

Fundamental Errors of the New Natural Law Theory

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Abstract. This essay argues that the new natural law theory (NNLT) propounds five errors that place it on a collision course with the traditional Thomistic understanding central to the moral magisterium of the Roman Catholic Church. These root errors are argued to be (1) the denial of the primacy of speculative over practical truth, (2) the negation of unified normative natural teleology expressed in the NNLT doctrine of the putative “incommensurability” of basic goods prior to choice, (3) failure to affirm the transcendence of the common good, (4) negation of the essentially theonomic character of the natural law, and (5) the intentionalist construction of human action. The teaching of St. Thomas Aquinas is held to be a superior light for understanding Catholic moral life. *National Catholic Bioethics Quarterly* 13.1 (Spring 2013): 105–131.

Germain Grisez, John Finnis, John Boyle, and Robert George are well known for their development and application of an account of the natural law that has come to be known—in part owing to adverse criticism—as the “new natural law theory” (NNLT).

The genesis of this account may be observed in an effort to rescue the Church from what these authors viewed as a deficient analysis of natural law, one that (supposedly) obstructed a proper defense of *Humanae vitae*.¹ Seeking new ways to defend the Church’s teaching, NNLT authors, in fact, developed a comprehensive treatment of natural law. It is only just to note that their efforts have been from the outset placed

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¹ See Germain Grisez, *Contraception and the Natural Law* (Milwaukee: Bruce Publishing, 1964); and Germain Grisez, Joseph Boyle, John Finnis, and William E. May, “‘Every Marital Act Ought to Be Open to New Life’: Toward a Clearer Understanding,” *The Thomist* 52 (1988): 365–426.

at the service of the magisterium, and that they have brought into renewed focus the centrality of natural law doctrine for any proper understanding of the Church's moral magisterium or insight into Catholic moral theology and philosophy.

However, and likewise from the beginning, the effort of these authors has suffered strong external criticism both on systematic grounds and for foundational inadequacy with respect to the correct understanding of the teaching of St. Thomas Aquinas—a teaching which is indeed central to the Church's moral patrimony.² A well-known and persistent controversy has thus kept pace with the development of this school of thought.

While there can be no question of treating every intervention or reasoning of NNLT advocates within the compass of a single essay, the NNLT is not merely a loose-knit consensus, but offers a principled and systematic analysis of moral philosophy. Given the important and widespread implications and applications of this theory, it is important to take stock of its strategic departures from the teaching of Aquinas as this has centrally formed the Catholic tradition. A small error in the beginning is great in the end, and as the NNLT has developed and been applied, destructive implications have ensued.

The NNLT involves assertions which the prior commentatorial tradition has never countenanced with respect to the teaching of Aquinas.³ This derogation of Aquinas's teaching has grave consequences, despite—and perhaps to some degree, precisely because of—the fact that the NNLT authors seek to serve the Church. It implies a relative disregard for the actual teaching of Aquinas combined with a seeming confidence that the tradition of Thomistic moral reflection is, at best, merely a less-developed and inferior ancestor of itself⁴ and, at worst, simply irrelevant.

² For example, see Russell Hittinger, *A Critique of the New Natural Law Theory* (Indiana: University of Notre Dame, 1987); Ralph McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (Washington, DC: Catholic University of America Press, 1982); Henry Veatch, *Swimming against the Current in Contemporary Philosophy: Occasional Essays and Papers* (Catholic University of America Press, 1990), especially the last two chapters, “Can John Finnis Bring Off a Revival of Natural Law,” and “Natural Law and the ‘Is’–‘Ought’ Question: Queries to Finnis and Grisez”; and Steven A. Long, “St. Thomas Aquinas through the Analytic Looking-Glass,” *The Thomist* 65 (2001): 259–300.

³ One does not find the NNLT account of “incommensurability of ends” either in the teaching of Aquinas or in any of the prominent Dominican commentators such as Capreolus, Cajetan, Vitoria, Bañez, and John of St. Thomas (John Poinsett); nor their treatment of object, intention, and action; nor their general view of natural law.

⁴ For this phenomenon at its zenith, see John Finnis's *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998). It prominently criticizes actual positions of St. Thomas Aquinas as inconsistent with what the author supposes Aquinas's principles to be. Thus, however, we must be willing to think that Aquinas is a not very penetrating thinker, since, after all, “there are some serious flaws in Aquinas' thoughts about human society. A sound critique of them can rest on premisses he himself understood and articulated better, I think, than his philosophical masters Plato and Aristotle, and much better than Machiavelli, Hobbes, and the other makers or heirs of the Enlightenment.” By

The present essay identifies and briefly addresses five principal errors that set the>NNLT in opposition to the teaching of Aquinas and render it—in this author’s view—unable finally to promote the Catholic patrimony. The essay is written with an attitude similar to that with which Jacques Maritain wrote *The Peasant of the Garonne*, in an effort to identify dislocations introduced under the erroneous belief that the>NNLT is consonant with the teaching of Aquinas and the traditional Catholic understanding of the natural law. In proposing the matter in this fashion, what is provided is summary in nature, and so exposes its author to the charge of inadequate consideration. Yet I have elsewhere argued these systematic issues at length.⁵

Strategic Errors

Five root errors genetically identify the>NNLT and put it on a collision course with the traditional moral magisterium of the Church. These proceed from the more profound and remote to the more practical and proximate. The importance of the more remote principles is often overlooked, given the contemporary prejudice against the importance of speculative truth for practical life. These errors (from which many others flow) are as follows:

- The denial of the primacy of speculative over practical truth
- The negation of unified normative natural teleology: the error of “incommensurability”
- The failure to affirm the transcendence of the common good
- The negation of the essentially theonomic character of the natural law
- The intentionalist construction of human action

The Primacy of the Speculative

The denial of the primacy of speculative over practical truth is perhaps the most formal error defining the>NNLT. As John Finnis articulates this central thesis of the>NNLT, “primary goods” are not derived “from any . . . propositions of speculative reason.”⁶ Aquinas famously teaches that the difference between speculative and practical intellect is accidental. Speculative knowledge is simply for the sake of the truth; practical knowledge is knowledge all the same but is called “practical”

contrast, one might instead judge that these “flaws” are instead proper implications, and that the principles from which they proceed simply diverge from the>NNLT.

⁵ See especially “Aquinas through the Analytic Looking-Glass”; but also “A Brief Disquisition regarding the Nature of the Object of the Moral Act according to St. Thomas Aquinas,” *The Thomist* 67 (2003); *The Teleological Grammar of the Moral Act* (Naples, FL: Sapientia Press of Ave Maria University, 2007); “The Natural Law, the Moral Object, and *Humanae Vitae*” in *Ressourcement Thomism, Sacred Doctrine, the Sacraments, and the Moral Life: Essays in Honor of Romanus Cessario, O.P.* (Washington DC: Catholic University of America Press, 2010), 285–311; and Steven A. Long, “Engaging Thomist Interlocutors” *Nova et Vetera*, English edition, 9.2 (2011): 267–295.

⁶ Finnis, *Natural Law and Natural Right* (Oxford: Clarendon Press, 1980), 46.

because of the accident (*vis à vis* truth as such) of the truth being further ordered to the good of an action.⁷

Thus, one could even know a practical science (which is one that includes doing or making in its object, e.g., ethics) in a speculative way, not because one had a pressing practical ethical dilemma or problem or for the good of any particular proposed action, but for the sake of contemplating the true nature of the good for man. Likewise, when one knows a truth for the sake of the good of an operation—as a participant in a space mission might wish to know certain truths of physics for the sake of their application in engineering to enable him to survive—what could be purely speculative becomes practical by its extension to agency.

