

## A Revised Analysis of the “Phoenix Abortion Case” and a Critique of New Natural Law Intentionality

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THE PRESENT ARTICLE CONSTITUTES a retraction of a paper I presented at the 2011 University Faculty for Life Conference—Life & Learning XXI, hosted by the Notre Dame Center for Ethics and Culture. It presupposes that the relevant facts of the so-called “Phoenix abortion case” (upon which my paper was based) are already broadly known.<sup>1</sup> At that conference, I presented a moral analysis of a

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<sup>1</sup> The case was that of a twenty-seven year old Catholic mother of four children with a history of pulmonary hypertension who was admitted to St. Joseph’s Hospital and Medical Center in Phoenix Arizona while eleven weeks pregnant with worsening symptoms. As her condition was deemed to be life-threatening, the Ethics Committee at St. Joseph’s Hospital and Medical Center was consulted. It judged that the performance of a D&C would be licit. That intervention was then carried out. For my original paper, I presupposed further medical facts relevant to the case as presented in M. Therese Lysaught, “Moral Analysis of an Intervention Performed at St. Joseph’s Hospital and Medical Center,” an unpublished analysis commissioned by Lloyd H. Dean, President and CEO of Catholic Healthcare West, available at: <http://www.washingtonpost.com/wp-srv/health/documents/abortion/lysaught-St-Josephs-Hospital-Analysis.pdf>, last accessed February 1, 2017. Additionally, these several observations and assumptions served as the basis of my original analysis. At eleven weeks, the fetus measures approximately 2 inches from crown to rump. Because the baby is so small and the tissues so soft, no matter what efforts might be made to “target only the placenta” (scraping it off the uterine wall), there would be almost certainly no practical way of avoiding contact with the fetus, thereby injuring it, likely even dismembering it. If the placenta were

hypothetical case of a life-threatening pregnancy (used for the sake of argument and based upon the Phoenix case) that concluded to a positive moral assessment of a lethal removal of a fetus from the womb, arguing that such an act could be morally distinguishable from an act of abortion. I crafted that analysis based on the account of moral intentionality emerging from what is today commonly referred to as “new natural law theory” (NNL).<sup>2</sup>

Accordingly, the present essay proceeds as follows. First, I offer (I) an overview of the NNL account of intentionality and the prominent role played therein by the concept of the “proposal.” Then follows (II) a brief summary of my original 2011 argument supporting lethal fetal removal by dilation and curettage (D&C) in the case of a life-threatening pregnancy. I then (III) critique NNL intentionality exposing the pitfalls entailed in its employment of the concept of the “proposal.” I next explore (IV) how Aquinas’s account of the moral object obviates those pitfalls and, finally, conclude by offering (V) a revised moral judgment on cases of life-threatening pregnancy as typified by the “Phoenix abortion case.” An appendix contains the essence of my original moral analysis of that case.<sup>3</sup>

Finally, an additional personal note is in order from the outset. For over two decades I adopted many, if not most, of the elements of NNL into my own understanding and teaching of natural law, including its account of intentionality. I count some of NNL’s leading proponents as friends with whom I have collaborated intellectually for many years, including Peter Ryan, SJ, Robert George, Christian

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first scraped from uterine wall, the embryo would expire within two to three minutes by asphyxia and by hemorrhaging through the umbilical cord. There is no way effectively to remove the placenta alone and intact at eleven weeks of gestation (as is, in fact possible, at full term). Nor is it medically accurate to describe the placenta as “the offending organ”; it is the presence of the pregnancy as a whole that occasions, in this case, the lethal distress of the mother (complicating her underlying condition). Whether the embryo had already expired or not, placenta, amniotic sack, and fetus would most likely be suctioned out, further dismembering the fetus in the process. If the fetus were alternatively removed by forceps, there would follow a similar effect on the fetus.

<sup>2</sup> See Christopher Tollefsen, “The New Natural Law Theory,” *Lyceum* 10.1 (Fall 2008): 1–17. A theory of moral intentionality presents an account of how we understand the content of what we intend, choose, and act for.

<sup>3</sup> I would like to thank Michael Augros, Stephen Brock, Kevin Flannery, S.J., and Christopher Tollefsen for many helpful comments and feedback on earlier drafts of this article.

Brugger, Patrick Lee, and Christopher Tollefsen as well as Germain Grisez. And although I have had fewer interactions with John Finnis, not only have I admired his work and learned exceptionally from him, but it was his earlier work on natural law theory that set me on my own intellectual journey into moral philosophy. I write with profound admiration, gratitude and affection, even if I must now express disagreement with NNL’s account of intentionality.

## I

NNL proposes an understanding moral intentionality, and specifically of the nature of moral objects of choice, whose fulcrum and neuralgic point is the concept of the “proposal.”<sup>4</sup> A 1991 article by John Finnis is foundational for understanding this notion. Finnis explains:

Acts are morally significant, and are morally assessed in terms of their type, their intrinsic character, just insofar as they are willed, are expressions of the agent’s free self-determination in choice. More precisely: for moral assessment and judgment, the act is what it is just as it is per se, that is, just as it is intended, under the description it has in the proposal which the agent adopts by choice—not under some self-deceiving description offered by conscience to conscience to rationalize evil, but under the description it has in the practical reasoning which

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<sup>4</sup> The NNL account of the moral object (and the crucial role played by the notion of the “proposal”) has had its share of critics; most notably (among others), see: Kevin Flannery, “What is Included in a Means to an End?” *Gregorianum* 74.3 (1993): 499–513; Flannery, “Placing Oneself in the Perspective of the Acting Person: *Veritatis Splendor* and the Nature of the Moral Act,” in *Live the Truth: the Moral Legacy of John Paul II in Catholic Healthcare*, ed. Edward J. Furton (Philadelphia: National Catholic Bioethics Center, 2006) 47–67; Flannery, “Thomas Aquinas and The New Natural Law Theory on the Object of the Human Act,” *National Catholic Bioethics Quarterly* 13.1 (2013): 79–104; Flannery, “John Finnis on Thomas Aquinas on Human Action,” in *Reason Morality and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford: Oxford University Press, 2015) 118–31; Steven A. Long, “Fundamental Errors of the New Natural Law Theory,” *National Catholic Bioethics Quarterly* 13.1 (2013): 105–31 (see especially 123–31, where Long’s critique of NNL’s “logician account of the object” in many ways coincides with the critique I offer here); and more recently, from the perspective of analytical philosophy, Matthew B. O’Brien and Robert C. Koons, “Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory,” *American Catholic Philosophical Quarterly* 86.4 (2012): 655–703.

makes the option (the proposal) seem to the chooser intelligent, eligible, “the thing for me to do.”<sup>5</sup>

Of similar importance are explanations of “proposal” such as the following from Germain Grisez: “By choice one adopts a proposal to do something. . . . Adopting a proposal to do something is a choice, just as a motion which is adopted is a decision of the group. The doing carries out the choice, much as the executive carries out a legislative body’s enactments. The action of an individual is defined by the proposal adopted by choice, just as the action of a group is defined by the motion adopted by a vote.”<sup>6</sup>

Christopher Tollefsen also offers a succinct explanation of NNL intentionality and the concept of “proposal” in these terms:

[This] account of intention can be expressed using the helpful notion of a proposal for action. In acting, agents seek to bring about some state of affairs in which a good or goods will be instantiated (agents thus envisage the state of affairs as offering a *benefit*). An agent’s proposal for action is her proposal to do such and such in order to bring about that state of affairs. Included in the proposal is both the state of affairs sought—the end—and the instrumentalities by which she will bring about that end—the means. “Intention” for the New Natural Lawyers encompasses both the end (including the good-related benefit which is anticipated in that end) and the means by which the end will be brought about.<sup>7</sup>

Tollefsen then clarifies:

A central point, however, for the New Natural Law account . . . is that intention is thus an agent-centered, or first-personal

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<sup>5</sup> John Finnis, *Intention and Identity: Collected Essays*, vol. 2 (Oxford: Oxford University Press, 2011), 165. The article is presented in this volume as chapter 9 under the title “Intentions and Objects” and replicates the original article published as “Object and Intention in Moral Judgments according to St. Thomas Aquinas,” *The Thomist* 55.1 (1991), 1–27. A revised version was published in *Finalité et Intentionnalité: Doctrine Thomiste et Perspectives Modernes*, ed. J. Follon and J. McEvoy, Bibliothèque Philosophique de Louvain 35 (Paris: J.Vrin, 1992), 127–48.

<sup>6</sup> Germain Grisez, *The Way of the Lord Jesus*, vol. 1, *Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), 9C, 233.

