

Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory

Matthew B. O'Brien

Robert C. Koons

Abstract. The “New Natural Law” Theory (NNL) of Grisez, Finnis, Boyle, and their collaborators offers a distinctive account of intentional action, which underlies a moral theory that aims to justify many aspects of traditional morality and Catholic doctrine. In fact, we show that the NNL is committed to premises that entail the permissibility of many actions that are irreconcilable with traditional morality and Catholic doctrine, such as elective abortions. These consequences follow principally from the NNL’s planning theory of intention coupled with an implicitly Cartesian conception of human behavior, in which behavior chosen by an agent has no intrinsic “intentionalness” apart from what he confers upon it as part of his plan. *Pace* the NNL collaborators, we sketch an alternative hylomorphic conception of intentional action that avoids untoward moral implications by grounding human agency in the exercise of basic powers that are either essential to human nature or acquired through participation in social practices.

Judith Jarvis Thomson’s 1971 article “A Defense of Abortion” in *Philosophy & Public Affairs* is among the most widely anthologized and discussed articles in the history of analytic philosophy. In a reply to Thomson published in the same journal two years later, John Finnis argued against her defense of abortion, several times drawing upon Germain Grisez’s *Abortion: the Myths, the Realities, and the Arguments*. In the course of his argument, however, Finnis qualified his dependence upon Grisez’s work:

For my part, I think Grisez's reliance on such counter-factual hypotheses to specify the morally relevant meaning or intention of human acts is excessive, for it removes morally relevant 'intention' too far from common-sense intention, tends to unravel the traditional and common-sense judgments on suicide (someone would say: "It's not death I'm choosing, only a long space of peace and quiet, after which I'd willingly be revived, if that were possible"!), and likewise disturbs our judgments on murder and in particular on the difference between administering (death-hastening) drugs to relieve pain and administering drugs to relieve-pain-by-killing.¹

Although in his book Grisez adamantly opposed direct abortion as unjust, he developed an idiosyncratic conception of direct and indirect action, according to which, for example, surgeons could intentionally chop a fetus to pieces in certain cases without thereby performing a "direct" abortion. This account of course has the effect of widening the class of abortions that count as indirect, such that procedures once thought of as unjust intentional killings get reassessed as excusable unintentional killings, provided that the sought-for benefits are "proportionate" to the death of the child.² But Grisez seemed to think that this proportionality criterion was rarely, if ever, met. Therefore, he thought that he could uphold traditional condemnations of abortion with

¹ John Finnis, "The Rights and Wrongs of Abortion," *Philosophy and Public Affairs* 2 (1973): 117–45, at 136.

² This is an implication directly acknowledged by Boyle, "Double-Effect and a Certain Type of Embryotomy," *Irish Theological Quarterly* 44 (1977): 303–18.

a justificatory innovation. He saw himself as vindicating traditional morality by offering an alternative, sounder theory of human action to rest it upon.³

Grisez's criteria for direct or intended action consisted, as Finnis noted, in certain counterfactual hypotheses: he asks us to suppose that imaginary artificial wombs and restorative operations became available to reconstitute and bring to term the dismembered fetus; if the mother and surgeon *would* take advantage of them *were* they available, then in the actual world where they are unavailable, the mother and surgeon need not intend the child's death by chopping it to pieces. Immediately following the passage quoted above, Finnis contrasted Grisez's position with the judgment of the Catholic magisterium, which he affirmed as his own:

In any event, the version of traditional nonconsequentialist ethics which has gained explicit ecclesiastical approval in the Roman church these last ninety years treats the matter differently; it treats a bad or unwanted aspect or effect of act A₁ as an *intended* aspect of A₁, not only when the good effect (unlike the bad) follows only by virtue of another human act A₂, but also *sometimes* when both the good effect and the bad effect are parts of one natural causal process requiring no further human act to achieve its effect.⁴

³ Grisez says elsewhere "that the concept of indirect killing [for proportionate reasons] is defensible, and that the principle of twofold effect should be conceived somewhat more broadly than it generally has been.... My position is that human life can never rightly be directly attacked, but that indirect killing covers more cases than has generally been supposed" ("Toward a Consistent Natural Law Ethics of Killing," *American Journal of Jurisprudence* 15 [1970]: 64–96, at 65–6).

⁴ Finnis, "The Rights and Wrongs of Abortion," 137.

Although Grisez adamantly opposed abortion, there is a striking convergence between his conception of direct and indirect action and the one argued for by Judith Thomson in her defense of abortion. This agreement is made explicit in a remark from a 1977 article by Joseph Boyle, a student of and longtime collaborator with Grisez, which he makes in the course of defending Grisez's conception of direct and indirect action. Boyle declared that

... Judith Jarvis Thomson has made a convincing argument which shows, in effect, that a class of direct abortions which are not properly therapeutic are nevertheless indirect killing. The class of abortions Thompson has in mind is that in which the woman exercises her right to remove the fetus from her body—a right which, she emphasizes, is not the same as the right to kill the fetus.⁵

Thomson argues that women can lethally remove pre-viable fetuses from their bodies without intending their deaths by appealing to the intuitions produced by her celebrated violinist thought experiment. Boyle agrees with Thomson's analysis of intentional action in the violinist case, even if he dissents from her ultimate moral evaluation:

Thomson thinks that considerations such as these establish that abortion is permissible. But the double effect theorist need not admit this even if he acknowledges, as I believe he should, that the killing is indirect. In cases of the type discussed by Thomson, it seems that the proportionality condition of the [principle of double effect] is not met.⁶

Boyle, like Grisez, wants to reaffirm the substance of traditional morality while nonetheless adopting a novel action theory, and on certain crucial points, that novel theory is the same one

⁵ Boyle, "Double-Effect and a Certain Type of Embryotomy," 313.

⁶ Ibid.

advocated by Thomson. Where Boyle departed from Thomson was, roughly speaking, in his application of the proportionality criterion. What Boyle and Grisez were proposing was that traditional morality was right to condemn a certain class of abortions as unjust, but mistaken in locating the wrong-making feature of those unjust actions in the actions themselves. The actions were wrong not because they were direct, intentional killings of innocents, the new natural lawyers proposed, but because the actions indirectly caused deaths at disproportionate cost in comparison to the goods they promoted.⁷ In spite of Grisez and Boyle's manifest opposition to "proportionalism" in philosophical and theological ethics, therefore, their own version of natural law theory includes a structurally significant realignment that gives proportionality a prominence it never had in the traditional Aristotelian-Thomistic moral theory that they wished to revise.

Since Finnis's 1973 reply to Thomson, he has changed and developed his position and abandoned the above mentioned criticisms of Grisez. In 2001 Finnis co-authored with Grisez and Boyle, "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory" in *The Thomist*.⁸ Like Grisez's early book on abortion, the new natural law theory ("NNL" hereafter) that Grisez, Finnis, and Boyle and their collaborators have developed in the intervening years is intended to provide a new and stronger foundation for the pro-life position. Indeed, the proponents of NNL argue that their theory is effectively more pro-life than many traditional expositions of Catholic

⁷ Boyle says, "... I agree that my version of DDE allows more harmful effects of actions to be side-effects than do older Catholic versions [of DDE]" ("Further Thoughts on Double Effect: Some Preliminary Responses," *The Journal of Medicine and Philosophy* 16 [1991]: 565–70, at 566).

⁸ John Finnis, Germain Grisez, and Joseph Boyle, "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory," *The Thomist* 65 (2001): 1–44.

morality, because the later formulations of the NNL oppose all capital punishment in addition to abortion, and the theory has been extended by some collaborators to forbid all intentional killing whatsoever, including intentional killing in just wars.⁹ The NNL action theory has since coalesced into what one collaborator, Christopher Tollefsen, characterizes as a “purely first person account of human action.”¹⁰

The NNL is not a static theory and its proponents have altered, discarded, or developed different aspects of it since its inception. In particular, the NNL no longer relies explicitly on counterfactual criteria in order to determine an agent’s intentions. Central to the latest versions of the NNL is the notion of a “proposal,” which is the plan of action that an agent determines for himself through deliberation and actually adopts in choosing to act. An agent’s intentions are determined by his proposal. But the NNL’s complete account of how agents form proposals to

⁹ This is the view of Gerald Bradley, “No Intentional Killing Whatsoever: The Case of Capital Punishment,” in *Natural Law and Moral Inquiry: Ethics, Metaphysics and Politics in the Work of Germain Grisez*, ed. Robert P. George (Washington, DC: Georgetown, 1998), 155–73. Here Bradley follows Finnis, arguing that the state may impose capital punishment without intentionally killing. Grisez and Boyle disagree with Finnis and Bradley on this point, however, because Grisez and Boyle, “fail to see how they [viz., public authorities] can *impose* death on anyone without choosing, among other things, to kill him or her” (“Response to Our Critics and Our Collaborators,” in *Natural Law and Moral Inquiry*, 213–37, at 223). It is instructive, however, that Grisez and Boyle characterize the disagreement as over the interpretation of the hypothetical agent’s internal psychology and not over any principle of act analysis.

¹⁰ Christopher Tollefsen, “Is a Purely First Person Account of Human Action Defensible?,” *Ethical Theory and Moral Practice* 9 (2006): 441–60.

act is not as uncontroversial or benign as this characterization sounds. For given the NNL's commitment to a "purely first person" account of human action, counterfactual criteria are implicitly re-introduced at the level of the formation of proposals. Therefore, as we shall argue in this essay, Finnis's 1973 criticisms of Grisez are still fundamentally correct and he was mistaken to abandon them, because the NNL has not succeeded in freeing itself from the problems about counterfactuals that Finnis identified early on, even though the theory's reliance upon implausible modal claims has become suppressed within an account of what it is for an agent to propose a plan of action. We shall suggest that a number of distinctive action theoretic theses of the NNL are false, and their conjunction compromises the NNL's opposition to abortion so severely that the theory's pro-life conclusions are undermined. In fact, upon closer inspection it appears that the NNL is committed to premises whose consequences entail a greater permissiveness of abortion (among other things) than many of the proportionalist and consequentialist moral theories that the NNL has opposed. Therefore, if our dialectical critique is correct, they need to abandon the conjunction of dubious theses we discuss below in order to maintain a principled pro-life position. Our positive proposal will be to sketch an alternative, hylomorphic conception of human action that supplements the first-personal specification of intention with (a) the natural capacities of rational animality exercised in intentional agency, and (b) the participation in social practices that makes distinctively human action possible.

Our argument will proceed in four sections. In §I we will contrast the NNL analysis of the principle of double effect with our own and argue that NNL is guilty of making implausible assumptions about the interiority and privacy of intending. In §II we will address the interpretation of St. Thomas and show how St. Thomas's discussions of intentional action call for the development of a robustly hylomorphic account. We will sketch that account in §III, and

in §IV we will return to some practical cases in order to demonstrate our account's implications and show how it resolves some hard cases that have bedeviled the principled application of double effect, and then contrast the application of our account with the NNL. Finally, in §V we will remark very briefly upon the broader philosophical context of action theory.

I.

The Principle of Double Effect. Sometimes an agent is morally justified in causing an evil as a foreseen but unintended consequence of his action, even though he would act wrongly if he were to intend the very same evil as a means to or an end of what he does. This idea is the essence of every plausible formulation of the principle of double effect.¹¹ The NNL's formulation of the principle implicates four broader theses that are distinctive of the theory, which are about basic reasons for action, intrinsic wrongs, and a planning or "proposing" account of deliberate agency:

(1) *Incommensurability of Basic Goods.* There is a finite plurality of basic goods (life, practical reasonableness, knowledge, work/play, friendship, aesthetic experience, religion, and marriage) that are the constituents of human well-being and the ultimate grounds for practical reasoning; there is neither any fact nor any principle dictating that any quantity or proportion of one good be rationally preferred to any quantity of another.¹²

¹¹ For the classic formulation of PDE, see Joseph Mangan, S.J., "An Historical Analysis of the Principle of Double Effect," *Theological Studies* 10 (March 1949): 41–61.

¹² E.g., Robert P. George, *In Defense of Natural Law* (New York: Oxford University Press, 1999), 50. For more extensive discussions of incommensurability according to the NNL see, Finnis, Boyle, and Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Oxford

(2) *The Unreasonableness of Directly Intending Unjustified Harm*. It is always unreasonable for an agent to intend directly that any person be deprived of any basic good.¹³

(3) *Direct Intending as Proposing*. An agent directly intends to bring about a condition just in case the obtaining of that condition is part of the descriptive content of his proposal in acting.¹⁴

University Press, 1987), chap. 8, sec. 3–5; Boyle, “Being Reasonable in Choosing Among Incommensurable Goods,” *Vera Lex* 6 (2005): 11–34; Boyle, “Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good,” *American Journal of Jurisprudence*, 47 (2002): 123–41. There is some ambiguity about the strength of the NNL’s incommensurability thesis, and in §IV below we will show why the theory is committed to a very strong version of the thesis.

¹³ E.g., Finnis, Boyle, and Grisez, *Nuclear Deterrence*; Grisez, *The Way of the Lord Jesus, Volume 1: Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), 205; Finnis, *Fundamentals of Ethics* (Washington, DC: Georgetown, 1983): 122, 132; George, *In Defense of Natural Law*, 101–2. We, along with more traditional Thomists, would wish to add a qualification to (2): “except in the case of punishment (or other cases involving deontological requirements).” Finnis himself accepted such a qualification in his early work, only to apparently abandon it in his later collaboration with Grisez and Boyle.

¹⁴ For the clearest presentation of this view see Christopher Tollefsen, “Is a Purely First Person Account of Human Action Defensible?,” 444–5. Tollefsen’s article is a perspicuous restatement of Grisez, Finnis, and Boyle’s argument from “‘Direct’ and ‘Indirect:’ A Reply to Critics of Our Action Theory.” See also Finnis, “Intention and Side-effects,” in *Liability and*

(4) *The First-Person Conceivability Test of Proposing*. An act description belongs to an agent's proposal just in case the agent conceives of an instrumentally rational plan for some benefit that includes that act description as a means or an end, and the agent adopts this plan in choice.¹⁵

We object to the conjunction of these four claims, both as an interpretation of Thomas Aquinas and the Thomistic tradition, and as an account of moral truth. We agree with the NNL that basic reasons for action are not reducible to a univocal good, as utilitarians have mistakenly supposed; but unlike the NNL, we hold that partial commensuration of basic reasons for action according to a hierarchy is still possible, and indeed necessary for rational action. Nevertheless, we do not mean to argue this point here. Rather, we wish to show how the conjunction of the NNL's assertion of strong incommensurability in (1), along with claims (2), (3), and (4) above, compromises its ability to account for many kinds of manifest wrongdoing. Therefore, most of our discussion will be devoted to claims (2), (3), and (4).

The phrase "to intend directly" is a term of art, which the NNL uses in its most systematic account of intentional action.¹⁶ Jeremy Bentham apparently introduced the notion of

Responsibility: Essays in Law and Morals, ed. R.G. Frey and Christopher W. Morris (Cambridge: Cambridge University, 1991), 32–64, at 36, 43–4.

¹⁵ Again, see Tollefsen, "Is a Purely First Person Account of Human Action Defensible?"

