 4 of the chapter begins with a series of sharp, sometimes (I’m afraid) shrill denials that natural law theory tries to infer the principles of practical reason from a prior metaphysically es-

5. I should rather have said something like “the demand of the common good”; for my doubts about “ideal” in this context, see John Finnis, *Law as Idea, Ideal and Duty: A Comment on Simmonds Law as a Moral Idea*, 1 *JURISPRUDENCE* 247, 247–53 (2010).

6. See 4 JOHN FINNIS, *COLLECTED ESSAYS OF JOHN FINNIS* 215–17, 219–22 (2011).

tablished knowledge of what human nature is and what is in line with it (or with human good, metaphysically conceived). These denials, read without much attention to the cultural situation of the book's immediate audience or to the book's argumentation as a whole, led a good many adherents of one or another neo-scholastic version of natural law theory to denounce the book as a radical break with the tradition of Aristotle and Plato. One of the most hostile of these critics encapsulated his criticisms in the title, intended by him as a condemnatory moniker, "the New Natural Law Theory", a title which has regrettably stuck. If we are to use the term new at all, it should be "new-classical", because the book's theory was intended as a renovation of the classical, which is a Platonic, Aristotelian and Thomistic kind of account or theory.

And that intention was not mistaken. But, as I say in the Postscript (2011), looking back on this section of chapter II:

[I]t was a serious weakness of the book that it did not deploy or indeed envisage the proper response to these would-be Aristotelian-Thomistic critics, the response that points to their own inattention to a cardinal principle of Aristotle's and Aquinas's methodology and working methods. That is the principle, pervasive in their work but conspicuously lost to view in the work of their modern would-be representatives, that we do not know natures of things without knowing those things' capacities, which in turn we cannot know without knowing their actualization in activity, which in turn we cannot understand with any adequacy except by knowing the activities' objects. That is the prime epistemological axiom for Aristotle and Aquinas, and its application to human action and practical reason is clear. *Adequate knowledge of human nature is not the source of our coming to understand human ends, goods, or flourishing.* Rather it is a resultant of our understanding of the intelligible objects of human willing and action, objects which are the intelligible goods (called 'values' in *NLNR*).

Of course, ontologically the order of dependence is precisely the reverse: objects of will are attainable only by actions made possible only by capacities which we have only by virtue of having the human (not ape, mouse or asteroid) nature we have. But the doubts pressed about the book's coherence with the *natural* law tradition are epistemological, and the doubters should have been challenged in advance, and sooner, on their own territory.<sup>7</sup>

So it was a particular pleasure to read Martin Rhonheimer's account of his own independent awareness of the significance of that epistemological principle or axiom, and of its inverse relation to the metaphysical or-

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7. NATURAL LAW & NATURAL RIGHTS, *supra* note 2, at 416–17.

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der of dependence, and of its power as a solvent of knotty problems such as the apparent vicious circle about practical truth which he expounds at the beginning of his paper. And of course it was also a pleasure to read his valuable confirmatory analysis and illustration of its place and significance in my own work. As he makes clear, the exposition of mine that he found of direct confirmatory value is not in *NLNR* but, too late alas, in *Fundamentals of Ethics* (1983), from which his paper quotes a number of extended passages.

Still, looking back at *NLNR* he finds value also in some statements there, particularly where chapter II says, on p. 34:

Aquinas considers that practical reasoning begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature, but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations.

Rhonheimer dwells upon my phrase "experiencing one's nature . . . from the inside". In doing so, he tacitly—and rightly—detaches it from what follows: "in the form of one's inclinations". It is a matter, he says, of "the self-experience of our practical intellect's *grasp of the goods* which are the goals of our natural inclinations" for "it is exactly here [that] natural ends and thus human nature manifest themselves." This seems to me exactly right, but I think it better not to leave this revision of *NLNR*'s formulation merely tacit. For there is an interpretation of Aquinas's theory of first practical principles according which it is the inclinations themselves that are the key to, and focus of, an account of practical reason and natural law; and such an interpretation—a substantial misinterpretation, I think—is given currency in the 2008 document of the International Theological Commission to which Rhonheimer refers with approval in relation to another matter. In the Postscript, I say about this same sentence:

The statement on p. 34, that "Aquinas considers that practical reasoning begins. . . by experiencing one's nature, so to speak from the inside, in the form of one's inclinations" is inaccurate as an account of Aquinas and misleading in its implications. Aquinas's account of the relation between natural inclinations and the understanding of first practical principles (propositions) is ambiguous and has been very variously interpreted. There are ways in which pre- or sub-rational inclinations can provide a kind of data for one's originating insights into intelligible goods and the principles which pick them out and direct us towards them; and there are the inclinations of the will that respond to those insights precisely because will, strictly speaking, is responsiveness to practical understanding of goods. It is far from clear that the data on the basis of which the originating practical insights occur

must include pre-rational inclinations, let alone that such inclinations are the only relevant data: as Stephen Brock asks . . . .

Even as regards goods to which sense-appetite also extends, is it true in every case that we experience sense-desires for them before we understand their goodness? For instance, can a child not understand the good of *coniunctio maris et feminae* [the union of man and woman in marriage] before he feels any urge toward it himself?

The important thing to be clear about is that what is decisive is the insight, the understanding, not the data on which this insight supervenes: the content, bringing with it the normativity, of the principles of practical reason (and ultimately, a bit further off than some of Fr. Rhonheimer's phrases in his paper may suggest, of the specifically *moral* principles and normativity), comes from the understanding of a range of possibilities as not merely possible but also *good, desirable, perfecting* and so forth.

In this initial insight one is attending, not inwards to the inclinations one may experience, but to the possible kind of object of choice and action and its outcome as an intrinsically good kind of state of affairs. The data for this kind of insight will commonly include inclinations (and feelings), to be sure, but more importantly the experienced or imagined objects of those inclinations (and feelings)—such as the concrete answers given to questions one has felt the urge to ask and has had answered—and the insight, itself *not* a practical insight, that a certain kind of state of affairs—knowledge—*is possible*, that is, available to choice and action. Data such as these provide the matrix for the further, new, original, *practical* insight—say, that knowledge is good, desirable, makes one better off (and ignorance and error are bad). If we are to speak of experience *here*, we could rightly refer to “the self-experience *of our practical intellect's grasp* of the goods which are the goals of our natural inclinations”, as Rhonheimer puts it. That these inclinations are natural is not the truth we rely upon in reaching that “grasp” (that insight or act of understanding), but is a metaphysical proposition that relies for its confirmation on the truth of the practical insight that these possibilities are indeed *good*, aspects of a possible and desirable *fulfilment* of oneself and anyone else.