<sup>7</sup> Tollefsen, “The New Natural Law Theory,” 9.

reality. It is from the point of view of the agent as seeking some good that a proposal is considered and adopted. What the agent intends is thus a matter of this proposal, and of nothing else: facts of the world, of causality, or of the proximity of one effect to another do not determine the agent's intention; and it is thus only by adopting the perspective of the acting person that an agent's action can be best understood.<sup>8</sup>

Hence, the tension between NNL and its critics on the question of moral intentionality might be parsed in terms of first-person-perspective intentionalism versus third-person-perspective intentionalism.<sup>9</sup> Their bone of contention is whether the moral object draws its entire content solely from the first person standpoint of the agent as she conceives of what she is choosing to bring about. Or (and quite independently of the agent) do certain facts in the world (as can be grasped from a third-person perspective) have a necessary bearing on understanding what she in fact intends as the object of her choice above and beyond her own first-person perspective?

The dispute, to say the least, is a complex one. I do not believe NNL denies that, with regard to our actions, "facts in the world," and particularly observable facts about the oftentimes physical things that *our actions are about*, have some bearing on the moral analysis of those actions. Nor do those holding to third-person-perspective intentionalism deny the import for moral analysis of the agent's own honest, subjective account of what she believed herself to be choosing and doing. In pastoral moral analysis (e.g., in counseling or in the confessional) this certainly can bring a lot to bear on our (third person) understanding of what the agent intended to do. Yet, the theoretical dispute here entails much more than merely a difference of emphasis.

Implicit in the NNL account of intentionality is the claim that the "proposal" is tantamount to what Aquinas meant when referring

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<sup>8</sup> Ibid.

<sup>9</sup> See especially, Christopher Tollefsen, "Is a Purely First Person Account of Human Action Defensible?" *Ethical Theory and Moral Practice* 9 (2006): 441–60. Here Tollefsen explores NNL first-person intentionalism in depth, developing its central claims that "it is only from the perspective of the choosing and acting agent that the nature of the act itself is determined" and that "there is, as far as human action is concerned, no natural class of actions on which [one's] intentions supervene. Rather, [what one does] is entirely a function of [one's] intention: the end and the means [one has] settled on" (ibid., 445).

to the moral object of an act. Indeed, Grisez (not without nuance) asserts the following in this respect:

The expression “the proposal adopted by choice,” has more or less the same meaning as St. Thomas’ expression “the object of an action.” The point made here by saying, “The action is defined by a proposal adopted by choice,” often is expressed in his language, “The action is specified by its object” (cf. St., 1-2, q. 18, a. 2). However, the classical moralists sometimes used “object of the act” to refer to the outward deed without clearly including its relationship to deliberation and choice. Thus, when they said that the object of the act is a determinant of its morality, they seemed to be trying to ground morality directly in nature considered physically and metaphysically, rather than in human goods. . . . This confusion offered an opportunity for theologians who adopted proportionalism to denounce as “physicalism” or “biologism” the thesis that some kinds of acts are always wrong—wrong *ex obiecto* or intrinsically evil—regardless of the foreseen goods which might be intended in choosing to do them. The present analysis provides a way of understanding “object of the act” which is not physicalist, but which does allow certain kinds of acts to be always wrong.<sup>10</sup>

In NNL, then, the moral object, the moral “species” of the action in question, is indicated or “defined” by the “proposal” for action developed by the acting subject in the process of deliberation and elaborated within practical reasoning as one, of perhaps several, possible alternatives for choice.

In tension with proportionalism, Finnis in particular has gone to great lengths to emphasize the intimate connection existing at the level of practical reasoning between the end intended by the agent and the means chosen for attaining it—both coming effectively to constitute one object of choice. This valid concern of Finnis’s draws his understanding of the “proposal” into sharp relief. In a 1987 article, Finnis explains:

It must be admitted that the term “object” is not used with satisfying clarity in the tradition. But one thing is wholly clear: in choosing to act to bring about some state of affairs

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<sup>10</sup> Grisez, *Christian Moral Principles*, 233–34.

as a means, whatever one thus envisages doing and bringing about as that means, together with whatever state of affairs one envisages as the end to which that means is a means, together constitute the “object of the act” so chosen. Now I have been explaining choice as the adoption of a proposal, viz. a proposal for action (or omission) in order to bring about a state of affairs either as an end in itself or as a means to some such end. Hence, my account of choice is equivalently an account of the “object” of the acts so chosen.<sup>11</sup>

More succinctly, Finnis would affirm some years later: “Choice, then, is of proposals, and the proposals one shapes in one’s deliberations include one’s ends and one’s means. . . . To use the classical terminology of Thomas, used again in *Reconciliatio et paenitentia*, one’s proposal, end and means (remote objective(s) and proximate objectives), is the object of one’s choice and act.<sup>12</sup>

<sup>11</sup> John Finnis, *Intention and Identity*, 149. The article is presented in this volume as chapter 8 under the title “Human Acts” and replicates the original article published as “The Act of the Person,” in *Persona, Verità e Morale, atti del Congresso Internazionale di Teologia Morale* (Rome: Città Nuova Editrice), 159–75.

<sup>12</sup> *Moral Absolutes* (Washington, DC: Catholic University of America Press, 1991), 69. In support of his contention that the tight connection between intention and choice is essentially that of Aquinas, in footnotes to both this and the preceding quote, Finnis cites the *Summa Theologiae* (*ST*) I-II, q.12, a. 4, ad 2: “Ad secundum dicendum quod finis, in quantum est res quaedam, est aliud voluntatis obiectum quam id quod est ad finem. Sed in quantum est ratio volendi id quod est ad finem, est unum et idem obiectum [The end, considered as a thing, and the means to that end, are distinct objects of the will. But in so far as the end is the formal object in willing the means, they are one and the same object]” (unless otherwise noted, all Latin quotations from Aquinas’s works are from the Leonine edition available at [www.corpusthomisticum.org](http://www.corpusthomisticum.org) and all English translations of *ST* are from the translation by the Fathers of the English Dominican Province [New York: Benziger Brothers, 1947]). Stephen Brock has (I believe correctly) pointed out (specifically critiquing Finnis’s “Object and Intention” as it first appeared in *The Thomist*; see note 6 above) that this passage of the *Summa* does not support Finnis’s contention:

Finnis . . . goes to great lengths to downplay the distinction between intention and choice. He judges that at least in the typical case, an intention is always identical with a choice; the distinction between them is only “formal” (a distinction of reason). In support of this he cites I-II, q. 12, a. 4, where Aquinas says that the intention of an end, and the choice of something for the sake of that end, form one act, and are distinct only in reason. But Aquinas is surely not trying to make

Closely related to disagreement over whether and how NNL intentionality relates to Aquinas's understanding of the moral object, NNL theorists and critics alike also disagree on how we are to interpret *Veritatis Splendor* (VS) §78 and its observation that, in moral analysis, a proper grasp of the moral object is to be had by placing oneself "in the perspective of the acting person."<sup>13</sup> NNL reads VS §78 as virtually excluding third-person accounts of action: "In morally evaluating human actions," affirm Grisez, Finnis, and Boyle, "one must identify the action to be evaluated from [the perspective of the acting person] rather than from the perspective of an observer."<sup>14</sup> As

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the same point that Finnis is. Even if it is true that most intentions are formed by choice, the point of I-II, q. 12, a. 4 is to establish the unity of an intention and *any* choice for the end intended, even if the choice is formed through a deliberation which terminates long after the intention was formed. This comes out in the reply to the third objection, where Aquinas notes that intentions can exist even when the means to their objects have not yet been selected. He takes this as a sign that intention and choice are *distinct*. . . . His thought is that an intention can exist without a choice for some means to what is intended; yet when the choice comes about, it forms one act with the intention, and the distinction between them is then only of reason; they form a kind of continuum.

See Stephen Brock, *Action and Conduct* (Edinburgh: T&T Clark), 1998, 186n123 (my gratitude to Kevin Flannery for alerting me to Brock's treatment of this point). For Finnis's most developed treatment of the linkage between intention and choice, see *Intention and Identity*, 152–59.

<sup>13</sup> That paragraph reads in part:

*The morality of the human act depends primarily and fundamentally on the "object" rationally chosen by the deliberate will, as is borne out by the insightful analysis, still valid today, made by Saint Thomas. In order to be able to grasp the object of an act which specifies that act morally, it is therefore necessary to place oneself in the perspective of the acting person. The object of the act of willing is in fact a freely chosen kind of behavior. To the extent that it is in conformity with the order of reason, it is the cause of the goodness of the will; it perfects us morally, and disposes us to recognize our ultimate end in the perfect good, primordial love. By the object of a given moral act, then, one cannot mean 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. Rather, that object is the proximate end of a deliberate decision which determines the act of willing on the part of the acting person.*

<sup>14</sup> John Finnis, Germain Grisez, and Joseph Boyle, "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory," *The Thomist* 65 (2001): 12. They go on to observe:



we will see further ahead, that disagreement sheds much light on the heart of the matter at issue here.

NNL, arguably in agreement with its critics, correctly wants to distance moral analysis from two extremes: on the one hand, a thoroughly legalistic physicalism (and *a fortiori*, "biologism") that takes no account of the acting person's interior understanding of his object of choice; and on the other, proportionalism, which conflates the moral object with the acting person's remote (and presumably rightly "calculated") intention, disconnecting that intention from the behaviors immediately chosen as means to the intended outcome and—when negative or harmful in some sense—evaluating those means as merely "physical," "ontic" but ultimately "pre-moral" evils.<sup>15</sup> Further analysis will suggest, however, that, in avoiding those two extremes, NNL is tripped up by its own problematic account of moral intentionality.