¹⁶ Finnis, Grisez, and Boyle, "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory." This account is elaborated in several other more recent works but not essentially changed.

“direct” intention and its use is problematic.¹⁷ In order to avoid some of the confusion engendered by the multiple uses to which this phrase has been put, we shall propose distinguishing two different terms of art: “direct intention” and “planning.” We will take (2) to be part of a stipulative definition of what one “directly intends” to bring about, and (3) and (4) to be stipulations about what one “plans” to bring about. With these revisions, we can see why the NNL is committed to a fifth claim:

(5) One directly intends to bring something about if and only if one plans to bring it about.

We don’t object to the “if” half of this principle.¹⁸ Hence, we will focus our attention on (5a):

(5a) One directly intends to bring something about only if one plans to bring it about.

The terms in which we have stated (5a) are our own. However, the NNL is clearly committed to the claim in its collaborators’ most recent work, including Christopher Tollefsen’s “Is a Purely First-Personal Account of Human Action Possible?” and also in Grisez, Finnis, and Boyle’s

¹⁷ G. E. M. Anscombe, “Action, Intention, and ‘Double Effect,’” in *Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle*, ed. P. A. Woodward (Notre Dame: University of Notre Dame Press, 1982), 50–66.

¹⁸ The term of art “direct intention” does not correspond precisely to Aquinas’s use of *intentio*. In I-II, q. 12, a. 1, he makes clear that he uses “intention” only in the case in which one thing is chosen as a means for another: in such cases, both the means and end are intended. However, the word “intention” would, for St. Thomas, be inappropriate in those cases of simple willing in which some act (like an act of contemplation) is immediately effected for its own sake. However, since all of the cases of willing that we are considering involve the choice of means, we can safely ignore this Thomistic distinction.

“‘Direct’ and ‘Indirect.’” According to the latter, for example, “Foreseen effects of what one does are intended only if they actually are among one’s reasons for acting. If they are not, they are part of neither the proposal one adopts in choosing nor the purpose(s) for the sake of which one chooses: they are part of neither the means nor the end(s).”¹⁹ Against (5a), we shall propose the following alternative principle:

(6) If one exercises a basic power *P* in circumstances such that one who exercises *P* in those circumstances normally knows that the occurrence of *C* is an essential constituent of that exercise of *P*, then one intends to bring about *C*, even if one does not plan to do so.

In order to explain (6), there are four notions that need to be defined: basic powers, exercises of powers, normal knowledge, and essential constituents.²⁰ Since the work of von Wright and Anscombe in the 1950s, the notion of a “basic action” has played a central role in action theory. Something is a basic action for an agent just in case the agent has the power to perform that action, and the agent does not normally exercise that power by performing some other action. A “basic power” is the power an agent has to perform such a basic action (or, better, to perform certain actions in a basic way). Basic powers can be either innate or acquired. There are certain

¹⁹ “‘Direct’ and ‘Indirect,’” 240.

²⁰ Our account will be generally sympathetic with the arguments of Stephen Brock, “On (Not Merely) Physical Objects of Moral Acts,” *Nova et Vetera* 6 (2008): 1–62; Laurence Dewan, “St. Thomas, Rhonheimer, and the Moral Object,” *ibid.*, 63–112; Kevin Flannery, “Aristotle and Human Movements,” *ibid.*, 113–38; Stephen Long, “Veritatis splendor §78 and the Moral Act,” *ibid.*, 139–56; Steven J. Jensen, *Good and Evil Actions: A Journey through Saint Thomas Aquinas* (Washington, DC: Catholic University of America Press, 2010).

basic powers, including powers of bodily movement and powers of intellect and imagination, which are part of the natural equipment of any normal human being.

Furthermore, if an agent acquires a skill as part of mastering an art or practice, then the agent acquires a new basic power, so a craftsman's repertoire of basic powers extends beyond the class of basic powers shared by all normal human beings. A musician has certain basic powers pertaining to the production of music; an athlete has basic powers pertaining to the proper use of the relevant objects and equipment, such as bats and balls; a physician has basic powers of a medical sort; a soldier has basic powers relating to the conduct of war; a husband and wife have the basic power to perform a marital act.

The exercise of basic powers is always intentional—with the agent's knowledge and on purpose. An agent cannot accidentally or inadvertently exercise such a power, or do so without knowing what he is doing. Basic powers are always exercised for the sake of some end, either internal, where the exercise of the power is part of an activity that is desirable for its own sake, or external, where the power is exercised for the sake of the production of some further consequence that is distinct from the exercise itself. Let us stipulate that a "basic action" is such an exercise of a basic power. We will assume that for each natural kind or sort of basic action, there is a unique, maximally specific basic power, the exercise of which is always a member of that kind.

Basic actions have constituents. Some of the processes accompanying the action are "essential" to the specific basic power generating the action and some are not. Which processes are essential to a basic power? Here are some proposals that we will reject:

- (7) A process *C* is essential to the exercise of a power *P* if and only if it is impossible to exercise *P* without producing *C*.

(7a) A process C is essential to the exercise of a power P if and only if C is a consequence of exercising P in the majority of cases.

(7b) A process C is essential to the exercise of a power P if and only if C is a “causally close” downstream effect of exercising P .

In order to find the right account of the essential processes of a basic power, we first need to recognize that a feature F can be essential to a kind K even if there are possible, and indeed actual, instances of K that lack F . As we will argue below, something could be essential to human beings even if that feature were missing in the majority of cases, and conversely, a feature can be present in all cases without being essential. Here is a first approximation to the truth:

(8) A process C is essential to the exercise of a power P if and only if the exercise of P is adequate (normally sufficient) for the production of C .

An essential constituent of the exercise of a power is a normal part or aspect of the exercise of that power. The human form of life defines a set of parameters and a range of values for those parameters that constitute our normal environment or ecological niche. It is normal for human beings to be located on the surface of the earth, in an atmosphere rich in oxygen and lacking high concentrations of toxic gases, operating under the influence of a gravitational field of a certain strength. We are normally in the presence of other human beings, with a typical repertoire of basic powers. And so on. In the normal human environment, the exercise of each basic power is sufficient to bring about certain results, unless abnormal features of the environment interfere. Such results are *essential*, but not invariably present, constituents of the exercise of that power. Finally, it remains to elucidate what it means for the *normal* practitioner of a practice to know that some eventuality is an essential constituent of the exercise of a power that belongs to that practice. Every agential exercise of a basic power is an intentional activity, presupposing a body

of knowledge on the part of the agent. For those powers that are innate, this knowledge is part of the normal equipment of a competent adult human being. For the acquired powers of a craft or *techne*, the knowledge in question comprises the expertise of the craftsman.

Since many basic powers belong to a social practice, such as medicine or soldiering, we must examine the history and function of that practice in order to discover its normally known essential constituents. The results internal to the teleology of the practice are essential to the powers exercised in that practice. We claim that when a craftsman exercises the powers involved in a social practice, he responsibly intends all of the normally known essential constituents of the exercises of those powers, regardless of whether he plans to bring about those processes as such, as in (3), and regardless of whether those produced processes would pass the first person conceivability test, as in (4). We shall call this the “traditional Aristotelian” account.

The NNL holds that the content of an agent’s intention is the content of the proposal that the agent adopts in choice, and it is the adoption of that proposal alone that determines what it is that an agent intends.²¹ In this context “intention” includes both the end that is willed and the means through which the end is willed. Thus for the NNL, intending is entirely a function of proposing. But what determines the content of an agent’s proposal? This is where problems arise and where the NNL diverges from the traditional Aristotelian account. Both accounts agree that an agent determines the content of his proposal to act by deliberation, but they diverge over what kinds of constraints govern the deliberate formation of a proposal. Because the NNL endorses a purely first person account of human action, it holds that instrumental rationality is the only constraint upon an agent’s formation of a proposal, while the traditional Aristotelian account holds that deliberation is additionally constrained by the nature of the basic powers that the agent

²¹ This formulation was suggested to us by an anonymous reviewer.

is deliberating about exercising. For the NNL an agent chooses the means to his ends under just those descriptions, and only those descriptions, which *he* believes to be the necessary means to his ends, and it is in virtue of being included in the content of this belief that an act description of the means counts as chosen and intended. According to Tollefsen, “The agent must, that is, conceive of an answer to a ‘Why?’ question asked about the means: Why did you think that pulling the trigger/releasing liquid drops/embedding an axe would bring about the desired state of affairs?”²² And it is the agent’s answer to this “Why?” question, which he arrives at via his own deliberation, that is the sole determinate of the description(s) under which a piece of behavior is chosen as a means.²³ As Finnis says, “Our understanding of intention and action is entirely in terms of the why and how questions that the acting person addressed in the deliberations that ended in choice and action.”²⁴

²² Christopher Tollefsen, “Is a Purely First Person Account of Human Action Possible?,” 453.

²³ We should note that Tollefsen’s and Finnis’s use of a “Why?” question departs considerably from Anscombe’s well-known heuristic use of a “Why?” question in *Intention*, but we cannot go into this point at any length there. On Anscombe’s use of the “Why?” question, see Matthew B. O’Brien, “Practical Necessity: A Study in Ethics, Law, and Human Action” (PhD diss., University of Texas, 2011), chap. 4 (“Intention, Social Practice, and Double Effect”), <http://catalog.lib.utexas.edu/record=b7762103~S29>; Richard Moran, “Anscombe on ‘Practical Knowledge,’” in *Agency and Action*, ed. J. Hyman and H. Steward, Royal Institute of Philosophy Supplement 55 (Cambridge: Cambridge University Press, 2004), 43–68.

²⁴ Finnis, “‘Direct’ and ‘Indirect,’” in *Intention and Identity, Collected Essays: Volume II* (Oxford: Oxford University Press, 2011), 235–68, at 268 (second endnote).

As Finnis's remark implies, the NNL holds that adopting the perspective of the acting person is a sufficient condition on explaining the nature of an agent's intentional actions. The traditional Aristotelian account holds by contrast that adopting the perspective of the agent is only a necessary condition. The perspective of the agent is not a sufficient condition, we contend, because agents can be mistaken about the content of their proposals. For the content of a proposal can include more than just those act descriptions which an agent mentions in an honest articulation of his proposal; it can include entailments of those descriptions. When the agent participates in a social practice, his intention includes the act descriptions entailed by the normal exercise of that practice's basic powers, even if these entailments do not appear in the why and how questions that the agent addresses to himself in the deliberations that end in choice and action. But for the NNL, the proposal only includes those explicit descriptions that motivate the agent. As Tollefsen puts it, if an agent proposes to bring about Y and he knows that X is causally necessary for Y, it nevertheless remains that

X is necessary *for* Y only if Y is desired, and X is picked out and desired by an agent among all the other possible states of affairs or events causally related to Y as the route by which the agent will obtain Y. Agent rationality is of course sensitive to natural causal relations, but it is not determined by them.²⁵

The agent's knowledge of natural causal relations enter into his deliberations about how to produce his desired benefits, but he intends the causal consequences of what he does only under those descriptions that *he* picks out and desires as aspects of his proposal. It is true that on this account the agent cannot just pick and desire any descriptions whatsoever as the ones he intends, because the desirable descriptions of the means he chooses must bear an instrumentally rational

²⁵ Tollefsen, "Is a Purely First Person Account of Human Action Possible?," 454.

relation to the ends he seeks. But this constraint is still remarkably weak, because it implies that so long as someone can conceive of a proposal that is instrumentally rational, then he can adopt that proposal by choice and perform it—and act intentionally under only those descriptions included in the proposal. In short, it implies that for the NNL the bare conceivability of an action entails its possibility. For any act description *D*, an agent can ensure that he does not act intentionally under *D* so long as he adopts an instrumentally rational proposal that does not mention *D* at any stage.

We charge that the NNL's account of proposing amounts to an implicitly Cartesian model for distinguishing intended acts from unintended consequences of an act. As we will discuss later on, this model clashes with the NNL's commitments elsewhere to a version of Thomistichylomorphism.²⁶ The Cartesian model is one for sorting out those *descriptions* of the action that count as action-specifying from those descriptions that count as side-effect-specifying. A description of an action is action-specifying if it, or something conceptually equivalent to it, figures in the agent's own practical reasoning, either as an end or as a means, as part of his proposal in acting. All other descriptions are side-effect-specifying, even those that are inseparable, on the basis of laws of nature or rules and techniques of practices, from action-specifying descriptions. The two categories of actions and side-effects are mutually exclusive, since side-effects (i.e., consequences) must be, as Hume noted, "separate existences" from the actions that are their causes. Thus, the NNL theorist can argue that Jones may use lethal force against Smith, without responsibly intending to kill him, so long as the death of Smith is neither

²⁶ See, for example, Finnis's repeated appeals to Elizabeth Anscombe—a consummate anti-Cartesian—in the introduction to *Intention and Identity*, 8, and in the essays referred to there.

sought by him as an end nor included, *as so described*, as a means to an end in his proposal. If Jones shoots Smith in the head with a high-caliber gun at point-blank range, his action is not an intentional killing so long as he proposed “to incapacitate” Smith. One might object to this claim by pointing out that the way in which Jones chose to incapacitate Smith was by killing him. But the NNL responds: the description “killing” never figured in the content of the plan that Jones proposed to himself, which is revealed by the fact that Jones could coherently imagine a possible world in which Smith survived his incapacitation, and this miraculous possibility would not contradict the instrumental rationality of Jones’s proposal. This shows that Smith’s death counts merely as an unintended consequence, and not as integral to Jones’s action. On the NNL account, Jones is still responsible for all the consequences he foreseeably brings about, including Smith’s death, but this kind of moral responsibility is crucially different from responsibly intending, because as Grisez, Finnis, and Boyle recognize, “since not all the moral criteria applicable to intending to do something apply to accepting bad side effects, one can sometimes reasonably accept something that it would be wrong to bring about intentionally.”²⁷ We call this NNL view “Cartesian” because it asserts that in the determination of action an agent’s self-conscious plan trumps publicly observable facts about his behavior or about the social practices in which he is a participant. The NNL doesn’t deny the relevance of behavioral and social facts to intentional action generally; it just denies that the behavioral and social facts could determine the object of an action independently from an agent’s self-consciously proposed plan in acting.

The traditional Aristotelian has the resources for recognizing that in acting we choose actions that belong to practices. Actions derive their natures and their intrinsic ends in part from those practices, and not only from the internal proposals of the agent. If Smith knowingly makes

²⁷ “‘Direct’ and ‘Indirect,’” *Intention and Identity*, 239.

use of an action that is, by virtue of its membership in a practice, a lethal act, then Smith is engaging in an intentional killing, even if the death of the victim, under that description, is irrelevant to his plans. Or to put the same point another way: before deliberating about genuinely possible plans or proposals, these options for choice are partially fixed by the various social practices in play, analogous to the manner in which a natural language antecedently fixes the possible meanings of words before a speaker chooses those words in order to speak. To say that there are external criteria in this way that limit the formation of proposals is not to reject planning theories of intention wholesale. Rather, it is to reject the grandiose metaphysical assumption that conceivability entails possibility, and to hold that the agent's deliberate formation of his proposal is constrained by social and behavioral facts. The proposals that it is possible for a doctor to adopt in choice are determined in part by the actual state of the medical craft of which he is a practitioner, and not merely by the benefits that he "conceives" he could bring about. Facts about the medical craft in 2012 make it possible for suitably trained and equipped surgeons to propose to save certain patients by transplanting part of a liver given by a living donor; facts about the medical craft in 1812 made it impossible for anyone at that time to propose this, regardless of whether or not they could have "conceived" of it.

