



Nearly Natural Law (2007)

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Nearly Natural Law

JOHN GARDNER *

1. Humanity, rationality, morality

We human beings are rational beings. We have a highly developed capacity to respond to reasons. This is an important aspect of our nature. It does not follow that there can be no case of a human being whose capacity to respond to reasons is limited or missing. It only follows that such a rationally deprived human being is not the central case or paradigm of a human being. In explaining what a human being is, it would be profoundly misleading, for example, to present someone in a permanent vegetative state as a first illustration. For she lacks altogether the natural human capacity to respond to reasons. This may tempt some to say that she is not human, and hence that she lacks human dignity or human rights or such like.¹ But this goes much too far. Even in her permanent vegetative state she is still human in various other respects. She still has, for example, a human

* Professor of Jurisprudence, University of Oxford. This is a much-extended version of my Natural Law Lecture, delivered at the University of Notre Dame Law School on 22 March 2007. A different version was delivered as the Leon Petrazycki Lecture under the auspices of the Ius et Lex Foundation at Warsaw University on 21 May 2007. I am grateful for the helpful questions and comments of those present on each occasion. Special thanks are owed to John Finnis, Robert George, and Tomasz Stawecki.

¹ See Michael Tooley, 'Abortion and Infanticide', *Philosophy and Public Affairs* 2 (1972), 37 (discussing persons rather than human beings, and neonates rather than PVS patients, but following the same pattern of thought.)

biology and a human physiognomy. These too are important aspects of human nature. Why are they important? Here is one reason why. That someone in a permanent vegetative state is still human in these other respects is the primary reason why we care about her being deprived of her human capacity to respond to reasons. We care because, as a human being, she ought to be rational. If she were not a human being, but literally a vegetable, her lack of rational capacities would not worry us. For it is not part of the nature of a vegetable to be rational.

Our highly developed capacity to respond to reasons includes the capacity to use *norms* to guide our actions and beliefs and feelings and desires and so on. A norm is the same thing as a standard. Some norms apply to us inescapably just because we are rational beings. These include, most obviously, the norms of rationality itself, such as the norm by which one should believe or act only for an undefeated reason. They also include the norms of logic, such as the principle of noncontradiction, conformity to which makes it possible for us to engage in reasoning. They also include moral norms. Being subject to morality is an inescapable part of being rational in much the same way that being subject to logic is an inescapable part of being rational. And being rational, to repeat, is part of being human.

It follows that any human being who asks the question ‘Why should I be moral?’ has already misunderstood either human nature or the nature of morality.² To ask this question is to suggest that one has some rationally intelligible alternative to being engaged with morality. But one has no such alternative. It is part of human nature to be engaged with morality; a being with little or no responsiveness to moral norms, even if otherwise

² For discussion see John Hospers, *Human Conduct* (New York 1961); Bernard Williams, *Morality* (New York 1972), 17–27; Michael Smith, *The Moral Problem* (Oxford 1994); Thomas Nagel, ‘The Value of Inviolability’, *Revue de Métaphysique et de Morale* 99 (1994), 149; Joseph Raz, ‘The Amoralist’ in G. Cullity & B. Gaut (eds), *Ethics and Practical Reason* (Oxford 1997) 369;

highly responsive to reasons, is rationally deprived. If we are explaining what a human being is, this one, like the human being in a permanent vegetative state, is not a suitable example. To hold him up as not only an example but indeed a model is the basic error of modern economics. It is no answer for economists to say that *homo economicus* does respond to moral norms whenever it is rational for him to do so. For this response uses a debased notion of the rational according to which morality is something from which one could rationally disengage, and hence for engaging with which one needs further (non-moral) reasons. In fact, being responsive to morality is an integral part of being rational, and so needs no (further) rational explanation.

Let's give this thesis a name – the 'inescapable morality thesis' or '(IM)' for short – and a canonical formulation:

(IM) Engagement with moral norms is an inescapable part of rational, and hence human, nature.

Three lines of thought, all fallacious, have tended to fuel doubts about the truth of (IM).

The first and most obvious source of doubt is that human beings perpetrate, and always have perpetrated, a great deal of immorality. It hardly needs saying that widespread failure to conform to moral norms does not by itself suggest that (IM) is false, since the explanation for much of the failure might be that human beings are prone to make moral mistakes just as they are prone to make other kinds of rational mistakes. The offenders in question are not disengaged from morality but merely misunderstand or misapply its norms. This explanation is consistent with, and indeed supportive of, (IM). So the immoralities emphasised by those who doubt (IM) must be different. They must be *knowing* or *indifferent* failures to conform to moral norms. Personally I doubt whether there is very much moral indifference in the world. In my experience even the basest people tend to kid themselves as well as others that what

they do is morally acceptable. Even the torturer and the gun runner and the ethnic cleanser cloak themselves in pathetically inadequate moral self-justifications (e.g. 'if I didn't do it someone else would' or 'nothing personal, it's only business' or 'they deserved it'). There is no general reason to suspect that these self-justifications are uttered insincerely. So long as they are sincere, even if self-deceptive, then this is not moral indifference but moral mistake, and it remains consistent with, and indeed supportive of, (IM). As for knowing failures to conform to moral norms, these are equally reconcilable with (IM). (IM) is not the thesis that, for a rational being, nothing can conflict with moral norms, nor is it the thesis that moral norms override everything with which they conflict. Human beings almost always have their reasons, often nakedly self-interested reasons, for their knowing failures to conform to moral norms. That human beings are prone to allow moral norms to be too easily defeated in conflicts with naked self-interest, and hence often need incentives to improve their moral conformity, does not show that their engagement with morality is rationally escapable. Once again, it shows nothing more than a tendency for rational agents to make rational mistakes, this time mistakes about the relative importance of their own profit. And once again this diagnosis is consistent with, and indeed supportive of, (IM).

Beyond all this there is the more general point that (IM) cannot be called into question by pointing to the existence of any number of human beings who lack moral engagement. For these supposed counterexamples may only go to show that, so far as the moral aspect of human nature is concerned, many or even most human beings are non-central cases. When we study the nature of human beings (or the nature of anything) there is not only the question of which things are included in and which things are excluded from the category at the limits, but also which are of those included are members of the category *par excellence*, and should be used as examples to shed light on the rest. One single counterexample suffices to show that a proposed

explanation of the nature of something is mistaken at the limits. But no number of supposed counterexamples can show that a proposed paradigm is not a paradigm. That is because a paradigm or central case is simply the case that shows how the other cases – including those supposed counterexamples – ought to be. It is part of the very idea of a central case that there might be cases (even statistically preponderant cases) that do not exhibit all the features that make the central case a central case.