Truth is the adequation or conformity of mind and thing, and practical truth is truth that is ordered to the good of an operation. As Aquinas teaches in the *Summa theologiae*, “the practical intellect knows truth, just as the speculative intellect, but it directs the known truth to operation.”⁸ Thus, this difference of speculative and practical intellects is, as Aquinas expressly says, “accidental”—for *all* truth as such involves conformity of knower and known, and the practical intellect knows truth “just as the speculative intellect,” but (and this is accidental to truth as such) it further orders this truth to the good of an operation.

This may seem an abstruse and practically meaningless proposition. But practical knowledge clearly presupposes a desire to act (the determination to *do* something springs either from desire or fear, and fear presupposes prior desire for some good perceived as threatened). The desire to act is clearly itself prior to forming an intention with respect to what is to be done, and to deliberation and choice of the means. Yet this desire to act presupposes knowledge. Since practical knowledge is *downstream of*, and *consequent upon*, a knowledge *preceding* desire, this prior knowledge cannot be practical and is necessarily speculative. Hence, all practical knowledge presupposes and depends on a prior *speculum* or speculative truth, without which no practical operation will or ever could ensue. Speculative knowledge is always prior to the entire practical order, which necessarily reposes on the foundation of such knowledge.

Those who affirm with Aquinas the priority of the speculative to the practical are not claiming, as NNLT authors such as Robert George have argued,⁹ that one may derive practical conclusions containing reasons for action from premises that do not include reasons for action. To the contrary, Aquinas teaches that there is

⁷ Thomas Aquinas, *Summa theologiae* (*ST*) I, q. 79, art. 11, *sed contra*, *resp.*, and *ad 2*.

⁸ *Ibid.*, *ad 2*.

⁹ See Robert P. George, “Natural Law and Human Nature,” in *Natural Law Theory: Contemporary Essays*, ed. Robert P. George (Oxford: Clarendon Press, 1992), 31–41, especially, for example, 38: “We cannot deduce or infer reasons for action from premisses that do not include reasons for action. We cannot deduce or infer basic reasons for action from anything.” This is an unexceptionable proposition; the problem resides with its application to the priority of the speculative to the practical, as though reality as such were deprived of *natural ends* the knowledge of which is *presupposed* to practical cognition, because prior to practical volition and intention.

speculative knowledge of reasons for action as a necessary condition of appetition and the ensuing formation of intention, deliberation, and so forth: that the “nature of things”—the teleological order of the universe as knowable by reason prior to volition, intention, and choice—includes normative reasons for action. Aquinas teaches us that the knowledge of an end is prior to the desire for it, and thus prior to its intention, so that always the speculative is first and the practical second. Thus, if one were, for example, to be misguided with respect to the nature of the good for man—in error regarding the end—practical wisdom would be drastically impeded.

Affirming the primacy of the speculative, and the accidentality of the distinction between practical and speculative knowledge, in no way denies that there are *per se nota* truths pertaining to practical reason, *precisely because the operations of practical reason are themselves constituted as such dependent on prior speculative knowledge*.¹⁰ The practical intellect knows truth just as does the speculative intellect and orders the known truth to the good of an operation—having for its object good under the aspect of truth as ordered to operation—and so practical reason is gestated in the womb of speculative knowledge. Practical knowledge, simply speaking, devolves from prior speculative cognition, which lies at the origin of volition, inclination, and subsequent intention. It is accidental to speculative knowledge that it should ignite desire, but it is not accidental to the teleological ordering of human nature that this should be the case.

Knowledge as such is speculative, involving adequation of knower and known, and practical cognition is distinguished by something accidental to knowledge, namely, the order to operation. That it is distinguished by something accidental does not mean that this accidentality does not bring with it its own distinctive characteristic features. Practical knowledge has distinctive concerns and considerations not found in purely speculative knowledge, because the mode of the knowing flows from the end of the knowing, and the end of practical knowing is the truth of the good of an operation. Nonetheless, the very reason for these distinctive features is the ordination of knowledge to operation, and that knowledge be ordained to operation is accidental to knowledge *as such*. Rather than depriving practical knowledge of its distinctive features, the recognition that practical knowledge presupposes and devolves from prior speculative cognition addresses the foundation of the practical as such.

¹⁰ One sees the contrary view in the words of John Finnis (*Aquinas*, 89–90): “Some commentators on Aquinas have imagined that they are such propositions, on which a ‘practical’, i.e. directive, character is conferred by the intervention of some act of will. Such a view not only contradicts Aquinas’ conception of the first practical principles as ‘founded on’ an absolutely first practical principle whose form—the form which makes every practical principle and proposition *practical*—is neither indicative nor imperative, but gerundive and directive. It also hopelessly contradicts his basic and pervasive understanding of will—that it is response to reasons. Practical intelligence is not slave to the will any more than it is the slave of the passions.” Of course the practical intelligence is not “slave to the will”—neither the fixed foundations and limits of practical reasoning nor prudential circumstances are simply matters of will. But the practical intelligence *qua* practical *necessarily presupposes* willing, and that willing necessarily is informed by and derivative from prior speculative knowledge.

While the speculative may be considered in precision from the practical, the converse is never true, because the practical implicitly and actually presupposes the speculative. Hence, the effort to separate from the speculative, for methodological purposes, and then reconnect later, is badly misconceived from the outset. Prior to volition and intention there is no practical reasoning; and prior to desire there is no volition or intention. It follows that the knowledge *prior* to desire, and *a fortiori* prior to volition and intention, is not practical but rather speculative knowledge. As Aquinas writes, “Now the first formal principle is universal ‘being’ and ‘truth,’ which is the object of the intellect. And therefore by this kind of motion the intellect moves the will, as presenting its object to it.”¹¹

This *speculum* is at the heart of every practical cognition, like the grain of sand around which a pearl will form. One does not deny the distinctiveness of the pearl to note that not all grains of sand are the start of the formation of a pearl, so that it is accidental to the sand that it be the beginning of a pearl. Likewise, it is accidental to knowledge as such—which is defined by speculative adequation—that it be further ordered to the good of an operation. The speculative as such and precisely viewed is not practical, but the practical is constituted in necessary dependence on the speculative.

The error of denying the primacy of the speculative is closely related to the NNLT denial of unified normative natural teleology. “Ought,” we are told, cannot be inferred from “is”;¹² practical implications cannot be inferred from speculative knowledge.¹³ But inasmuch as nature *is* ordered to end as its good—a truth from which we may abstract, but which is real all the same—this ordering cannot help but supply reasons for action and “oughts.” And while it is accidental to some speculative knowledge as such that it engenders inclination, it is not accidental to human nature that it is ordered in such a way that knowledge engenders appetite. Nature and good are not antipodes, despite the conjoint negations of analytic logicism and continental a priorism. Man’s reason is a “measured measure.” It is not itself the measure of the things that are from nature, although it is the measure of our action¹⁴—in other words, in order for our reason to be the proper measure of our acts, our reason must first be measured and normed by reality, by that which is.

One recalls what our late pontiff Blessed John Paul II wrote in n. 83 of *Fides et ratio* regarding “the need for a philosophy of genuinely metaphysical range, capable, that is, of transcending empirical data in order to attain something absolute, ultimate and foundational in its search for truth. This requirement is implicit in

¹¹ *ST I-II*, q. 9, a. 1: “Primum autem principium formale est ens et verum universale, quod est obiectum intellectus. Et ideo isto modo motionis intellectus movet voluntatem, sicut praesentans ei obiectum suum.”

¹² See, for example, John Finnis, *Natural Law and Natural Rights*, 47: “Aristotle and Aquinas would readily grant that *ought* cannot be deduced from *is*.”