Vitally important to this discussion—and as I will explore in section IV below—is Aquinas's contention that the moral object has a two-fold dimension: not merely an interior dimension as a behavior

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Many theorists, even when discussing actions in the context of moral assessment, do not adopt and steadily maintain the perspective of the acting person, and many do not adopt it at all. They consider actions, behavior, and outcomes from, so to speak, the outside—from the perspective of a spectator—in which primary or exclusive attention is given to causal relationships. Such displacement or abandonment of the acting person's deliberative perspective was common among Catholic manualists of moral theology. (*ibid.*)

<sup>15</sup> Clear to anyone who has worked with NNL is the notable (and laudable) degree to which it was shaped and articulated over time in tension with proportionalism (as suggested in the earlier quote from Grisez; see note 11). In particular, NNL reacts to the false moral space proportionalists sought to open up between the acting person's intention and his choice of means. Their aim was nothing less than to shift the point of moral analysis away from what the tradition considers paramount—namely, *what one chooses* (the "proximate end" of a choice, i.e., the "object of the act")—and exclusively toward a consideration of the acting person's intention (the motive or reason for acting). That shift opens up a space in moral analysis for the justification of virtually any choice and action in light of a proportionate reason, and the elimination (as NNL correctly maintains and insists) of the category of intrinsically evil acts. Proportionalism accomplishes this by contrasting "moral evil" with the categories of "ontic" or "pre-moral" evil, in combination with a dualistic anthropology that posits within the human person two levels of willing, the 'thematic' and the 'a-thematic'; this in turn becomes the platform for their doctrine of the "fundamental option."

conceptually conceived and object of choice (an “elicited act” of the will), but also a dimension exterior to the acting subject, in the very realities at which the exterior (or “commanded”) acts of the will that carry out the chosen behavior are aimed.<sup>16</sup>

According to Aquinas, both exterior and interior acts of the will have their distinct, but intimately related, objects in so far as moral analysis is concerned.<sup>17</sup> Commanded acts of the will are themselves specific, basic patterns of behavior that are aimed at realities that are the target or *terminus*<sup>18</sup> of (the very reason for) those patterns of

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<sup>16</sup> On the distinction between elicited and commanded acts of the will, Stephen Brock is most helpful:

Now...Thomas divides the genus of human acts into two sorts, elicited or interior, and commanded or exterior. These are not quite on a par. That is, they are not two independent species of the genus. Commanded acts are human in virtue of elicited acts. All human acts proceed from the will. Some proceed from it immediately, such as to will, to intend, to choose, and so on; they are elicited from it. Others proceed from it mediately, through powers under the will's command. The powers are moved to them by elicited acts of will. Note that in fact Thomas calls both types acts of will. “Act of will’ is of two sorts: one which is of it immediately, namely, to will; and another which is an act of will commanded by the will and exercised through another power, such as to walk and to speak” [S.T., I-II, 6, 4]. Choice is of course an elicited act. As for its object, Thomas makes it clear that both elicited and commanded acts can be chosen. We can choose between willing and not willing, and between doing and not doing; and also between willing this or willing that, and between doing this or doing that. Still, I think that we can say that the more typical object of choice is a commanded act, one carried out by some power other than the will—what *Veritatis Splendor* calls a “freely chosen kind of behavior.”

See Stephen Brock, “Veritatis Splendor §78, St. Thomas, and (Not Merely) Physical Objects of Moral Acts,” *Nova et Vetera* (English) 6.1 (2008):16.

<sup>17</sup> *ST* I-II, q. 18, a. 6, corp.: “In actu autem voluntario invenitur duplex actus, scilicet actus interior voluntatis, et actus exterior, et uterque horum actuum habet suum obiectum. Finis autem proprie est obiectum interioris actus voluntarii, id autem circa quod est actio exterior, est obiectum eius [Now, in a voluntary action, there is a twofold action, viz., the interior action of the will, and the external action: and each of these actions has its object. The end is properly the object of the interior act of the will: while the object of the external action is that on which the action is brought to bear.]”

<sup>18</sup> Such is the term employed by Aquinas, following Aristotle, in explaining how actions (being movements) receive their intelligibility—their “species”—from their objects. Flannery offers a helpful exploration of the Aristotelian foundation of Aquinas's theory of the moral object in “Thomas Aquinas and the New

behaviors. Stephen Brock explains: “There can be many true answers to the question, ‘What is [an acting person] doing?’ For each answer, or for each kind of action that he is performing, there will be something, distinct from the action, to which the action is related, and on which the action’s being of that kind depends. This is the object of that kind of action.”<sup>19</sup>

As Brock observes, that “something, distinct from the action, to which the action is related” Aquinas calls the *materia circa quam*, the object(s) of the exterior act(s) of the will in acting.<sup>20</sup> That is, the object of the exterior or commanded acts (e.g., a set of golf clubs, things belonging to another, a recently shot deer, a married person) stands as *matter vis-à-vis* the object of the interior act of the will (the action grasped in its basic form or *ratio* by practical reasoning, e.g., to play golf, to steal, to go deer hunting, to have sex, etc.) that stands as the *form* in constituting the moral object.<sup>21</sup>

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Natural Law Theory.”

<sup>19</sup> Brock, “Veritatis Splendor §78,” 19.

<sup>20</sup> *ST* I-II, q. 18, a. 2, ad 2: “Ad secundum dicendum quod obiectum non est materia ex qua, sed materia circa quam, et habet quodammodo rationem formae, inquantum dat speciem ” (The object is not the matter of which [a thing is made] but the matter about which [something is done]; and stands in relation to the act as its form, as it were, through giving it its species).

<sup>21</sup> As Flannery has aptly noted, the matter-form relation with regard to objects of exterior and interior acts should not be understood as in the metaphysical composition of natural substances. In the former case, the matter is *materia circa quam* not (as in the latter case) *materia ex qua*. He notes Aquinas’s explanation in a response to a question regarding the distinction between sins:

Objects, in so far as they are related to exterior acts, have the character of “matter about which” [an act is]; but, in so far as they are related to the interior act of the will, they have the character of ends—and it is because of this that they give species to an act. Although they also, in so far as they are “matter about which,” must be understood as termini (by which movements are specified, as is said in the fifth book of the *Physics* and in the tenth of the *Nicomachean Ethics*), nonetheless, the termini of movements give species in as much as they have the character of an end [*ST* 1–2.72.3 ad 2]. (“Thomas Aquinas and The New Natural Law,” 85; Flannery’s translation.)

Nor can Aquinas’s use of the term *materia* mean simply “physical.” The object of the exterior act stands as matter to the form (the interior act) as St. Thomas posits at *ST* I-II, q. 18, a. 6, corp.: “Et ideo actus humani species formaliter consideratur secundum finem, materialiter autem secundum obiectum exterioris actus [consequently, the species of a human act is considered formally with regard to the end, but materially with regard to the object of the external

NNL and its critics disagree on how the realities that are the aim of the acting person's exterior acts (intelligible behaviors and the realities they bear upon, especially when these are actual physical objects) relate to or enter into the constitution of the object of the interior act. A further, and closely related, disagreement hinges on the extent to which the causal nexus between the chosen behavior and its immediate effects enters (or does not necessarily enter into) the understanding of what one is choosing as the moral object of choice.

The fundamental disagreement hinges, then, on how behaviors (e.g., taking what belongs to another, speaking an untruth, striking an aggressor, aiming a pistol, crushing a fetal skull, removing a vital organ, administering morphine, etc.) and their objects (e.g., things belonging to another, an aggressor, a pistol, a fetal skull, a vital organ, morphine, etc.) as comprehensible from the standpoint of persons external to the acting subject contribute to a proper comprehension of the "object of the act" in moral analysis. Pivotal in understanding NNL's account of the moral object is, as I have stated from the outset, the role played by the "proposal." At times, the language used by NNL theorists has seemed in fact to identify the "proposal" with the object of the act itself (a position, as we will see further on, asserted by at least one critic of NNL and rejected by John Finnis). What is certain is that NNL does construe the moral object as a *possible state of affairs* (which, as I hope to show, is itself problematic), whether that is tantamount to what NNL theorists mean by "proposal" or whether the latter simply stands as a concept or idea of that state of affairs. At very least, it is certainly the case that, in NNL, the "proposal" does the theoretical heavy lifting that, in Aquinas's account of moral intentionality, is accomplished by the "object of the act."