So much for the first source of doubt about (IM). Here is a second source. Every proposed moral norm calls for justification. Actually, every proposed norm, moral or otherwise, calls for justification. But with moral norms the stakes are particularly high. Moral norms are among those that stand or fall on their justification. If the norm does not turn out to be justified (i.e. if those to whom it applies are not justified in using it) then it is not a moral norm. Surely this is enough to vindicate the economist's insistence that we need further reasons for acting morally, and hence to rehabilitate the scorned question 'Why should I be moral?' For this question, surely, is only a generalization of the sensible question 'Why should I do that?', asked by someone who wants to hear the justification for a proposed moral norm. Or is it? On closer inspection, the questions are very different. Those who ask the second question are already caring about, and hence engaging with, morality, in defiance of the sceptical tenor of the first question. They are asking whether this is what morality really expects of them precisely because, if it does, there will be nowhere rationally to hide from the expectation. So they are affirming, rather than casting doubt on, (IM). The economist who points out that *homo economicus* does respond to moral norms whenever it is rational for him to do so may seem only to be asserting the innocent truth that moral norms stand or fall on their justifications. But that would be true only if the economist allowed moral justifications to count without insisting on the need for a further non-moral justification for rational beings to take an interest in the moral justification in question.

The third source of doubt about (IM) is that it seems to assimilate morality to invariant bodies of norms like the norms of logic. While there are arguably some timeless and placeless moral norms, to regard morality as wholly comprised of these is to limit morality to too narrow a range of subject-matters. The norms that forbid race discrimination, for example, are sensitive to various historical and social contingencies, but it would be a mistake to conclude from this that race discrimination is not immoral. Yet doesn't (IM) entail that it is not? This challenge is closely related to the previous one and involves a similar misreading of (IM). (IM) has nothing to say about the content or scope of morality. It concerns only morality's hold over us as rational beings. Whatever subject-matters morality may regulate and with whatever sensitivity to changing circumstances, a rational being cannot but be concerned with its norms in all the cases to which those norms apply. To know a moral norm as moral, to put it another way, is to be committed to using it as a guide to action (albeit one that may be defeated by countervailing considerations). This is perfectly consistent with the idea that morality adapts itself to changing circumstances and thereby remains justified at all times and places. So, for example, some of the moral norms that apply in situations of dire emergency may be different from those that apply otherwise. Yet even in emergencies, moral norms – those moral norms that are applicable in the circumstances – remain rationally inescapable and (IM) continues to hold. There is no room for the response 'It's an emergency so morality doesn't apply' because morality, by its nature, already adapts itself to the emergency.³

³ By the same token there is no room for David Gauthier's view, in his *Morals by Agreement* (Oxford 1986) at 84, that perfectly competitive markets, if any existed, would be a 'morally-free zone'. If under certain conditions there is no moral objection to pursuit of profit at another's expense, that is not because under those conditions morality does not apply but because under those conditions morality permits what would otherwise be immorality.

2. Norm and normativity

(IM) implicitly contrasts moral norms with at least some other norms, norms from which rational beings might in principle disengage, and hence with which they need a (further) reason to engage. Yet the very idea of such a norm is puzzling. If a norm is such that its existence doesn't already entail that we have reason enough to engage with it, in what sense is it a norm? The simple answer is that something is a norm if it can be used as a norm. And not everything that can be used as a norm is such that, rationally, one cannot but use it as a norm. As a rational being I can, for example, use Marcella Hazan's recipe for *ossobuco* or I can use Anna del Conte's recipe for *ossobuco*. I can also take no interest at all in any recipe for *ossobuco*, or indeed in any recipe at all. Engagement with the norms contained in cookbooks is not inescapable for rational beings. And yet they are undoubtedly norms. The Hazan and del Conte recipes cannot be used except normatively, i.e. in guiding and appraising one's attempts to cook *ossobuco*. The same is true of, for example, the platinum-iridium bar that was once kept by the French Academy of Sciences to provide an authoritative measurement of one metre in space. The markings on this bar were normative, i.e. available for use as norms of measurement. Yet engagement with these markings was never inescapable for rational beings, who might always have decided to measure space in yards or cubits instead.

You may say that parallel examples exist in morality. For example, friends are subject to norms of friendship. But there is no rational requirement to have friends. Friendless people may be missing out on one of the good things in life, but so (you may say) are people who don't try Marcella Hazan's recipe for *ossobuco*, or even people who prefer yards to metres. So it seems that the norms of friendship are, in the relevant sense, escapable: they are not such that one cannot but use them as norms. Doesn't this falsify (IM)? Or at any rate isn't the only way to rescue (IM) in the face of this counterexample to deny, in

desperation, that the norms of friendship are moral norms? Not quite. The supposed resemblance here between the moral norms of friendship and the norms contained in Marcella Hazan's recipe for *ossobuco* is superficial and deceptive. The best way to see this is to think about the two sets of norms as they might be invoked by an observer or adviser. While preparing for a dinner party, let's suppose, Alan asks Beth, his partner, for advice concerning his (Alan's) friendship with Colin: 'Should I avoid mentioning this dinner party to Colin in case he is hurt at not having been invited?' Never mind what Beth replies. The point that matters here is that if Beth regards her reply as dictated by a moral norm of friendship, or indeed any other moral norm, then she cannot but be committed to this norm as a guide to Alan's action (and to her own action of judging Alan's actions). She cannot intelligibly say: 'Morally you should certainly tell him, but I wouldn't give any credence to that norm if I were you.'⁴ But things might be very different if, later in the same conversation, Alan asks Beth for advice concerning his (Alan's) culinary efforts. 'Should I put

⁴ I mean she cannot intelligibly say this if she regards her reply as dictated by a genuine moral norm. I do not mean to deny that she could intelligibly say it to convey some other meaning. In particular, the word 'moral' and its cognates are sometimes used in scare-quote-marks (or in a special tone of voice, or with a capital letter, etc.) to refer to some sectional moral outlook such as that of the bourgeoisie or one's parents or the Church or social convention etc. In this parasitic usage a reference to 'morality' may be scathing and not at all committed. Consider, for example, Hans Kelsen's portrayal of 'moralities' as sectional normative systems in his *General Theory of Law and State* (trans. Wedberg, New York 1945), 374-5. I find that many of my students follow Kelsen putting scare-quote-marks (visible or invisible) around references to 'morality', and listing as 'moral' various norms that they clearly find ridiculous or worse. This is one of the tendencies that Bernard Williams rightly derides when he derides the modern reinvention of morality as a 'peculiar institution' in *Ethics and the Limits of Philosophy* (London 1985). Unfortunately Williams shows little backbone in the face of this tendency. He decides to rebrand (genuine) morality as 'ethics', which makes for more and worse confusion.