### III

I inserted the word “feelings” a couple of times, a moment ago, so as to extend the discussion from the texts raised by Fr. Rhonheimer to the cluster of issues helpfully reviewed for us by Fred Lawrence in the later writings (and somewhat different earlier works) of Bernard Lonergan, issues concerning values and our apprehension of values. I think my treatment of those, by way of critique of Lonergan, in *Fundamentals of Ethics* remains sound and can be supplemented by my discussion of inclinations and feelings in *Aquinas* in sections III.4 and III.6, not to mention the elaborate discussion, in section III.3, of the intertwining of reason and will. I

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had briefly revisited the issues in debate with Lonergan and Lawrence's paper in a 1992 essay now essay nine in volume V<sup>8</sup> (in the course of addressing wider issues, not relevant on this occasion, in the later Lonergan). It remains true, as I say in essay four of volume I (from 2005), that "Lonergan's critique of empiricism, in *Insight*, has much of unsurpassed value, and helped me greatly at a crucial stage of my education."<sup>9</sup> I should add something I have not said before today, that my personal discovery of the principle of Aristotle's and Aquinas's methodology which Rhonheimer highlighted for us today and I called *cardinal* a few minutes ago was in Lonergan's *Method in Theology*. There he articulates it briefly, as something well known to himself and his readers. But I'm not so sure he followed through on it in the study of deliberation, choice and action; and I am fairly sure that few of his readers ever gave it the attention it warrants.

Fred Lawrence referred to the significance for the later Lonergan of Pascal's "The heart has its reasons . . ." In another 2005 essay, now the first in volume I, I took up the Shakespearean counterpart, earlier and I suggested better than Pascal's, in the line near the end of Shakespeare's wonderful poem in honour (hidden in plain view) of a Catholic martyr and her husband (who died abroad after years of enforced exile from her for their common, adopted faith),<sup>10</sup> "Phoenix and Turtle[dove]":

This couple's closeness and constancy in love, especially while divided and *parted* by exile, are celebrated in a series of virtuoso quasi-mathematical, quasi-metaphysical paradoxes over seven stanzas, culminating in the structure of cause-and-effect, evidence-and-inference, antecedent-and-consequent that is introduced along with the poem's last quasi-personal subject, Reason itself:

Reason in itself confounded,  
Saw Division grow together,  
To themselves yet either neither,  
Simple were so well compounded  
That it cried, how true a twain,  
Seemeth this concordant one,  
Love hath Reason, Reason none,  
If what parts can so remain.

"Love hath Reason" is here most carefully presented as expressing Reason's own insightful judgment. Anyone who accepts a position like [mine] will want to take this statement in a sense that corresponds neither to the Humean/Weberian "desire creates reason" and "confers value upon its object", nor to the Pascalian "the heart has its reasons, which are unknown to reason".

8. See 5 FINNIS, *supra* note 6, at 147.

9. See 1 FINNIS, *supra* note 6, at 88.

10. John Finnis & Patrick Martin, *Another Turn for the Turtle: Shakespeare's Intercession for Love's Martyr*, TIMES LITERARY SUPP., 12–14 (Apr. 18, 2003).

May not this poet's "Love hath Reason" be compatible with and perhaps even affirm the position that love of persons, each precisely for his or her own sake, has the reasons which the first practical principles pick out, the human goods towards which those principles direct us, each of these goods an aspect of the worth (in deprivation or fulfilment) of each human being?

Practical reason's first principles are, so to speak, transparent for the persons who can flourish in the kinds of way to which those principles direct us—so transparent that it is, in truth, those persons for whose sake we are responding when we respond at all to those reasons' summons. Such love goes all the way from the truly all-embracing "Love your neighbour as yourself" to particular commitment to another—for example, the uniquely exclusive while outward-looking commitment constitutive of marital love—and is of the essence of all the practical normativity we call moral and, in proper case, legal. And for backsliders like us, the relatively few persons of heroic virtue can be a reminder, inspiring rather than depressing, that *but for* one's own—one's "love's" and "will's"—responsiveness to what these reasons summon us to, rational capacity would and will be for each of us nothing more than what Hume pretended it cannot but be for all, a slave of the passions that thus is, gives, and has "reason none". If the poet who was a self-effacing maestro of judgment, and whose artistry gets its deepest force in enactments of reconciliation and fellowship, concurs in denying that the highest or deepest *imperium* belongs to sightless desire or aversion, we have a telling witness or advocate (not precisely an argument) . . . .<sup>11</sup>

Questioned about this by Terence Irwin, I responded:

I want to maintain, and I suggest that the poem maintains, the priority of insight and understanding of goods to every response of will, including the totalizing sort of response of friendship or *amor amicitiae*.<sup>12</sup>

After a couple of paragraphs of exegesis, I concluded:

So I take the poem to be saying—not that Love supplies motives unknown to reason, motives which then operate in place of Reason, in Reason's place—but rather (i) that the Love exemplified in the literally exemplary couple *has* the true reasons (fully acknowledgeable by Reason) that are given by the worth of the persons involved, their true loveableness, but (ii) that to live up to this takes more than the intelligibility of the loveable goods in-

11. See I FINNIS, *supra* note 6, at 37–38.

12. *Id.* at 40.

stantiated in these loveable persons; it takes the wholehearted response of those persons; and (iii) that to observe by example the possibility of such devoted, constant, ‘true’ responsiveness enables one to deepen and reinforce one’s understanding of the goods of knowledge, friendship, and practical reasonableness and thus also one’s understanding of the good/value of the persons whose whole lives instantiate and exemplify those goods so awesomely. Love *does have* reasons, but these would remain “no reason” if they remained merely intelligibilities affirmable by reason, and were not taken up, out of the fungibility of goods that can be and are instantiable in countless people, and embodied in *commitment to this particular person*. (Something like the same issue arises in patriotism and other forms of loyalty.)<sup>13</sup>

## IV

Chapters III through V of *NLNR* outline a philosophical account of practical reason’s first principles—into which I have been straying during the past ten minutes—and of the moral principles that (as implications of the basic good of practical reasonableness and thus the virtue of *prudentia*<sup>14</sup>) direct the prioritizing in application of those not-yet moral first principles in choices, commitments and actions by individuals and groups, moral principles which when specified in their bearing on the first principles warrant articulation as more specific moral norms (precepts, rules). Some of these moral norms, especially norms about killing, falsification of research, and so forth, pick out kinds of choice which can be judged unreasonable prior to any general theory of justice and rights such as is undertaken in chapters VII and VIII. The account in chapters III–V is flawed in some aspects (as I point out in the Postscript) by its lack of any principle showing the unity and rationale of the so-called methodological requirements of practical reasonableness, and by its lack of a clear and stable analysis of action, proposals for choice, and intention (three tightly inter-related matters), and its lack of an account of the intransitive significance of choices as lasting in the character of the persons who made them until, if ever, they repent of them. These deficiencies were all at least addressed in *Fundamentals of Ethics*, and the remedies were deployed in *Nuclear Deterrence* (1987) and in *Moral Absolutes* (1993), and were further explicated and shown to be well rooted in the philosophical tradition in *Aquinas*. The disedifying rhetoric and confusion of Glanville Williams and Ian Kennedy about intention in medical ethics, displayed to us by John Keown, have their philosophical (if not existential) root in complete failure to understand that intention is a matter of the contents of proposals shaped up in real (not presentational) deliberation for choice, proposals which pick out

13. *Id.*

14. For the inter-definability of *bonum rationis* [good of practical reasonableness] and *prudentia*, see AQUINAS, *supra* note 2, at 83–85, 119.

nested structures of ends and means, all those, and only those, being intended.