## II

It was based on NNL intentionality that I crafted my 2011 moral analysis of the "Phoenix abortion case" (see appendix) and engaged in an exchange on that topic with my friend Kevin Flannery. I will present here a very brief synopsis of that analysis. In addition to the

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action].” Nor does this use of “matter” to refer to the object of the exterior act of the will mean precisely the same thing as “matter” in the expressions “grave matter,” “parvity of matter,” etc., although they are closely related. In the former sense, “matter” is employed as one component of the matter-form analogy comparing the metaphysical composition of things to human acts; the latter sense is a morally qualifying term used in the context of the determination of an action as mortally or venially sinful.

known facts of the case at the time,<sup>22</sup> my analysis presupposed (1) that the mother was on the point of irreversibly fatal medical complications and (2) that the medical team had exhausted all other medical means at their disposal to save the mother’s life, the only remaining means being the removal of the fetus. I framed the relevant moral question as follows: In the specific situation in which pregnancy—the presence, ectopically or intrauterine, of a gestating fetus—endangers the mother’s life such that she will necessarily die if the pregnancy continues, is it morally licit for a doctor to take actions upon the fetus such that, as a result of those actions, fetal death will ensue immediately? In 2011, I responded in the affirmative.

The procedures a physician would most likely use today in such instances would be salpingostomy (for ectopic tubal pregnancies),<sup>23</sup> D&C<sup>24</sup> (for normally gestating fetuses), and—in exceedingly rare cases—the craniotomy.<sup>25</sup>

My original argument also required two provisos, the second more central to the argument itself:

(a) In a case such as that presented at St. Joseph’s hospital in Phoenix, it is not reasonable to consider the placenta as such the “offending organ.”

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<sup>22</sup> See note 1.

<sup>23</sup> A salpingostomy is a manner of treating ectopic pregnancy in the fallopian tube which has not yet ruptured. In this procedure, an incision (called a linear salpingostomy) is made through the wall of the fallopian tube in the area of the ectopic pregnancy; the doctor dislodges the ectopically placed embryo through the use of a scooping procedure in which he detaches the placental tissue that has attached to the tube. Once dislodged, that tissue, including the embryo proper, are then flushed out of the tube with an instrument called a suction-irrigator. The incision is then left to heal and the tube is left intact. Salpingostomy would be justified only in the (very rare) instance that a mother’s life would truly be in danger and there were medical reasons that contraindicate the performance of salpingectomy.

<sup>24</sup> Dilation means enlarging or expanding the entrance of a woman’s uterus so that a thin, sharp instrument (the curette) can scrape or suction away (suction curette) the lining of the uterus and take tissue samples (if used for other medical or clinical purposes) or detach a gestating fetus.

<sup>25</sup> Perhaps the most plausible historical scenario in which the craniotomy was performed was in the event of hydrocephaly in which an abnormal buildup of cerebrospinal fluid (CSF) in the ventricles of the child’s brain makes the head too large for vaginal delivery. The physician would make an incision in the back of the child’s head, compressing the head to release the fluid and getting the head to a size that would allow vaginal delivery (in situations where cesarean delivery is not safely possible).

Such a conception of things presupposes the physiologically (and philosophically) false distinction between the placenta, on the one hand (as a “shared” organ between baby and mother), and the “fetus proper,” on the other. Even if characterized as a “shared organ,” the placenta is primarily a *vital* organ of the fetus. To target the placenta *is* to target the fetus. Therefore, the conceptual distinction between placenta and “embryo proper” or “fetus proper” had no bearing on my opinion.<sup>26</sup>

(b) I argued partly with reference to other kinds of cases. Among these is the case of legitimate self-defense. With regard to the latter, however, I did not intend to imply that the fetus is an aggressor with regard to the mother. Both are at all times to be seen as patients. The fetus is an innocent human person, yet it is so intimately entwined in a grave medical complication endangering the mother’s life that one can reasonably affirm that it is the very presence of the gestating fetus that is causing the life-threatening situation for the mother. Though not an aggressor, and innocent, the gestating fetus does nonetheless represent a threat to the mother’s life. The point of my discussion of self-defense, however, was not so much to draw an analogy as to defend, by counter-example, NNL intentionality.

The question then was whether a physician, in performing such a medical intervention, could have as his moral object of choice an act that does *not* qualify as the act the Church traditionally condemns as direct abortion, defined in *Evangelium Vitae* §58 as “the *deliberate and direct killing*, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth” (emphasis added). The question and its resolution depended on resolving what constitutes a true understanding of the moral object of choice in this case.

Basing my approach on the NNL account of moral intentionality, it seemed to me that one could admit the following as probable: that, in the situation described, a physician could formulate (in the process of practical reasoning), deliberate on, and choose as his “proposal” *to remove the fetus from its place of gestation* by engaging in external actions

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<sup>26</sup> This distinction was heavily employed in the moral analysis conducted by Therese Lysaught. The distinction is invalid and, consequently, rendered her analysis unsound. Due to this and other deficiencies in her argumentation that I do not address here, her analysis cannot be used as a point of reference in coming to a sound moral judgment on the “Phoenix case.”

taken directly upon the fetus, foreseeing but not intending (holding *praeter intentionem*) the death of the fetus—“lethal fetal removal” as distinct from abortion.

Based on this account of intentionality, a D&C *could* be performed *qua* abortion. But it need not be so in all cases: one could conceive of, and engage in, a D&C *without intending* to kill the unborn child. The latter, in an extreme instance as presented in the Phoenix case, would be an act of “fetal removal” and morally licit; the former, an act of abortion, would be intrinsically immoral, an act *malum ex se*, an act *qui nullo modo bene fieri potest*, and prohibited by an exceptionless moral norm. Which is to say, there is no good (i.e., licit) way to perform a procured abortion (which includes the intention of killing—of directly and intentionally bringing about a dead fetus either as an end or as a means). There can be, however, in extreme and unusual circumstances, a licit manner of using the technique known as D&C in removing a pre-term embryo or fetus from its place of gestation without intending to kill the fetus. Such—I argued in 2011—could be the moral object of choice for those involved in limited situations in which a mother’s life is patently endangered by the presence of the fetus gestating in her womb.

### III

NNL theorists have made attempts to distinguish and disassociate the “proposal” from what could otherwise be the acting subject’s skewed perception of what he is doing resulting from interior turmoil, obfuscations, rationalizations, or outright dishonesty. For example, Finnis, Grisez, and Boyle affirm that “what counts for moral analysis is not what may or may not be included in various descriptions that might be given by observers, or even by the acting persons reflecting on what they have done, but what is or is not included within a proposal developed in deliberation for possible adoption by choice. Only the *truthful* articulation of that proposal can be a description that specifies an act for the purposes of moral analysis.”<sup>27</sup>

And, as we saw above, Finnis articulates the object of the act as “the description [that the act] has in the proposal which the agent adopts by choice—not under some *self-deceiving description offered by conscience to conscience to rationalize evil*, but under the description it has in the practical reasoning.”<sup>28</sup> Additionally, Finnis clarifies: “The

<sup>27</sup> Finnis, *Intention and Identity*, 255; emphasis my own.

<sup>28</sup> *Ibid.*, 165; emphasis my own.

means are included in the proposal, not under some description which makes them seem compatible with some legal or moral rule but under that description which makes them intelligibly attractive *as means*—that is, the description under which they enter into one’s deliberation toward choice (*not one’s rationalizing of attempts to square that choice with one’s conscience or with the law*).<sup>29</sup>

Finnis offers an example of just a rationalization. If a military commander were to find it useful to flood the battleground with human refugees, and if he understands that the way to make this happen is to kill some civilians and destroy their shelters by bombing, “then killing or injuring noncombatants in their homes is intelligibly attractive and is the relevant true description of what one chooses and does. That description does not alter just because one tells oneself and others that what one is doing is ‘bombing military targets.’”<sup>30</sup>

Clearly then, NNL wants to be able to distinguish rationalized or untruthful accounts of the moral object (“I am merely bombing military targets”) from presumably truthful and non-disingenuous accounts, such as a doctor’s account of his action in performing a craniotomy on a fetus: “I am merely narrowing a cranium.”<sup>31</sup> But, by employing its notion of “proposal,” NNL labors under enormous difficulties to render such distinctions credible.

After years of intellectual engagement with NNL, I have arrived at the conclusion that its account of moral intentionality, which holds that one arrives at a true understanding of the moral object only by way of accessing the agent’s “proposal,” is internally flawed. And that flaw emanates from NNL’s theoretical anchoring of the knowledge of the moral object in the subject-relative perspective of the agent.

<sup>29</sup> Finnis, *Moral Absolutes*, 68–69; emphasis my own.

<sup>30</sup> *Ibid.*, 69.

<sup>31</sup> For the NNL approach to the craniotomy issue, see especially Joseph Boyle, “Double Effect and a Certain Type of Embryotomy,” *Irish Theological Quarterly* 44 (1977): 303–18; Grisez, Finnis, and Boyle, “Direct’ and ‘Indirect;” 21–31; Germain Grisez, *The Way of the Lord Jesus*, vol. 2, *Living a Christian Life* (Chicago: Franciscan Herald Press, 1993), 502–03. For critiques of their position, see especially Flannery, “What is Included in a Means to an End?” and Steven A. Long, “A Brief Disquisition regarding the Nature of the Object of the Moral Act according to St. Thomas Aquinas,” *The Thomist* 67 (2003): 45–71. Flannery has also presented a strong argument suggesting that the Church’s ordinary and universal magisterium, on the question of the licitness of the craniotomy, is now settled, and settled against the procedure; see “Vital Conflicts’ and the Catholic Magisterial Tradition,” *National Catholic Bioethics Quarterly* 11.4 (2011): 691–707.