¹³ John Finnis, Germain Grisez, and Joseph Boyle, “Practical Principles, Moral Truth, and Ultimate Ends,” *American Journal of Jurisprudence* 32 (1987): 99–151, 101–102; 127.

¹⁴ *ST I-II*, q. 91, a. 3 ad 2.

sapiential and analytical knowledge alike; and in particular it is a requirement for knowing the moral good, which has its ultimate foundation in the Supreme Good, God himself.” A philosophy of genuinely metaphysical range is indeed a “requirement” for adequate understanding of the moral good.

Owing to its negation of the primacy of the speculative,¹⁵ the>NNLT severely derogates the *essentially theocentric and theonomic character of the doctrine of natural law*, something of which I will speak below. In its superordination of the practical to the speculative, it bears more likeness both to the teaching of Immanuel Kant and of John Duns Scotus than it does to the moral teaching of Aquinas. This view is, as it were, the “original sin” of the>NNLT against the light of the intellect and the supremacy of the speculative at the heart of Aquinas’s doctrine of natural law.

*Negation of Unified Normative Natural Teleology:
The Error of “Incommensurability”*

The negation of the primacy of the speculative with respect to the practical is the formal element that is most determinative of the later failures of the>NNLT. But the most important *material* judgment that flows from this loss of the primacy of the speculative is the judgment that unified normative natural teleology is not foundational for natural law. This is so fundamental an error that a book would be required to do justice to its manifold implications. From ordinary ethical analysis to the furthest reaches of bioethics, the>NNLT refusal to admit that unified natural teleology is normative for moral judgment—that the order of precepts follows the order of inclinations, which follows the order of ends¹⁶—dooms its teaching to the confines of deontology and a new casuistry.

It is indeed largely because of this failure to acknowledge the normative function of natural teleology that the>NNLT denies that the first precept of the natural law—to do and pursue good and avoid evil—is a genuine moral precept.¹⁷ More importantly, the denial that the hierarchy of ends defining the nature of the good is normative for our moral life¹⁸ fails to see that ends are reasons for action, and that the ordering of nature toward ends is a truth of nature. As noted above, it is not that reasons for action are logically deduced from propositions that contain no reasons for action. Rather, it is the case that natures are teleologically ordered—that natures

¹⁵ See Finnis, *Aquinas*, 89–90.

¹⁶ *ST* I-II q. 94 a. 2.

¹⁷ See Finnis, *Aquinas*, 86–87.

¹⁸ See Finnis, *Natural Law and Natural Rights*, 92–95, the section titled “All Equally Fundamental” and especially the lines on 93: “Each is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence, there is no objective priority amongst them.” Note also 112–118, especially 112, regarding basic goods: “They are incommensurable.” The>NNLT denies any hierarchy of “basic” goods prior to choice. Of course, for Aquinas this is impossible, for anything that is not desired as the *finis ultimus* is necessarily desired as ordered to it (*ST* I-II, q. 1, a. 6).

and actions are for the sake of an end. Since natural teleological order exists, real implications for action flow from knowledge of this order.¹⁹

The quintessential act of modern conjury occurs in the supposition that because one may abstract from teleological order, it therefore does not exist. But our capacity to abstract from natural order does not imply its nonexistence. The truth that hypothetico-deductive physics largely abstracts from the ordering of natures toward ends cannot supplant the truth that action *as such* can only be understood and denominated in relation to an end. While it is often thought that teleology does not pertain to the cosmos at large but only (at best) to deliberate human actions, in fact no agency is intelligible as such without reference to that toward which it tends. (Why would one call something “agency” that does nothing—is not a “doing”—and that neither tends toward anything nor brings anything about?)

Contrary to the Humean supposition that an “ought” cannot be derived from an “is,” the good *exists*. The idea that nature lacks teleology or that speculative knowledge of nature must omit teleology—or that it implies nothing regarding human morality—is erroneous. It is of course true that much of the cosmos is beneath the level of agency and subtends it and is taken up by it as an ant moves a pebble. But agency as such involves motion toward an end—it does not seem that an act that tends toward or does nothing is intelligible as an act.

It has become popular in some quarters—including the NNLT—to speak of natural teleology as though it pertained only to the physical species of actions.²⁰ But “nature” does not only pertain to “lower nature,” and it is the nature of agency in all its analogical extension that implies and requires to be specified and denominated by something that stands in the place of the end. The beginning of wisdom is the realization that reason is not normed by itself. As Aquinas so well puts it, “Human reason is not, of itself, the rule of things: but the principles impressed on it by nature, are general rules and measures of all things relating to human conduct, whereof the natural reason is the rule and measure, although it is not the measure of things that are from nature.”²¹ Or, to put it simply, in order for reason to be an adequate rule or measure of conduct, it must first receive—have “impressed on it by nature”—the rule to which it must conform, so as to be able to serve as an adequate rule and measure for conduct.

¹⁹ Potencies are ordered toward, and determined by, acts, and not vice versa; there is no contradiction in affirming that the potency is determined by the act, while the act—because potency is accidental to act as such—is not defined by the potency.

²⁰ See John Finnis, Germain Grisez, Joseph Boyle, “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” *The Thomist* 65.1 (January 2001): 1–44, especially 23–25, where Aquinas’s distinction between the physical and moral species is interpreted in such a way as to render the natural teleology of the act of craniotomy to be irrelevant to the judgment of its moral species (an argument that runs through the remainder of the essay).

²¹ *ST* I-II q. 91, a. 3, ad 2: “Ad secundum dicendum quod ratio humana secundum se non est regula rerum, sed principia ei naturaliter indita, sunt quaedam regulae generales et mensurae omnium eorum quae sunt per hominem agenda, quorum ratio naturalis est regula et mensura, licet non sit mensura eorum quae sunt a natura.”

Reason is not its own norm, but it is normed by the order of things as impressed by and participating in the Divine Mind. Aquinas's account affirms the secondary causality of the human mind within divine illumination, which is not a direct illumination but rather a participated illumination, whereby the intellective power enables man to apprehend, conceive, understand, and judge the order impressed by the divine wisdom on nature, and to receive this order in a *preceptive* manner as articulating reasons for conduct. The rational basis for our ethical lives transcends practical reason while also interiorly ordering it.

The NNLT does admit that there are “basic” natural goods or ends. But according to the NNLT these goods exhibit no morally significant order prior to choice. This judgment implicitly denies the unity of human nature and good: it denies the unification of natural ends according to their diverse teleological relations to the good life as an ordered whole. The name for this view—that putatively “basic” goods (for example, life, practical reasonability, religion, play, knowledge, sociability, and practical reasonableness²²) are not ordered amongst one another hierarchically in a morally significant manner but rather are strictly incomparable—is “incommensurability.” The NNLT holds that these basic goods or ends are “not co-measured” by one another, are not “parts” of that whole of the good life that can be compared in their relation to the whole, such that some would be naturally nobler than others.²³ Of course, for the NNLT authors, the basic goods as such are said to be nobler than merely instrumental goods which are depicted as simple utilities.

Basic goods in themselves are said in the NNLT not to be subject to any morally significant order prior to choice.²⁴ It is choice that is held to impose a morally significant order on these goods, while in themselves these goods are held not to be naturally ordered one to another. One sees here that, contrary to the tradition of Catholic moral reflection, which has been decisively formed in relation to the teachings of Aristotle and Aquinas, the NNLT embraces the quintessentially modern view that moral order is wholly consequent on choice rather than naturally prior to and norming such choice.