the meat in the oven now?', asks Alan. Beth may reply, citing a norm from the cookbook lying open on the table: 'According to Marcella Hazan, you should wait until the oven is at 180°C.' At this point Alan may intelligibly continue: 'So that's what I should do, right?' And Beth may intelligibly reply: 'No, I wouldn't give any credence to that norm if I were you. Hazan is wrong.' In other words it is open to Beth to cite a norm from the cookbook – unlike a moral norm – without being committed to this norm as a guide to Alan's, or anyone else's, action. She can cite it as a norm in what Joseph Raz usefully calls a *detached way*.⁵

Of course Beth may also have her own norms for cooking *ossobuco*, to which she is committed. She may (for all we know) be a believer in the Anna del Conte recipe. So the suggestion is not that one can *only* relate to culinary norms in a detached way. The suggestion is that one can relate to culinary norms in either a committed or a detached way, whereas moral norms (norms that one recognizes to be moral norms) are among those that one cannot but relate to in a committed way. It is irrelevant to the last point that many moral norms apply only in certain situations (e.g. only between friends, only in emergencies) and that one can in principle avoid being in these situations. Moral norms are all inescapable in the sense relevant to (IM) even though there is clearly a different sense in which some of them remain escapable (in that one can avoid getting oneself into the situations in which one would inescapably be engaged with them). This is just another way to make the point I already made once: the contrast implicitly drawn in (IM) between norms with which a rational being is inescapably engaged and those from which she may instead be disengaged is not the same as the contrast between norms that apply invariantly (irrespective of circumstance) and those that have a narrower scope of application.

⁵ Raz, *The Authority of Law* (Oxford 1979), 153–7.

Nor is the contrast implicitly drawn in (IM) to be confused with the contrast between norms of obligation (or duty) and other norms. Norms vary in respect of their normative force. Some are obligation-imposing, some are permission-granting, some are power-conferring. It is tempting to say that the difference between the moral norms of friendship and the norms found in a Marcella Hazan recipe is that the former are (or include) obligation-imposing norms and the latter are (or do) not. This is a mistake.⁶ Except where she makes space for variations, the norms in Marcella Hazan's recipe for *ossobuco* are straightforwardly obligatory. If one is to follow the recipe one must take these specified steps whether one likes it or not. It is no answer to say that one has no obligation to follow the recipe in the first place, or to keep following it. For it is equally true that one has no obligation to make friends, or to stay friends with them, and yet the norms of friendship clearly include obligation-imposing norms. Whether a norm is obligation-imposing does not depend on whether the activity or relationship it helps to structure is itself obligatory. Still less does it depend on whether the norm is such that engagement with it is rationally inescapable: one can recognize a norm as obligation-imposing without thinking it remotely worth using as a guide to action.

If the cookbook case does not convince you, consider this case instead. Barring special situations, nobody has an obligation to play *Monopoly*, nor (if they do play *Monopoly*) to assume the role of 'banker' in the game. Yet under the rules of *Monopoly*, whoever does assume the role of banker has to pay out £200 from the bank to each player whenever that player's token passes 'Go'. This is the banker's obligation. She must do it whether she likes it or not. In respect of normative force there is no difference between this norm of *Monopoly* and the norm of friendship

⁶ For a recent example of this mistake see Sophie Delacroix, *Legal Norms and Normativity* (Oxford 2006), xi-xii.

according to which, when a friend is in trouble, one must give the friend's needs priority over the no less urgent needs of strangers. What strikes some as a difference in respect of normative force here is in fact the difference between moral norms and some other norms that is identified by (IM). Both norms are obligation-imposing, but it is possible to cite the *Monopoly* obligation in a detached way – while, for example, deriding the playing of *Monopoly* as a total waste of time ('as this daft obligation owed by the banker only goes to show!'). Whereas recognizing the obligation of friendship as an obligation of friendship (and hence a moral obligation) entails being committed to it as a guide to the action of those who have friends, and to the judgment of those who judge them.

H.L.A. Hart famously struggled, in *The Concept of Law*, to explain the nature of obligations in such a way that one could still regard a norm as obligation-imposing while remaining noncommittal about whether to engage with it as a guide to action. Solving this problem was important to his explanation of the nature of law. For him it brought to a head the wider problem of the normativity of law. How, wondered Hart, is it possible that the law is made up of norms even though these norms do not exhibit the property picked out in (IM), i.e. even though it is not the case that engagement with legal norms is rationally inescapable? Hart's progress towards a solution of this problem was inhibited by his failure to keep apart two questions.⁷ One is the question of whether it is possible to use a norm in the sense of *following* it without being committed to it as a guide to anyone's behaviour. The other is the question of whether it is possible to use a norm in the sense of *applying* it without being committed to it as a guide to anyone's behaviour. You may say that applying a norm is just another way of

⁷ A failure previously pointed out by Neil MacCormick in *Legal Reasoning and Legal Theory* (Oxford 1978), 292.

following it. But the case of Alan and Beth above shows that it need not be. Beth uses the norm from Marcella Hazan's cookbook *qua* norm-applier (she applies it to the case of Alan's *ossobuco*) but she does not use it *qua* norm-follower nor does she commit herself to its being so used by Alan or by anyone else. She applies it only to say that it should not be followed.

Hart failed to register this distinction in his famous and otherwise highly illuminating treatment of what he called the 'internal aspect' of rules.⁸ The consequences for his attempt to explain law's normativity were severe. Thinking only of those who use legal norms by following them, he found it impossible to explain how a legal norm could be used except by those who were committed to it. He correctly stressed that this commitment on the part of legal norm-users – their 'internal point of view' – need not be a moral commitment. It could be a commitment out of fear, for the sake of a quiet life, to subvert the system from within, etc. In other words it could be the kind of half-hearted commitment that he often designated by the word 'acceptance'.⁹ But however he rephrased this point the basic problem re-emerged that, when we focus on norm-use as norm-following, there is no room for legal norms to be used as norms, and hence to qualify as norms in the first place, except for one who is (to the relevant degree) committed to their use as a guide to action. From this we may be tempted to conclude that there is no normativity without commitment. If this is true, then (IM) can be generalized to all norms, including legal norms, the norms of games, the norms in recipes, etc. Hart knew full well that this was the wrong answer.¹⁰ But having missed the distinction between the two modes of norm-use, Hart could not see where his handling of the problem had gone wrong.