Consider another example. Soldiers are trained to apply lethal force to their enemies in combat. Many of the actions that make up this practice are inherently lethal: they always, or at least normally, result in death when carried out successfully and in their normal circumstances. The lethality of the acts within this practice does not depend on adventitious circumstances. These acts count as intentional killings, even if the participants in the military practice do not themselves self-consciously aim at the deaths of the enemy combatants, under that description, so long as death of the victim is a normal concomitant (given the laws of nature) of the

successful execution of the practice. As St. Thomas puts it: “What is always or frequently joined to the effect *falls under the intention* itself. For it is stupid to say that someone intends something but does not will that which is always or frequently joined to it.”²⁸ In contrast, attacks on

²⁸ Aquinas, *Commentary on Aristotle’s Physics*, rev. ed., trans. R. Blackwell, R. Spath, and W. E. Thirlkel (Notre Dame, IN: Dumb Ox Books, 1999), Book II, Lecture 8, paragraph 214: “...quod enim vel semper vel ut frequenter coniungitur effectui, cadit sub eadem intentione. Stultum est enim dicere quod aliquis intendat aliquid, et non velit illud quod ut frequenter vel semper adiungitur.” In context, it’s clear that Aquinas intends the *velit* [will] in the second sentence to represent a class of cases that is equivalent to those represented by *intendat* [intends]. This is confirmed by the question on intention in *ST*, I-II, q. 12. In the first article, St. Thomas says that intending is one of three acts of the will, the others being simple volition and enjoyment. The distinction between simple volition and intention consists in the fact that intention involves ordering some means to the end, while simple volition is the willing of the end simpliciter. He concludes the first article thus: “For we are said to intend health not only because we will it but because we will to attain it by means of something else.” That makes clear that intending is one way of willing something in relation to an end; in fact, it is one of precisely three ways of willing something. So, as Christopher Tollefsen pointed out to us (email message to Matthew O’Brien, September 22, 2010), it is indeed consistent with what Aquinas says to suppose that it would *not* be stupid to think that one might intend something without *intending* its natural consequences (in the narrow sense of “intending”). However, it would, according to St. Thomas, be stupid to think that one could intend *A* without *either* simply willing or intending or enjoying each of *A*’s natural consequences. But this is exactly the case that the NNL theory

legitimate military targets in a just war may cause the death of innocent civilians as a foreseeable consequence, without being an intentional killing of those civilians, so long as the military practices on both sides do not have those civilian deaths as essential or per se constituents of the action. For example, the bombing of a military fuel depot is not part of a practice in which collateral damage is a normal concomitant: such a bombing can successfully take place without causing any civilian deaths and without any miraculous intervention. However, using a powerful bomb to hit an urban recruiting center would involve the intentional killing of civilians, since it is part of the normal practice of creating such centers that they be located in the vicinity of non-combatants.

Obviously, much turns on the notion of an essential or per se constituent. It is clearly a much easier standard to satisfy than is the standard of conceptual inseparability employed by the Cartesian. If realizing condition *A* in and of itself entails, by virtue of the laws of nature, the realization of condition *B*, and an agent knows this, then *B* is certainly included in his intention to bring about *A*. Thus, the death of an infant is an essential constituent of performing a craniotomy upon it, and the death of the victim is an essential constituent of shooting him in the head with a large-caliber firearm.

This entailment by laws of nature is a sufficient but not a necessary condition of normal constitution or concomitance. Even if there are freak occurrences in which *B* does not accompany *A*, *B* might still be a normal concomitant of *A*. For example, in 1848 Phineas P. Gage famously survived having a three-and-a-half-foot iron rod shot through his skull in a railroad accident. Death is nonetheless a normal concomitance of such an event. Therefore, if you

requires to be possible, in order to classify those natural consequences as unintended (in the broad sense of “intending”).

propose to shoot an iron rod through somebody's head as a stunt, and your victim's death is no part of your proposal—on the strength of Gage having survived precisely the same behavioral performance—you nevertheless ought to be imputed with the intention to kill. In these circumstances, your intending to shoot his head through with the rod entails your intending his death. “Killing” is a relatively indeterminate act description that must be chosen, if it is to be chosen, by specifying some more determinate *way* of killing. Shooting three-foot iron rods through people's heads is a way of killing them. In the abstract it may sound odd to say that by intending *A*, one intends *B*, when the occurrence of *A* does not necessarily entail the occurrence of *B*. How could this be? The oddity dissolves when we consider that this phenomenon is not peculiar to human action but occurs throughout the natural world. Some natural kind *F* may have a feature *G* necessarily, but a particular *F* may nonetheless lack the feature *G*. For example, ornithologists would agree that necessarily ducks have two legs. It is part of the nature of waterfowl to be two-legged. This is a truth of biology, which isn't contradicted by the presence of the odd defective duck that happens to be born with only one leg. Indeed, even if all ducks were struck by a crippling disease that caused them to lose a leg, we should still say that it belongs to the natural kind *duck* to be two-legged.

The broader lesson here is that the normality involved in the definition both of natural substances and human actions is not merely a statistical notion, despite St. Thomas's use of the word “frequently” in the quotation above. An event may occur in nearly every actual instance of a practice, under extant circumstances, without that event's being an essential constituent of the action. Suppose, for example, that an enemy makes a rule of locating schools and hospitals in the immediate vicinity of all of its military installations. Under such circumstances, every air strike against those installations would cause innocent civilian deaths. Nonetheless, those deaths would

not count as essential constituents of the strikes, so long as there was nothing in the nature of the strikes or of the installations themselves that necessitated a high propensity for civilian deaths. The strikes have in fact a high likelihood of causing civilian deaths, but only because of the presence of the extraneous circumstance of the perverse location of those civilians, a circumstance in no way demanded by the striking force's practice. In the same way, the removal of a cancerous uterus during pregnancy has the virtual certainty of causing the fetus's death, but it does not count as an intentional killing, since the fetus's presence in the uterus is a circumstance extrinsic to the practice of the oncological therapy of removing diseased uteruses.

Anscombe's notion of a "brute fact" is helpful in order to understand the entailment relations between act descriptions.²⁹ The truth of an act description *D* consists in behavioral facts, call them *xyz*, performed in the context of certain social practices. Anscombe calls *xyz* "brute relative" to *D*, by which she seems to mean something analogous to the relation of matter to form. For example, suppose that you owe a grocer \$20 for the cart of potatoes he delivered at your house. The truth of the act description "delivering the potatoes" consists in the fact that the grocer carted the potatoes to your house and the fact that he left them there. These facts are brute relative to the description "delivering." The description "delivering" is itself brute relative to the description "owing the grocer \$20"; the truth of your owing him consists in the fact that he delivered the goods, together with your joint participation in the social practice of using money. Furthermore, the descriptions of the facts of "carting potatoes to your house" and "leaving them

²⁹ Anscombe, "On Brute Facts," in *Ethics, Religion, and Politics: Collected Philosophical Papers Vol. III* (Oxford: Blackwell, 1981), 22–5. The application of Anscombe's notion of a brute fact to the intention/foresight distinction is examined more fully in Matthew B. O'Brien, "Practical Necessity," chap. 4 ("Intention, Social Practice, and Double Effect").

there” consist in the obtaining of more basic facts that are brute relative to these descriptions. Brute facts are distinctive because the higher-order descriptions that they make true cannot necessarily be inferred from just the facts themselves—valid inferences always “presuppose a context of normal procedure” that may be invalidated when special circumstances obtain.³⁰ Thus a “delivering” isn’t entailed merely by the carting of the potatoes to your house and leaving them there, in any context whatsoever, because the grocer might be play acting, or he might have arranged for someone to remove the potatoes immediately after he left them, and so on. Nevertheless, unless special circumstances really do alter the background social practices, you can validly infer that the grocer has delivered the potatoes simply from knowing that you ordered the potatoes and the grocer brought them to your door. These behavioral facts are what the delivering consists in.

If this account of brute facts is correct, then it can be developed and applied to the determination of intention versus foresight. It is self-evident that the act descriptions “killing an unborn child” and “crushing an unborn child’s head and cutting her to pieces” are conceptually distinct, and so it is possible to include one without the other in a proposal to act. But as we saw above with Anscombe’s examples, the conceptual separability of act descriptions does not prevent entailment relations between those descriptions where the facts described are brute relative to the truth of some higher-order act description. Thus the crushing and the cutting may be facts that are brute relative to the description “killing.” If this is so, then in the context of normal medical procedure, choosing to crush an unborn child’s head and cut her to pieces, under those descriptions, entails choosing to kill her. Normal medical procedure does not at present include techniques or apparatus that allow surgeons to dismember unborn children and

³⁰ Anscombe, “On Brute Facts,” 23.

reconstitute them without causing their deaths. Now suppose that a surgeon, who knows the present state of medical procedure and so knows that crushing and cutting the unborn child will kill the child, deliberately adopts a proposal that excludes the specific description “killing” from his means, because according to his plan the killing of the unborn child, so described, does not contribute to the benefit he seeks. The benefit he seeks is to save the life of the mother. We claim that the conceptual innocence of his conscious proposal doesn’t matter. He still kills the child intentionally, because the means he does choose that contributes to the benefit he seeks—the crushing and cutting—are brute relative to the description “killing,” and since he knows the lethal consequences of the crushing and the cutting, and medical practice is what it is, he must intend those lethal consequences as integral to his action. An agent’s intention includes not just his self-conscious proposal, but also the descriptions that are brute relative to his self-conscious proposal.

II.

The Interpretation of Aquinas. The roots of the principle of double effect are traceable to St. Thomas Aquinas’s account of human action. Elizabeth Anscombe argues that since the seventeenth century, however, theologians and philosophers have confused the development of the principle by variously distorting or ignoring the relevant passages from Aquinas’s texts.³¹ A characteristic mistake is to focus unduly upon *Summa theologiae* I-II, q. 64, a. 7, and to spin out from this single article an entire theory about the individuation of intentional actions. This approach requires discounting the fact that the question arises within the context of Aquinas’s analysis of justice, and not human action, and more importantly, this approach manifestly contradicts many of the texts where Aquinas does address intentional action specifically: e.g., I-

³¹ Anscombe, “Action, Intention and ‘Double Effect.’”

II, q. 20, a. 5, about the effect of consequences on the goodness or malice of actions. Grisez set the NNL along this mistaken course in his 1970 reformulation of double effect, “Toward a Consistent Natural Law Ethics of Killing,” and his collaborators have followed.³² It is noteworthy that in section III of his essay, where Grisez argues for his reformulation of double effect, he neglects to mention a single passage from Aquinas apart from I-II, q. 64, a. 7.

Question 64 is devoted to examining justice and the use of lethal force in instances of private self-defense. Aquinas adopts a very rigorist position about the morality of private self-defense: an individual may use only such force as is sufficient to disable his unjust attacker. In cases where such force has a foreseeably lethal consequence, Aquinas says that the self-defender may nevertheless use force without intending his assailant’s foreseen death. As he says, “Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention.” However, the article never makes explicit what constitutes a “moderate” defense, which is within the “limits of blameless defense.” It is noteworthy that even in this passage, Aquinas’s focus is on the quantum of force that is permissible, rather than on the defender’s proposal in acting.³³

³² Cf. Finnis, *Fundamentals of Ethics*, 85. Grisez’s article preceded the publication of his book *Abortion*. The definitive collaborative restatement of the NNL action theory is Grisez, Finnis, and Boyle, “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” but Tollefsen, “Is a Purely First Person Account of Human Action Defensible?” is an especially perspicuous elaboration.

³³ The relevant passage reads: “Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since

Aquinas's focused discussion of the relevant aspects of human action comes in I-II, q. 20, a. 5, and his response merits a lengthy quotation:

The consequences of an action are either foreseen or not. If they are foreseen, it is evident that they increase the goodness or malice. For when a man foresees that many evils may follow from his action, and yet does not therefore desist therefrom, this shows his will to be all the more inordinate. *But if the consequences are not foreseen, we must make a distinction. Because if they (the consequences) follow from the nature of the action and in the majority of cases, in this respect, the consequences increase the goodness or malice of that action: for it is evident that an action is specifically better, if better results can follow from it; and specifically the worse, if it is of a nature to produce worse results. On the other hand, if the consequences follow by accident and seldom, then they do not increase the goodness or malice of the action: because we do not judge of a thing according to that which belongs to it by accident, but only according to that which belongs to it of itself.*³⁴

this is accidental as explained above (43, 3; I-II, 12, 1). Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor.

Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful...."

³⁴ Italics added. Unless otherwise noted, English translations of the *ST* are from Fathers

Clearly, Aquinas's focus is on what is essential or accidental to the action, not on what is going on within the content of an agent's proposal or practical reasoning, because *unforeseen* consequences can increase or decrease the malice of an action. Aquinas's discussion of amputation, which appears immediately after the famous question 64, confirms this account.

As Aquinas explains in I-II, q. 12, a. 1, the word "intention" refers to the tendencies of an action, including the act of the will, and not to some introspectible or phenomenological "content" of that act. In addition, Aquinas clearly rejects a reduction of moral evaluation to the contents of the acts of the will (the means and ends of one's proposal). In I-II, q. 18, a. 4, Aquinas claims that there is a *fourfold* source of goodness (or malice) in human acts: the *genus* of intentional action (according to which all such acts are good qua human acts), the *species* of the action (derived from its "object"), the circumstances of the action, and its end. Thus, the end of the act (which Aquinas clearly means to include all intermediate ends, and not just the

of the English Dominican Province (New York: Benziger, 1947) with occasional revisions of our own. The Latin of the Leonine edition reads: "Respondeo dicendum quod eventus sequens aut est praecogitatus, aut non. Si est praecogitatus, manifestum est quod addit ad bonitatem vel malitiam. Cum enim aliquis cogitans quod ex opere suo multa mala possunt sequi, nec propter hoc dimittit, ex hoc apparet voluntas eius esse magis inordinata. Si autem eventus sequens non sit praecogitatus, tunc distinguendum est. Quia si per se sequitur ex tali actu, et ut in pluribus, secundum hoc eventus sequens addit ad bonitatem vel malitiam actus, manifestum est enim meliorem actum esse ex suo genere, ex quo possunt plura bona sequi; et peiorem, ex quo nata sunt plura mala sequi. Si vero per accidens, et ut in paucioribus, tunc eventus sequens non addit ad bonitatem vel ad malitiam actus, non enim datur iudicium de re aliqua secundum illud quod est per accidens, sed solum secundum illud quod est per se."

ultimate end) is only one of four potential sources for success or failure. In article 1 of the same question, Aquinas explains that each act derives its species (its essential kind) from its “object,” that is, from the act considered (in part) as a behavioral phenomenon.³⁵

In article 5 of the same question, Aquinas states that whether a human act is good or evil depends solely on whether the *object* of the act is (in its actual circumstances) in accordance with or contrary to human reason. Thus, the evaluation of an action *in situ* depends upon judging whether the objective tendencies of the action-type characteristically accompanying the basic power being exercised are, in the relevant circumstances, in accordance with the rational principles of the natural law. Therefore, Anscombe is correct to conclude that one cannot prevent oneself from intending that which one knows to be a *per se* concomitant of one’s action, even if one’s proposal in acting does not include that concomitant.