Thus, for the NNLT, unified normative teleology as impressed by God on nature prior to any choice does not rule or measure moral judgment, at least not beyond the naturally given distinction between basic and merely instrumental goods. Rather, what rules or measures moral judgment is simply the basic goods themselves and the recognition that one should never act contrary to them. But no morally significant positive ordering of these goods prior to choice is insisted on as essential to the good. This foundational separation from natural teleology strongly distinguishes the NNLT from the teaching of Aquinas.

For Aquinas, as for Aristotle, human nature as a whole is teleologically ordered. Teleology is not something that pertains only to “lower” or “physical” nature, but

²² There is some difference regarding the exact constitution of the list, but these seven have been named as constituents by John Finnis in *Natural Law and Natural Rights*, 85–90.

²³ *Ibid.*, 112–118.

²⁴ *Ibid.*, 92–95.

pertains to human nature as a unified whole. Action as such cannot be denominated apart from end. Further and most prominently, for Aquinas and Aristotle the good for man is an ordered whole.²⁵ If putatively basic “goods” are not ordered to the end of the good life, why should one denominate them as “good”? And if they are ordered to the end of the good life, then they are “co-ordered” and “co-measured” in relation to it, they are “commensurable,” that is, comparable in their ordering, according as they are more or less comprehensive of the good for man.

Commensuration is not necessarily crassly quantitative: goods are teleologically commensurated. Thus, life is a good and an end, but it is not the supreme good and end; it is good not only *in itself*, but precisely as *further ordered* toward other and *nobler* ends, such as justice, truth, friendship, and wisdom. In a sense, merely by acknowledging that the putatively “basic” goods are “basic,” the NNLT admits this much commensuration: each shares in a common *ratio*. But for them, this *ratio* does not admit of order. Thus, all basic goods are basic but none is loftier than any other, and there is no *order* that is requisite to the good beyond the negative order of not acting directly against a basic good.

Yet, to the contrary, were any good not ordered toward the good life as such and as a whole, then no one could ever have a reason for pursuing such a “good.” Such putatively “nonordered” and “basic” goods would be like roads that end in the middle of nowhere, leading to nothing. Such a view is simply incompatible with the teaching of Aquinas, according to whom it is impossible for one agent to have two absolutely last ends, and for whom whatever is not the last end or *finis ultimus* is desired as ordered to the *finis ultimus*.²⁶ Thus, the entire order of proportionate natural ends is now desirable in relation to the supernatural good of beatific vision, which is the final end of man, and is judged in relation to this end, as likewise natural ends may be judged among themselves. Some ends are nobler than others: for example, wisdom is nobler than life because it is truer to say that we live so as to achieve wisdom than it is to say that we have wisdom simply to live; and the whole order of proportionate natural ends is further ordered in grace toward the final end of supernatural beatific vision.

The moral life is not simply a non-ordered list of goods that one should not act against, because the prior and classical question must always be decisive: namely, what is the right ordering of goods as defining the nature of the good for man? Granted that life is a great good, it is inferior to the good of truth and likewise to the goods of justice and friendship, because it is part of the very core of the goodness of life that it is by nature *further ordered* to these loftier goods and ordered to them so as to be perfected by them. To suggest that life is merely one among other goods that have no morally significant order prior to choice is to lose the moral as such, to lose the question of the order that defines the nature of the good. It is virtually a descent into sociology (people seek these goods) while losing the rational element in moral thought (what is the normative order of these goods that should inform our actions).

²⁵ *ST* I-II q. 1, art. 4, 5.

²⁶ *Ibid.*, q. 1, a. 5.

The proposition that a lower good is ordered to a higher good is understood by some NNLT authors to imply that knowledge of the hierarchy of ends or goods should by itself be sufficient to provide an answer to practical questions. Since it is not possible to reach immediately practical conclusions simply from the hierarchy of ends, these authors consider such hierarchy to be otiose for moral reflection.²⁷ But the hierarchy of ends is only the major premise for addressing such questions, since prudential knowledge of circumstances, gifts, limitations, and so forth is always required. That one cannot deduce from the superiority of wisdom to life whether to contemplate or obtain medicine does not alter the proposition that wisdom is a good nobler than life, and that any reasonable moral understanding should acknowledge this normative order—an order which, taken together with prudential specification, entails practical implications.

The compass directions will not answer the question of whether one needs to detour or not; but the compass directions do objectively measure whether one is approaching, or moving away from, the objective. Likewise, without the hierarchy of ends, it is impossible to determine whether one is progressing toward the good life or regressing from it.

Also, on the NNLT account, what constitutes “acting against a good”? Is it only an act of commission? Is any least positive engagement with respect to all the goods *required*? If so, how can such a positive *minima natura* be determined? If one must “to some degree” act toward all the basic goods, what determines the requisite “degree”? If there is a way of assigning this, why is this not itself an instance of the putatively impossible commensuration? If no way exists to determine the requisite degree of positive commitment that must be shown each of the basic goods in action, is the matter then wholly subjective? In that case, why could not someone, on the ground of the NNLT, simply pursue the good of play but never the good of friendship or religion?

The NNLT claims that there is no morally significant order among goods prior to choice. But it seems simply contrary to the truth to deny that every life—in accord with its own unique gifts and circumstances—must nonetheless recognize the primacy of truth and wisdom. Goods are not morally incommensurable prior to choice, but if they were, all commensuration would be arbitrary. On such a hypothesis it would then be reasonable to judge wisdom and friendship to be *solely for the sake of staying alive* rather than as goods superordinate to life. This is manifestly false.

Good action is governed by reason and right appetite, both of which are normatively specified by teleological order. Rather than understand the dignity and importance of the order providentially impressed on nature from the beginning, the NNLT treats reason as implicitly *constitutive* of the good rather than as merely *regulatory* of the good in action (for the good *in itself* is prior to our use of reason and indeed the reason for our action).

²⁷ See Robert George, “Recent Criticism of Natural Law Theory,” *University of Chicago Law Review* 55.4 (Autumn 1988): 1371–1429.

Aquinas says that every creature passively participates in the eternal law (the type or idea of the government of things in God), whereby it receives its being, nature, powers, ordering of these powers to the end, and even the activation of these powers toward the end; but that man also participates in this order rationally and actively. The human creature as rational is capable of receiving the whole ordering of nature *preceptively*, that is to say, *as articulating reasons to act and reasons not to act*. This *preceptive* rational reception of the divinely impressed order is what Aquinas calls the *rational, active participation in the eternal law*.

Aquinas teaches that natural law is *nothing other than a rational participation in the eternal law*. But this rational participation in the eternal law *necessarily presupposes and implies the prior passive participation in the eternal law*, whereby the creature passively receives its being, nature, and natural ordering. For Aquinas, natural law is not a doctrine of direct divine illuminationism—even though it *is* true that the natural law is the divine light as human reason naturally participates in it. Nor is natural law an a priori structure of human knowing. Rather, natural law is the rational *preceptive* participation of the divinely impressed ordering of human nature, which ordering accordingly and as rationally received is morally normative.

Contrary to this understanding, for the NNLT, passive participation appears to be taken merely for a neutral physical precondition of natural law rather than as possessing any morally normative function. Thus, the order to the end is viewed as a mere “physical” datum giving no more than a physical species of an act, whereas the moral species is understood as consequent on a reason not *normed* by teleological order but *replacing or substituting for* teleological order. Teleological order is doomed, in this understanding, to be taken for a merely lower physical reality subject to a reinterpretation of reason emancipated from natural teleology.

In this specific respect, the NNLT is profoundly similar to the teaching of Kant—although it contains more natural density inasmuch as the list of basic goods provides at least some natural content. Nonetheless, despite this greater natural density, the “basic” goods are held to be subject to no morally significant order prior to choice. This clearly implies that neither the divine wisdom as source of all morally significant order, nor any common good whatsoever (i.e., neither God as extrinsic common good of the universe, nor even the common good of justice, or truth) is morally significant prior to choice. But *sed contra*: it is precisely the ordering of human nature, society, and the universe—even the order *of* the universe to God—that is of moral significance in norming moral choice.