⁸ Hart, *The Concept of Law* (Oxford 1961), 55.

⁹ *Ibid.*, 112-3, read with 198-9.

¹⁰ See the entry in his diary reported by Nicola Lacey in *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford 2004), 228.

The ‘problem of normativity’ with which Hart was struggling is the same puzzle with which we started this section: How can there be norms, engagement with which is not an inescapable part of rational, and hence human, nature? How can it be the case that grasping (for example) legal norms, *qua* legal norms, does not commit one to their use as guides to action? I will call this ‘Hart’s problem of normativity’. This is the very opposite of the ‘problem of normativity’ that is emphasised by some recent moral philosophers in the Kantian tradition, led by Christine Korsgaard.¹¹ These neo-Kantians wonder: How can there be norms, engagement with which is an inescapable part of rational, and hence human, nature? How can it be the case that merely grasping (for example) moral norms, *qua* moral norms, commits one to their use as a guide to action? I will call this ‘Korsgaard’s problem of normativity.’ One may be troubled by both of these problems of normativity. But in a way they are rival problems. One must treat one of the two problems of normativity as solved or dissolved in order to see the other as a problem. Hart’s problem of normativity becomes a problem only when one tends to think of a norm as a kind of reason, and hence as inescapably engaging the attention of any rational being without further ado. Korsgaard’s problem of normativity, by contrast, becomes a problem only when one thinks of a norm, not as a reason in itself, but as something which rational beings might or might not have a reason to use. I hope I have made my own position on this rivalry tolerably clear. I think of a norm as a kind of reason. So the real problem of normativity, for me, is Hart’s problem of normativity: If a norm is such that its existence doesn’t already entail that we have reason enough to engage with it, in what sense is it a norm? Fortunately there is a solution at hand. The simple solution, as I said, is that something is a norm if it can be used as a norm. But this simple solution conceals much

¹¹ See Korsgaard, *The Sources of Normativity* (Cambridge 1996), 10-16.

complexity. For what does it mean to use a norm? The answer is that one can use something as a norm by applying it as a norm, and since one can apply some norms in a detached way (witness Beth), there can be norms, the existence of which does not entail that we have reason enough to engage with them.

3. Law and its central case

To repeat: even though his explanation of how this is possible failed, Hart believed that legal norms belong to the latter class of norms: the class of norms, the existence of which does not entail that we have reason enough to engage with them. He believed the ‘escapable law thesis’, or ‘(EL)’ for short:

(EL) Engagement with legal norms is not an inescapable part of rational, and hence human, nature.

Is (EL) true? You may think it is not true if, as some believe, law is necessary for human beings, or human societies, to flourish.¹² Of course this proposal does not have much plausibility when applied to small groups of human beings living in isolated circumstances. At the very least it needs to be qualified to apply only to more complex civilisations and mobile populations. Perhaps, even its proponents may admit, there are relatively few contexts in which it applies with full stringency. But never mind that. In those contexts in which it does apply – where law is humanly necessary – isn’t it the case that engagement with legal norms is humanly inescapable, contrary to (EL)?

Not so fast. True, the necessity to have law, if and when there is such a necessity, might sometimes be a reason for me to obey the law (e.g. where my breaking the law would contribute

¹² I am thinking of the position taken by Tony Honoré in ‘Must we Obey? Necessity as a Ground of Obligation’, *Virginia Law Review* 67 (1981), 39

to law's breakdown). It might even yield, on occasions, a moral obligation for me to obey the law. But this consideration points in favour of (EL), not against it. The same is true, indeed, of all other arguments in support of the existence of a moral obligation to obey the law. After all, believers in the existence of a moral obligation to obey the law offer the moral obligation to obey the law as part of their answer to the question 'Why should I obey, or otherwise engage with, the law?' And that question is a good one precisely because law (unlike morality) is something that one needs (further) reasons to obey, or indeed to engage with. Legal norms answer to rationality. Unlike moral norms, they do not form an inescapable part of rationality. An unjustified moral norm is an oxymoron; an unjustified legal norm is always a live possibility. It follows that law is humanly escapable in the relevant sense (even if it is also humanly necessary).

So in this respect – in respect of the property picked out in (EL) – legal norms are unlike moral norms and like the norms of a game or a recipe. Their existence as norms leaves open the question of whether they (or some of them) are worth using as guides to action. Thus one may cite them as norms in a detached way. One may intelligibly say 'that's the law, but I wouldn't give it much credence if I were you', in much the same way that one might dismiss a recipe for *ossobuco* or a game of *Monopoly*.

Yet law is neither a recipe nor a game. There are numerous differences.¹³ I will emphasise just one. Legal norms, unlike the norms of games or recipes, inevitably have moral consequences. To change the law is inevitably to change the position of some people in morally important ways. Advertisement of the law will cause some people to alter their daily pursuits. Enforcement of the law will put some people under stress or cost them money or freedom. Even if the law is not advertised or enforced, this itself

¹³ For some of the most important differences, see Raz, *Practical Reason and Norms* (London 1975), 150-4.

raises moral issues about the behaviour of those responsible for advertising or enforcing it. Every legal issue, however superficially technical, is a moral issue, for its resolution inevitably has morally important consequences for someone. This is not true of every issue addressed in a cookbook or in the rules of a game. These are made morally important only by the addition of special circumstances (e.g. we are cooking for people with dangerous allergies or we are playing for the last place on the lifeboat). Another way to put this is to say that every legal norm, unlike every norm in a cookbook or in a game, is a putative (or purported or supposed) moral norm: it is a proposal, on the part of the law, for tackling and resolving one or more moral problems. If the legal norm does that job well, then in the process it is absorbed into morality. It becomes a moral norm as well as a legal one. And those who see it as such cannot but be committed to it as a guide to action: they cannot but be committed to it *qua* moral even though *qua* legal it was open to them to raise doubts about its hold over them.