One reason why the NNL collaborators seem to misconstrue Aquinas’s account of human action is because they seem to have imported into it a states-of-affairs ontology that is alien to the dynamism of Aquinas’s Aristotelian conception of act and potency. Joseph Boyle says, “one

³⁵ At this point, NNL collaborators are prone to object, as Finnis does, that the “attempt to distinguish the intended from the unintended by reference to sheer physical ‘immediacy’ of cause and effect is unsound, a confusion of categories, of human behaviour and human action” (“Intention and Side-effects,” 58). But this isn’t a substantive objection; it simply evinces that for the NNL the use of the term “human behaviour” is being partly defined negatively in terms of intention and does nothing to *show* that the nature of human actions are not in part determined by physical behavior, irrespective of one’s honestly professed plan in acting. See Anscombe, “On Promising and its Justice,” *Metaphysics and Philosophy of Mind: Collected Philosophical Papers, Vol. II* (Oxford: Basil Blackwell, 1979): 10–21, at 12.

must intend not only the more distant and ulterior goals but also the immediate aim one has in undertaking an action. Thus one must intend what Aquinas calls the *formal object* of one's act. In more contemporary language, an action is an undertaking to bring about a certain state of affairs."³⁶ But the difference between actions' formal objects and undertakings' states of affairs is not simply a matter of jargon, however, and to construe Aquinas's account of action in terms of producing states of affairs is to make an ontological category mistake. It is of course possible to try to bring certain states of affairs about; but to characterize the nature of human action in such terms is inaccurate, because the individuation criteria for states of affairs, as opposed to teleologically-ordered processes or activities, are extremely subjective.³⁷ Many of the hard cases in action theory revolve around how to determine the descriptions under which an agent chooses a means to an end, and solving this problem turns on how it is first posed. It matters crucially whether the object of choice is a state of affairs or the exercise of a basic power.

On Aquinas's account, human action is a whole with two proper parts: a formal part, which is an interior, elicited act of the will for the sake of an end, plus a material part, which is

³⁶ Joseph Boyle, "Toward an Understanding of the Principle of Double Effect," *The Doctrine of Double Effect*, 10.

³⁷ Although Boyle seems to have introduced states of affairs ontology into the NNL action theory (see *ibid.*, 14–5), the theory's reliance upon the idea is most evident in Tollefsen: "In every case, however, the basics of action are these: I seek some benefit by bringing about some state of affairs in which the benefit is to be achieved. My intention encompasses the ultimately desired state of affairs, the benefit I seek in that state of affairs, and any subordinate states of affairs that I choose as instrumental towards achieving the ultimately desired state of affairs" ("Is a Purely First Person Account of Human Action Defensible?," 444).

an exterior bodily act “commanded” by the will’s interior act.³⁸ In “commanding” the exterior act, the will exercises both innate and socially acquired basic powers. The exercise of such basic powers initiates an activity in which the will’s interior act reaches its terminus—which is to say that what agents choose most fundamentally are activities and processes. Actions, which are episodic, should be understood as derivative from ongoing activities and processes.

For the NNL, agents choose generic “undertakings” defined and individuated solely by the “states of affairs” that are aspects of the agents’ proposals. For Aquinas, however, agents choose relatively determinate processes or activities, and these are specified antecedent to choice as “agential matter,” as it were, by the powers they exercise, the behavior they involve, and the circumstances in which they occur. It is important to see that we are not complaining that the use of the state-of-affairs ontology makes NNL theory too “fine-grained” in its classification of actions. We are not advocating that this fine-grained classification should be replaced by a coarser one, in which actions are individuated only by their physical features. We are in fact claiming that the NNL is insufficiently fine-grained: it misses distinctions that a hylomorphic account captures by paying equal attention to the structure of practical reasoning in a proposal *and* the essential nature of the commanded acts. For example, one can give what would ordinarily be a lethal poison to a patient without intending his death, so long as one gives, along with the poison, a neutralizing antidote. This complex action, which is intentionally giving both

³⁸ The interiority of the interior act of the will, for Aquinas, is not private Cartesian interiority, because the will’s interior act is correlative with the exterior act. Furthermore, the will’s interior act is not itself a human action, but a proper part of a human action. This prevents Aquinas’s account from being subject to Ryle-style regress problems that afflict some other theories of the will.

the poison and the antidote, is not one that normally includes the death of the patient as one of its components, unlike the action of intentionally giving the poison alone.³⁹

III.

A Hylomorphic Theory of Intentional Action. Let us turn now to the rationale for principle (6), the inclusion of known essential constituents within the scope of responsible intention. Principle (6) is rooted in the Aristotelian's hylomorphic conception of human beings and their properly human acts. By contrast NNL, via principle (5)'s identification of responsible intention with the descriptive content of one's rational plan, is implicitly Cartesian in character: an agent is fully identified only with his motivating reasons, as grasped from a first-person perspective. This ignores the fully embodied character of human animal life and implicitly alienates agency or responsibility from the biological essences of basic powers of action, for intention/behavior dualism is just as problematic as mind/body dualism.

It is additionally problematic, and perhaps even self-contradictory, for the NNL to insist on a "purely first person account" of human action, because elsewhere collaborators in the NNL project have forcefully and persuasively rejected a purely first person account of human nature and identity.⁴⁰ But the explanation of human action, nature, and identity should be methodologically continuous. Many philosophers accept a version of "wide psychological reductionism" about human identity, according to which human beings are not really a species of animal but "selves" whose conditions for survival and identity consist in purely psychological

³⁹ We are indebted to Mark C. Murphy for prompting us to make this clarification.

⁴⁰ George and Lee, *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge: Cambridge University Press, 2008).

criteria of continuity.⁴¹ This Cartesian view is purely first-personal because it takes the (alleged) phenomenological separability of first person conscious experience from embodiment to entail that human beings are *essentially* consciously experiencing “selves.” Once this dualism is established, the first-person self gets analyzed as a full-bore substance, an epiphenomenon, or some sort of emergence from the brain. The main argument for this view is the “method of cases,” whereby bizarre hypothetical counterfactual scenarios (involving brain transplants and *Star Trek*-style teleportation) are described and then we’re asked to consult our intuitions about whether or not certain individuals are identical with certain predecessors.

Against this view, Robert George and Patrick Lee make a cogent book-length case for the proposition that human beings are essentially embodied rational animals, not first-person selves: thus they argue that “in human beings, the agent that performs the act of understanding (including conceptual self-awareness, what everyone refers to as ‘I’) is a bodily entity, not a spiritual entity making use of the body as an extrinsic instrument” just as “the agent that performs the act of sensing is a bodily entity,” and these agents are one and the same individual animal.⁴² The Cartesian intuitions pumped by the method of cases are irrelevant to determining criteria for continuity, however, because someone will only have the Cartesian intuitions about the hypothetical cases if he is *already* committed to some form of self/body dualism; but this issue is just what is supposed to be adjudicated by the method of cases, so it ends up begging the question it set out to answer. George and Lee reject the method of cases that appeals only to first-

⁴¹ See Sidney Shoemaker for a classic version of this view, “Persons and Their Pasts,” *American Philosophical Quarterly* 7 (1970): 269–85.

⁴² George and Lee, *Body-Self Dualism*, 4, 22–38.

person intuitions in favor of a “mixed,” first- and third-person account of human nature and identity that begins with an investigation of animal bodily agency.

Oddly, however, when we turn from human identity and nature to human action, the NNL collaborators unambiguously endorse the method of cases and its Cartesian consequences—although they of course reject the label “Cartesian.” Now the question is: how can it be that human nature and identity cannot be analyzed from a purely first-person perspective, but human actions can be? Why are actions relevantly different in this respect from the agents who perform them? The NNL gives no good reason to think that actions are relevantly different, and it could not do so, for human actions are aspects of the human agents who perform them. Human actions are genuine physical existents, but they are accidents and not substances, so their being is dependent upon the being of human agents.⁴³ Actions are isolated pieces of activity, and agents are the loci of activity, and the nature of agents is specified by their activity. All this implies that the explanation of action, activity, and agency should be methodologically continuous. What’s more, the NNL itself explicitly endorses the Scholastic maxim according to which acts are specified by their objects, powers specified by their acts, and natures by their powers.⁴⁴ Given this ontological commitment, it isn’t possible for bodily intentional action to be a “purely first personal reality,” as Tollefsen has put it, because if that were so, then human nature, which is ultimately specified by human acts, would itself be a purely first personal, i.e.,

⁴³ Of course “physical” does not mean “*merely* physical,” and we do not deny that there are mental actions; our interest is in those human actions that have a bodily component.

⁴⁴ Finnis, *Fundamentals of Ethics*, 25.

purely spiritual, reality.⁴⁵ In short, the relation between intention and behavior is a species of the general problem of the relation between mind and body, and the NNL is schizophrenic insofar as it endorseshylomorphism as a solution to the latter and pure planning intentionalism as a solution to the former.

This incoherence cannot be avoided by appealing to Aquinas's distinction between the four "different modes of order that reason considers," which he mentions in the introduction to his commentary on Aristotle's *Nicomachean Ethics*. In their more recent work the NNL collaborators have emphasized the importance of recognizing these four orders and the "four irreducibly distinct [diversae] kinds" of sciences they give rise to. According to Finnis's gloss on Aquinas, these include:

- (1) sciences of matters and relationships {ordo} unaffected by our thinking, i.e., of the 'order of nature {rerum naturalium}' studied by the 'natural philosophy' which includes 'natural science' {[scientia] naturalis}, mathematics, and metaphysics;
- (2) the sciences of the order we can bring into our own thinking, i.e. logic in its widest sense;
- (3) the sciences of order we can bring into our deliberating, choosing, and voluntary actions, i.e. the moral, economic, and political sciences compendiously called *philosophia moralis*;
- (4) the sciences of the multitude of practical arts, the technologies or techniques which, by bringing order into matter of any kind external to our thinking and willing, yield 'things constituted by human reason'.⁴⁶

⁴⁵ This issue provokes interesting problems that we can't go into here. The human form is spiritual, but not "purely spiritual," as it were, because the human form is the form of a body.

⁴⁶ Finnis, "Subject-Matter and Method," in *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 21–55, at 21.

Is Aquinas's third order, *philosophia moralis*, co-extensive with the NNL's conception of ethics as a purely practical enquiry, and action theory as purely first-personal? Does Aquinas confine philosophical anthropology to the first order, along with natural science, mathematics, and metaphysics? If this were so, then Aquinas would appear to lend support to the NNL's methodology, because the difference between the "order that reason does not establish but only beholds, such is the order of things in nature," i.e., natural philosophy, and the "order that reason in deliberating establishes in the operations of the will," i.e., *philosophia moralis*, might ground a corresponding difference in methodology between the explanation of human nature and identity (natural philosophy) and human action (*philosophia moralis*). This difference, in turn, might justify the NNL's mixed first- and third-person account of the former (as in George and Lee's book) and purely first-person account of the latter.

Finnis's construal of *philosophia moralis* is flawed, however, which prevents the appeal to the four orders from meeting the charge of incoherence. Finnis's definition of *philosophia moralis* arbitrarily restricts its subject matter to voluntary actions alone, whereas Aquinas himself clearly includes in *philosophia moralis* both (a) the nature of voluntary actions, and (b) the nature of the voluntary agents who perform them. Aquinas states in the *Commentary*:

As the subject of natural philosophy is motion, or mobile being, so the subject of *philosophia moralis* is human action ordered to an end, *or even man, as he is an agent voluntarily acting for an end* [*vel etiam homo prout est voluntarie agens propter finem*].⁴⁷

It is unsurprising that Aquinas would include the study of man himself in *philosophia moralis*, and not merely human actions, because he follows Aristotle in holding that actions are "in" the

⁴⁷ Aquinas, *Commentary on Aristotle's Nicomachean Ethics*, trans. C. I. Litzinger (Notre Dame, IN: Dumb Ox Books, 1993), Lecture I.1.

agents who perform them. Acting, as opposed to making, does not have a terminus in an external product, but “remains in the agent himself.”⁴⁸ Human action manifests man’s specific difference (rationality), but this can be abstracted away in order to study man *qua* animal, *qua* living creature, or *qua* massive body. Sciences that abstract in this way fall outside of *philosophia moralis*. *Philosophia moralis* does not restrict its subject matter by abstraction, but by purpose. Thus it studies man *qua* man, for the sake of acting and becoming good, and not merely for the sake of acquiring knowledge. The practicality of *philosophia moralis* limits the exactitude and exhaustiveness with which human nature must be known, because in order to act virtuously it isn’t necessary to have systematic demonstrative knowledge about human psychology, but the practicality of the science does not—and could not—remove descriptive, third-person accounts of human nature from its methodological purview altogether. For Aquinas the relative practical or theoretical character of knowledge is a matter of degree, not all-or-nothing. The good of theoretical reason is truth, and practical truth is the consequence of action produced by reasoning for the sake of some good, which is itself the exercise of practical knowledge. This is fully practical reasoning, which is the reasoning that someone uses in trying to get something or make something happen; reasoning that is partially practical and partially theoretical is the reasoning that someone uses in trying to know something about “practicables,” or things that can be done.⁴⁹ The subject of practical and theoretical reasoning is too vast to pursue here. It is sufficient for our purposes to point out that Aquinas’s very brief discussion of the four orders of reason and the practicality of *philosophia moralis* provides no support for conceiving of ethics or action theory in terms of a purely first-person methodology, because Thomistic *philosophia*

⁴⁸ Cf. Aquinas, *Commentary on Aristotle’s Nicomachean Ethics*, Lecture I.13.

⁴⁹ See, Aquinas, *ST I*, q. 14, a. 16.

moralis includes an essential component of third-person and descriptive philosophical anthropology.

It is worth mentioning a further, independent reason why distinguishing between four orders of reason does not itself avoid the incoherence described above, or give grounds for a purely first-person ethics and action theory. In Aquinas's remarks about the four orders he never addresses the question which is crucial for the NNL's distinctive claims: given that the four orders of reason correspond to irreducibly distinct kinds of sciences, what non-reductive relations of dependence might still obtain between the different orders and their distinct sciences? For it is quite possible that different modes of knowledge are irreducibly distinct, but nevertheless dependent upon each other. The proponents of the NNL never seem to recognize this possibility, and seem to think that pointing out irreducibility is sufficient to establish non-dependence, but this is clearly mistaken.⁵⁰ For surely any genuine instance of the "order that reason in deliberating establishes in the operations of the will" must be both logically and metaphysically possible, and thus dependent upon other orders. Consider an example of non-reductive dependence. Suppose, *per impossible*, that sound metaphysical enquiry and theoretical physics were to demonstrate that the world is devoid of teleology. If this were true, then there could not be moral knowledge, because moral knowledge presupposes the existence of real human goods to which human agents order their actions, and this just is one species of teleology,

⁵⁰ Finnis's arguments in chapter two of *Aquinas* establish only the non-reducibility of the four orders, even though he asserts more than this, namely, the non-dependence of *philosophia moralis* upon any of the other orders.

which is what we supposed that natural philosophy explained away.⁵¹ Therefore, systematic moral knowledge depends upon prior natural knowledge in this respect, even though the former is not reducible to the latter.