This is of great importance for many reasons. First and most prominently, it is important because it dooms the NNLT to provide analyses of moral goods that are so infected with the modern and postmodern rejection of natural teleology as to be incapable of providing an integrally Catholic account of moral life. Second, it is important because it contributes to the loss of nature in the account of natural law in all its departments, including the analysis of human moral action.

The loss of morally significant teleological order prior to and governing choice imposes great burdens on the NNLT, especially in coping with questions of social and political order in themselves and in relation to divine revelation. The order of lower goods to higher goods is a necessary feature of moral and political life (and the

reason why the political common good cannot admit of the suppression of religious truth). The>NNLT account of incommensurability would of itself doom the theory to an extremely strict deontology. For this reason, the>NNLT has developed an account of the object of moral action, and intention, which enables the theory to escape from the limitations of its doctrine of incommensurability while liberally making use of the argument that natural teleology is merely and reductively physical rather than moral.

The negation of unified normative natural teleology as morally significant prior to choice implies at least two further enormities as already suggested above: *the loss of the transcendence of the common good*²⁸ and *the loss of the theocentric and theonomic character of natural law*.

Negation of the Transcendence of the Common Good

It is without doubt the strong tendency, if not the completely settled teaching, of the>NNLT to treat the common good as purely an instrumental good.²⁹ It is difficult to see how it could be otherwise, given the doctrine of incommensurability, unless it were held that the common good had no moral significance prior to choice *despite* its objectively greater nobility (which makes no sense whatsoever, since that which is objectively more noble is just so far more an end and so more governing, more regulative with respect to the good life).

Certainly even apart from the express teaching of incommensurability, the denial of the transcendence of the common good is a teaching that may be inferred from general>NNLT analysis of moral questions (e.g., from the analysis of the death penalty or just war). But manifestly, from the doctrine of the “incommensurability” of goods, it is impossible that prior to choice a good be morally constituted as superordinate, much less as transcendent. This of course has the drastic effect of implying that God as the extrinsic common good of the universe, and as the common good of all ordained in grace to the beatific vision, is not of superordinate moral import prior to choice nor transcendent of merely private good.

While the writings of>NNLT authors seem to affirm that the common good is merely instrumental, such a view also seems to be necessitated by pivotal moral teachings of the>NNLT. Thus, for example, the death penalty is opposed on principled

²⁸ I am indebted to the work of Charles de Koninck, whose *The Primacy of the Common Good against the Personalists* and *In Defense of St. Thomas* constitute the most masterful treatment of the common good in the commentatorial tradition. See *The Writings of Charles de Koninck*, vol. 2, ed. Ralph McInerney (University of Notre Dame Press, 1999).

²⁹ For example, see Finnis, *Aquinas*, 247: “The thought that we cannot live reasonably and well apart from a *civitas* is consistent with the proposition that the common good specific to the *civitas* as such—the public good—is not basic but, rather, instrumental to securing human goods which are basic (including other forms of community or association, especially domestic and religious associations) and none of which is in itself specifically political, i.e. concerned with the state. If that proposition needs qualification, the qualification concerns the restoration of justice by the irreparable modes of punishment reserved to the state government.” To the best of my knowledge>NNLT authors have not acknowledged the transcendence of the common good analogically speaking, including the common good of civil society.

grounds that seem to imply that it is a *malum in se*, an evil in itself,³⁰ despite the truth that the rational justification for the death penalty has been embraced by all the fathers and doctors of the Church, other than Tertullian (who died outside the Church). Even the reservations of Lactantius pertain not so much to the penalty in itself, but to his distrust of secular courts and his objection to Christians seeking to address evils by recourse to them. Augustine's teaching is clear.³¹ Nor does *Evangelium vitae* or any other font of authoritative magisterial teaching conform to the NNLT insistence that the death penalty is a *malum in se*.

As Aquinas puts it, the judge prefers the good of justice to the life of the individual, bearing the individual no malice.³² Nor does Aquinas's reference to the criminal descending to the level of the beasts in action imply denial of substantive human dignity, as it pertains to acquired dignity.³³ The ground of the permissibility of state-imposed penalty as such is the transcendence of the common good—not merely as a quantitatively greater good, but a good more communicable to many, more intelligibly irradiant, and more universal. The reference to the defect of the criminal with respect to acquired dignity goes to the *applicability* of penalty. Inasmuch as individuals preserve their acquired dignity, that is, they do no grave wrong, it is unreasonable to slay them or impose any other penalty on them for that matter; but given the performance of grave evil, the imposing of a penalty of death (or for that matter other grave penalties) may be justified, owing to the need to punish grave wrongdoing.

It is precisely the substantive dignity of the very person who gravely harms his acquired dignity by vicious conduct that renders him subject to judgment and punishment (a nonrational agent can merit punishment only equivocally). Of course, such a penalty is a matter of prudence, and it may be imprudent to have recourse to such punishment.³⁴ But there is no foundation either in the teaching of the Church fathers and doctors or in Sacred Scripture for the claim that the death penalty is intrinsically immoral.

For the fathers and doctors of the Church—including, conspicuously, Augustine and Aquinas—the common good of justice in society transcends the good of

³⁰ Finnis refers to the intentional execution of guilty felons in just punishment as an “inherently immoral means.” *Aquinas*, 282.

³¹ For St. Augustine, see *The City of God*, 1.21.

³² *ST* II-II, q. 25, a. 6, ad 2.

³³ *Ibid.*, q. 64, a. 2, ad 3.

³⁴ What penalties are reasonable at a given time in a society is a function of prudence. The principled justification of the death penalty in Catholic tradition does not imply that every society must or should impose it, nor that circumstances cannot be such as to render it counterproductive or harmful. But the Roman Catholic moral tradition of centuries, the clear consensus of the Fathers and Doctors of the Church, uniform catechesis over centuries, and unequivocal pronouncements such as Pope Pius XII's teaching of the essential validity of the penalty (see *Acta Apostolicae Sedis* [1955], 81–82, recounting this teaching of Pope Pius XII) all indicate its principled legitimacy. One observes the high theological note represented by the requirement of an acknowledgment of the validity of the death penalty in order for the Waldensians to re-establish ecclesial communion (*Denzinger*, n. 425).

the life of the individual. Clearly for Aquinas, the life of the individual is ordered to the common good, which is understood not merely as a quantitatively greater good, but as a more formal and superordinate good.³⁵ The common good is a good that is one in number and that is by its nature more communicable to many, more intelligibly irradiant and causally diffusive. It is good *for* the individual without being merely an individual good. Unlike private goods, which, if one has, another does not, the common good is more diffusive. Justice is good for the individual, but it is not merely any individual's good. Truth may be possessed by many without diminution; likewise, if one does justice to one person, one is not required to do injustice to another (whereas in the distribution of fixed material goods to give more to one is to give less to another).

While, for economic purposes, it is completely licit to think in terms of common utilities—much economic analysis that is helpful for the common ordering of social affairs proceeds in this way—nonetheless, no one reasonably sacrifices his life for a common utility. By contrast, the common good, understood as a good or end more communicable to many by its nature, and as transcending private or individual good, is a noble end of our labor, striving, and sacrifice. The philosophic analysis of the common good considers not merely economic common utilities, but goods that by their very character are more rationally diffusive such as to be perfective *of* and *for* the individual, without thereby becoming individual or private goods. These are goods such as truth and justice, or God as extrinsic common good of the universe, or the common good of the Church, or the common good of the Heavenly City in supernatural beatitude.