Candace Vogler's paper has focused on the one book of mine which, as is explicit from the outset, is controlled by the methods of theology, for which (as she accurately reminds the reader) moral doctrine provides both data and principles in some measure outside the range of philosophy's sources though not outside philosophy's demand that affirmations and denials be intelligible and coherent with each other and that arguments be formally valid and sound. Some of her concern in the paper is to identify precisely how far the normative affirmations of moral philosophy must be taken to rest on presuppositions about divine existence, creation and providence, if not also divine law intended (willed) as directive in human deliberating towards free choices. Much of that concern I will reserve for all too brief discussion in the last section of this Response, when (under the auspices, so to speak, of chapter XIII of *NLNR*, chapter VI of *FoE*, and chapter X of *Aquinas*) I consider also Michael White's inquiry into the relation between natural law and the eternal law of the divine mind.

Vogler's indeed friendly analytic philosopher's contribution on the theme of moral absolutes, exceptionless negative moral norms, proceeds by letting Peter Geach articulate the objection—one that anyone can at least somehow anticipate and appreciate—to any claim that there are such norms, holding true even in dire circumstances. To that objection she suggests that I might entertain three lines of response. The third of these involves an appeal to divine law, and so is not responsive to the objection when it is put, as Geach intended it, as an objection not to exceptionless divine prohibitions (if such there are) but to the claim that natural, philosophical reason can reasonably affirm that one or more such norms are true and *exceptionlessly* exclude, say, torture or rape or killing innocents with intent precisely to kill them. And that is a claim I have been willing to defend without resort to theology's resources, in various works, even *Moral Absolutes*.

Nor will I say much about the second line of response that she projects and explores. It is essentially Kantian in inspiration, and little or nothing helpful in ethics is to be expected from Kantian lines of argument, as distinct from a few Kantian re-articulations of *theses* which he finds in the tradition and re-proposes in the face of utilitarianism and skepticism, such as elements of his idea of duties to oneself, or the categorical imperative never to treat humanity in oneself or others as a mere means. Kantian lines of ethical argumentation all are defeated from the outset by his failure to identify any principle of practical reason—that is, any intrinsic good to be pursued in practical reasoning—save practical reasonableness itself. So in place of arguments in the third of the four domains I mentioned above, we have arguments essentially drawn from, or fit only for, the second domain, that is the domain of logic itself, broadly

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understood: the conditions of orderly thought whatever its subject-matter and domain. The Kantian-style argumentation envisaged in the second line of response that Vogler supposes I might want to make to Geach does not look, like most of Kant's arguments, to self-contradiction. But it does look to and argue from a trans-categorical or cross-domain concept in the second domain: the concept of forms of reasoning or argumentation appropriate to the domains. Reasoning in the first domain (nature and the natural sciences) is in terms of what does, did, or will happen (and not, it is claimed, in terms of what is supposed to happen). So reasoning in the third, the ethical domain, being reasoning that is supposed to be in terms of what is *supposed to* happen, should not be in terms of what will happen—that is, should not try to assess what will happen if I do this, or if I don't do it. So exceptionless moral norms cannot be defeated by appeals to the bad consequences of adhering to them. But this, as it stands, would indeed be a desperate way to argue in response to Geach or at all. In each of the domains we legitimately think about what is supposed to happen, in strongly different but analogous sense of "supposed to be". And in each of the domains, even the logical and the moral, we think about what will happen if. After all, practical reasoning in the third, moral domain is in the form of practical "syllogisms", in which at least one premise is about what is good and so to be (ought to be) pursued or done (or what is bad and so ought not to be done or pursued), and at least one other premise is about what will—in the factual circumstances—serve as a means to actually doing or attaining the good, or will involve or bring about the bad. For the rest, the imagined Kantian response to Geach's challenge seems to me just question-begging, that is, *petitio principii*, helping itself to the conclusion in dispute, that what you are always supposed to do is abstain from certain kinds of act defined in non-normative terms. I am not saying that there is no case for contrasting practical reasoning with non-practical assessment of acts and their consequences, and I will mention how I think that can and should be done at the end of this section, when we have a few more pieces of the puzzle in place.

I add as a footnote that if Kant indeed said, as Vogler reports, that "you are *required to tell the murderer*" that you have his intended victim in your house rather than violate the exceptionless moral norm against lying by denying that you have, he set himself against the entire tradition, which holds that you have a very firm obligation not to betray your friends or abandon the innocent to murder and so a very strict obligation not to disclose to the murderer the truth that he wants disclosed.<sup>15</sup>

So I turn to the first of the three imagined lines of response, the one that Candace Vogler thinks too unpromising to be worth dwelling on. Let us first recall Geach's objection:

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15. See *id.* at 158 n.26, 159–60.

[S]omebody might very well admit that not only is there something bad about certain acts, but also it is desirable to become the sort of person who needs to act in the contrary way; and yet not admit that such acts are to be avoided in all circumstances and at any price. To be sure, a virtuous person cannot be ready in advance to do such acts; and if he does do them they will damage his virtuous habits and perhaps irreparably wreck his hard-won integrity of soul. But at this point someone may protest “Are you the only person to be considered? Suppose the price of your precious integrity is a most fearful disaster! Haven’t you got a hand to burn for your country (or mankind) and your friends?”.

Vogler says that I have responded to this line of thought in my explorations with Germain Grisez and Boyle of the policy of nuclear deterrence, a policy of “standing prepared to commit intrinsically wrongful acts for the sake of preserving a great good, and/or . . . preventing great evil”. She says this could not succeed in answering Geach, since he is “*not* suggesting that there could be a sound policy . . . that favors taking, or threatening to take, wrongful means to exalted ends in general”; instead his objection “is geared to highly specific circumstances and could involve human agents who are very nearly uniquely positioned to commit the wrong in question.” So: unless there is “a serious argument on uncontroversial grounds that there is no important difference between general policy questions and questions concerning specific individual acts under specific sorts of circumstances”, our argument doesn’t even connect with Geach’s in the right sort of way and can’t succeed.