John Finnis famously argues that understanding this feature of law is essential to understanding the nature of law. '[A]ctions, practices, etc.,' he writes, 'can be fully understood only by understanding their point, that is to say their objective.'¹⁴ And unlike a game or recipe, he adds, law has, by its nature, a moral point or objective (viz. the solution of moral problems). This fact is said by Finnis to have the following implications:

If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation ... a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statistically customary order is regarded as a moral ideal ... then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint it is a matter of overriding importance that

¹⁴ Finnis, *Natural Law and Natural Rights* (Oxford 1980), 3.

law as distinct from other forms of social order should come into being, and become an object of the theorists' description.¹⁵

One may wonder why Finnis contrasts law here with 'other forms of social order', and not with games or recipes. For surely all 'forms of social order' share law's predicament – their operations cannot but affect people in morally significant ways – and hence, by Finnis's logic, they must equally have as their central case the case in which they are morally successful? Yes indeed, and that is part of Finnis's message. Law's moral objective, he supposes, suffices to distinguish law from a game or a recipe. But it does not suffice to distinguish law from various non-legal ways of organising society. What suffices to distinguish law from various non-legal ways of organising society is the distinctive (Finnis might be tempted to say 'superior') way in which law serves (when it does serve, as it does in its central case) the moral objective that it shares with them. To understand the nature of law we have to understand this distinctiveness in law's mode of service, and that, says Finnis, requires first an understanding of the moral objective that is being served. There is much to say about this last claim: about the claim that we need to know about law's objective(s) in order to understand law's distinctive mode of service to whatever objectives it may have. However, we are not concerned here with trying to understand law's distinctive mode of service. Our interest is only in the thesis that law has by its nature a moral objective, and the thesis about law's central case that is said by Finnis to follow from it.

Strictly speaking, of course, Finnis does not speak of *law's* central case in the passage just quoted.¹⁶ He speaks of the central case of the 'legal viewpoint.' That is because he is reacting to Hart's discussion of the 'internal point of view' of legal officials and other law-followers. He is reacting, first and foremost, to

¹⁵ Ibid, 14-25.

¹⁶ He does so later in the same book. Ibid at 276ff.

Hart's suggestion that those who accept the law as a guide to action may do so for reasons of many kinds, including non-moral as well as moral reasons. True enough, replies Finnis, but the law-follower who complies because he regards legal norms as morally binding is a more central case of a law-follower than is the one who does so for other reasons, e.g. out of fear for his job or wish to subvert the regime.¹⁷ For the law-follower who complies because he regards legal norms as morally binding is the one who complies with law on law's own terms, as a solver of moral problems. By the same token, law that merits such compliance – morally successful law – is a more central case of law than law that does not. So it is a mistake for those studying the nature of law to be indifferent, in their selection of examples, as between moral and immoral legal systems or as between moral and immoral laws. In explaining what a legal system or a law is, says Finnis, it would be deeply misleading to present (say) the Nazi legal system or a South African apartheid law as one's basic illustration of law. Such legal systems and laws are, in a sense, not true to law's nature. They are 'deviant' cases of law.¹⁸

This claim that morally successful law is the central case of law is sometimes taken to mean that immoral law is only doubtfully or questionably law. It occupies a grey area, or sits on a borderline, between law and non-law.¹⁹ Now there is no doubt that there are borderline cases of law, for there are borderline cases of everything. There is probably also a grey area between law and non-law, into which emerging and crumbling legal systems temporarily fall.²⁰ But Finnis cannot mean to

¹⁷ Ibid, 13-14.

¹⁸ Ibid, 14.

¹⁹ Finnis encourages this reading at *ibid*, 10, when (explaining the distinction between central and non-central cases) he quotes a remark about borderline cases from Raz's *Practical Reason and Norms*, above note 13, 150.

²⁰ A prominent theme of Hart's stylized discussion of the emergence of law in *The Concept of Law*, above note 8, ch 5.

consign immoral law to such an indeterminate status. For the failure of immoral law is, according to Finnis, a failure to be what law should be – a failure of law *qua* law – and that failure is troubling precisely because what we are dealing with is indeed a case of law. Recall the same point as it arose in connection with human nature. Human beings that lack characteristically human rational capacities, such as those in permanent vegetative states, are not non-human or doubtfully human. It is the fact that they are human beings that makes their lack of characteristically human rational capacities troubling. It is because they are indeed human beings that they ought to be as human beings ought to be, viz. rational beings. And likewise it is because immoral law is indeed law that it ought to be as law ought to be, viz. morally successful in whatever way counts as moral success for law.

Finnis has been known to say that he does not much care whether Nazi law or South African apartheid law is law, that the matter strikes him as philosophically inconsequential, that the important thing is to focus our attention on the central case of law.²¹ But this is an unsustainable stance. For, as I said before, it is part of the very idea of a central case that there might be cases (even statistically preponderant cases) that do not exhibit all the features that make the central case a central case. And it is possession of the *other* features, and hence membership of the class of things that is under investigation, that make the limit cases eligible to be compared with the central case, and found wanting relative to the central case. So we need to ask what those other features are. Studying the central case of something can therefore only be part of the task of studying the nature of that thing. Finnis criticises some ‘legal positivists’ for focusing all their attention on the limit cases of law at the expense of attention to

²¹ Finnis, ‘On Reason and Authority in *Law’s Empire*’, *Law and Philosophy* 6 (1987), 357 at 376; similarly, ‘Natural Law Theories’ in Edward N. Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Spring 2007 edition), <http://plato.stanford.edu/entries/natural-law-theories/> at §3.1.

the central case, and thereby offering incomplete theories of law.²² 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 what Raz calls ‘the limits of law’,²³ a topic raising no less intriguing philosophical questions.

But perhaps there is a question of priority as between the two topics? Does Finnis mean that we should begin our explanation of law’s nature with an explanation of law’s central case, and only then move out to the limit cases? One ambitious version of this proposal, associated with Ronald Dworkin, would have it that the point or objective of law, as realized in the central case, explains all the other defining features of law, including all those that obtain in the limit cases where the point or objective is not realized. How law is depends entirely on how it ought to be. Law is comprehensively tailored to its purpose.²⁴ As a general approach to the study of the nature of things, this is wildly implausible. Take human nature. Human beings are rational beings: they have a highly developed capacity to respond to reasons. They are also embodied beings: they have a human biology and a human physiognomy. They are embodied even in limit cases.²⁵ But their capacity to respond to reasons varies, and

²² And in their incompleteness, ‘incoherence’: see ‘The Incoherence of Legal Positivism’, *Notre Dame Law Review* 75 (2000), 1597.

²³ Raz, ‘Legal Principles and the Limits of Law’, *Yale Law Review* 81 (1972), 823.

²⁴ Dworkin, *Law’s Empire* (Cambridge, Mass. 1986), 92-5.