By analogy of attribution, we come to speak of the social arrangements within any society for the sake of such common goods as “the common good of society”—much as we call the courts, the police, the prisons, and so forth, “the justice system” all the while realizing that there are *de facto* imperfections and failings incompatible with justice in this system. But in the absence of a realistic sense of the common good as not merely a quantitative commonality, but as an end by nature more communicable to many, more universal, and more irradiant in good, the moral superordinacy of the common good is lost. Episodes such as 9/11—where, when everyone else *descended* from and *fled* the burning buildings, courageous firefighters *ascended* to serve the common good—cannot be properly understood without fathoming the transcendence of the common good.

The failure to affirm the transcendence of the common good also deleteriously affects the NNLT understanding of the relation between divine revelation and the political order. Because political society is *further, if remotely, ordered* to the ultimate good of persons—if it is not so ordered, it is not *good*—any attempt of the political

³⁵ *ST* II-II, q. 152, a. 4, ad 3: “ad tertium dicendum quod bonum commune potius est bono privato si sit ejusdem generis.”—“The common good take precedence of the private good if it be of the same genus.” See also q. 58, a. 7, ad 2, which makes clear that the difference between individual and common good is something formal: “The common good of the realm and the particular good of the individual differ not only in respect of the *many* and the *few*, but also under a formal aspect.”

state to suppress the liberty of persons to discover divine truth, or to suppress the living of such truth, closes the political order off from loftier common goods to which it is really ordered. Just insofar as the political state seeks to dis sever society from higher goods to which it is genuinely ordered, the state renders itself no longer to constitute an authentic common good: *mala lex nulla lex*. Thus, the political state is limited not only from below by the vibrancy of private goods but from above by the transcendence of loftier common goods both natural and supernatural.

Hampered by the abnegation of the higher speculative truths for practical life, and of any awareness of the normativity of teleology whether in nature or grace, the NNLTL authors seem to deny the transcendence of the common good and at least to tend toward an instrumentalist account. This strongly disrupts the moral understanding of social, political, and legal order, while it also contributes, alongside the other aforementioned errors, to the loss of the theocentricity and theonomic character of the doctrine of natural law.

Negation of the Essentially Theonomic Character of Natural Law

If speculative truth is not understood to be prior to, and presupposed by, the practical as such; if natural teleological order is not normative for our moral judgment; if there is not, then, an *order* of common goods reaching even to God as the extrinsic common good of the universe; then it will be difficult to retain what for Aquinas is absolutely essential to the natural law, namely its theocentric and theonomic character.

Because God is the first efficient cause, and is also the last final cause, that is, the final end, of the universe, it follows that to deny that teleological order is morally significant prior to choice is to deny that the divine wisdom is morally normative for man prior to choice. This in itself is incompatible with the Catholic tradition of moral theology. In any case, the theonomic character of natural law is reflected, for Aquinas, in the very definition he proffers for the natural law as “nothing other than the rational participation of eternal law.” A thing’s definition is not, one would think, accidental to it. And contrary to the views of those for whom natural law is a pure praxiology generating right analysis of particular moral questions, for Aquinas it is the *precondition* for right exercise of practical reason. It is the normative theological and metaphysical order that undergirds, makes possible, and flows into our moral logic. On this older Thomistic view, our practical reasoning is epistemically and ontologically derived from the natural law. It is derivative of the larger cosmic story rather than supplanting it. While through our practical moral reason we actively participate in the divine government of our own actions, the precondition for this active participation is the mind’s prior *adequatio* or conformity to the right end. For it is knowledge of the end which is the root of right appetite, and all practical moral judgment must be conformed to right appetite. As Aquinas writes in question 19 of the *Prima secundae* of the *Summa theologiae*, “Now in regard to the means, the rectitude of the reason depends on its conformity with the desire of a due end: *nevertheless the very desire of the due end presupposes on the part of reason a right apprehension of the end.*”³⁶

³⁶ STI-II, q. 19, a. 3, ad 2: “In his autem quae sunt ad finem, rectitudo rationis consistit in conformitate ad appetitum finis debiti. Sed tamen et ipse appetitus finis debiti praesupponit

It is the divine wisdom that impresses the normative teleological order on creation, and it is the function of our reason to apprehend this order so that it may norm our action appropriately. Because law proceeds from the mind of the legislator to the mind of the recipient, this divinely impressed ordering is not properly “law” save insofar as it is rationally received as articulating reasons for action. But it is the very same passively participated order that, when received rationally, is the natural law. Just as the ordering of the ink in a book does not function as it is designed to do save insofar as it is read, so the order in the cosmos and in particular in human nature is ordered to be received by man not only *de facto* and ontologically, but *rationally* and as providing the normative ground of conduct.

Having broken the relation between speculative and practical, between teleological order and rational precept, the>NNLT is more or less forced to the conclusion held so plainly by John Finnis, “that natural law can be understood, assented to, applied, and reflectively analysed without adverting to the question of the existence of God.”³⁷

This is wrong for several reasons. First, because there are natural moral obligations to God which bind under natural law, and which accordingly cannot be “understood, assented to, applied, or reflectively analyzed without adverting to the question of the existence of God.” The fideist tendency of the>NNLT consequent on the loss of the theocentricity of natural law doctrine is here on prominent display. For Aquinas, the duty of religion is comprised under the virtue of justice,³⁸ since one owes God public and private worship, thanks, and honor as the infinitely good source of every finite good. But this means precisely that natural law doctrine must advert to the existence of God as a simple matter of justice: since if there is an infinitely good First Cause, then it would be unjust not to offer thanks to the Cause of all good things; and if there is not such a cause, it would be delusive to offer such thanks and unjust to expect others to do so.

Second, the very *form* of natural law is “*nothing other than a rational participation of the eternal law.*”³⁹ This clearly implies that *were there no eternal law, there would be no natural law.* The reason is clear, namely, that the normativity of natural teleological order is a function of its impress by divine wisdom, such that this order comprises genuine *law*, proceeding from the mind of the legislator to the mind of the recipient. As Yves Simon suggested, the last word in natural law is not mere facticity, but the mind of the lawgiver.⁴⁰ Indeed, the proper sense of law requires and implies promulgation by the lawgiver.

Of course, this *does not mean* that one must be aware of the reality of God to have *any minimal degree of knowledge of the natural law whatsoever.* The proposi-

rectam apprehensionem de fine, quae est per rationem,” emphasis added.

³⁷ John Finnis, *Natural Law and Natural Right* (Oxford: 1980), 49.

³⁸ *ST* II-II, q. 81, a. 2.

³⁹ *Ibid.*, I-II, q. 91, art. 2, resp. and ad 2.

⁴⁰ Yves Simon, *The Tradition of Natural Law: A Philosopher’s Reflections*, ed. Vukan Kuic (New York: Fordham University Press, 1992), 136–141. This is one of the greatest and most lucid short works on the natural law ever written.

tion is not epistemic. Rather, the proposition refers to the *being and nature of the law*⁴¹—that is, although one may know aspects of natural law before realizing that natural law implies and presupposes the reality of the eternal law, this law *as such* is not finally intelligible either formally as law, or in its being, or even in its full content, apart from the reality of God. It is not intelligible *qua* law apart from God, because a law proceeds from a mind to a mind, and is not merely a descriptive but a prescriptive proposition. The unified normative teleology impressed by God on creation is normative precisely *qua* participation of the uncreated divine wisdom. It is not intelligible in its being apart from God, because nothing can be wholly apart from divine causality, and a rational participation of *nothing* is not natural law. It is not intelligible even in its content apart from God, because the natural law *itself includes duties toward God*.