But I think there is a serious argument on uncontroversial grounds that no differences relevant to Geach’s challenge can be found between “policy questions”—such as whether to have a standing policy of nuclear deterrence—and questions concerning particular individual acts under specific sorts of dire circumstance. (Incidentally, the question at issue—or as I am taking it to be in issue—is not well framed in the way that Vogler’s formulations here suggest, namely as a question about “taking wrongful means” or “being positioned to commit wrong” in dire circumstances; the question is precisely whether, in such dire circumstances, the means are wrongful or involve committing wrong at all. Nor did our argument about the policy of *threatening* final retaliation or city swapping assume that final retaliation and city swapping are wrong; we accepted the burden of arguing that actually destroying whole cities full of non-combatants as a deterrent to further attack is wrong even if you never made a threat to do so and never previously intended to or had a policy of doing so or even had a policy of being ready to do so.)

To see the argument, look back at Geach’s words: “a virtuous person cannot be ready in advance to do such acts . . . .” And at Vogler’s: “Geach’s objection is geared to highly specific circumstances, and . . . agents . . . nearly uniquely positioned to [do the specific kind of act—she

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says “commit the wrong”] in question.” But if Geach’s objection were sound, we *should*, as soon as we have grasped and assented to it, be prepared, *in advance*, to do some raping, torturing or killing of innocents as innocents in order to avert “most fearful disaster”. And his objection is not geared to highly specific circumstances, but to circumstances of a kind (not rare in human affairs), which he leaves highly unspecific. To see how unspecific, consider Vogler’s illustrative scenarios: one is of a terrible threat of disaster of the kind that many relevant experts armed with vast resources of serious scientific inquiry can pronounce upon, and so one imagines some wide-ranging cataclysm embracing humankind or large swathes of it, all avertable by a single act of torture, rape, or whatever. But Geach spoke of “burning a hand” (laying aside your precious integrity) not only for mankind, but also for a country, or for “your friends”. And soon Vogler is talking about just one person facing death at the hands of a murderer. Nor do we gain the slightest specificity for the kind of situation in which it is OK to rape or torture when she adds that the agent must be nearly uniquely positioned; for agents are nearly always uniquely positioned. The argument that Geach is launching is illustrated by Bernard Williams’s Jim in the jungle, invited by the bandit to kill one innocent peasant to save nineteen others from being killed by the bandit—or indeed, being invited (let’s spin Williams’s story-telling a little) to kill nineteen to save one from the bandit’s intent to kill all twenty. Jim is put in the jungle by Williams as a vivid symbol of his being “uniquely positioned” to avert the disaster, and the form of the objection is the same whether the disaster is to the nineteen or (in my variant scenario) to the one who could be saved if only Jim would sacrifice his own “precious integrity” (to use the Geachian objector’s bluster).

In short: the Geachian rhetorical question/objection, if sound and not blocked off by divine commands coming from outside philosophy, would entail the adoption of a policy, the policy of being prepared to rape, torture etc. whenever the evil to be thereby averted or the good to be thereby attained is great *enough*. So, on any plausible construal, it likewise entails the adoption of the still wider policy of assessing amounts or degrees of pre-moral good and bad involved in or promised by alternative options; the policy known philosophically as consequentialism or proportionalism. So it is open to all the objections to which that quite general ethical method is exposed, and which I have tried to expound across all the works I have mentioned. And as it stands, the Geachian challenge does not need to be trumped by divine commands *ex machina*, because it is incoherent in seeking to distinguish (as Vogler helpfully shows it implicitly does) between, on the one hand, a “policy” (her word) of being ready in advance and, on the other hand, *just doing* what you can to avert disaster. The incoherence consists in inviting us to even contemplate such situations; for the invitation, Geach’s and Vogler’s, is issued *in advance* and invites a conscientious answer, a forming of one’s conscience, here and now, in the study or the seminar or lecture room. The invitation as such is

reasonable, and is made in the sound philosophical tradition every time that tradition invites us to consider Socrates's "better to suffer wrong than to do it" or his story about refusing to help liquidate Leon of Salamis under threat of disaster (for him, Socrates) if he didn't. But the suggested response to the invitation to consider dire circumstances is *unreasonable* just because the distinction it relies upon, between policy and "specific kinds of circumstance" cannot be drawn.

And this is not the "cannot be drawn" of sophistical, sorites arguments. For every freely chosen action is the adoption of a proposal. And as I maintain in *Moral Absolutes*, taking up implicitly the theme that Vogler mentions, that action is done "under the guise of the good" (or as Aquinas says better, very rarely saying *sub specie boni* and rather frequently saying, instead, *sub ratione boni*: is done "as, intelligibly, good", one might translate it):

Being intelligibly appealing, the proposal includes all, and only, that which makes it seem worthwhile to attempt whatever one will attempt in trying to carry out the proposal. Thus the proposal includes both one's "ultimate" purpose (say restoring one's health, giving expression to one's friendship, restoring peace with justice [or, I might have added, averting world-wide disaster, or country-wide catastrophe, or destruction of friends, or protection of an innocent from his would-be murder]) and all the means one judges appropriate to effecting that purpose (taking bitter medicine, acquiring thus-and-thus a gift to give one's friend, undertaking military operations [or, I might have added, carrying out a salvific rape or torture session, shooting peasant in the jungle till bandit is satisfied they're dead . . .])False . . .

[E]verything included within one's proposal has the character of *end*. . . . The distinction between end and means is only relative . . . .

[C]hoosing is adopting a proposal, and what one thus adopts is, so to speak, synthesized with one's will, that is with oneself as an acting subject. . . . Every choice, once made, lasts in one's character. As behavior, performance, cause, one's choice and action may be frustrated and utterly fail [or, I might have added, it may succeed right off—my rape or murder may avert the disaster and thus be confined by Geach and Vogler to the "very nearly uniquely positioned" person, me, who did it]. But unless and until one repents of it—that is, reverses it by some contrary, incompatible choice—one retains the character which one specified and created for oneself by intelligently shaping and freely adopting the object of that choice, the [*whole*] proposal

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[end as well as means, that] one synthesized with one's will by choice.<sup>16</sup>

And in the essay mentioned by Vogler, essay I.12 on moral absolutes in Aristotle and Aquinas, I deploy these considerations against consequentialism:

How could one conceivably assess the overall net pre-moral value and disvalue of [the change of character that is an inbuilt side-effect of adopting a proposal], and of the changes of attitude, ethos, and practice which so often result from a single choice? This sort of consequence simply cannot be commensurated with a choice's other consequences.<sup>17</sup>

But I need not have followed my response to Geach so far afield. Suffice it to say, first: choosing a particular, unique act for particular consequences, in themselves unique, is always choosing for reasons which enter into the proposal adopted by choice, reasons which always are specific, *not particular*—that is, always have generality, picking out some *type* of purpose and means and circumstances, *and always thus constitute a policy*. And second, there is thus no prospect whatever of finding a criterion to distinguish, other than stipulatively, between policies and one-off deliberate, morally significant acts. Thirdly, as I have said, the attempts to give some rigor to the rhetorical questions of the imaginary Geachian objector by finding such a criterion fail, not least because they are attempts conducted in public and so, pending the intervention of revealed divine law, invite everyone to start drawing up their advance policies of readiness to set aside traditional moral norms whenever the stakes are high. Fourthly, the imaginary objector's rhetorical questions lack logical integrity; for in sneering at someone's reluctance to rape or murder as clinging to "your precious integrity", the objector is implying that a person of real moral integrity will do what is necessary to avert great loss to mankind, country, friends, or someone. That is, there is nothing in Geach's objection that amounts to a special "sort of appeal [that] has not . . . been adequately answered"; it is just (in another guise) the standard utilitarian, consequentialist or proportionalist argumentation that attempts to give some philosophical responsibility to Machiavellian or Nietzschean constructions of a different kind of virtue and integrity. In all our works defending moral absolutes, that defence is *preceded*, logically and usually also expositoryly, by a critique of consequentialist and proportionalist claims that reason can, without appealing to moral norms, commensurate the consequences of choosing and of refusing to choose to destroy or damage a person or persons in one of the basic aspects of their personal good in one or other of the ways picked out by the moral absolutes of the tradition.

16. JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISIONS, AND TRUTH 68–69, 72–73 (1991).

17. See 1 FINNIS, *supra* note 6, at 196.

I return, as I promised, to a logical note suggested by the second line of response to Geach that Vogler envisaged on my behalf. In *Fundamentals of Ethics*, chapter V.2 (with a few after-echoes in *Moral Absolutes* chapter II.4), I develop a line of thought that has some resemblances to, though many significant differences from, that second response. My thought, indebted to thoughts of Anscombe's student, Anselm Mueller, was that proportionalism and consequentialism are "eventistic", and as such cannot possibly accommodate Socrates's axiom that it is better to suffer wrong than to do it. Very briefly, eventism is the position which says that when deliberating about whether to make a choice I should treat the prospective choice as an event like other events, to be assessed for its consequences. So it cannot matter to the eventist whether a wrong is done by me or by another, and for an eventist Socrates's axiom thus has no even superficial plausibility—and is actually perverse whenever one's refusal to do a wrong (like Socrates refusing to help liquidate Leon) is going to result in another, second wrong, one's own unjust treatment (such as Socrates expected to incur himself, along with Leon's wrongful liquidation by those Socrates reasonably believed were willing to participate in it). Towards the end of my discussion, I say:

To prove that imagination is deceiving, when it suggests that I can guide my own choice by an assessment of alternative states of affairs which includes an evaluation of the difference made by my choosing itself, we need only consider the following. If one could do what imagination suggests, then one might be assessing, say, four alternative states of affairs . . . : (i) JMF does P on proportionalist grounds and lives thereafter as a proportionalist; (ii) JMF refuses to do P, and suffers the consequences; (iii) JMF refuses to do P, and gets away with it; (iv) JMF does P, on proportionalist grounds, but thereafter *repents* of having done so and lives according to a moral code such as Socrates' [a code with exceptionless moral norms]. And this fourth alternative might very well [on proportionalists' assumptions about assessment of alternative worlds] be the best of those four possible worlds. (Much of the argumentation in Hare's *Moral Thinking* assumes that it might be so.) But that fourth state of affairs is simply not a conceivable subject-matter (object or content) of [I would now say proposal for] choice. I *cannot* [coherently] conclude a train of practical reasoning: "P would be the *right* thing to do provided I afterwards *repent* of having done P". What might, on eventistic assumptions and in certain circumstances, seem the most rational choice is, *as a choice*, merely irrational, incoherent. Thus imagination's suggestion that I can reasonably consider my own possible choices "objectively", from a viewpoint that anyone might adopt [as one can consider events as such], must be a mere illusion.

Here, then, we find a place for a kind of intimation of the significance of the logical differences between reasoning in the different domains respectively, though not the intimation that Vogler found for me in Kant.

A last note. Her paper benignly remarks, more than once, that my project in *Moral Absolutes* was ambitious, and that one of its particularly ambitious purposes was to defend moral norms relating not only to murder, torture and so forth but also to sex. My developed defence of *those* moral absolutes, the defence I developed once I got clear, regrettably belatedly, about the rationally secure place of marriage in the set of basic human goods and first principles of practical reason, is a defence that turns on the significance of the policy one implicitly, willy nilly (so far as one has a coherent will), adopts when one approves *any* act of non-marital sex. Since the policy entails a conditional willingness, such approval is against the good of marriage because it necessarily corrupts the (intentions in the) marital acts of those who so approve or endorse even one non-marital act—even if it is of a kind that they themselves do not want and may never be in a position to want to engage in. That is an argument you can inspect at your leisure in volume III, essays 20 and 22 of my *Collected Essays*. I believe it to be sound and true, notwithstanding that it involves strong theses about choices and actions being under the guise of the good (better put: *sub ratione boni*), and so being the adoption of policies and corresponding kinds of far-reaching conditional willingness.

## V

In thinking about the moral absolutes against rape, torture, murder and the like, we are thinking of rights, rights that are accurately described as human and absolute. This absoluteness is the exceptionlessness of the duties identified directly by these moral absolutes. In the European Convention on Human Rights, as I suggested in *Natural Law and Natural Rights* chapter VIII section 4 (at pp. 212–13) and section 7, that seems to have been the intention behind the drafting of the provisions on life, torture, and slavery, and the ECtHR has held that to be indeed the meaning of art. 3. In *NLNR* I did not face up to the fact that art. 3 forbids not only torture but also any inhuman or degrading treatment, and it seems clear that neither the inhuman nor the degrading can be identified as kinds of acts independently of moral norms, particularly of justice, norms proposing a due measure in the light of the needs and predicament of other people in various dimensions. So a norm forbidding inhuman or degrading treatment exceptionlessly lacks the character of the moral absolutes I defined and tried to defend in *Moral Absolutes*. And even in relation to torture, which can indeed be characterized correctly for purposes of moral judgment without relying, in the characterization, on prior moral norms or judgments (though that correct characterization will, I think, be a bit narrower than the definition established by international treaties in recent decades), the ECtHR has declared that the absoluteness, the excep-

tionlessness, extends not only to acts of torture or acts intended to facilitate torture, but also to any act which results (intentionally or knowingly or not) in a real risk that someone will be tortured, regardless of whether the act is intended and/or needed to protect the rights of others. In this way, the Court shows itself to be indifferent to the need, if one is to have a set of moral norms coherent with one another, to define the kinds of act picked out by an exceptionless negative norm by reference to their intention (or as is sometimes said, their object—meaning their close-in intention). To include side-effects in the definition of the absolutely excluded kinds of act is to create impossible, morally unacceptable, collisions of responsibilities for avoiding outcomes (results) of certain bad kinds—as Elizabeth Anscombe pointed out and Joseph Boyle has elaborated. To say this is not necessarily to dissent from the results of the ECtHR’s legislating in this area, but is to point out that those results, and the Court’s rule-making, cannot rationally be justified by repeating the mantra that art. 3 is absolute.

George Christie has introduced us to a number of other features of and problems with the ECHR. We could take up a number of aspects of his discussion, but I will content myself with a few observations.