On this, Finnis could not be clearer: "In relation to acts done for a reason, these principles are specified by a principle less all-pervasive in St. Thomas's writings but clearly fundamental to his thought: what end-directed things are per se is to be described in terms of their intention—is *what their author(s) intend them to be*."<sup>32</sup>

NNL's recourse to the notion of "proposal" seemingly leaves no place for a valid manner of grasping the moral object *from without* the agent, and NNL theorists oftentimes seem to discard such a possibility outright. Grisez, for example, in his discussion of historical problems in applying the principle of double effect, states, "The older moral theologians [in applying more traditional formulations of the principle of double effect] started out by thinking of human acts in a commonsense way, as chunks of behavior having some moral significance because of their inherent characteristics and their being done on purpose. If one takes this view, one literally never knows exactly what anyone is doing, and so one will not be able to deal with precision with difficult cases of the sort for which the principle of double effect was designed."<sup>33</sup>

In a word, Grisez is suggesting here that behaviors cannot be understood (we cannot "know exactly what anyone is doing") but for grasping the "proposal" as understood by the agent in question. Yet, NNL does little, for its part, to explain how those involved in the moral evaluation of the act in question—those beside the agent himself—are to gain access to the privileged subjective realm of the agent's interiority and thus to understand his behavior.

This is what NNL considers "the primacy of the internal perspective."<sup>34</sup> And, as suggested earlier, in insisting on the role played in moral analysis by the perspective, NNL theorists are quite convinced that they have correctly interpreted *VS* §78 and its remark about placing oneself "in the perspective of the acting person." Along with most critics of NNL, I would suggest, on the contrary, that NNL's "internal perspective" is almost certainly *not* the internal perspective suggested by Pope St. John Paul II in *VS* §78. That one line from the encyclical must be understood in the context of the entire paragraph

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<sup>32</sup> Finnis, *Intention and Identity*, 162; emphasis my own.

<sup>33</sup> Grisez, *Christian Moral Principles*, 308.

<sup>34</sup> "It was appropriate for [*Veritatis Splendor*], in the course of rejecting proportionalism as incompatible with Catholic faith, to affirm the primacy of the internal perspective in the understanding of action for the purposes of moral assessment" (Finnis, Grisez, and Boyle, "Direct' and 'Indirect,'" 13–14).

in which it is contained, particularly in its close conjunction with that paragraph's reference to the second article of question 8 of the *Summa theologiae* (ST), to which I have already alluded:

Certain actions are called human, inasmuch as they are voluntary, as stated above. Now, in a voluntary action, there is a twofold action, viz. the interior action of the will, and the exterior action: and each of these actions has its object. The end is properly the object of the interior act of the will: while the object of the exterior action, is that on which the action is brought to bear. Therefore just as the exterior action takes its species from the object on which it bears; so the interior act of the will takes its species from the end, as from its own proper object. Now that which is on the part of the will is formal in regard to that which is on the part of the exterior action: because the will uses the limbs to act as instruments; nor have exterior actions any measure of morality, save in so far as they are voluntary.<sup>35</sup>

In other words, the putative injunction in *VS* §78 that one must get at the nature of the object from “the perspective of the acting person” is no injunction at all. It is rather simply a way of articulating Aquinas's understanding that the external accomplishment of an act receives its very status as moral from the interior act of the will. Hence, *VS* §78 is simply asserting the patent truth that, in the moral evaluation of actions, we must understand them *as willed and intended by an agent*, and that is all. *VS* §78 is *not* requiring of us, in moral analysis, to enter with the psyche of the acting person to understand as he understands what he is choosing and bringing about.<sup>36</sup>

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<sup>35</sup> “Respondeo dicendum quod aliqui actus dicuntur humani, in quantum sunt voluntarii, sicut supra dictum est. In actu autem voluntario invenitur duplex actus, scilicet actus interior voluntatis, et actus exterior, et uterque horum actuum habet suum obiectum. Finis autem proprie est obiectum interioris actus voluntarii, id autem circa quod est actio exterior, est obiectum eius. Sicut igitur actus exterior accipit speciem ab obiecto circa quod est; ita actus interior voluntatis accipit speciem a fine, sicut a proprio obiecto. Ita autem quod est ex parte voluntatis, se habet ut formale ad id quod est ex parte exterioris actus, quia voluntas utitur membris ad agendum, sicut instrumentis; neque actus exteriores habent rationem moralitatis, nisi in quantum sunt voluntarii.”

<sup>36</sup> Again, Flannery has it quite right:

It might appear to some that this latter remark [i.e. “to place oneself in the perspective of the acting person”] constitutes a shift away from

An essay by Kevin Flannery published in a festschrift honoring John Finnis is particularly helpful here.<sup>37</sup> A portion of that essay is dedicated to critiquing Finnis’s interpretation of two passages from Aquinas: his *Commentary on the Sentences* II, d. 40, q. 1, a. 1 and *ST* I-II, q. 20 a. 1. Flannery’s point is that, contrary to Finnis’s interpretation of them, neither passage supports NNL’s understanding of the moral object by which Flannery takes NNL to mean nothing other than the “proposal” itself. As Flannery sees it, in NNL, the “proposal” quite simply *is* the moral object. Consequently, Flannery holds that these passages from Aquinas serve rather to highlight Aquinas’s quite distinct understanding of the moral object.

At one point in his analysis,<sup>38</sup> Flannery calls attention to a usage of Latin by Finnis, a usage he employs presumably to highlight Aquinas’s understanding of the moral object. It occurs in Finnis’s 1991 essay “Object and Intention in Moral Judgments according to St. Thomas Aquinas,” cited above,<sup>39</sup> and is repeated in the 2011 edition of the same essay in Finnis’s *Intention and Identity: Collected Essays*, volume 2. In both editions of the essay, the usage appears in footnote 44. The relevant portion of that footnote reads as follows:

[Aquinas’s] disagreement is not with the judgment that there are acts which, as he states, are wrong in themselves and cannot in any way be rightly done (*de se malus, qui nullo modo bene fieri potest*). It is with Lombard’s denial that such acts are wrong by reason of will, intention, purpose (*finis*). Such acts, says Aquinas, *are* wrongful by reason of the acting person’s will. There need be nothing wrong with his *intentio* or *voluntas intendens*, his ultimate motivating purpose (*finis ultimus*), e.g., to give money to the poor. What is wrongful is, rather, his choice, his *electio* or

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the more traditional approach—sometimes (inaccurately) dismissed as excessively “physicalist”—and toward a more modern approach that looks to the reason why we do things rather than to the objective characterization of the things we do. But there is no grounds for such an interpretation in the text of *Veritatis splendor*. . . . According to Thomas (and also the encyclical), even though there is such a thing as an “exterior” act, it can only be understood as a human act at all in a “non-physicalist” way, i.e., by placing oneself “in the perspective of the acting person.” (“Placing Oneself in the Perspective of the Acting Person,” 48–49)

<sup>37</sup> Flannery, “John Finnis on Thomas Aquinas on Human Action,” 118–31.

<sup>38</sup> *Ibid.*, 129–30.

<sup>39</sup> See note 5.

*voluntas eligens*, his immediate purpose (*objectus proximus* or *finis proximus*), e.g., to forge this testament: Sent. II, d. 40 q. 1 a.2.<sup>40</sup>

Finnis's use of *objectus proximus* here, as Flannery suggests, would seem revealing. As Flannery points out, *objectus proximus* is not even Aquinas's term. Yet, Finnis suggests this language is synonymous with Aquinas's actual usage of *objectum proximum*, the object of the act, the proximate end (*finis proximus*) of a specific kind of behavior that takes its species from the object. *Objectum*, as Flannery notes, is the passive participle of the verb *obicio* (to set before or to place before one). Consequently, an *objectum* is something that is "set before" us; we are exposed to it.

As such, *objectum* adequately conveys nuances of what Aquinas means by moral object as that which is first presented to the intellect and then to the will by way of the agent's practical reasoning, *but not originating in his reasoning*. An *objectus*, by contrast, (a fourth declension, masculine noun, a term essentially not found in Aquinas's lexicon) means "a putting against," "an opposing," a notion that presupposes the *elaboration* of that which is then "placed in opposition" and that is—not surprisingly—quite suggestive of the nature of a "proposal" as conceived within NNL, which emphasizes the agent's *elaboration* of the object and its arising primarily from his own exercise of articulating in deliberation the content of what he might eventually choose and do.<sup>41</sup> Flannery summarizes the problem in these terms: "Whereas Aquinas, adhering to the theory set out in [Aristotle's] *De An.* 3.10, understands the object as something presented to the intellect (which is inseparable from rational appetite) as an *appetibile* (or desirable thing), Finnis understands it as a *proposal*: as something coming from the agent."<sup>42</sup>

In that same festschrift, Finnis responds to Flannery's contention that NNL understands the moral object to be precisely the "proposal" originating from within the agent. It is worth quoting a large portion of Finnis's response in its entirety:

When one chooses, one chooses between incompatible proposals. Each proposal picks out one or more—usually more than one—object(s): to move the handle, to pump the water, to

<sup>40</sup> Finnis, *Intention and Identity*, 165 (2011 edition).