Thus, to suggest that the majesty and solemnity of the divine order is irrelevant to natural law doctrine clearly is to promulgate a species of natural law doctrine not only other than that of Aquinas but alien to Catholic tradition. It is, of course, *inconvenient* that this should be true in a society in which secularist protocols are juridically enforced, such that any piece of legislation that seems to have a “religious” intent may be subjected to arbitrary limitations or outright nullification. But the truth is that both natural and human law participate in eternal law both in their being and in their nature *qua* law, and not merely by some extrinsic analogy of attribution to God of a theocratic sort. For the theist, law as law derives from the divine ordering of creation, and absent this divine ordering no law whatsoever could exist or be intelligible as law. Hence, every just law of the state falls within the provenance of God, whether secularist jurisprudence, as exercised by those who deny metaphysical reasoning, acknowledges this or not.

It is, ironically, this inconvenience of classical natural law that accounts for the remarkable political engagement of the NNLT at the hands of its proponents in North America. It is an inconvenience that has invited similar attentions in the past. For example, one thinks of the works of the great jurist Giorgio Del Vecchio,⁴² who attempted to defend natural law on largely Kantian foundations, not least because—in a skeptical climate—the fear obtained that if one must answer all skeptical objections prior to developing an account of practical reason, such an account would never be developed. Yet such an effort is stillborn precisely because the Thomistic doctrine of practical reason is animated from within by foundationally metaphysical judgments. If one needed to hold onto either the doctrine of practical reason or the metaphysics of the tradition, the latter would be the correct choice: because, given the latter (and contrary to the view of the NNLT), the former is actually implicit in relation to the teleological dynamism of man’s actual nature.

In any case, because of the prevalence of agnostic and skeptical modes of thought in academe that are remote from the metaphysical realism of Aquinas, and because the legal culture of the United States of America is particularly affected by

⁴¹ See again Simon, *Tradition of Natural Law*, 62–63.

⁴² See, for instance, Giorgio Del Vecchio, *Philosophy of Law*, trans. Thomas Owen Martin (Washington, DC: Catholic University of America Press, 1953).

the distinctive hostility of the Supreme Court toward religious speech⁴³ and exercise, it becomes positively attractive to be able to forward an account of natural law that putatively has no speculative or metaphysical foundations and requires no reference to God. Thus, despite the effects of the doctrine of incommensurability in implying that there is no morally significant order of basic goods prior to choice, the doctrine of the NNLT has certain limited political and legal advantages in the pathological situation of secularist culture. Yet such advantages are shortcomings inasmuch as they presuppose and proceed from formal error about nature and law.

Natural law doctrine is theocentric, not as an ad hoc entailment of a theocratic view of political order, but as a function of the metaphysical analysis of the being, nature, and intelligibility of law as such. Any just law, promulgated within any society, owes its being and its legal character to its participation in the eternal law. Thus it is not by some *superadded religiosity* that just government participates in the eternal law—rather it is by the very being and nature of just law that it participates in eternal law. The essential point is that all just law and government participates in the eternal law, and that the state receives its power to judge, to punish, and indeed to execute from God. The nature of human society and political government, and the authority to punish or even slay, do not originate in any mere social contract, but in that natural law which is nothing other than a rational participation in eternal law.

Thus, the NNLT remotion, or distance, from the theological, metaphysical, and speculative character of natural law, while offering certain practical benefits given the secularist impositions of contemporary law and politics in North America, does so at the cost of the loss of a correct understanding of law as such and the *ratio* of its just directive authority. A Christian understanding of law and society that honors natural truth, is open to supernatural revelation, and hinges on the theonomic character of natural law, is replaced by an account that renders the role of God in natural law to be extrinsic to natural law doctrine proper. This is simply neither the Catholic tradition nor the teaching of Aquinas. Even apart from its speculative deficiency, merely as a prudential question, this error constitutes too great an exaction to be compensated for by the degree of legal and social traction that it offers the Church in the particular—and pathological—circumstance of legally structural antitheism.

The Intentionalist Construction of Human Action

All the prior strategic defects of the NNLT are practically worsened by the NNLT account of moral object, end, and intention, because it is these accounts that most affect the application of the whole doctrine to singular human action. Faced with a deontological doctrine of incommensurability that cannot fathom the transcendence of the common good, the normative order of goods prior to choice, and the theocentric character of the moral law, the NNLT is forced to compromise the analysis of human action to achieve any recognition of order among goods. The

⁴³ The Supreme Court appears to view religious speech as more deleteriously contagious and destructive than syphilis, and takes many pains lest someone should hear untoward “religious” speech: something demonstrably far from the views of the founders as likewise from the first one hundred and fifty years of high court jurisprudence.

problem is that the order consequently acknowledged is not that which is impressed on nature by divine providence prior to choice, but rather the order that any contingent agent may decide to place in his actions on behalf of a good intention: for the object of moral action is taken by the NNLT to be simply the agent's "proposal" for action, *excluding* the integral nature and *per se* effects of the action chosen. The price for substituting a deontological praxeology for the speculative foundations of natural law is the distortion of the nature of human action.

Should the agent's proposal for action exclude the deliberately chosen causality of that act, then the NNLT holds that such deliberately chosen causality is not included within the object of the action. While the NNLT asserts that whatever the agent proposes either as means or as end is included within "intention," so that the means is included in the object of the moral act, *nonetheless* "what the agent proposes" is given trumping rights over the objective constitution of the freely chosen means. "Means" is taken to be equivalent to "the agent's description of means" and so is reduced to whatsoever it is about the proposed action that is desirable to the agent, excluding all else. Thus, if the agent does not describe his choice of means as including what is objectively essential to the means freely chosen and willed, then the NNLT excludes this objectively essential truth of the means from the object of the moral act. *This is what constitutes the logicism of the NNLT regarding the object of the moral act, namely, its conversion of the deliberately chosen moral causality of an act into a mere ideational proposal of the agent.* Such a proposal is free to emphasize whatever good effect the agent seeks without acknowledging the very nature of the action that is deliberately and voluntarily embraced as means.

Thus, for the NNLT it becomes enough that one seeks a good end; so in craniotomy, crushing a child's skull is construed as merely redesigning the circumference of the skull⁴⁴ rather than deliberately choosing to inflict lethal injury on the child. Why? Because by craniotomy the agent *proposes* to aid the mother and does not *propose* to harm the child (while, all the same, the deliberately chosen action termi-

⁴⁴ See Finnis, Grisez, and Boyle, "'Direct' and 'Indirect,'" in the main text after note 55, "The baby's death is a side effect of changing the dimensions of its skull," and in note 38 the following response to Brock's criticisms: "But Brock fails to show the object of the surgeon's chosen act is better described as 'producing the crushed skull of an innocent person' than as 'cranium-narrowing for the purposes of removal from the birth canal.'" Yet the Church has never accepted such a view. Replying to the Archbishop of Lyon's inquiry about whether Catholic schools could teach that craniotomy was licit as a means of saving the mother, when the alternative would be the death of both mother and child, the Congregation instructed, "It cannot be taught safely" (*tuto doceri non posse*). See Henry Denzinger's *Enchiridion symbolorum*, trans. Roy J. Deferrari, from the thirtieth edition as *The Sources of Catholic Doctrine* (Fitzwilliam, NH: Loreto Publications, 1954), 473, n. 1889–1890a. See also *Acta sanctae sedis* 1884: 556. The Denzinger passages note also the insistence of the Congregation, placing the conscience of a surgeon at rest about performing craniotomies in cases where otherwise he thought the mother would die, by giving a negative answer to the question "Whether he can safely repeat the above mentioned operations under the recurring circumstances?" The moral magisterium of the Church has never embraced the logic of intentionalism.