By relying exclusively on the method of cases in analyzing human action, the NNL also commits the same question-begging fallacy that the dualistic psychological reductionists like Shoemaker and Parfit make in arguing for their theory of personal identity. Grisez, Finnis, and Boyle together, and Tollefsen as well, defend their first personal account of agency by describing many different hypothetical cases, and then appealing to intuitions about whether or not certain true descriptions of actions in those cases count as intentional.⁵² But unless you *already* agree with them, the NNL collaborators' interpretations of the cases do not provide independent reasons for affirming the first personal account that they favor. Their argument establishes only that adopting the first person perspective is a necessary condition on explaining action, but they assert the more controversial claim that it is a sufficient condition.

The embodiment of human life entails that an agent cannot alienate his agency or responsibility from the physical essences of his basic powers of action. To clarify this contrast, we need to look more carefully at the justification for principle (2), which is affirmed by both traditional (Aristotelian) natural lawyers and by NNL theorists. Why is it normally unreasonable

⁵¹ *Nota bene* that because this is a *per impossible* argument, it is irrelevant whether or not *asserting* that the world is devoid of teleology is performatively consistent or self-referentially coherent.

⁵² Grisez, Finnis, and Boyle, “‘Direct’ and ‘Indirect’”; Tollefsen, “Is a Purely First Person Account of Human Action Defensible?”; and Tollefsen, “The New Natural Law Theory,” *Lyceum* 10 (2008), <http://lyceumphilosophy.com/?q=node/97>.

to intend responsibly to deprive another of some basic good? As Finnis and George recognize, the wrongness of such responsible intending is bound up with the way in which our characters as moral actors are determined by the sort of actions we habitually perform. A morally good person cannot be justified in doing evil that good may come, since to act in such a way habitually is to become a person with bad character, regularly performing acts that are intrinsically bad in nature. As George puts it, “In freely choosing ... one integrates the goods (or the damaging and consequent privation of the goods, i.e., the evils) one intends into one’s will.”⁵³ There is inevitably a “synthesis between oneself as an acting person and the objects of one’s choices.”⁵⁴ Finnis insists rightly that we constitute ourselves by our choices. By our choices, we create a new identity or character: “our choices last until an incompatible choice is made,... an act of repentance.”⁵⁵

Aristotelian natural lawyers and NNL theorists agree that it is always wrong to propose to deprive another of a basic good without special justification. Proposing (deliberate choice) is itself an action. If one has no special justification for doing so (if one is not required by independent considerations of justice, e.g., punishment), then the choice of trying to deprive another of a basic good is itself intrinsically bad. If I choose to try to harm another unjustly, it does not matter whether I aim to do so via the essential constituents or the accidental consequences of one of my basic actions. The wrongness of the intention is independent of the moral permissibility of the physical acts used to carry out the plan.

⁵³ George, “Natural Law and Positive Law,” *In Defense of Natural Law* (New York: Oxford University Press, 1999), 102–12, at 106.

⁵⁴ *Ibid.*

⁵⁵ Finnis, *Fundamentals of Ethics*, 140.

However, the NNL theorists err in assuming that if a proposal is conceptually innocent (containing no unjust attack on a basic good in any of its desired steps, as conceived by the agent), then the acts used to carry out the plan must be so also. If an agent performs some basic act in carrying out a plan, what he is choosing to do (the chosen act as a whole) includes all of the essential constituents of that basic act, whereas the NNL assumes that an agent's object of choice is itself a function only of the introspectible content of his proposal. But an agent's proposal does not exclusively determine the descriptions under which what he does is chosen as a means, because there are at least two acts to consider independently of the proposal: the exercise of the will itself, and the exercise of the basic power being used by the will.⁵⁶ Both acts have their own proper object: the act of the will has as its object a plan, and the basic power being used has (typically) some complex bodily movement as its object. The action as a whole is morally good only if *both* objects are good, because they are both proper parts of a complete human action.

The essential constituents of the act an agent chooses to perform are *part* of what he does. If he knows what he is doing, he must know those essential constituents (or be negligent for failing to know them), so he cannot alienate himself from those essential constituents by excluding them from his conscious proposal. They are a part of what he has become in performing the act. If he willingly and knowingly crushes the skull of another human being or fires a large-caliber bullet at point-blank range into his head, the agent becomes a killer, regardless of whether the death, so described, was part of his proposal, in the sense that the success of the proposed plan would have been stymied had the death not occurred. Finnis

⁵⁶ See *ST* I-II, q. 18, a. 6 on the “twofoldness” of voluntary action: the interior act of the will and the external action.

remarks, “wrongness is never a matter of the behavior considered as a physical performance and/or outcome, but is always a matter of the will’s orientation to its immediate (if not also its further) object. Synonymous with ‘bear on inappropriate matter’ is ‘are inherently linked with a bad end’”⁵⁷ But the contrast between *either* “physical performance” *or* “the will’s orientation” is a false one, because a piece of behavior considered as a physical performance is a determinant of the will’s orientation to its immediate object. To characterize a physical performance as a type of human behavior that is eligible to be chosen is already to characterize the performance as intrinsically apt to embody some definite range of ends and not others. Thus a possible physical performance may have an intrinsic intentionalness that is entirely independent from actually being chosen by an agent as part of his proposal. As Anscombe points out, it is only “[a]gainst the background of certain modern traditions in philosophy—especially the Cartesian—[that] it is hardly noticed that intention may relate to the intentionalness of the particular act that is done, as well as to the purpose for which it is done. . . .”⁵⁸ The NNL cannot allow for the intentionalness of a particular act that is done to consist in causal facts about the act’s behavior only because it operates against this Cartesian background that Anscombe identifies, and accordingly it makes unexamined assumptions about causality and the physical.⁵⁹

⁵⁷ Finnis, *Aquinas*, 143 n 46.

⁵⁸ Anscombe, “Action, Intention, and ‘Double Effect,’” 218.

⁵⁹ This assumption is quite clear in a claim by Tollefsen, where he asserts as a near truism that “it would not make sense for there to be an absolute moral restriction on causing damage to a good, or by extension, causing death. Such damagings are inevitable in many, and perhaps all, genuine choices” (“Intending to Damage Basic Goods,” *Christian Bioethics* 14 [2008]: 272–82, at 273). But such damage to basic goods is causally inevitable *only* if “causality” is understood in

But causal facts about an agent's behavior can in part determine the object of his choice, because *pace* the Cartesian, human behavior is not a concatenation of formless physical events which stand in merely efficient causal relations to each other. Human behavior, considered antecedent to choice as the matter of intentional action, is structured by forms and disposed to ends. The will gets its orientation to an immediate object, and thereby becomes good or bad, by the choice of an antecedently disposed physical performance, which, in virtue of its disposition or "intentionalness," is or isn't capable of being ordered to man's final end.

The specification of the object of an intentional action is therefore structurally analogous to the specification of the proximate matter of the human substantial form: both the object of the action and proximate matter are "physical" but not "*merely* physical," because both, in different respects, are material apt to be actualized by form.⁶⁰ In the case of action, the content of the

a Cartesian or Humean fashion, according to which the causal consequences of a choice include the entire undifferentiated physical stream of events that are downstream of the chosen behavioral event. If, on the contrary, the causality of an act of choice is conceived of as the exercise of final and formal causal power—the embodying of form in matter—then it may make perfect sense to restrict "causing" damage absolutely.

⁶⁰ On the problematic idea of a "merely physical" behavioral description, see Anscombe, "On Promising and its Justice," 11–2, and "On Brute Facts," 22–5, both in *Ethics, Religion, and Politics: Collected Philosophical Papers Vol. III* (Oxford: Blackwell, 1981). Furthermore, note the congruence of our position with John Paul II's *Veritatis Splendor* (1993) §78: "The object of the act of willing is in fact a freely chosen kind of behaviour," without the object being "a process or an event of the merely physical order, to be assessed on the basis of its ability to bring about a given state of affairs in the outside world." Thus evaluating an action "from the

agent's intention confers the form upon the pre-disposed behavior he chooses, and in the case of a human being, the rational soul informs "flesh and bones" material.⁶¹ As Aquinas remarks, hylomorphism is implicit in the very notion of action, because "*operable* means the application of form to matter...."⁶²

IV.

Hard Cases and the Application of Double Effect. The centrality of double effect has come to the fore once again with a recent controversy over a religious sister who, in her capacity as ethicist at a (now formerly) Catholic hospital in Phoenix, Arizona, approved an abortion in order to reduce a severe risk to a pregnant mother who was suffering from pulmonary arterial hypertension (PAH).⁶³ By approving the procedure, did the sister, doctors, and hospital share in

perspective of the acting person" is a necessary, but not sufficient condition for specifying the object of an act.

⁶¹Thus Aquinas: "Now just as in the genus of natural things, a whole is composed of matter and form (e.g., man, who is one natural being, though he has many parts, is composed of soul and body); so, in human acts, the act of a lower power is in the position of matter in regard to the act of a higher power, in so far as the lower power acts in virtue of the higher power moving it..." (*ST I-II*, q. 17, a. 4).

⁶² "... operabile enim est aliquid per applicationem formae ad materiam..." (*ST I*, 14, 16).

⁶³ See "Nun excommunicated, loses hospital post over decision on abortion," *The Catholic Sun*, Phoenix, AZ, May 18, 2010, <http://www.catholicsun.org/2010/may/18/NUN-EXCOMMUNICATED.html>. But the issue involved in the Arizona case is not new. As far back as 1970 Grisez wrote, "By my reformulation of the principle of double effect, some additional operations involving the removal of a nonviable fetus could be justified. An example would be

an intention to kill the unborn child and thereby violate an exceptionless norm against intending the death of an innocent human being; or did they blamelessly intend to reduce grave risk to the mother, merely foreseeing the unborn child's death as a likely but tragic side-effect?⁶⁴

The answer, barring further revelations about the specifics of the case, is that the doctors performed a direct abortion on the unborn child and intended the child's death as a means to the end of saving the mother's life, and by approving the doctors' procedure, the sister and the hospital shared in intending the death of the unborn child and violating the exceptionless norm. She and the doctors cannot be exonerated from intending the child's death by appealing to the principle of double effect, because although they had an admirable goal in saving the mother, the means they chose for the sake of that goal was the death of the innocent child. The principle of double effect permits sometimes bringing about bad effects foreseeably, but prohibits choosing them, and they chose the child's death as a means to reducing risk to the mother, because in the circumstances of the situation, their cutting the child to pieces and removing her from the womb was brute relative to killing the child.

when the pregnancy itself was dangerously overloading an ill mother's heart and kidneys" ("Toward a Consistent Natural Law Ethics of Killing," 94). For the medical context that PAH involves, and details about the Phoenix case, see the concise summary by Nicanor Pier Giorgio Austriaco, O.P., "Abortion in a Case of Pulmonary Arterial Hypertension," *National Catholic Bioethics Quarterly* 11 (2011): 505–7.

⁶⁴ M. Therese Lysaught provided moral analysis for the Phoenix hospital in favor of the latter, and her argument was based upon the work of Grisez. See "Moral Analysis of Procedure at Phoenix Hospital," *CNS Documentary Service* 40 (2011): 536–49.

Why shouldn't we say that the doctors chose merely to "end the pregnancy" (or some such innocuous description) and not to "kill the child"? No doubt they regretted the child's death. The description "killing" needn't have entered into their proposal. If the child had miraculously survived the abortion, then they would have rejoiced. Surely there is nothing wrong with "ending a pregnancy," so described, since after all a natural birth "ends a pregnancy" as well.⁶⁵ These objections rest on two mistakes that by now are familiar: first, a faulty analysis of how the ascriptions of intentions work, and second, a faulty Cartesian individualism that neglects the social aspect of action.

As Tollefsen has correctly recognized, "[a]scriptions of intention are intensional—that is, they are usually true only insofar as the description is one under which the agent takes himself to be acting." But from this fact he draws a fallacious inference: "So there is no substitution of one definite description of an agent's act with another *salva veritate*: the agent intended to marry his fiancée; he did not intend to marry his best friend's lover, even though she was in fact his best friend's lover."⁶⁶ Tollefsen wants to show that actions are individuated by the descriptive content of the agent's proposal. That is, for a given piece of behavior, there are as many actions as there are descriptions under which the agent adopts his proposal. But this metaphysical thesis about act individuation—or the individuation of states of affairs, as Tollefsen puts it sometimes⁶⁷—does not follow from the mere fact that attributions of intention involve intensional contexts, and

⁶⁵ This in effect was the justification of the abortion proffered by St. Joseph's Hospital in Phoenix: see "Bishop Olmsted Announcement: Frequently Asked Questions," http://www.stjosephs-phx.org/Who_We_Are/Press_Center/212144.

⁶⁶ Tollefsen, "Intending to Damage Basic Goods," 277.

⁶⁷ Tollefsen, "Is a Purely First Person Account of Human Action Defensible?" 445.

phrases in action sentences are therefore not generally intersubstitutable. It may indeed be true that the agent did not intend to marry his best friend's lover, so described, but this fact cannot be shown by pointing to the non-substitutability of the two descriptions "fiancée" and "best friend's lover." The individuation of actions, or of objects generally, is not a simple function of whether or not definite descriptions can be substituted while preserving truth. If it were so, then as Anscombe points out, we could prove, absurdly, that the President of the United States and the US Commander-in-Chief *must* be different men, because the President is the Commander-in-Chief by being President, but the Commander-in-chief is not the President by being the Commander-in-Chief.⁶⁸

Tollefsen's mistake lies in confusing a distinction between the senses of two descriptions with a distinction in reference. Just because two descriptions differ in sense, in that the predicates they incorporate are not logically or metaphysically identical, we cannot conclude that the two descriptive singular terms really refer to distinct individual actions, events, or objects. To take another example from Anscombe: if you're playing chess and you say, "In this position moving the queen thusly *is* delivering mate," you are not making an identity claim between the senses of the two definite descriptions. Rather, you're using the description "delivering mate" to refer to the act of moving the queen thusly: you're characterizing a certain moving of the queen as *the mating move* of the game. There is only one move in question, which is one exercise of the power of chess-playing, and if someone wants to say that there are two "actions" underlying the one move, then what such "actions" are is *prima facie* obscure.⁶⁹ Recall our earlier discussion of

⁶⁸ G. E. M. Anscombe, "Under a Description," in *Metaphysics and Philosophy of Mind: Collected Philosophical Papers, Vol. II* (Oxford: Blackwell, 1979): 208–19.