<sup>41</sup> In the 2013 paperback edition of *Intention and Identity*, the corresponding wording in the last sentence of footnote 44 now reads "objectum proximum."

<sup>42</sup> Flannery, "John Finnis on Thomas Aquinas on Human Action," 128.

replenish the house cistern, to serve the inhabitants . . . to earn one's salary, and so forth. In the theological and now doctrinal theses that have recently installed the term "object" in the heart of our civilization, "object" denotes the more "proximate" (say, pumping water), rather than the more "remote" (say, earning pay or a reward), in this sequence of means to ends. As the deliberating and acting person envisages matters, the *good* of pumping is that it will replenish the cistern, and the good of doing that is that it will serve . . . the inhabitants, and the good of that may be envisaged as . . . a good for its own sake, or as a means to a salary . . . and so on. Obviously, the object in every case is a possible *state of affairs* considered as *being brought about by action* choosable *for the sake of the benefit* (whether merely as means or also as end) *thereby attainable*. Equally obviously, the proposal is an *idea* of such states of affair *as eligible*, that is, *as to be pursued and brought about*; it is a plan framed in terms suitable for acceptance or rejection—for being chosen, or being rejected in favour of an alternative one prefers (chooses). At the moment of choice, one has two or more proposals, each proposing, picking out, one or more objects as suitable for choice; but as yet one has no object (save to get into a position to choose); and even after one has chosen one of these (sets of objects) in preference to the other(s)—by adopting one of those proposals—the state(s) of affairs which it is now one's object(ive) to bring about remain(s) to be brought about. In short: It is inconceivable that the proposal *is* the object, and equally inconceivable that the object *is* the proposal. [Such] is not my position, nor anyone else's so far as I am aware.<sup>43</sup>

Now, were we to grant Finnis's point that there is theoretical space between the "proposal adopted by choice" and the moral object—the *possible* state of affairs<sup>44</sup>—for which the proposal stands (as an idea), this in no way helps NNL. On the contrary, it serves only to reinforce the problematic nature of its theory of intentionality. And I

<sup>43</sup> Keown and George, *Reason Morality and Law*, 492–93.

<sup>44</sup> By "state of affairs," I take it that NNL means something to this effect: "a possibility, actuality or impossibility of the kind expressed by a nominalization of a declarative sentence"; see Ernest Sosa, "State of Affairs," in *The Cambridge Dictionary of Philosophy*, ed. Robert Audi (Cambridge: Cambridge University Press, 1995).

think it is further and readily evident that a *possible state of affairs* to be brought about by choice and action is certainly *not* Aquinas's "object of the act."

Aquinas typically describes the object of the interior act of the will as a behavior such as to walk or to speak.<sup>45</sup> In fact, Aquinas is quite clear that the object of the interior act of choice either is or at least always involves a behavior.<sup>46</sup> We might further observe that, as such, these objects are behaviors *conceptualized* (to go deer hunting, to take from another, etc.), since they are presented to the will by practical reasoning and are not as yet exterior acts *in actu*. As such, are these objects not simply, as Finnis would have it, *ideas* of possible states of affairs—proposals? Hardly. I might have an idea of watching reruns of *I Love Lucy* this evening. If I choose to do this, however, I do not choose the *idea* of doing it; rather, I direct my powers and capacities to bring about the set of exterior actions that will constitute my sitting in front of a television at a certain hour watching reruns of *I Love Lucy*.

The heart of the problem with NNL intentionality is that it understands human choice and action precisely and simply as an enterprise of bringing about *states of affairs* understood through the highly subjective lens of the agent's "proposal." As to this, the problematic

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<sup>45</sup> See *ST* I-II, q. 6, a. 4, corp.

<sup>46</sup> *ST* I-II, q. 13, a. 4, resp.: "Respondeo dicendum quod, sicut intentio est finis, ita electio est eorum quae sunt ad finem. Finis autem vel est actio, vel res aliqua. Et cum res aliqua fuerit finis, necesse est quod aliqua humana actio interveniat, vel in quantum homo facit rem illam quae est finis, sicut medicus facit sanitatem, quae est finis eius (unde et facere sanitatem dicitur finis medici); vel in quantum homo aliquo modo utitur vel fruitur re quae est finis, sicut avaro est finis pecunia, vel possessio pecuniae. Et eodem modo dicendum est de eo quod est ad finem. Quia necesse est ut id quod est ad finem, vel sit actio; vel res aliqua, interveniente aliqua actione, per quam facit id quod est ad finem, vel utitur eo. Et per hunc modum electio semper est humanorum actuum [I answer that, just as intention regards the end, so does choice regard the means. Now the end is either an action or a thing. And when the end is a thing, some human action must intervene; either in so far as man produces the thing which is the end, as the physician produces health (wherefore the production of health is said to be the end of the physician); or in so far as man, in some fashion, uses or enjoys the thing which is the end; thus for the miser, money or the possession of money is the end. The same is to be said of the means. For the means must needs be either an action; or a thing, with some action intervening whereby man either makes the thing which is the means, or puts it to some use. And thus it is that choice is always in regard to human acts]."

recourse to the very notion of *states of affairs*, Matthew O'Brien and Robert Koons have made a keen observation from the perspective of analytical philosophy: "The difference between actions' formal objects and undertakings' states of affair 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."<sup>47</sup>

As for the notion of "proposal," the problem remains the degree to which this conceptual device can fail to evade dissolving into mere contrivances of the content-construing noetic activity of the agent. The problem here, in a word, is one of subjectivity versus objectivity.<sup>48</sup> As far as their respective intentional constitutions as objects of

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<sup>47</sup> O'Brien and Koons, "Objects of Intention," 674. The authors have shed considerable light on the critical difference between understanding the moral object as merely a state of affairs and understanding it as a basic behavior whose objective teleology is anchored in basic powers of the human person exercised within the context of social practices. Christopher Tollefsen has offered a thoughtful response to O'Brien and Koons, in the course of which he raises a particularly valid challenge to proponents of third-person accounts of moral objects. To paraphrase his argument, it would seem that third-person observers would be hard pressed to distinguish, for example, between the act of a soldier who fires upon an on-coming aggressor intending to kill him but actually only hitting him in the leg and the act of a soldier in an identical situation who fires intending precisely to hit him in the leg. In a word, Tollefsen asks how one could pinpoint the moral objects in play in either case but by trusting both soldiers' descriptions of their corresponding proposals; see his "Response to Robert Koons and Matthew O'Brien's 'Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory,'" *American Catholic Philosophical Quarterly* 87.4 (2013): 751–78.

<sup>48</sup> For the purposes of the present essay, a common sense understanding of subjectivity versus objectivity is both sufficient and valid. That is not to minimize the enormous significance of that question in moral philosophy, but the issue has its roots and resolution (not without complexities) at the level of ontology and epistemology. Not uncommonly, philosophers of a more realist bent apply "objective" ontologically, referring to the being-in-itself or degree of ontological autonomy of the entity in question, while they apply "subjective" to an entity's being-constituted or being-dependent-upon an intentional act for its existence. The two terms, however, admit of a broader use if we consider, as Joseph Seifert wonderfully explored, that, between the purely constituted being, on the one hand, and the purely un-constituted, subject-in-

thought, true accounts of behavior, ideas of possible states of affairs, and rationalizations—and even outright lies—as far as they go, are all in some sense *intellectus conceptiones*. They are not “constructs” of the mind in the modern, post-Kantian sense, but, in the Thomistic sense, the result—*conceptus*—of an internal noetic process. Yet their degree of anchorage and origination in extra-subjective reality is quite different. The “proposal” remains always vulnerable to subject-relative manipulation or contrivance due to its origin in the noetic activity of the agent. It can always run the risk of remaining more embedded in subject-relative interferences and obfuscations than in a more pristinely subject-independent consideration of the realities that are the aim and “object” of the exterior act(s) of the acting subject. In sum, NNL’s center of gravity rests with that consideration—the agent’s subjectivity-laden, introspective construal and subsequent consideration of a “proposal”—an idea of a possible state of affairs to be brought about by choice. By contrast, as I hope to explore in the following section, Aquinas’s account of moral intentionality places its center of gravity not in the introspective activity of the agent, but on a *behavior specified by, and intelligible because of, its object*.