I agree with his overall judgment that the application of instruments such as the ECHR calls upon judges to perform a role better left to political actors politically responsible for their decisions—“better left” at least in the social and cultural conditions prevailing today in say the United States, the United Kingdom, and Australia. I assembled grounds for such an overall political judgment, without articulating the judgment itself, in the 1985 lecture that now is essay I in the Human Rights volume of my essays. I admire and go along with the demonstration, in a powerful but lone dissenting judgment given last week by my former Oxford colleague Justice Heydon, in Australia’s highest court, that the purportedly interpretative responsibilities conferred on the courts by legislation broadly similar to the Canadian Charter of Rights are in truth legislative, law-making powers (and so are incompatible with the principle of the separation of powers as it has been found to be implicit in and given exclusory force by the Australian Constitution).<sup>18</sup>

What I have said about exceptionless moral norms and absolute rights entails that I make a proviso to Christie’s statement that “natural virtues exist in a universe in which the morally right result is dependent on the totality of all the circumstances, that is to say, in a moral world in which situation ethics reigns.” Absolute rights trump other moral responsibilities, whatever the situation. (This is not, of course, Dworkin’s “rights are trumps thesis” for which his paradigm right was, absurdly, the “right to freedom of speech”, one of the most situation-relative and non-absolute of all commonly proclaimed rights.) But exceptionless moral norms, and the corresponding absolute rights, are all negative: not to choose—or be sub-

18. *Momcilovic v R* [2011] HCA 34, ¶¶ 379-457 (Austl.).

jected to—an act of a certain type. Such norms exclude certain options from the conscientious deliberations of decent people. But they do not indicate what *is to be done* in this or any situation, by a decent person, and no affirmative responsibility—to do an act of a certain kind—is other than situation-relative: no affirmative responsibility holds good regardless of the circumstances. In many situations the circumstances to be conscientiously taken into account by a decent person include the laws of the place, and the expectations that other people have, and many other such culturally formed contingencies, schedules of acceptable and unacceptable risk, and so forth. As Heydon J. points out, declarations of human rights supervene upon a body of laws which already give effect to countless determinations of what respect for human rights requires, given all the other determinations already made; and this supervening is by a technique which in itself departs from the Rule of Law, both by its vagueness and its retrospectivity.

I spoke a moment ago about the social and cultural conditions prevailing today in countries like the United Kingdom (and I could have mentioned also France, Germany, Italy, Switzerland and many others). In referring to the ECHR's provisions for derogation from the articles of the convention other than those about torture, slavery, and fair trial—"derogation", that is, in the strong sense, predicated on war or national emergency threatening the life of the nation, as distinct from the routine legal limitations and restrictions envisaged or articulated by the terms of all the other articles—Christie ventured the opinion that such derogations—that is, such emergencies—"are things of the past . . . now only of historical interest". I'm not so sure. As I say in volume IV's essay on Hart as a political philosopher:

European states in the early twenty-first century move ever more clearly out of the social and political conditions of the 1960s into a trajectory of demographic and cultural decay; circumscription of political, religious, and educational speech and associated freedoms; pervasive untruthfulness about equality and diversity; population transfer and replacement by a kind of reverse colonization; and resultant internal fissiparation foreshadowing, it seems, ethnic and religious inter-communal miseries of hatred, bloodshed, and political paralysis reminiscent of late twentieth-century Yugoslavia's or the Levant's.<sup>19</sup>

The judgments of law-makers about the truth or falsity of such mainly factual but partly moral assessments and predictions profoundly affect their judgment about the responsibilities and immunities we have under laws articulated partly in terms of human rights, laws which embody and/or call for assessments of a multitude of human needs and interests and of possible and arguably "proportionate" means of meeting those needs, satisfying those interests, and averting threats (of many kinds and degrees of

19. See 3 FINNIS, *supra* note 6, at 274–5.

likelihood) to the interests and obstacles to the meeting of those needs. The making of such assessments very far outruns judicial competence and the resources of legal learning and the structure of litigation.

## VI

Having given its account of practical reason's first principles and of their elaboration as moral norms under the aegis of the "methodological requirements of practical reasonableness" (later better explained in terms of the requirement of openness to integral fulfilment), *NLNR* turned to the various forms of common good, and their instantiation in friendships and wider communities. Then the problems of justice such as arise between friends, non-friends, and enemies were traced, and the specification of principles of justice into specific rights was displayed in its logic and its manifestations in human rights instruments purporting to track morality's requirements of justice were sketched out a bit. Then chapter IX tackled the problem of putting these norms and rights into effect in the life of the community, as aspects of its common good, which are in tension with other aspects. Such problems of defining and implementing the complex aspects of a community's common good were shown to be coordination problems, in the wide sense in which I used that term. The solution of coordination problems was shown to require, in practice, authority, which in turn could efficiently serve its coordinating functions if its identity, limits and conditions of use were given some stability and coordinated resolution. So, finally, chapter X came into view, on law as the modality of authority adapted systematically to resolving coordination problems in a relatively specific kind of way, coercive where necessary but essentially by appeal from the practical reasonableness of law-makers to the practical reasonableness of subjects, not by reproducing the standing specific norms of morality but by supplementing them with countless *determinationes* that in countless ways could have been more or less different but once settled in the authoritative way become the standard for the self-direction of free subjects including those who favoured or would have favoured a different resolution. My conception of positive law, and of the essentials of its relation to natural, that is, moral law, is summarily set out in the infamous seventeen-line definition on pp. 276–77:

Throughout this chapter, the term "law" has been used with a focal meaning so as to refer primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a "complete" community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any

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other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

Only in chapter XI do I turn to the question of the various kinds of obligation that should be predicated on laws of this positive-law kind, and of the grounds for such predications. To speak of obligation is to speak of what is needed, in a certain kind of sense of necessity, and the need for obligation is, in my view as I think Aquinas's, secondary to other needs that law serves with its rules, not all of which are obligation-imposing even in their form. The need to treat laws as obligation-imposing is conditional and subordinate in the set of ends and means that clusters around the institution of state law. As I say in *Aquinas* as the conclusion of the section in chapter VIII on "Law as primary proper means of co-ordinating civil society":

[T]he fundamental notion of law [is:] a prescription of *reason*, by means of which rational and indeed conscientious and reasonable practical judgments about the needs of a complete community's common, public good, having been made and published by law-makers, are understood and adopted by citizens as the *imperium* of their own autonomous, individual practical reason and will.<sup>20</sup>

*Imperium* had been explained earlier (and also in *NLNR* chapter XI.8 in some pages (338–40) central to an understanding of that book), as having nothing necessarily to do with obligation, but rather as the directive one gives oneself, after one has made a choice, to execute the choice for the sake of the benefits opted for in the choice and kept in view by the *imperium*.