⁶⁹ Anscombe, "Under a Description," 212–3.

brute facts. One and the same intentional action may be characterized materially by describing the brute facts in which the action consists, or it may be characterized formally by describing the higher-order intention that the action realizes. “Moving the queen thusly” is brute relative to the description “delivering mate.” Moving the queen, in the context of the rules of the game and the relevant circumstances, entails delivering mate. It is important to appreciate what we are *not* claiming: that moving the queen and delivering mate are the same action because they are physically indistinguishable. The physicalist and the Cartesian make equal and opposite mistakes. The physicalist identifies the action with its wholly “outer,” physical realization, and the Cartesian with its wholly “inner,” formal aspect. The hylomorphist insists that every action is essentially an event with both aspects. What both physicalists and Cartesians are missing is the crucial role of the basic powers that are exercised in executing an intention. “Moving the queen” is “delivering mate” on this occasion because both descriptions refer to the same exercise of a basic power of chess-playing.

If we return to the Phoenix case and apply this account, then it becomes clear that it is impossible to individuate an act of “ending the pregnancy” or “removing the child from the womb” from an act of “killing the unborn child” just by appealing to the non-substitutivity or intensional inequivalence of these descriptions. For these former descriptions are indeterminate relative to the concrete lethal procedures that were (or could have been) chosen. D&E abortions, D&C abortions, and so-called “placentectomies” are all essentially death-dealing to the unborn children upon whom they are performed, because these procedures either destroy the vital organs of the unborn children or deprive them of the gestational conditions in their mother that are ordinary and necessary for life and growth. These procedures are equivalent to killing a healthy adult by “cardiotectomy” (heart-removal) in order, say, to acquire a transplantable organ to save

another person, or equivalent to suffocating a sleeping person by evacuating the oxygen from his bedroom in order to refill another person's medically-required oxygen tank.

The second mistake in the reply noted above is a faulty Cartesian individualism that neglects the social aspect of action. Recall that the Aristotelian natural law account emphasizes that human acts have a dual dependence upon both (a) the nature of the individual people who perform them, and (b) the social practices in which they are performed. The Cartesian, by contrast, analyzes acts as such solely in reference to the choosing self's proposed plan in acting. So long as the agent proposes an instrumentally rational plan, the Cartesian holds that his intention in acting just is what he says it is—neither more nor less.

In neglecting social practice the Cartesian commits what might be called the “Humpty Dumpty fallacy,” after a famous passage from Lewis Carroll's *Through the Looking Glass*.⁷⁰ Carroll's ironic dialogue between Alice and Humpty Dumpty is a nice illustration of how actions get constituted by social practices. Words are uttered in speech acts which are parts of the social practice of linguistic communication, so when you use a word to express a meaning, that meaning is a function of the linguistic practice, not your subjective wishes. Your wishes determine which words you choose, but not the meanings of the words you choose.⁷¹

⁷⁰ Lewis Carroll, *Through the Looking Glass* (New York: Thomas Crowell & Co., 1893), 131–2. In this passage Humpty Dumpty says that “glory” means “a knock-down argument” because he claims that words mean just what he says they mean, “no more and no less.”

⁷¹ Irony and metaphor are not counterexamples, but proofs of the social constitution of meaning, because irony and metaphor presuppose a socially fixed meaning that can be played off of.

Suppose that you utter the sentence, “God lacks all glory.” This is an act of blasphemy (unless, say, you’re speaking as a character in a play). Suppose, further, that you claim to be innocent of intentional blaspheming, since although you know what the standard of meaning of “glory” is in English, you intend your use of the word to mean, on this occasion, “fault.” After all, we can certainly conceive of a possible world where “glory” did mean “fault,” even though in the actual world it means magnificent splendor. This defense would be sophistical, even if it accurately represented the proposal you adopted, because you would have committed the Humpty Dumpty fallacy. It is possible to commit the Humpty Dumpty fallacy not just in choosing a word in order to mean something, but also in choosing an action for the sake of an end. Just as words get their meanings conferred by the practice of language, so non-linguistic acts get their intentions conferred in part by social practices. To be clear: the NNL does not claim that what an agent “says” about his action determines his intention, but it does claim that what an agent *proposes* wholly determines the content of his intention, and it is this claim that commits an instance of the Humpty Dumpty fallacy.

In the Phoenix case, the relevant social practice is medicine. It is impossible for the doctors to have intended to “end the pregnancy” without thereby intending to “kill the unborn child,” because the nature of the procedures which they did or could have performed is fixed by the actual practice of medicine, regardless of any proposal to pry apart descriptions by conceptual fiat. The doctors performed an abortion procedure upon the child, the success-criteria of which include the removal of the pre-viable child from the womb; evacuating a pre-viable child from the womb is a *way* of killing the child, whether by D&C, D&E, or placentectomy. Instead of trying to treat the mother’s diseased condition, they decided to end the otherwise healthy pregnancy that was a causally incidental aggravation to the disease, which they achieved

by killing the unborn child. Social practices do not necessarily determine the specific goodness or badness of one's action, but they always determine some of the descriptions under which one acts intentionally, regardless of one's self-conscious proposal.

The unjust killing in the Phoenix case can be contrasted with surgical procedures that also cause deaths, but are permissible because they do not involve intentional killing: e.g., the removal of a cancerous uterus from a woman who happens to be pregnant and the case of treating an ectopic pregnancy. Both of these cases highlight how human animality, and in particular proper biological functioning, determines the nature of human actions in addition to social practice. Human animality is the other crucial determinant ignored by the Cartesian model of act analysis. In the cancerous uterus case, the object of the surgical procedure is the uterus, and not the child, whose presence is unrelated to the lethal risk that the diseased organ presents to the mother. Therefore, it is possible to treat the cancer by removing the womb, foreseeing the child's death but not intending it. Even though the child's death is "causally close" to treating the cancer—in a Humean sense of event causality—the death is an accidental consequence and not a *per se* constituent of the treatment.

Evaluating the treatment of an ectopic pregnancy is more difficult, because in an ectopic pregnancy it appears to be the unborn child's very presence that threatens the mother. In an ectopic pregnancy the embryo implants outside the uterus, e.g., in a fallopian tube, and although outside the uterus the embryo's maturation is impossible, even its partial continued growth can kill the mother by causing the fallopian tube to rupture. Nevertheless it is possible to prevent rupture by removing the tube (either surgically or chemically) without intending the embryo's death even though this is foreseen with certainty. In removing the tube the surgeon is not depriving the embryo of a condition that is sufficient for its survival, nor of a condition that is

natural for the embryo at that point in its development, and the embryo doesn't have a claim on its mother to extend momentarily its *unnatural* growth at the cost of her death. By removing the fallopian tube, the surgeon is removing an unnatural *delayer* of the child's death: he is not thereby causing, or even hastening her death, which is due to the absence of the supply of oxygen and nutrients from a placenta properly implanted in the womb.⁷² Removing the tube and removing the cancerous uterus are similar because both are targeted remedies of defective biological functioning.

Consider an analogy. Suppose that after a nuclear disaster, a radioactive victim is mistakenly placed in a hospital room with another patient in critical condition who hasn't been exposed to radiation and is expected eventually to recover. Both patients are in an extremely fragile condition and if they are moved they will surely die. The first victim will soon succumb to radiation poisoning and is receiving palliative care, but if he remains in the room, he will expose the other patient to a lethal dose of radiation, which would kill him too. In this case, it is permissible to move the radioactive patient out of the room in order to save the other patient from lethal exposure, allowing him at least to recover eventually. Even though the death of the radioactive patient caused by the stress of the movement is foreseen, this need not be intended.

⁷² An "unnatural inhibitor of death" is not as novel an idea as it might sound. It's implicit in the familiar case of administering a dose of painkillers to a terminally ill patient in order to ease severe pain, while knowing that hastened death will be an unintended result. Omitting to administer the drug would be an act of unreasonably prolonging life. So too, we argue, omitting to remove the rupture prone tube would unreasonably prolong the life of the implanted embryo that is in a terminal condition, at the further cost of the mother's life.

Another hypothetical case: suppose that two people have become pinned between two automobiles as a result of a crash. The first has sustained fatal internal injuries, which will kill him within an hour. The second may be saved, but only if the two vehicles are immediately separated and he is rushed to the operating room. However, separating the two vehicles will cause the first victim to bleed out, resulting in immediate death. It is clear that the vehicles can be separated without intending to kill the first victim, since he will die of internal injuries caused by the crash. The separation of the vehicles would merely remove an unnatural condition that is delaying his death.

These hypothetical cases are analogous to the treatment of an ectopic pregnancy. The presence of the radioactive patient, like the presence of the embryo, is the cause of the lethal threat to the other person. Both are causes of the lethal threat in virtue of an unnatural and accidental fact about them, however, and not in virtue of their intrinsic natures functioning healthfully in their proper context. Therefore, it is possible to remedy the defective functioning without intending to do them any harm. If human nature were radically different, e.g., if we didn't reproduce sexually, then what it would be possible to choose and intend would be radically different. But given our proper biological functioning as it is, then our possible intentional actions are circumscribed and predisposed in certain fixed ways.

Now consider another hypothetical case that will flesh out the untoward implications of the NNL's account of double effect. Suppose that a woman is suffering through a difficult pregnancy that does not threaten her life, but incapacitates her with regular bouts of nausea and weakness to a degree that renders her bedridden. She arranges for a surgeon to perform a craniotomy on her pre-viable unborn child and to remove it from her womb, which will result in the child's death. She is a devoted academic, and she does not want a difficult pregnancy to

compromise her pursuit of the good of knowledge by distracting her from finishing a book that will likely win her tenure and make a signal contribution to her field. Has the woman procured a direct abortion and intentionally killed her unborn child? Most ordinary people and most philosophers would presumably say “yes,” whether or not they think abortion is right or wrong or the woman justified or not. But the NNL cannot say this. Rather, the NNL can at most say that the woman has knowingly caused the unborn child’s death, but it remains to be seen whether she intended it.⁷³ To determine her intention, we first need to know her proposal in acting, which cannot simply be inferred from her having deliberately arranged for a craniotomy. As Finnis says,

What states of affairs are means and what are side-effects depends on the description which they have in the proposal or plan adopted in the choice which brings them about, i.e., in the clear-headed practical reasoning which makes that plan seem a rationally attractive option.⁷⁴

If “killing the unborn child” or some equivalent act description did not figure in her clear-headed practical reasoning, then she need not have intended the child’s death. As an illustration of her proposal, she could have imagined a possible world in which the pre-viable unborn child miraculously survived the craniotomy and removal from the womb. In this counterfactual situation, her proposal in acting would not be frustrated, because by successfully ending the difficult pregnancy without killing her child, the woman would have succeeded in furthering her

⁷³ The NNL includes certain “modes of responsibility,” and a defender of NNL might reply that appeal to the modes could block this sort of implication. We do not think this is so, but in any case we address the relevance of the modes later on.

⁷⁴ Finnis, “Intention and Side-effects,” 43.

pursuit of knowledge, and she may even have rejoiced in securing two goods—the life of her child and the conditions of tranquil enquiry prerequisite for the pursuit of knowledge—which she had thought to be tragically incompatible. According to Finnis, “Any who welcome and rejoice in an effect of their actions, but who in *no* way adapt their practical reasoning (and thus the plan they adopt and execute) with a view to bringing about that effect, do not intend it.”⁷⁵ Therefore, because her proposal does not include the child’s death, she can choose to “end her difficult pregnancy,” under this description, for the sake of pursuing knowledge. Even though she knowingly deprives her innocent child of the ordinary and proper biological conditions that are necessary for its survival, she need not intend her child’s death, on the NNL account, because these conditions are facts about “mere” behavioral causality and not about her clear-headed plan in acting.⁷⁶

The descriptions under which an agent performs an action intentionally are not the only morally relevant features of his action. Therefore, although the NNL, on its own terms, cannot say that the woman in the hypothetical case kills her child intentionally, it may still condemn her action as unjust if the theory can show that the action’s foreseeable consequences are somehow problematic, because the woman’s proposal includes *accepting* the consequence of her child’s

⁷⁵ Ibid., 44.

⁷⁶ We are not claiming that the NNL theory ignores facts about behavioral causality completely. They do not. Rather, we are claiming that the NNL theory ignores facts about behavioral causality in specifying the object of action, or in other words, in specifying the descriptions under which agents choose means for the sake of ends. The NNL has what might be called a *pure planning* account of intentional action.

death, if not intending it.⁷⁷ As the hypothetical case is constructed, at least two basic goods are at stake: life and knowledge. According to the NNL's strong incommensurability thesis, principle (1), no basic good can as such be commensurated, measured, or assessed in relation to any other basic good. This is because there is no hierarchy among the basic goods, even if individuals may freely choose to privilege one or some basic goods in the ordering of their own lives without thereby acting unreasonably. What agents can never do reasonably is *act against* a basic good intentionally, because so doing would amount to downgrading it in relation to the others, which unreasonably contradicts the good's essential incommensurability and seems to deny that it really is a fundamental aspect of human flourishing.

There is some ambiguity in how strong the NNL's incommensurability thesis is. Sometimes the thesis appears to be relatively weak, and to encompass nothing more than an affirmation that the human good is variegated, which contradicts certain forms of consequentialism that mischaracterize the human good as monolithic.⁷⁸ A weak version of the thesis states that the basic goods are not reducible to one another: each good offers something distinctive.⁷⁹ We have no qualms about this rather uncontroversial version of incommensurability. As we noted above, however, the non-reducibility of x to y does not imply

⁷⁷ Finnis, Boyle, and Grisez, *Nuclear Deterrence*, 292.

⁷⁸ Thus Finnis, Boyle, and Grisez remark at one point, "our claim [about incommensurability] is only that 'greater good' and 'lesser evil' are meaningless on the lips of consequentialists when they are engaged in their particular enterprise" (*Nuclear Deterrence*, 263).

⁷⁹ This statement of the NNL's incommensurability thesis was proposed to us by an anonymous reviewer.

that x bears no ordering relation to y , so the non-reducibility of the basic goods to one another is perfectly compatible with their being hierarchically ordered to one another. The good of play may offer something that the good of religion does not, for example, yet religion may still be superior to play.⁸⁰ The proponents of the NNL emphatically reject the possibility of any such normative hierarchy between the basic goods, which implies that their version of the incommensurability thesis must be stronger than the weak version. In fact, in the very course of

⁸⁰ Recently Grisez has argued that the strong incommensurability thesis is compatible with holding that the basic good of religion ought to function as the “overarching purpose to unify one’s entire life” (“Natural Law, God, Religion, and Human Fulfillment,” *American Journal of Jurisprudence* 46 [2001]: 3–36, at 16). Grisez asserts that unlike religion, no other basic good, such as knowledge or harmony with others, could be relevant to every choice one might make. In spite of the fact that religion is no better than the other basic goods, therefore, its perpetual relevance to choice means that everyone ought to treat it as his overarching life’s purpose. This argument fails on several counts: first, even if religion is unique in being perpetually relevant to choice, it’s not clear why this logical fact should imply the normative conclusion that Grisez wants it to. Just because I *can* always pursue x why does it follow that I *ought* always pursue x ? I may respond to the perpetual relevance of religion, but why *must* I do so, given that it’s no better or more important than the other basic goods I’m reasonably pursuing? Second, Grisez’s initial assertion seems to be false, because it’s quite possible for knowledge, aesthetic experience, or play to be relevant to every choice—witness the lives of uncompromising scientists, aesthetes, or ironists. If religion isn’t unique in being perpetually relevant, then even if the previous criticism is met, religion cannot rationally require its preeminence in a rational agent’s life.

defending the NNL against the charge that its incommensurability thesis imperils common sense moral judgments, Robert George formulates the thesis quite strongly: “[t]he incommensurability thesis states that basic values and their particular instantiations as they figure in options for choice cannot be weighed and measured in accordance with an objective standard of comparison.”⁸¹ This formulation from 1999 echoes the version proposed jointly by Grisez, Finnis, and Boyle in 1987—“No basic good considered precisely as such can be meaningfully said to be better than another”—and Grisez reaffirms this strong version again in 2001 and has not appeared to alter it in any of the remarks on his extensive website.⁸²

In any case, the evaluation of intentional action as it promotes or frustrates the incommensurable basic goods is only the first stage of the NNL’s two-stage account of fully moral evaluation. The first stage of evaluation explains the bare intelligibility of an intentional action, but not yet its full reasonableness. For an action to be evil is for it to be rationally defective in some respect, but in order to count as a human action in the first place, it must

⁸¹ Robert P. George, “Does the ‘Incommensurability Thesis’ Imperil Common Sense Moral Judgments?,” in *In Defense of the Natural Law* (Oxford: Oxford University Press, 1999), 92–101, at 93.