#### IV

Aquinas’s account of moral intentionality avoids the subjective pitfalls of NNL’s “proposal” by anchoring an understanding of the moral object in those perspective-independent realities—the *materia circa quam*—that constitute the target of the exterior act(s) of the agent. Again, according to Aquinas, the object of the interior act of the will is a chosen behavior realizable as an exterior act. In turn, that exterior act has its object, its target or *terminus*. That object, what the exterior act *is about* (the *materia circa quam*), gives sense to the exterior act. But that giving of sense arises only from the object’s being the aim as well, and simultaneously with the interior act of the will that renders the exterior act moral to begin with. Again, Brock summarizes:

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dependent being, on the other, there are varying degrees of partial ontological dependence and independence. In chapter 7 of his *Back to Things in Themselves* (New York: Routledge, 1987), he has marshaled this unruly crowd of meanings into ordered categories, articulating and differentiating an array of both ontological and epistemological uses of the term, with particular attention given to the term “objective.” Dietrich von Hildebrand similarly articulated six senses of the term “subjective” in chapter 5 of his *What is Philosophy?* (Chicago: Franciscan Herald Press, 1973).



The will bears on the action as specified by the thing, and it bears on the thing as object of the action. The action's status as an end and the thing's status as an end are inseparable from each other. Here is a crucial implication of the distinction between *finis cuius* and *finis quo*. Although action and object are distinct, and although both are ends, we should not think of them as distinct ends. *They are the same end*. This is not absurd, because each "is" that end in a distinct sense. Thus Thomas: "[A]s was said above, 'end' is said in two ways: in one way, the thing itself; in another, the attainment of the thing. Which indeed are not two ends, but one end, considered in itself, and applied to another . . . ; therefore God is not one end, and the enjoyment of God another."<sup>49</sup>

So, both exterior act and its object, although distinct, constitute one and the same end.

Now, it is in this context of willing (intending and choosing) an end that meaning—*ratio*—arises, that the intelligibility of an act emerges. This is the "giving of moral species by the object." The point of origin of that intelligibility is the *materia circa quam*, the object of the exterior act of the will, the target and source of the intelligible content of that behavior, that in light of which the behavior makes practical and reasonable "sense." Aquinas understands behavior not simply as a possible state of affairs to be brought about by choice, but as a teleologically oriented and intelligible comportment, the intelligibility of which is anchored in elements preceding and inherently independent of the agent's intellectual consideration of the possible behavior.

The object of the exterior act is the point of departure for the coalescing of a moral species—intelligibility—of an act in as much as it has the character of an end envisaged by the will. Brock has succinctly explained how this can be the case with objects of exterior acts even when those objects are in fact material things: "[Aquinas] insists that anything that functions as the *materia circa quam* of a commanded or exterior human act, specifying it, *must* also be functioning as an object of an elicited or interior act of the will; this is *why* it specifies the exterior act. The exterior act has no object that is

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<sup>49</sup> Brock, "Veritatis Splendor §78," 27. The internal quote of Aquinas is from *ST* I-II, q. 20, a. 1, ad 1.

not also an object of an interior act.”<sup>50</sup> To better grasp how, on such an understanding of intentionality, the moral species coalesces and how we arrive at an understanding of behaviors, I offer the following examples.

The first is taken from Finnis, Grisez, and Boyle.<sup>51</sup> A rancher prepares to castrate a calf. The terminus of the act, the objects of the exterior act, are the calf’s healthy testicles inherently bound up with its reproductive capacity as the sperm-producing organs. This is, in virtue of the calf’s natural form, the dominant intelligible feature of this act. Consequently, the testicles, as terminus of the act, give sense to the exterior act: a castration. Castration, in light of the natural capacity with which the testicles are bound up, gives intelligibility to what is being undertaken as the object of the interior act of the will: a sterilization. Granted, the act entails many other features (testosterone reduction, pain infliction, bleeding, etc.), but elimination of the procreative power is integral to the intelligibility of the act in a way that these other features are not. Elimination of such a natural endowment anchored in and emerging from this animal’s substantial form takes an intelligible precedence over other features when considering *what’s happening* here.

Hence, the rancher may well understand his project (his “proposal”) as nothing more than “testosterone reduction” (since the testicles are the chief source of this hormone) with a view to producing a better beef product, with more consistent tenderness and marbling in the beef, in order to please consumers, and so on. Indeed, sterilization need not be part of his “proposal.” But on a Thomistic analysis, it is, nonetheless, *the action* he accomplishes. Sterilization is the intelligibility of the act arising from its particular object in this particular intentional context, and *is so* independently of the rancher’s first-person perspective on what he understands himself to be doing. He understands himself to be lowering testosterone in the calf by castrating it. He is simultaneously sterilizing a calf by castrating it. His action, the object of his choice, the what-he-is-doing, is aptly understood as sterilization. NNL flatly denies this.<sup>52</sup>

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<sup>50</sup> Ibid., 26–27.

<sup>51</sup> See Finnis, *Intention and Identity*, 237–38.

<sup>52</sup> “So, although the performance is sterilizing (as anyone would say who looks just at the *performance* and its physical effects), any question as to what is included in the farmer’s proposal is not settled by reference to his behavior. Indeed, since sterilizing (achieving a state of infertility) is for the farmer

We can consider another textbook example. A live grenade has landed in a trench full of soldiers. One soldier immediately pounces on the grenade, covering it with his body, encasing it beneath his abdomen. In this case, unlike the preceding one, the context (rather than a natural capacity) provides the dominant intelligible feature of this act: soldiers huddled in a small area in close proximity to a live grenade and the immediate practical exigency that they be protected from the impending blast. The terminus of the exterior act in this case is two-fold: the soldier's own body and the grenade. As such, and in this particular context, they give sense to the exterior act: a bodily smothering. Smothering, in turn, in the context so understood, gives intelligibility to what is being undertaken as the object of the soldier's interior act of the will: a shielding.

In sum, the moral object as Aquinas understands it has a point of origination that is by far freer than and independent of the subject-relative manipulation or contrivance to which the NNL "proposal" is susceptible. It has a starting point that exists from without the intellect of the acting subject: its foundation is some intelligible reality, and at times even a physical thing, manifested to the intellect as simultaneously intelligible and desirable. Given the heavily subject-relative origins of the "proposal," the NNL account of moral intentionality leaves open the door to errors of moral judgment. Employing NNL intentionality, those engaged in moral analysis (most especially the agent himself) can easily fail to attend sufficiently and adequately to the intelligibility of a basic behavior in question and, rather, *construct* an inadequate, or at best partial, conception of a possible action, resulting in conceptions of moral objects that are substantially—to use Finnis's own words—"what their author(s) intend them to be." Such conceptions may or may not coincide with the true intelligibility of the basic behaviors in question.<sup>53</sup>

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neither end (purpose) nor means, it is not included in the proposals he adopts, is not what he chooses, and for the purposes of an account of human action is not what he is *doing*" (ibid., 238).

<sup>53</sup> And it should finally be noted that Aquinas's understanding of this process—of picking up basic behaviors and grasping them intentionally as behaviors open to choice—does not necessarily coincide theoretically with his distinction between conceiving an action *in genere naturae* versus understanding it *in genere moris*; nor does this distinction coincide with the use with which it has been employed by John Finnis. By his distinction, Aquinas seeks to differentiate—not unlike Finnis—two distinct perspectives or vantage points for consideration. But there the similarities end, and Aquinas's and the latter's

## V

Finally, I must return to the Phoenix case and conclude with a revision of my original moral analysis (see the appendix below). As should be clear, NNL intentionality—in instances such as the “Phoenix abortion case”—allows for the understanding of the performance of a D&C as “fetal removal” (from a womb, foreseeing embryo demise as an immediate consequence), yet distinct from a very different “proposal”—namely, a D&C abortion.

While D&C is routinely performed for female health issues unrelated to abortion, it is also a principal means for procuring an abortion, particularly during the first trimester. As a chosen means for procuring an abortion, it constitutes a well-established medical procedure. During the procedure, a physician uses a curette to scrape the surface of the uterus to dislodge the sac containing the developing fetus and the fetal placenta. The uterine lining, fetus, and placenta are removed in pieces. The procedure may also require suctioning to empty the uterus.

Wholly and plainly embedded in the intelligibility of this medical practice is the understanding that taking a curette to the live fetal corpus and dissecting it is death dealing. The intelligibility of this act arises from consideration of the immediate object of the set of basic behaviors comprising the D&C abortion—namely, the fetus. Those basic behaviors (cutting, scraping, and suctioning) applied to a human fetus constitute the killing of the fetus. This is a core intelligible content of the medical procedure known as a D&C abortion.

But such is also the case, even beyond this particular medical practice, in virtue of considerations at the level of human goods and natural teleology. Rational consideration of this set of behaviors as applied to the fetus cannot but be rationally grasped as incompatible

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distinctions are not to be conflated. To be sure, Aquinas would appear to mean the following. To consider something *in genere naturae* suggests a *metaphysical* consideration of the reality in question (in this context, an action)—that is, how it is “in nature” (e.g., one or multiple, divisible, indivisible, etc.). Notice that this does not coincide with the NNL understanding of considering an action from a third-person-descriptive perspective on the action *qua* physical performance or behavior. To consider something *in genere moris* suggests nothing more than considering that reality—if it can be so considered—from *the perspective of its having proceeded from the will*. The latter has nothing to do with the NNL distinction between a third-person account of a behavior and the agent’s consideration of the proposal he adopts by choice. See Aquinas’s *In II Sent.* d. 42, q. 1, a. 1, corp. For Finnis’s discussion of *in genere naturae/in genere moris*, see *Intention and Identity*, 164–65, particularly note 42.

with the basic human good of self-preservation to which a developing fetus is teleologically directed.