²⁵ I simplify. There are various limit cases. One may equally be a limit case of a human being in virtue of lacking a human physiognomy, even though one has a fully human rationality. The proper treatment to be accorded such a human being is the theme of the famous story of Joseph Merrick, played by John Hurt in David Lynch’s 1980 film *The Elephant Man*, and sensitively discussed in Ashley Montagu, *The Elephant Man: A Study in Human Dignity* (London 1972). The case of a being that lacks a human biology but possesses

its most highly developed version marks the central case of humanity. Should we conclude that human embodiment is explained by human rationality? I see no reason to think so. Rationality and embodiment are relatively independent aspects of human nature. Even inasmuch as they are connected, there is no general explanatory priority as between them. It is not the case that the truth of 'human beings are embodied by nature' is explained by the truth of 'human beings are rational by nature', nor *vice versa*. Indeed these two propositions do not admit of explanation at all, in the sense that Dworkin has in mind. They admit of elucidation ('how do you mean?') but not justification ('why is that the case?'). They are simply given by the concept of a human being, and there is no further question of why they are so given, in virtue of what they are so given, or such like.

The concept of law is no different. To present it as different, Dworkin has to present the concept of law as belonging to a special class of concepts (called 'interpretive concepts') of which it is true that the (other) criteria for the correct use of the concept answer to the point or objective of the thing of which it is the concept.²⁶ But a moment's thought shows that one already needs at least some other relatively independent criteria to identify the thing in question, such that one can begin to discuss *its* (that very thing's) point or objective. Our conclusion should not be that these other criteria have explanatory priority over the study of

both human rationality and human physiognomy is in a way more troubling. The proper treatment of such imaginary beings has been the subject of much science fiction. In the central case of humanity, human rationality, human physiognomy, human biology and various other features converge. At the limits, one or more of them is lacking while others remain. Similar points can be made about the central and limit cases of law and legal system. The central case of law is not only morally successful but includes a division between officials and subjects, a system of courts, etc. There are various limit cases in which one or other of these features is lacking, while others remain.

²⁶ *Law's Empire*, above note 24, 410.

law's point or objective.²⁷ Our conclusion should be that study of the nature of law, or indeed of the nature of anything, is like the mid-ocean reconstruction of Neurath's boat. As each aspect of the nature of law is elucidated, other aspects need to be held constant in the background to orientate the investigation; one can in principle begin one's investigations with any aspect of the nature of law so long as one does not attempt to open up everything else at the same time; one cannot dismantle the whole ship and rebuild it from one plank, as Dworkin's radical proposal would have us do.

There is, however, a more modest and more plausible version of the idea that we should begin our explanation of law's nature with an explanation of law's central case. If the central case of law is, as Finnis says, a case of law that is successful relative to a certain distinctively legal point or objective, then we need to understand what counts as successful law in order to understand law that fails. That is simply an application of the more general truth that one cannot understand failed endeavour except by understanding what it fails to be, viz. successful endeavour. One cannot understand what attempted murder is without first understanding what murder is. One cannot understand what it would be to fail in one's plan to buy a house without first understanding what counts as buying a house. Similarly, if law by its nature has a moral objective, one cannot understand what immoral law is without first understanding what morally successful law is. For if law has a moral point or objective, then immoral law is a failed attempt at morally successful law. Immoral

²⁷ I erred in suggesting otherwise at the end of 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199 at 226. I said there that the study of the conditions of legal validity has 'logical priority' over the study of law's point or objective. John Finnis rightly took me to task over this remark in 'Law and What I Truly Should Decide', *American Journal of Jurisprudence* 48 (2003), 107 at 129. I was much closer to the truth when I wrote, earlier in '5½ Myths', of these as 'relatively independent questions' (ibid, 224).

law is, in that sense, a deviant case, and its study is logically parasitic on the study of its paradigmatic (morally successful) counterpart.²⁸

If this is what Finnis means by insisting on the priority of the central case in the study of the nature of law, then our attention inevitably turns to the question of whether law does indeed have, by its nature, a moral point or objective. Now the point or objective of law can only be the point or objective of those human beings who represent the law.²⁹ Law cannot act apart from the acts of its human agents, viz. its officials. So we need to know whether the law's officials, acting *qua* officials, cannot but act with a moral point or objective. The obvious and fatal objection to this proposal, admitted by Finnis himself, is that some officials only pretend to act with a moral point or objective when they act on behalf of the law. They present the law as morally binding but their reasons for doing so are (say) nakedly self-interested or capricious.³⁰ They think of their position as a business opportunity or a game. It is no answer to say that this makes them deviant cases of legal officials. For Finnis's thesis that morally successful law is the central case of law is based on the claim that, even in the deviant cases, law still has a moral point or objective. Since there are admittedly some deviant cases where it does not have that objective, because those who represent it and give it its objective do not, Finnis's argument seems to fail at the first step. Or does it?

²⁸ This reading bears out Finnis's claim (*Natural Law and Natural Rights*, above note 14, at 20) that what he calls the 'central case' is the same thing that Aristotle explains at *Eudemian Ethics* 1236^a16-20, and which Aristotelian scholars have come to call 'focal meaning' (following G.E.L. Owen, 'Logic and Metaphysics in Some Earlier Works of Aristotle' in I Düring and G.E.L. Owen (eds), *Aristotle and Plato in the Mid-Fourth Century* (Gothenburg 1960).)

²⁹ I discussed this constraint in more detail in 'Law's Aim in *Law's Empire*' in Scott Hershovitz (ed), *Exploring Law's Empire* (Oxford 2006).

³⁰ *Natural Law and Natural Rights*, above note 14, at 13-14

Not quite. For Finnis's line of thought, if we are interpreting it correctly, can readily be extended. Just as one needs to understand success in order to understand the corresponding failure, so one needs to understand a true proposition (i.e. what would count as its being true) in order to understand its false counterpart. Just as morally successful law is the central case of law with a moral point or objective, so law with a moral point or objective is the central case of law with a supposed or claimed moral point or objective. It follows that, even when we acknowledge the existence of the official who merely pretends to act with a moral objective, the central case of law remains the case of morally successful law. And it remains the case that the deviant case can only be understood as a deviation from the central case. We need to understand what counts as successful law in order to understand law that fails in the attempt, and we need to understand what is being attempted in order to understand the false claim to be attempting it. In this way morally successful law remains the model relative to which all other kinds of law fall to be understood. Finnis is right to insist, then, that law has a moral nature. We need to understand law's moral claim – the moral quality that it presents itself as having – in order to understand even the most immoral of laws.