⁸² Grisez, Finnis, and Boyle, “Practical Principles, Moral Truth, and Ultimate Ends,” 110. And Grisez from 2001: “There is a hierarchy of values: Every basic human good is superior to any instrumental good and to anything considered good precisely as the object of emotional desire. Yet, considered precisely as the ultimate reasons for acting, the whole set of basic goods does not constitute a hierarchy. Rather, as ultimate reasons for acting, they are incommensurable: neither equally good nor more or less good than one another” (“Natural Law, God, Religion, and Human Fulfillment,” 14–5).

succeed in being intelligible; it cannot be rationally defective to the degree that it is absolutely pointless. The first stage of evaluation explains this intelligibility in terms of pursuit of the basic goods and this stage is not meant to explain the intelligible, but defective rationality that constitutes immorality.⁸³ Indeed, Grisez even says that for this reason “[m]orally neutral expressions are needed” to label the basic goods.⁸⁴ The NNL explanation of fully moral action is completed only with the second stage of evaluation, and this stage consists in what the NNL collaborators have variously called the good or requirements of practical reasonableness, “second-order” practical reasons, intermediate moral principles, or again, “modes of responsibility.” Although later formulations of the NNL account construe these requirements or modes as specifications of a master principle of morality (viz., “choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfillment”⁸⁵), it is more important for the subject of this essay to focus upon the specific modes, because the master

⁸³ As George puts it, “practical knowledge [of the basic goods] in its ‘pre-moral’ aspect is directive (although not fully normative). It directs action to intelligible ends and, thus, away from pointlessness. It identifies goods as ‘to be done and pursued.’ Thus immoral choices are not irrational” (“Recent Criticism of Natural Law Theory,” in *In Defense of Natural Law* [Oxford: Oxford University Press, 1999], 31–82, at 53).

⁸⁴ Grisez makes this remark specifically about what he calls “reflexive goods,” such as social harmony and inner peace, in “Natural Law, God, Religion, and Human Fulfillment,” 15 n 8.

⁸⁵ Finnis, Boyle, and Grisez, *Nuclear Deterrence*, 283.

principle itself is too indeterminate to generate practicable moral norms (which it is not meant to do), as several of the NNL collaborators have pointed out.⁸⁶

According to Finnis the nine requirements of practical reasonableness that comprise the second-stage of act evaluation include coherence, non-arbitrariness, impartiality, detachment, commitment, efficiency, respect for every basic good, respect for the common good, and individual conscience.⁸⁷ Grisez offers a list of eight similar “modes of responsibility” that differ in details from Finnis’s list. Each of the eight modes is meant to exclude a “certain unreasonable way of willing, a particular way of acting which is inconsistent with [the first principle of morality, which is] a will toward integral human fulfillment.”⁸⁸ For Finnis and Grisez, these

⁸⁶ The NNL notion of “integral human fulfillment” and the corresponding first principle of morality are rather vague; integral human fulfillment is unlike Aristotle’s *eudaimonia* or Aquinas’s *beatitudo (imperfecta)* in structure and content. George, for example, argues that integral human fulfillment is at once (a) indistinct from the set of basic goods, but (b) unrealizable in action, (c) incapable of serving as the object in a plan, and yet nonetheless (d) is “an ideal ... in the sense of something that, while not a direct object of choices or attainable by and in them, can nevertheless be imagined (if imperfectly) and even wished for, and so can provide the standards by which choices may reasonably be guided” (“Recent Criticism of Natural Law Theory,” 51). It seems to us that an object of wish or imagination that cannot itself be intended is logically incapable of providing rational guidance. We shall ignore this matter here, however.

⁸⁷ Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 100–33.

⁸⁸ Grisez, *The Way of the Lord Jesus*, 205.

requirements or modes are meant to regulate agents' pursuit of the basic goods and to provide an analysis of moral and immoral action, since immoral action is supposed to consist in violating one or more of the requirements. It is crucial to note, as Finnis, Grisez, and Boyle point out, that most of the requirements are not exceptionless:

Different modes of responsibility work differently, so not all specific norms are absolute. Universalizability [i.e., impartiality or fairness] can exclude as unfair an action proposed under a limited description, yet allow as fair an action which includes all the elements of that description together with some other morally relevant features.⁸⁹

Finnis's incisive exposition of this requirement and others in *Natural Law and Natural Rights* is particularly admirable. We shall argue, however, that this achievement is compromised by the conjunction of the four distinctive NNL theses that we stated at the outset. Since all but one of the requirements or modes are comparatively general and admit of many exceptions, this entails that their force is sapped by the pliability of the purely first personal account of intentional action in conjunction with the strong incommensurability thesis.

This consequence is evident from the fact that the requirements or modes are incapable of providing any further grounds for the NNL to condemn the action of "ending the difficult pregnancy" described in our hypothetical case. From Finnis's list of requirements there are only two that would appear to be relevant: impartiality (i.e., the "Golden Rule") and respect for every basic good.⁹⁰ Therefore, the question is: in choosing to "end a difficult pregnancy" in order to

⁸⁹ *Nuclear Deterrence*, 293.

⁹⁰ According to Grisez's eighth mode, "One should not be moved by a stronger desire for one instance of an intelligible good to act for it by choosing to destroy, damage, or impede some other instance of an intelligible good" (*Christian Moral Principles*, 217). Although on the

secure the conditions required for the pursuit of knowledge, does the woman fail to respect any basic good, or is she unduly partial in choosing an action whose upshots result in unfair benefits to herself or harms to others, thus violating the Golden Rule? As we have already seen, the requirement to respect every basic good is not actually relevant because the woman in the case does not intentionally harm or act against any basic good. She brings about the death of her child, but this doesn't amount to acting against the basic good of life, because on the NNL view she need not *intend* her child's death even though she (in part) causes it. As Tollefsen says, "it would not make sense for there to be an absolute moral restriction on causing damage to a good, or, by extension, causing death. Such damagings are inevitable in many, and perhaps all, genuine choices. What is not inevitable, and can be absolutely prohibited, is 'intentional' damagings and destruction of basic goods."⁹¹ The woman intends for her child's head to be crushed and to be removed from her womb, but as the NNL has been at pains to establish, acting intentionally under this description does not amount to intentional killing.⁹²

The Golden Rule "enjoins us to treat others as we would have them treat us—a rule that applies with full force to accepting or refusing to accept foreseen albeit unintended side effects

surface this sounds like it might rule out the proposed analyses of the hypothetical case, as Grisez glosses the mode it does not. He says that the mode does not apply to situations "in which a person chooses to act for a good while foreseeing that executing the choice will incidentally bring about unwanted evils—which, however, can be accepted without violating any other mode of responsibility" (ibid.).

⁹¹ Tollefsen, "Intending to Damage Basic Goods," 273; cf. George, "Recent Criticism of Natural Law Theory," 79 n 67.

⁹² Tollefsen, "Intending to Damage Basic Goods," 275.

of actions which one has reasons to perform.”⁹³ Does the NNL analysis imply that the woman acts unfairly in knowingly accepting consequences that include her child’s death? It does not, as we shall show momentarily. Finnis’s requirement of impartiality corresponds roughly to Grisez’s second and fifth mode of responsibility. According to Grisez’s second mode: “Unnecessary individualism is not consistent with a will toward integral human fulfillment, which requires a fellowship of persons sharing in goods.”⁹⁴ And the fifth mode: “One should not, in response to different feelings toward different persons, willingly proceed with a preference for anyone unless the preference is required by intelligible goods themselves.”⁹⁵ Together these two modes require that the known upshots of an agent’s choices respect the sociality of integral human fulfillment and impartiality toward persons’ equal dignity. Every action inevitably yields some mix of benefits and harms among its upshots, as the NNL often emphasizes. Whether or not the foreseen upshots of an action are unduly partial to the agent who performed the action, and therefore in violation of a relevant mode, depends upon distribution of benefits and harms among the upshots. This question can only be settled by a comparative evaluation of different possible actions along with their foreseen upshots. But now the NNL’s strong incommensurability thesis kicks in again: on its own grounds, the NNL cannot commensurate, rank, or compare different possible distributions of benefits and harms as better or worse in regard to impartiality or partiality among persons, because there is *ex hypothesi* no common factor shared by the different basic goods and no hierarchy of value between them. On occasion the NNL collaborators insist

⁹³ George, “Does the ‘Incommensurability Thesis’ Imperil Common Sense Moral Judgments?” 98.

⁹⁴ Germain Grisez, *The Way of the Lord Jesus*, 206.

⁹⁵ *Ibid.*, 211.

that there is a different kind of hierarchy of value that is compatible with incommensurability. For example, Grisez says, “Every basic human good is superior to any instrumental good and to anything considered good precisely as the object of emotional desire.”⁹⁶ This kind of superiority is indeed quite plausible, but acknowledging it doesn’t alter the kind of hypothetical case we are considering, because in this case the woman’s action does not purport to privilege the value of subjective preferences above any basic goods. On the contrary, she acts for the basic good of knowledge.

There is one further, derivative kind of commensurability between basic goods that the NNL allows, but this allowance only makes matters worse for any attempt to criticize the hypothetical abortive scholar from an NNL perspective. This derivative kind of commensurability is the “subjective” commensuration that someone may, according to the NNL, reasonably impose upon his pursuit of the basic goods given his contingent situation in life, gifts, and vocational commitments. The basic goods themselves do not demand any such commensuration, but George emphasizes that the basic goods

can sometimes be brought into a certain form of rational commensurability with respect to future choices by a choice or commitment (embodied in a choice) which one reasonably makes here and now. In light of a reasonable personal (e.g., vocational, relational, educational) commitment I have made, *it may be perfectly reasonable for me to fail to treat, and, indeed, it may be patently unreasonable for me to fail to treat, certain basic values or certain possible instantiations of a single basic value as superior to others in their directive force (for me)*. Choosing in harmony with one’s past reasonable commitments, and, thus, establishing or maintaining one’s personal integrity (in the non-

⁹⁶ Grisez, “Natural Law, God, Religion, and Human Fulfillment,” 14.

moral as well as the moral sense), constitutes an important moral reason which often guides our choices between rationally grounded options.⁹⁷

If such vocational commensuration of the basic goods is reasonable, and the scholar in our hypothetical case decides to privilege, for herself, the basic good of knowledge, then she has even further rational grounds for accepting the foreseen evil of her child's death, particularly if she proposes to seek knowledge in order to make it available to others. On the NNL's grounds, her decision would seem to be an exemplary case of regrettably causing evil while maintaining "a reasonable openness to all the goods across all persons."⁹⁸

It is important to appreciate that the NNL regards the basic goods as aspects of persons, and not as detached Platonic entities, as some critics have mistakenly charged:

basic human goods, while analytically distinguishable from the persons whom they fulfill, are not extrinsic purposes of human action, but rather intrinsic aspects of persons.... To act for the sake of a person, for example, is to favor some constitutive aspect(s) of that person's well-being—i.e., to promote or preserve or protect basic goods as instantiated in that person.⁹⁹

Therefore, any requirement of fairness or impartiality between persons must be cashed out in terms of impartiality between the basic goods. As George says, acting for the sake of a person just is to act for the sake of the basic goods instantiated in, or that are aspects of, that person, and

⁹⁷ George, "Does the 'Incommensurability Thesis' Imperil Common Sense Moral Judgments?," 94; emphasis added.

⁹⁸ This phrase is Tollefsen's, "The New Natural Law Theory," 3.

⁹⁹ George, "Recent Criticism of Natural Law Theory," 66.

as Grisez says, “[basic human] goods do not have anyone’s proper name attached to them.”¹⁰⁰ Provided that no basic good is damaged intentionally, then *any* distribution of harms and benefits among the alternative possible upshots of an action will for the NNL be incommensurable, equally impartial, and equally acceptable instantiations of basic goods in persons.¹⁰¹ An injunction to treat people fairly will not itself provide any additional content to one’s moral obligations beyond the obligations already generated by the goods themselves and the other *ceteris paribus* modes of responsibility. If you act against a good as a means to pursuing some other good, you act unreasonably because you thereby prefer one good to another, which amounts to an attempt to commensurate the incommensurable. “But to accept a similar state of affairs as an unwanted side-effect need not be. For it is not necessarily excluded by any mode of responsibility, and so it need not be at odds with integral human fulfilment.”¹⁰²

Given that all the comparative options for choice are incommensurable, so must all the comparative “acceptances” of foreseen upshots be incommensurable, because agents choose actions and accept upshots in light of the same set of incommensurable basic goods. The only remaining avenue for analyzing the choice of an action or the acceptance of an action’s upshots

¹⁰⁰ Grisez, *Christian Moral Principles*, 576.

¹⁰¹ We are assuming that the other, mostly formal requirements of practical reasonableness have been met, so that the relevant action accords with the agent’s conscientious judgment, fits within a coherent life plan to which the agent is committed, is a reasonably efficient way of pursuing his goals, and doesn’t stem from inordinate attachment to instrumental goods like money or pleasure. Many horrendous evils are of course compatible with satisfying these further requirements.

¹⁰² *Nuclear Deterrence*, 292–3.

as antisocial or unduly partial is to construe wronging other people in terms of intentionally damaging basic goods. But it is conceptually impossible for the acceptance of an action's upshots to be intentional, because upshots are in this context defined as the merely foreseen and nonessential consequences of an action. We have already shown that many kinds of action, which commonsense morality would condemn as direct abortions and murders, cannot be intentional killings on the NNL account of intention, because the actions don't directly damage any basic goods.¹⁰³ The NNL's modes of responsibility or requirements of practical reasonableness that comprise its second-stage of act evaluation turn out not to alter this implication, because they are indeterminate requirements and the criteria for specifying and applying them to particular cases are defined in terms of not damaging basic goods.¹⁰⁴

¹⁰³ The NNL collaborators have misunderstood the implications of their theory. Thus in discussing just war Finnis, Boyle, and Grisez write, "Our theory differs and is more restrictive [than Aquinas's] only in this, that military action must be directed toward stopping the enemy's unjust use of force, not toward killing those who are bringing that force to bear. By requiring that the death of an enemy soldier be brought about only as a side-effect of a military act having a different appropriate object, our moral theory would limit warfare as stringently as possible to the pursuit of the good purposes which can justify it" (*Nuclear Deterrence*, 315). This is exactly backwards. The NNL theory is much *less* restrictive than Aquinas, because although the NNL prohibition on intentional killing is absolute and Aquinas's is not, the NNL prohibition is less demanding in practice because many fewer cases will count as instances of intentional killing on the NNL's purely first person account of human action.