So I am reluctant to go along with Mark Murphy's suggestion when he says "I take the organizing idea of Finnis's view to be that law is binding in reason . . . ." This makes primary what is secondary and leaves out of view what is primary, in my view: the complex of ideas about securing common good under conditions of immense complexity and variety of reasonable alternatives. Murphy's emphasis here and pervasively on obligation seems to me too Kantian in spirit, too close to the similar quasi-Kantianism of Raz's "Normal Justification Thesis" about authority (including authority exercised by making and applying law): the idea that authority's (and thus law's) essential function is to enable us to fulfill the [moral] obligations we already have (but in the absence of authoritative coordination cannot fulfill). This again hides away the notions of good, common good, ends (all

20. AQUINAS, *supra* note 2, at 258.

*sub ratione boni*) and means; if it does not rashly assume that all the obligations we have to foster common good in community pre-date the emergence of coordination solutions via authority, it certainly treats the individual virtue of compliance with duty as prior in explanatory order to the sheer *flourishing* of individuals and groups in political community, the good which is the real explanatory source of the need for and shape of individual virtue so far as it is relevant to these issues.

I question Murphy's rendering of my legal-philosophical project because it is so bound up with his account of the so-called weak natural law thesis, which his paper is agreeably and helpfully keen to defend against various positivists and against proponents (if such could be found) of the so-called strong natural law thesis. For he defines the weak (that is, sound) natural law thesis thus (p. 4): "To be law is to be such that, if it is not a rational standard, it is defective as law." And rational standard has just been given a highly stipulative definition: a standard, for example a law, is a rational standard if and only if it is "binding in reason . . . that is, backed by decisive reasons for compliance"—a definition which concludes the very sentence in which he stated what he takes to be the organizing idea of my view of law. So, much as I welcome his aid and his paper's ringing conclusion that my appeal (as he sees it) to the weak (sound) natural law thesis "defines the subject" which Leiter and others had complained I was merely changing (that is, evading), I am hampered in embracing the setting up and course of the defence.

My difficulty is greater and perhaps more definite in relation to the core of Murphy's argumentation. I will state two inter-related concerns, or sets of concerns.

First, then, a good deal of the defence pivots on a conception of "kind-membership", and of the normativity of kind-membership—the "ought to be" implicit in, or warranting, any judgment of defectiveness (such as that involved in the definition of the sound natural law thesis. I am inclined to think that this sort of conceptual analysis is unsound, because it floats above the four domains and is inattentive to their differences and to their respective rationales. Systematically, from the first sentence of its first section, the paper uses examples from the first (frogs' legs), the second (assertions), and fourth (clocks), but it never suggests that there might be differences between them—and such differences might well affect, perhaps strongly, the kinds of normativity involved in kind-membership in the three domains. Nor does the paper note that there is another domain, the third in Aquinas's and my more recent enumeration, the domain of *praxis*, free choice, morality and (we may suppose) of law including positive law (notwithstanding its technical aspects in the service of moral ends). I think that in fact the paper's notion of kind-membership is in thrall to an inappropriate, first-domain paradigm of kind-normativity. And its demonstration that "the ought of kind-membership is not one of [the] practical oughts" [as in "you ought to act for

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the sake of . . . and not for bad outcomes such as might result from a pointless doomsday machine”] altogether fails because the kinds it takes are from the first domain (frogs) and the fourth (construction of a pointless but effective doomsday machine). There is in fact every reason to expect that the oughts of kind-membership within the domain of *praxis*, morality and law, the oughts with which a sound natural-law theory of law is concerned, will be predicated by the theory in view, not of some concept of kind-membership ranging univocally across the four domains, but of human goods and bads and the bearing of rational deliberation and choices on such good and bad outcomes and actions.

So, secondly and more particularly: the paper argues that the task of sound natural law theory is to show what normative and non-normative conditions for the existence of law are necessitated by its office<sup>21</sup> of giving decisive reasons for compliance with its rules [that is, by stipulation, of being—or purporting to be [a Razian touch]—a “rational standard”]. Murphy admits that there may well be necessary conditions for the existence of law, which are not necessitated by this postulated and very formal “office”, and he is unsure how to think about that. This uncertainty of his is warranted, because his method is fragile not only where he admits its fragility (in relation to settling what is necessary for carrying out the office—of identifying just what makes something “constitutionally unable” to perform an office: “the weak link here”, he notes), but fragile also where he does not make such an admission: namely in identifying the office itself. My definition of law (no more than an expansion of Aquinas’s) identifies both law’s office as serving the common good of a complete community and the conditions without which it *cannot* perform that office satisfactorily. I can see no case for reducing the office to the formal rationale of imposing obligation, still less to reducing it further to the Razian formal rationale of *purporting* to impose obligation.

My last observation about Murphy’s harrying of the positivists harks back to the first section of my remarks today. I do not see the need to accede, as his paper does, to the Razian/Dicksonian demand that there be identified a set of necessary and sufficient conditions for the existence of a kind of subject-matter like law. To be sure, there are excellent reasons for going along a very long way (though not *à outrance*) with the lawyerly demand that necessary and sufficient conditions be laid down for the existence (validity) of all the laws of a concrete legal system, because such hard-edged clarity is needed (normally) for the satisfactory carrying out of law’s characteristic contribution to the common good. But there is no case for seeking out the point at which—the precise set of missing conditions under which—some subject of action and reflection in the domain of social *praxis*, something intended or purporting to be, or describable

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21. The Greek of *Parts of Animals* I: 641b1–2 is *ergon*, work or function: this key Aristotelian word straddles the Thomistic “act” and “object” as those terms are used in the epistemological axiom.

somehow as, a “thing of a kind” (say, law or laws) “is not even a candidate for being such a thing” or is “no such thing at all” or “necessarily nonexistent as a thing of that kind”. This kind of attention to the margins seems fruitless. Attention to what makes something defective is quite enough, and will *include* due attention, in its proper place, to the question when and how laws impose or do not impose moral obligation.

## VII

Michael White argues that if practical reason is to have the character of law, say as natural law, it must get that character from an external cause that itself exemplifies rationality and stands above and in authority over one’s own or any other human being’s practical rationality (functioning, let’s assume, perfectly as rationality). Such an external source is the *lex aeterna* of Aquinas’s *Summa Theologiae*, rooted here in Augustine and quite unrooted (White holds) in Aristotle. Candace Vogler suggests essentially the same thesis at the end of her paper, when she quotes Matthew O’Brien’s defence of “Anscombe’s insistence that we require divine law ethics of the sort that informs Judeo-Christian thought in order to give the appropriate sense to the special *moral* ought” (I shall leave aside, in these last minutes, her extension of this thought to the question of absolute, that is exceptionless prohibitions such as I touched on at some length earlier). And these references to divine law are not to divine positive law, as in the revealed law of the Old Covenant, or the *revealed* law of the New Covenant (including the Decalogue), but to the *natural law* that is available to reason unaided (as St. Paul teaches: *Romans* 2: 14–16) by divine revelation, but is confirmed and clarified by the Decalogue, and is to be regarded as in line with the divine intention, i.e. with the *lex aeterna*.