Consequently, one might honestly conceive of one’s “proposal” as a D&C being performed *qua* “removal of a fetus” while believing it possible to hold the killing of the fetus *praeter intentionem*. But in light of the foregoing considerations, D&C *qua* fetal removal belies the manifest intelligibility of the behavior in question, which is simply the killing of the fetus: the terminus of the D&C is a fetus-dissected, and a fetus-dissected is inescapably and without exception co-terminus as a real datum in the world with a fetus-killed. Those choosing to perform a D&C in this situation, no matter whether one subjectively understands this as merely fetal removal (i.e., an NNL-styled “proposal”), given the objective path of intelligibility from basic behaviors involved to their object and the exceptionless incompatibility of that practice with the good of self-preservation of the embryo, one cannot but be including the killing of the embryo within his intention.

A different, but related and vitally important question here, beyond the scope of the present essay, would be the issue of the degree of *subjective moral responsibility* of someone colluding, condoning, assisting or performing the D&C who was honestly convinced at the time that his manner of understanding what he was colluding in, condoning, assisting in, or performing excluded killing the fetus from his intention.

Finally, we should recall that, in the realm of understanding and grasping *agibilia*, there must come to bear the acquired virtue of prudence (*recta ratio agibilium*) to ensure to the extent humanly possible a *right* grasp of the object. But, given that same complexity and the variability of degrees of prudence coming to bear, in very complex behaviors (ones that especially evoke profound emotions), disagreements on the nature of object in complex moral questions are almost certainly to be expected.

## Appendix

*My previous moral analysis of the “Phoenix abortion case” presented at UFL 2011*

My argument proceeded essentially as follows: In the case of self-defense, according to the classic analysis of St. Thomas in the seventh article of question 64 of *ST II-II*, one and the same actor could adopt as the object of choice either to repel the aggressor (a licit object) or,

if it were to enter into her intention, to kill the aggressor (an illicit object without exception).<sup>54</sup> Again, without in any way suggesting that the fetus stands to the mother as an aggressor in any manner, it is clear, nonetheless, that, just as it is true that a woman can licitly use requisite (even if lethal) force *on the body* of the aggressor with the sole object of repelling him in order to save her own life, it also is true that a doctor could licitly use a D&C or related procedures *on the body* of the unborn child with the sole object of removing it from the mother's womb and thereby averting the threat that the baby's presence within her is itself posing to the mother's life.

The point is that Aquinas's teaching here sheds a considerable amount of light on our understanding of intentionality. What if, in order to repel an unjust aggressor, the victim's only recourse were to crush his skull with a large stone? Such a state of affairs would almost universally be accepted by moralists as reasonable as long as the act involved no more than the requisite amount of force. Hence, "deliberately using a stone to crush the skull of a human being"—though a human act possessed of its own "basic intelligibility" *in genere naturae*, cannot be characterized in itself as the kind of act Thomas identifies as "de se malus, qui nullo modo bene fieri potest."<sup>55</sup> Nor could any set of actions taken directly on the body of another human being that result immediately and directly in death be considered, without further specification, as an intrinsically evil action.

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<sup>54</sup> Thomas holds that an actual intention to kill a person (*occidere hominem*) can icitly be held only by the authority of the state and only with regard to the guilty. He notes elsewhere, however, that in its "natural species," considered as an exterior act, *occidere hominem* is one, while it can differ in moral species as the object of choice, either as the illicit act of killing, or as the licit object of an administration of justice: "Possibile tamen est quod unus actus secundum speciem naturae, ordinetur ad diversos fines voluntatis, sicut hoc ipsum quod est occidere hominem, quod est idem secundum speciem naturae, potest ordinari sicut in finem ad conservationem iustitiae, et ad satisfaciendum irae. Et ex hoc erunt diversi actus secundum speciem moris, quia uno modo erit actus virtutis, alio modo erit actus vitii [It is possible, however, that an act which is one in respect of its natural species, be ordained to several ends of the will: thus this act to kill a man, which is but one act in respect of its natural species, can be ordained, as to an end, to the safeguarding of justice, and to the satisfying of anger: the result being that there would be several acts in different species of morality: since in one way there will be an act of virtue, in another an act of vice]" (*ST I-II*, q. 1, a. 3, ad 3).

<sup>55</sup> That is, an act which is "in and of itself evil, which in no manner can be rightly done" (see *In II Sent.* d. 40, q. 1, a. 2, corp.; my own translation).

But that is precisely what my friend Kevin Flannery and others *do* discover in the case of craniotomy, salpingostomy, and D&C. They find in each of these behaviors a basic intelligibility that is, in itself, without further specification or qualification, homicidal and therefore intrinsically disordered. Yet, that basic intelligibility is no more or less basic than that of, say, taking a rock and bashing in a skull as part of a performance of self-defense. If they construe the former as intrinsically evil precisely by reason of its basic intelligibility without further specification, they must of necessity construe the latter as unreasonable and intrinsically evil by reason of its substantially identical basic intelligibility without the further specification that could be given (in *each* of these two kinds of case) by reference to the intentionality of the acting person. (i.e., deliberation about possible proposals, settling upon a proposal, and adopting it by choice).

If however, we hold to Aquinas's analysis of self-defense, we can see how intrinsic evil *could* be committed: a person could illicitly choose *to kill* an aggressor in order to save her life by taking the occasion of the threat to her life as *also* an opportunity to satisfy, let's imagine for example, her longstanding hatred of the aggressor. And a doctor who routinely performs on-demand abortions of convenience *could* be illicitly choosing to perform *yet another* one (with its intention to kill the fetus) on the occasion of, and with an *accompanying* intent to avert, the threat to the mother's life presented by her pregnancy.

On the view of those who give greater weight to the basic intelligibility of the act, however, even a doctor who is formally opposed to procured abortion who performs a craniotomy in order to save the mother's life *could not but be intending* a dead embryo/fetus. Indeed, that killing cannot but be directly intended as the object of the will, and the will is necessarily evil because of this object, no aspect of which could rationally be held *praeter intentionem* due to the intrinsic connection between the basic behavior (skull crushing and flushing of the embryo from the tube) and its bringing about death. The killing is not something that "follows from" the behavior; the killing, on their view, is quite precisely the chosen behavior, and it cannot be otherwise.

Yet, as should be apparent, no less is the woman's act of grasping a large stone and bashing it against the aggressor's skull "headed toward" bringing about death. If the latter act is licit on a sound reading of Aquinas, how could the former fail to be?

If Aquinas (with the vast tradition that follows him, including the *Catechism of the Catholic Church* §2263) permits as licit direct

actions against the body of the assailant and recognizes that “killing the assailant” need not be part of the proposal (the moral object of choice) when the victim picks up a large stone and bashes it against the assailant’s skull, *servatis servandis*, “killing the fetus” need not be part of the proposal a doctor adopts when taking direct actions upon the fetus, removing it from the womb in the performance of a D&C, a salpingostomy, or a craniotomy.

More importantly, however, the performance, for instance, of a D&C *qua* abortion (DC1) and the performance of a D&C *qua* removing the fetus (DC2) each has its own distinct moral intelligibility, accompanying mind set, motivations, rationale, and peculiarly distinct set of specific behaviors. *The real difference in moral projects would be borne out in the manner in which they were performed.* DC1 would be carried out just as a standard D&C abortion: the physician would understand that he is “performing another abortion,” and he would perhaps use the curette first directly on the fetus, alternatively suctioning out fetal parts before working on the remaining fetal organ, the placenta, and scraping it free from the uterine wall. The physician might report “regret” that the “pregnancy had to be terminated,” but he nonetheless would understand himself to have performed a “D&C abortion.” DC2 would be carried out differently: there would at least be an apprehensiveness to directly target the fetal corpus with the curette; the physician might reasonably attempt to detach the placenta, avoiding contact with the fetal corpus, and out of respect for the fetus, attempt to remove the baby through the cervical os with a forceps, as opposed to suctioning. If performed by a physician of genuinely pro-life convictions, the whole experience will present itself as tragic and, indeed, traumatic. Were it possible to remove the fetus intact, he would do so; were it possible to remove the fetus to a safe environment (e.g., an artificial womb) he would gladly do so. Bringing about a dead fetus is never a part of what he intends; he excludes that from his proposal, and it is present only *as a foreseen, indeed perhaps immediate, and necessary consequence* of his proposal *to remove the fetus*, whose continuing presence constitutes an immediate danger to the life of the mother (without whose life that unborn person too could not survive). Bringing about a dead fetus does *not* inform the interior act of will; the doctor does not choose to kill the fetus; his project is not about making the fetus dead; his project is about removing the fetus; full stop. N-V