¹⁰⁴ This fact implies that Grisez's presentation is somewhat misleading in listing the requirement not to damage basic goods as simply one among the various modes of responsibility.

The NNL has no room for assessments of proportionality and disproportionality across the basic classes of good.¹⁰⁵ This self-imposed restriction implies that the principle of double effect will lose most of its restrictive force from an NNL perspective. The NNL collaborators don't appear to have recognized this because they tend to focus on hard cases where typically only one class of good is at stake: e.g., the basic good of life involved in medical or military dilemmas.¹⁰⁶ According to the principle of double effect, in choosing an action that is good or neutral, it can be permissible to bring about an evil foreseeably, so long as that evil is not intended and so long as the good sought is proportionate to the evil caused. For the NNL, however, double effect's proportionality criterion is empty whenever the good and evil at stake implicate more than one incommensurable class of good. Finnis says,

This requirement is in effect superordinate since all the other modes must get interpreted through it. It is unsurprising that in the later works by the NNL collaborators this requirement has become the dominant subject of discussion in their analysis of wrongdoing and the other modes seem to fall by the wayside (Cf. Tollefsen, "Intending to Damage Basic Goods," 272–82).

¹⁰⁵ Sherif Girgis pointed out to us (see note 124) that the NNL also seems to hold that choice *within* a single class of good is strongly incommensurable. If this is so, then the situation may be worse than we have characterized it; we ignore this issue here.

¹⁰⁶ Although they recognize the possibility, for example, in arguing that a woman may use lethal force against a rapist without intending his death, even though she is not acting to preserve (instantiations of) the basic good of life (Finnis, Boyle, and Grisez, *Nuclear Deterrence*, 314). But they fail to discuss the obvious question that this provokes: why doesn't the theory license using lethal force for the sake of other basic goods such as play, friendship, or religion?

One's acceptance of the side-effects must satisfy all moral requirements (must 'be proportionate', as it was often vaguely put). That something is a side-effect rather than an intended means entails the satisfaction of one, important, but only one moral requirement [for assessing an action]: that one never *choose*—intend—to destroy, damage or impede any instantiation of a basic human good.¹⁰⁷

But Finnis fails to recognize that his own strong incommensurability thesis vitiates the further substantive moral requirements beyond the requirement not to choose to destroy the instantiation of a basic human good. To evaluate the proportionality of goods *just is* to commensurate them in some respect, but strong incommensurability is axiomatic for the theory and rules this out, so the theory has no room for a general proportionality criterion at any stage of moral analysis.¹⁰⁸

Consider Boyle's statement of value incommensurability:

If these features of an option or within a set of options fall within a category of benefit, that is, within several of the basic human goods, then the elements of value in an option or between will be incommensurable ... [and] there will be no covering value common to the good-making features in play, and that is the needed common measure.¹⁰⁹

¹⁰⁷ Finnis, "Intention and Side-effects," 56.

¹⁰⁸ Christopher Kaczor, in "Notes & Abstracts," *National Catholic Bioethics Quarterly* 11 (2011): 385–6, argues that proportionality is illuminated by Grisez, Finnis, and Boyle's work on practical reasonableness, but Kaczor doesn't try to show how this can be squared with their commitment to strong incommensurability.

¹⁰⁹ Boyle, "Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good," *American Journal of Jurisprudence* 47 (2002): 123–41, at 132.

The>NNL explicitly claims that a doctor may justly perform a craniotomy in order to promote one instantiation of the basic good of life intentionally (i.e., save the mother), even if he harms another instantiation of the basic good of life foreseeably (i.e., lethally crush the child).¹¹⁰ The mother herself may reasonably prefer to save her own life by knowingly causing her child’s death. On pain of self-contradiction, we argue, the>NNL is committed to holding that a doctor may justly perform a craniotomy in order to promote *any* instantiation of *any* basic good, such as knowledge or play or whatever, so long as the resulting harm to one instantiation of the basic good of life is merely foreseen. Unless a basic good is directly *acted against*, it is reasonable to prefer any one basic good to another. According to Tollefsen, “One intends destruction [or damage of a basic good] when either the state of affairs pursued or the means chosen are desirable precisely as they include a privation of a good.”¹¹¹ But in the hypothetical abortive scholar case, neither the sought after state of affairs nor the chosen means is desirable precisely as they include a privation of a good. In short, the only way to avoid these untoward implications

¹¹⁰ Finnis says that making proportionate judgments about strongly incommensurable goods “is a matter ... of adhering to the rational requirement of impartiality by an intuitive awareness of one’s own *feelings* as one imaginatively puts oneself in the place of those who will suffer from the effects of the alternative options [for choice]...” (“War and Peace in the Natural Law Tradition,” in *Human Rights and the Common Good: Collected Essays: Volume III* [Oxford: Oxford University Press, 2011], 183–207, at 186; emphasis in original). It is just not clear how this process is supposed to generate determinate answers in concrete cases or how it really is possible on the assumption of strong incommensurability.

¹¹¹ Tollefsen, “Intending to Damage Basic Goods,” 276.

is for the NNL to scrap its strong incommensurability thesis and the purely first personal account of human action.

Finnis, Boyle, and Grisez anticipate something like the foregoing criticism in the context of just war theory in their book *Nuclear Deterrence*, which gives the NNL's most extensive discussion of applying the requirements of impartiality and Golden Rule to particular cases.¹¹² They recognize that "to apply the Golden Rule—to make sense of 'as you would have others do'—one must be able to commensurate burdens and benefits as they affect oneself, in order to know what one considers *too great an evil* to accept."¹¹³ They reply that this requisite commensuration is in fact "pre-moral commensuration," because it is based on people's feelings, which is therefore compatible with the *moral* incommensurability of the basic goods in their theory: "Everyone carries out this commensuration by intuitive awareness of his or her own differentiated feelings towards various goods and bads as concretely remembered, experienced, or imagined."¹¹⁴ Such pre-moral commensuration is not "rational and objective commensuration," which is what on their view is impossible.¹¹⁵ Why does the NNL view not entail subjectivism about the criteria of impartiality, then? They insist that their appeal to people's subjective feelings does not entail subjectivism about impartiality, because "anyone who applied the Golden Rule makes reference to subjective feelings but judges according to a rational standard: impartiality amongst different persons."¹¹⁶ Furthermore, "the way upright

¹¹² See *Nuclear Deterrence*, chap. IX.7

¹¹³ *Ibid.*, 265.

¹¹⁴ *Ibid.*

¹¹⁵ *Nuclear Deterrence*, 265.

¹¹⁶ *Ibid.*, 266.

people commensurate rationally incommensurable goods and bads, by intuition of feelings, as when they apply the Golden Rule ... presuppose[s] moral standards.”¹¹⁷ It is extremely difficult to see what the force of the argument here is supposed to be, and how it could be possible for applications of the Golden Rule to consist of a rational standard *and* be a function of people’s subjective feelings. Finnis, Boyle, and Grisez’s contrast between the “moral” and “pre-moral” is obscure, and their appeal to subjective feelings, yet rejection of subjectivism, seems to be special pleading. If the Golden Rule enjoins someone to treat others as he would have them treat him, and how he should want to be treated is determined subjectively by his feelings and not objectively by reason, then the Golden Rule is an empty formalism. Finnis, Boyle, and Grisez even seem to concede as much when they add that the rational application of the Golden Rule to subjective feelings presupposes already being an “upright person” in possession of unnamed “moral standards.” But if this is true and someone must already know what morality requires in order to apply the Golden Rule, then the Golden Rule itself cannot provide any independent guidance to reasonable choice that forestalls the untoward consequences we highlight here.

Much of the motivation behind the NNL has been a sincere and noble opposition to the laxity of proportionalism in moral theology and consequentialism in moral philosophy. But if our assessment of the NNL is accurate, both proportionalism and consequentialism can be *less* radically permissive than the NNL. For presumably the Catholic proportionalist, for example, must hold that a mother who aborts her child for the sake of furthering her academic career acts wrongly by seeking a lesser good at a disproportionate cost, sacrificing a greater good. But the NNL isn’t even entitled to say this much, because of principle (1), its strong incommensurability thesis. The two basic goods at stake in the abortion case, life and knowledge, are strongly

¹¹⁷ Ibid.

incommensurable, and it can never be disproportionate to prefer either one to the other, and indeed, such preference may be required by vocational commitments.¹¹⁸

A final clarification is in order. We have argued that the nature of intention in the NNL's first person account of agency is unwittingly subjective and liable to manipulation because it empowers agents to exonerate themselves from moral responsibility for many heinous evils they bring about. The NNL collaborators are not insensitive to this accusation.¹¹⁹ Their replies to it are unpersuasive, however, because they inevitably choose to respond by discussing just those cases that fall into the one, limited class of manipulative "intending" that the first person account of agency is equipped to deal with. This class involves agents who manifestly *deceive themselves* in professing to intend certain ends and means and not others.

So the NNL can say, this time along with common sense, that the general who orders the bombing of a civilian city in order to induce surrender of the enemy, cannot profess to be innocent of murder; for the death of the civilians is the means he chooses to lowering enemy morale, which is the means to inducing surrender, and intention includes both ends and means to the ends. Similarly, the NNL can say that if you put strychnine in your uncle's soup in order to get your inheritance, you cannot profess to be innocent of murder; for your uncle's death was a necessary means to getting your inheritance. The only reason why the NNL is capable of analyzing these two cases as intentional killings, however, is because they include *self*-deception. The agent, from his own perspective, lies to or deceives himself about what his means to

¹¹⁸ Boyle, "Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good," 132–3.

¹¹⁹ Tollefsen, "Is a Purely First Person Account of Human Action Defensible?," 453; Finnis, "Intention and Side-effects," 54.

effecting his plan really are. But as we have shown with the case of the abortive scholar discussed above, the purely first personal account is impotent to object to cases of clear-eyed intending that don't involve self-deception or lying, no matter how absurd or insane such cases may be, because according to the NNL, "it is the agent herself who is the sole determinant of what her intention is."¹²⁰ For the NNL, it is impossible for an honest person to be mistaken about the content of his proposal to act, so he is infallibly aware of his intentions.

It is instructive to note that a consequentialist such as Jonathan Bennett endorses virtually the same account of intention as the NNL theory, but Bennett thinks the account implies a *reductio ad absurdum* of intention's relevance to the moral evaluation of action, which is why he concludes that there is "no intended/foreseen difference which belongs in the load-bearing part of a moral structure" and endorses consequentialism.¹²¹ Indeed, in spite of the NNL proponents' desire to condemn actions such as Truman's nuclear attack against civilian cities during the Second World War as violations of an exceptionless norm against intentional killing, it is hard to see why a Truman equipped with a purely first-person account of intentional action could not have honestly revised his proposal in acting in order to avoid the violation. For of course it was the *appearance* of massive casualties that helped to induce surrender, not the actual physical event in the "merely" causal order of bringing those deaths about that induced surrender—had the casualties miraculously come back to life after the surrender, then his proposal would not have been frustrated, because he could have honestly denied that "the means chosen are desirable

¹²⁰ Tollefsen, "Is a Purely First Person Account of Human Action Defensible?," 453.

¹²¹ Jonathan Bennett, "Intended as a Means," in *The Tanner Lectures on Human Values* (Oxford: Oxford University Press, 1980), 95–116, at 116.

precisely as they include a privation of a good.”¹²² If it is possible to choose to dismember an unborn child and remove her from the womb without thereby choosing her death, then why cannot it be possible to choose to drop a nuclear bomb on a city without thereby choosing the death of the city’s inhabitants? In both cases, the states of affairs integral to the success of the proposal need not include this very act description: “death of the patient(s) acted upon.”

V.

Conclusion. The NNL action theory gives a first impression of lightness in its metaphysical baggage, even, perhaps, of complete innocence with respect to metaphysical entanglement. This first impression belies the full picture. As we have seen, the NNL account of intentional action implicitly relies upon a Cartesian model, as heavy-laden with metaphysics as the traditional Thomistic model. The purely first personal account of human action is premised upon highly controversial assumptions about modal ontology, which ultimately have nothing to do with either the first-person perspective of the agent or the third-person perspective of the observer, but assume that conceivability entails possibility. Furthermore, this assumption is incompatible with the NNL’s cogent rejection of Cartesianism in the theory of human nature and identity, which is most evident from George and Lee’s eloquent defense of Aristotelian anthropology in *Body-Self Dualism*.

In applying the doctrine of double effect to a type of action such as the causation of death, any theory must address these questions: when is an act essentially one of killing? What must one do to avoid becoming essentially a killer? Answers to these questions presuppose an answer to a still more fundamental metaphysical question: what is the essence of human agency? More simply, what is it for a human being to do something? For the NNL, intentional action

¹²² Tollefsen, “Intending to Damage Basic Goods,” 276.

involves the construction and implementation of a proposal, whose content, barring self-deception, is directly and infallibly available to the agent and the agent alone: “For if the purely first person account is correct, there can be no criteria [for specifying intention]: there is nothing against which to test the agent’s action to determine what intention the agent had, or must have had, for it is the agent herself who is the sole determinant of what her intention is.”¹²³ As we said at the outset, our critique here is mostly dialectical; we have tried to flesh out implications of the NNL that its proponents have not recognized. In order to avoid *aporia*, however, we have tried to sketch an alternative approach to intentional action that avoids the unpalatable consequences that follow from the NNL, and this approach involves the use of basic powers of action, including those powers that constitute established social practices. For the essence of one’s agency extends beyond the theater of the mind to include the natural teleology of the embodied ways of acting, activated and exercised by the will.¹²⁴

Villanova University

¹²³ Tollefsen, “Is a Purely First Person Account of Human Action Defensible?,” 453.

¹²⁴ An earlier version of this paper was presented at the University of St. Thomas in Houston and at a session on the “new natural law theory” at the November 2012 American Catholic Philosophical Association Annual Meeting in Baltimore. For the latter event, we are indebted to the organizer, Patrick Toner, along with Mark C. Murphy, our respondent, and Christopher Tollefsen, our co-presenter, as well as to the audience. We owe thanks to a number of colleagues who read and commented on complete or partial drafts of this paper, including Ryan T. Anderson, J. Budziszewski, Matthew Franck, Sherif Girgis, Luke Gormally, Robert T. Miller, David R. Oakley, Stephen Napier, David Pedersen, Nicholas J. Teh, Helen Watt, and three anonymous reviewers for the *American Catholic Philosophical Quarterly*.

Villanova, Pennsylvania

The University of Texas at Austin

Austin, Texas