She lets O’Brien make the point more amply:

If someone does not believe in God, or believes in God but does not believe that God intends—legislates—for him to strive for his own perfection, then only the former, immanent source of moral normativity remains. If someone does believe in a divine legislator, however, then choosing to cooperate with God’s plan is for him practically necessary to achieve his own perfection, and the authority of morality’s claims upon him will rest in the authority of God . . . .

When we look at this passage in its context on the cited page of O’Brien’s thesis we find that by the “immanent source of moral normativity”, he means (and says) that morality without the *demand* implicit in divine legislation is no more (and no less) than the *recommendation* implicit in one’s regarding one’s acquisition of virtue as “due to oneself, as constituting [one’s] immanent perfection”.

A raft of issues beckon, and by now I can only be very summary. An ethics that makes one’s own perfection the sole supreme source of norma-

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tivity is repugnant to reason. The reductive reading of Aristotelian-type ethics, which O'Brien here takes for granted, though it has plenty of support in Aristotle's text and in neo-scholasticism, is also incoherent with much else in Aristotle. Think, for example, of the centrality of general or legal justice, and even more pertinently of Aristotle's majestic evocation (near the beginning of book I of the *Nicomachean Ethics*) of the universal common good, the supreme good and end of the political philosophy of which ethics is a kind of part, a passage presenting that universal common good, and not my precious virtue considered in abstraction from *that*, as the ultimate end and supreme good of human existence and action.<sup>22</sup> But leave Aristotle where he lies; the ethics defended by the new classical natural law theory finds the immanent source of moral normativity in the *bonum rationis*, the practical reasonableness or rationality of making all one's choices consistent with *integral human fulfillment*, which is the fulfillment of all human persons and communities in all the basic goods of human existence, and is the proper object of the *integral* directiveness of all the first principles of practical reason taken together. And the master moral principle that one's choices are to be consistent with *that*, the principle that is then specified in the Golden Rule and all the other demands of justice and other virtues, is no mere recommendation, and nor therefore are the moral norms specifying that principle, including the moral absolutes protecting persons in the basic aspects of their wellbeing against every choice precisely to harm. Nor are either the master principle or the specific moral norms mere means to an end of individual (my own!) perfection: the good of practical reasonableness is transparent for integral human fulfillment, a far different horizon of finality and goodness.

As I have contended in my essay on Anscombe's posthumously collected essays, in volume II at pp. 74–75:

[H]er whole discussion assumes that any non-theistic moral philosopher who followed her advice and desisted from using the terms derived (she thought) from divine-law ethics could still find real distinctions to be drawn between the virtues and the vices, the just and the unjust, and more generally the reasonable and the unreasonable in action, and could still hold that "it is in any case a disgraceful thing to say that one had better commit this unjust action".

But then I think it follows that this thesis of Anscombe's lacks what one might call working importance. If the issue is not about ethical scepticism as such, but only about the precise *force* of a negative ethical predicate such as 'is vicious and unreasonable', and if it is further accepted that this could extend to 'vicious and unreasonable whatever the circumstances', then I think the issue is quite marginal . . . I should add that I rather doubt the

22. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 7–8; see AQUINAS, *supra* note 2, at 114–15 (quoting Aquinas's powerful rendering of this).

thesis, even when marginalized. I do not think Anscombe was right to say that *dei* in Aristotle (who, as she says, did without a notion of divine law) is really different from the modern ‘moral ought’, and I can’t see that, for example, Gaius the second-century AD jurist is presupposing a divine law when he treats natural right and natural law as synonymous with what natural reason requires of us.

Reflecting on White’s remarks about the absence of any divine law in Aristotle (something also asserted by O’Brien and the scholars he cites), I think my statement that Aristotle “did without a notion of divine law” should be taken very narrowly indeed. White speaks of Aristotle’s deities, but in the last paragraph of *Metaphysics* Lambda (XII), which Jaeger plausibly saw as a free-standing lecture summing up Aristotle’s most primary theses, there comes into focus (but also was foreshadowed earlier in that book XII) the one prime mover, the self-sufficient originating and maintaining principle of the eternal cosmos, and Aristotle concludes with the ringing Homeric words adapted to this monotheistic ruler: the world does not have the will to be governed [*politeuesthai*] badly: “The rule of many is not good: let there be *one ruler* [*koiranos*]”.<sup>23</sup> Again, though the *Rhetoric* does not purport to expound Aristotle’s positions precisely as such, one cannot rightly dismiss his unabashed deployment of the position that there is a natural law that holds for all men and is discernible to all, concerning the just and the unjust, a law that he says is the very same law that Sophocles’ Antigone spoke of as “statutes that live from all eternity” and Empedocles’ as each a “universal precept” [*pantôn nomimon*] and Alcidas as specifically precepts of God who has made all men free and none a slave.<sup>24</sup> Aristotle’s ethics, at a minimum, is open to such ideas. If we revisit that quotation from O’Brien:

If someone does not believe in God, or believes in God but does not believe that God intends—legislates—for him to strive for his own perfection, then only the former, immanent source of moral perfection remains.

I think it matters where the negation sign is put here. Is or is not this non-believer someone who believes that reason establishes that there is no God and/or that there is no divine intention for human life? Such a closure—far different from Aristotle’s reticence, however far one goes in treating it as a practical agnosticism—leaves much in darkness, including the status of practical reason’s principles and norms. Notoriously, such denial and closure tends to unravel the very idea that virtues and vices are matters of reason and true practical propositions, rather than matters of convention or a sort of sophisticated means of getting along, ultimately a

23. ARISTOTLE, *METAPHYSICS* bk. XII.10 (quoting Odysseus in HOMER, *ILIAD* bk. II, at 204).

24. ARISTOTLE, *RHETORIC* bk. I, at 13.

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mask behind which one pursues one's purposes as one settles them with the autonomy of following out one's strongest or most settled desires and aversions.

And to be sure, the ethics of eternal and natural law is penetratingly evoked by White as a matter of our divine filiation, such filiation—such membership somehow (I take it) in the household of God—may be in the natural household of the created and providentially ordered natural order in which human practical knowledge of practical truth is also a natural, partial but sound knowledge of the mind of God (*lex aeterna*), or it may be membership in the supernaturally given household of salvation disclosed to us by revelation, the household of the saints. In either and both, such membership requires of us a fitting attentiveness to the needs and good of all in that household.

This is an ethics markedly different from and, I think, rationally superior to any idea that the rationale and necessity of treating God as authoritative precisely and most fundamentally is that doing so is what one needs “to achieve one's own perfection”.<sup>25</sup>

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25. See AQUINAS, *supra* note 2, at 119–23, 308–09, 314–15, 327–31; NATURAL LAW & NATURAL RIGHTS, *supra* note 2, at 378, 406–10.

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