Although I have presented this line of thought as a development of Finnis's position, it also has powerful echoes in the work of Hart and Raz. It was incipient (although no more) in Hart's early attempt to explain the defeasibility of the criteria for the correct use of certain concepts of interest to lawyers.³¹ Hart rightly saw that a full analysis of some concepts (including the concept of law) requires sensitivity to negative as well as positive criteria. But he botched the important point that the negative criteria, or at least some of them, *qualify* rather than *deny* the

³¹ Hart, 'The Ascription of Responsibility and Rights', *Proceedings of the Aristotelian Society* 49 (1948), 171 at 172-82.

application of the concept to a particular case, and do so by relegating that case to non-paradigmatic status: 'Yes, it's a law, but an immoral one'; 'Yes, she's a human being, but she's not fully in command of her faculties'; 'Yes, it was a promise, but it was extracted under duress'; and so forth. Raz develops the same line of thought in much greater detail as applied to law. He explains that law always claims legitimate authority even though it does not always enjoy such authority. One cannot understand law without understanding this claim, which is a claim to be morally binding. Thus one cannot understand law that is not morally binding except as a deviation from the central case in which law is morally binding.³² More generally, says Raz, one cannot understand detached normative statements except by understanding their committed counterparts, for detached normative statements are parasitic statements made from the imagined point of view of one who is committed to them.³³ These thoughts are consonant with Finnis's. They show that any criticism that Finnis has to make of 'legal positivists' for their supposed reluctance to see law through the lens of its central case is exaggerated.³⁴ Both Hart and Raz espouse versions of the 'central case' approach and both can find room within that approach to recognize law's distinctively moral nature without abandoning their interest in the other features that all law (including the limit case of immoral law) has in common, some of which are independent of its moral nature (for they are also held in common with games, recipes, etc.).

³² Raz, *The Authority of Law*, above note 5, 8.

³³ *Ibid.*, 159.

³⁴ *Natural Law and Natural Rights*, above note 14, 357.

4. Laws as presumptively morally obligatory

Recall that the central case of the 'legal viewpoint', for Finnis, is the 'point of view in which legal obligation is treated as at least presumptively a moral obligation.' Why 'presumptively'? If law that is presumptively morally binding is a more central case of law than law that is not morally binding, then law that is morally binding without qualification is a more central case of law than law that is merely presumptively morally binding. The completely central case of law, to put it another way, is the case of law that is completely morally successful. It has precisely the moral implications that it purports to have: absolute legal obligations are absolute moral obligations, unconditional legal obligations are unconditional moral obligations, universal legal obligations are universal moral obligations, and so on. For an unqualified legal obligation to count as a qualified (merely presumptive) moral obligation represents, by these lights, a kind of failure, and hence a less than perfectly central case of law.

Which leads us to the next question: What is a 'presumptive' moral obligation anyway? Is it one that only appears to be a moral obligation, but may still turn out on closer inspection not to be a moral obligation at all? Or is it a moral obligation that is real enough, yet is capable of being overridden by countervailing considerations? The two ideas are often run together, but they are not the same. An obligation that is merely apparent does not need to be, and cannot be, overridden by countervailing considerations, for there is, on closer inspection, nothing there to override.³⁵ Discussions of the 'prima facie moral obligation to obey the law' usually take 'prima facie' to mean 'overridable' rather than 'apparent', but it is not clear that Finnis follows suit. It is not clear, indeed, that Finnis believes in the logical

³⁵ John Searle, 'Prima Facie Obligations' in J. Raz (ed), *Practical Reasoning* (Oxford 1978), 81.

possibility of overridable moral obligations. He may hold that where others see overridden moral obligations there are, on closer inspection, no moral obligations at all.³⁶

Be that as it may: in what follows I will attempt to remain equivocal between the epistemic interpretation of ‘presumptive’ as apparent and the practical interpretation of ‘presumptive’ as overridable, for nothing turns here on the difference between the two. For simplicity’s sake I will also ignore the doubts I have expressed about law’s being, in its central case, presumptively morally obligatory rather than morally obligatory *tout court*.

So let’s agree, with all quibbles set aside, that the central case of the ‘legal viewpoint’ is indeed the ‘point of view in which legal obligation is treated as at least presumptively a moral obligation’. It is tempting to draw the conclusion, without further ado, that legal obligations *are* presumptively moral obligations. One can see what is tempting about this line of thought by returning to Hart’s idea of ‘defeasibility’. It is a short step from the thought that law is *defeasibly* morally binding to the thought that law is *presumptively* morally binding. A short step, but a fallacious one. The first of the two thoughts, as sketched in section 3 above, is a thought about concepts.³⁷ Its implication is that a legal norm that is not also a moral norm is not a central but a deviant case of law. But this tells us nothing about how many

³⁶ See Finnis, ‘Some Professorial Fallacies about Rights’, *Adelaide Law Review* 4 (1972), 377 at 387. What Finnis says on this page about rights must be applicable, *mutatis mutandis*, to the corresponding obligations.

³⁷ See G.F. Baker, ‘Defeasibility and Meaning’ in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (Oxford 1977). I am not attempting to monopolise the word ‘defeasible’ to express a thought about concepts. It can also conveniently be used to express the thought that a certain reason is subject to being overridden by others. Hart himself confused these two thoughts from time to time in ‘The Ascription of Responsibility and Rights’, above note 31. I am merely trying to avoid perpetuating this confusion by using ‘defeasible’ consistently and univocally to express a thought about concepts.

cases of law are central and how many are deviant, and nor does it suggest, as the second thought does, that one should be disposed to regard or treat each case of law that one encounters as a central case of law. It is perfectly compatible with the first thought to conclude that all or most of the law that exists in a given legal system, and indeed in the world, is deviant law, and should be treated with contempt, or should be treated with contempt unless special considerations apply. One can readily hold that law is morally binding in its central case while all the time maintaining epistemic and practical dispositions according to which law is rarely morally binding, and requires special considerations to make it so in particular contexts or particular cases. Law is defeasibly morally binding, in the conceptual sense of 'defeasibly', but it is not presumptively moral binding, in either the epistemic or the practical sense of 'presumptively'.

That law is defeasibly morally obligatory (i.e. that immoral law is law only in a deviant sense) is part of the nature of law, a conceptual truth. That law is presumptively morally obligatory (i.e. that we should be disposed to regard or treat whatever law we encounter as morally obligatory) is no part of law's nature. It is a proposition that needs to be defended by moral arguments. I am not suggesting that Finnis makes no moral arguments in favour of law's presumptive moral obligatoriness. On the contrary, he makes a moral argument at some length. To boil it down, he argues that law's distinctive mode of contribution to its moral objective lies in its co-ordination of the conduct of those whom it regulates, and that this co-ordinative contribution can be made only to the extent that legal norms are treated as morally binding by virtue of their membership in a legal system even when they would not qualify as morally binding taken one at a time.³⁸ The success or failure of this argument is not our concern

³⁸ Ibid, 319 and nearby. The argument is elaborated further in Finnis's 'The Authority of Law in the Predicament of Contemporary Social Theory' in *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984), 115.

here. Our concern is with the extent to which it may garner accidental and unwarranted support from Finnis's remarks about law's central case. On the one hand it is possible to read parts of Finnis's discussion of the moral obligation to obey the law as bearing on the moral obligation to obey the law *only in the central case of law*. But reading the discussion in this way makes it a foregone conclusion that there is a presumptive moral obligation to obey the law, for it is part of the very specification of the central case of law that a legal obligation in the central case is 'at least presumptively a moral obligation'. A moral argument to establish this is redundant. On the other hand a moral argument is essential if the discussion is read as a discussion of the moral obligation to obey the law more generally, i.e. not limited to law's central case, but including its deviant cases. Since Finnis does make a moral argument at length, and since he includes extensive discussion of cases in which the presumption of moral obligatoriness is displaced by the immorality of particular laws, we must assume that he means the discussion to be understood as a discussion of the latter topic, i.e. of law more generally, including its deviant cases. But some of his readers may understand it to be a discussion of the former topic, and so may allow themselves to be swayed in favour of Finnis's conclusion (that the law is presumptively morally obligatory) by the fact that, in its central case, law is presumptively morally obligatory by its very nature. In general, Finnis does not help to forestall this potential confusion. His tolerance of continuing and unresolved ambiguity in the meaning of the word 'law' means that it is extremely hard to keep track of whether, in particular contexts, he is speaking of the central case of law only or the whole gamut of law all the way out to the limit cases.

There is a corresponding, and correspondingly disorienting, toleration of ambiguity in Finnis's use of normative language more generally. At times he allows that there can be normativity that does not entail commitment on the part of the norm-user, i.e. that there can be norms, including norms of obligation, the

existence of which does not entail that we have reason enough to engage with them.³⁹ On other occasions he seems to deny such things the standing of norms. They are merely ‘regarded and treated and enforced’ as norms, and their being regarded and treated and enforced as norms does not mean that they are norms.⁴⁰ This returns us to (EL). Does Finnis endorse it? Does he accept that laws which are not morally binding – and indeed which we have no reason to follow – are nevertheless norms? It seems clear to me that he needs to accept (EL) and the corresponding idea of normativity. For the idea that we have an obligation to obey the law (and hence the question of whether we do have such an obligation) makes sense only on the footing that the law is made up of norms, things which are capable of being obeyed or violated. Moreover it is only if laws are norms that it makes sense to hold them up for scrutiny as norms and to find them wanting (‘deviant’) if they are not good (morally acceptable) norms. Finnis clearly needs both of these ideas to make sense. It is open to him to say, with Hart and Raz, that the central case of a norm (and hence of normativity) is the case of a norm that we are justified in following. But he cannot, consistently with his own arguments, deny that there are other norms as well, disappointing though they may be.

5. Natural law for legal positivists

These remarks, if sound, show the affinity between Finnis’s thesis according to which morally successful law is the central case of

³⁹ This is the stance of the passage from *Natural Law and Natural Rights* quoted in the text at note 14 above, where even legal obligations that are not morally obligatory are nevertheless classified as obligations (without quotation marks).

⁴⁰ Finnis, ‘Natural Law: the Classical Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002), 1 at 23.

law and the central concerns of the 'legal positivist' tradition.⁴¹ Legal positivists are those who have reminded us, time and again, that (EL) is true: that law is rationally escapable. There is always an intelligible question of whether one should obey the law, and that (the positivists rightly insist) is because law is a human creation and therefore exhibits the familiar and pervasive human capacity for moral error. By that route one could understand the main thrust of this paper as a defence of legal positivism.

In mounting this defence, nevertheless, I have espoused a number of doctrines (and tackled a number of issues) more often associated with the so-called 'natural law' tradition in jurisprudence. The name of that tradition is in various ways misleading. In particular it encourages a search for some elusive kind of naturalness in the existence of human laws and legal systems. There may be some sense in which human laws and legal systems are natural, but they are certainly not natural in the sense in which morality is natural. Morality is natural in the sense given by (IM): engagement with moral norms is an inescapable part of human nature. By this criterion, law is decidedly unnatural. As (EL) says, engagement with legal norms is *not* an inescapable part of human nature. Concerning legal norms the question always arises, as it does not concerning moral norms, of why I should obey them. Contrary to the impression given by its name, this is acknowledged and indeed emphasised in the natural law tradition. Natural law, in the tradition of that name, is not the same thing as human law. Natural law is the same thing as morality. It is the higher thing to which human law answers. We may regret that members of the tradition seem to feel a need to present morality as a kind of law, which it is not. For a start, morality is not a system (and is not made up of systems) and nor does it make claims, pursue aims, or have institutions or officials,

⁴¹ An affinity which Finnis readily concedes in spite of his many other criticisms of the legal positivist tradition. See his 'The Truth in Legal Positivism' in R. George (ed), *The Autonomy of Law* (Oxford 1996).

all of which features are essential to the nature of law. Nevertheless, even as we resist the idea that morality is a kind of law, we should endorse the idea that morality is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality.

Next I explored and endorsed the thesis, also associated with the natural law tradition, that law's answerability to morality is part of the very nature of law. I explained how the study of the nature of law can and must begin, in a certain sense, with the central case of law as morally successful law. For one must understand the non-central cases, the deviant cases, as deviations from that model of morally successful law. Nevertheless, I insisted, one must understand the deviant (or limit) cases too: the philosophically fruitful study of the nature of law is not exhausted by the study of law's central case. For law's other features, found in the limit cases, make the limit cases eligible to be compared with the central case, and found inadequate according to the standards captured in the central case. Inasmuch as those who belong to the natural law tradition have eschewed detailed philosophical work at the limits of law in favour of a predominant focus on law's central case, they have provided only a partial account of their subject, in much the same way that they have sometimes accused legal positivists of doing by labouring away at the limits of law without attending adequately to the moral success that marks law's central case.

Finally I turned my attention to the supposed moral obligation to obey the law. The natural law tradition has sometimes been associated with the view that there is such an obligation, at least presumptively. I have not rejected that view here. But I have warned against a possible inference from the view that the central case of law is the case of presumptively obligatory law to the view that law (more generally) is presumptively obligatory. This, I warned, is a fallacious move.