nates in the body of the fetus—not the mother—and in a lethal way). With respect to the moral object and intention, the NNLT is largely seconded by Rev. Martin Rhonheimer, who urges similar conclusions (although he appears to hold that it is *impossible* to will the death of the child in craniotomy as a means inasmuch as the child will not survive in any case—something that seems contrary to fact).⁴⁵

One prominent and revealing illustration of the implications of the NNLT account of the moral object and intention may be found in the case of the formerly Catholic St. Joseph’s Hospital, which lost its Catholic status for performing a direct abortion.⁴⁶ The ethicist (Therese Lysaught) officially retained by the hospital after the fact to defend (with full access to the hospital’s medical charts) the clinical abortion performed there, did so on the express grounds of the NNLT doctrine: that only an agent’s description of his intention defines the moral object of his action.⁴⁷ This defense cedes that a dilation and curettage was performed to relieve the stress on

⁴⁵ See Martin Rhonheimer, *Vital Conflicts in Medical Ethics: A Virtue Approach to Craniotomy and Tubal Pregnancies*, ed. William E. Murphy Jr. (Washington, DC: Catholic University of America Press, 2009), 122: “In fact, in the case where mother *and* child would die if the life-saving intervention were not undertaken, there is not even the *possibility* of a weighing of goods (in the sense of weighing between two lives and deciding which one should not live so that the other be saved).” And again, 124: “Only if the fetus would otherwise survive could its death by said to be chosen as a means—and thus caused ‘directly’ in a morally relevant way. But in our case the death of the fetus is not willed to save the mother; as far as the life of the fetus is concerned, it is beyond any kind of willing.” But, to the contrary, just as one may wrongly kill a mortally wounded soldier on the field of battle, so one may wrongfully kill a fetus that nonetheless is dying, and directness and indirectness of willing cannot be separated from the morally significant causality of one’s action or reduced to a mere logical proposal shorn of nature. While holding that “*it is morally impermissible to weigh two lives against each other and to make a preferential choice*” (122, emphasis added) Rhonheimer thus believes that choosing to crush the skull of the fetus can be indirect (when the fetus is dying) because one seeks thereby not principally its death but good to another.

⁴⁶ See the statement of the USCCB Committee on Doctrine, “The Distinction between Direct Abortion and Legitimate Medical Procedures,” June 23, 2010, which reports the condemnation of this act by the local ordinary, Bishop Thomas Olmsted. It addresses the difference between direct abortion and legitimate medical procedures by reference to the direct causality of legitimate surgery as targeting only the removal of malfunctioning organs of the mother and not terminating in the body of the fetus in such manner as to harm or destroy it. “There is nothing intrinsically wrong with surgery to remove a malfunctioning organ.” This is the classical analysis in terms of morally significant causality as opposed to the reduction of the object of the moral act to the agent’s mere description of his proposal for action.

⁴⁷ Therese Lysaught, “Moral Analysis of an Intervention Performed at St. Joseph’s Hospital and Medical Center,” available at <http://www.commonwealmagazine.org/blog/wp-content/uploads/2010/12/St.-Josephs-Hospital-Analysis.pdf>, 3: “The Ethics Committee at St. Joseph’s Hospital and Medical Center was asked for a determination of whether or not the intervention to address the placental issue via a D&C would be morally appropriate according to Catholic teaching. Per their reading of the *Ethical and Religious Directives for Catholic Health Care Services* (4th edition) and their understanding of the Catholic moral tradition, the Ethics Committee determined that the intervention would not be considered

the mother suffering with pulmonary hypertension, but argues that the act was not a direct abortion because it sought principally to remove the placenta, which it would have sought to do even had the child been dead.⁴⁸ The analysis and conclusion are explicitly based on the work of Grisez, and also Rhonheimer and even Rhonheimer's editor, William Murphy, all of whom are cited.⁴⁹

It must be stressed that the destruction of the placenta entails lacerating, tearing, or crushing the fetus. Even were this not true, it is also the case that the placenta is not unilaterally the organ of the mother, as it is the organ for the oxygenation and the nutrition of the fetus: so that destroying it is equivalent to destroying the lungs of an adult (or starving someone to death, were the other causes of death not manifestly quicker). That is to say that it is by no means clear that acts directed solely at the placenta—presuming that such an act is so much as possible, since the action by its nature would appear to kill the fetus by crushing, lacerating, or dismembering it—can be “indirect” with respect to the fetus, inasmuch as the fetus's normal biological organ for breathing and nutrition is the placenta. It must be stressed that the point at issue is the nature of the NNLT and its implications. That these implications extend to the defense of actions that terminate in the body of an innocent in such a way as to kill that innocent is revelatory with respect to the NNLT. That the principles of the NNLT imply the permissibility of such an act is damning, and this would be true even if for some reason Lysaught's account of the facts—*made at the bequest of the hospital itself*—were somehow *mirabile dictu* to be erroneous.

What is prominently at stake in the Phoenix case is not a standard application of the traditional distinction between taking an action that directly aids the mother while merely indirectly harming the fetus, and taking an action directly targeting the fetus. Rather, what is at stake is the “redefinition” of what “direct” means. The NNLT analysis implies that what Lysaught describes as occurring in the Phoenix case was not a direct abortion.⁵⁰

According to the NNLT, an action that terminates in the body of the fetus in such a way as to harm or destroy the fetus should be considered “indirect” harm insofar as the agent intends some further good objective and the harm is not included in the agent's description of his proposal for action. The actual moral causality embraced by choice is systematically replaced by the NNLT with the mere description of a proposal for action: as though we chose only the aspect under which we act, but not the act itself. Such an account renders the language of “direct” and “indirect” to refer exclusively to a preferred description of action rather than to action. Thus, the NNLT account that initially was intended to defend the Church's teaching both on contraception and abortion has come full circle, or “transmigrated,” to a doctrinal

a direct abortion. They therefore approved the intervention, which was carried out on November 5, 2009.”

⁴⁸ Ibid., 3.

⁴⁹ Ibid., 7–18.

⁵⁰ The NNLT implies that the case in question bears more similarity to standard cases of double effect than to abortion despite the fact that the action taken was such as to terminate in the body of the fetus in such a manner as to destroy the fetus.

defense of actions that terminate immediately in the fetus and are such as to harm or destroy the fetus: what the tradition has always considered to be direct abortions.

Veritatis splendor n. 78 is at times misconstrued as justifying the intentionalism of the NNLT:

The object of the act of willing is in fact a freely chosen kind of behaviour. 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.⁵¹

But this is merely to say that the object of a given moral act does not designate *merely* a physical reality, because action is from the perspective of the acting person and so the *ratio* of intention is always essential. There is no doubt of this. But to say that action may not be *reduced* merely to some physical state of affairs apart from reason is far from saying that the natural order that is consciously embraced in rational choice is not included within the object of the moral act.

It is simply and wholly incorrect to read *Veritatis splendor* n. 78 as licensing the *exclusion* of the deliberately and voluntarily chosen moral causality of an act from the object of that act on the ground that this rationally embraced causality is not what is chiefly sought or indicated by the agent's "proposal" for action. "Proposals" for action are subject to criticism, in part, on the ground of rationalizing the use of evil means—actions that are intrinsically disordered and unjust—to attain good intended ends. Those who cite *Veritatis splendor* n. 78 in this way forget or do not rightly understand the remainder of the paragraph:

Rather, that object is the proximate end of a deliberate decision which determines the act of willing on the part of the acting person. Consequently, as the *Catechism of the Catholic Church* teaches, "there are certain specific kinds of behaviour that are always wrong to choose, because choosing them involves a disorder of the will, that is, a moral evil." And Saint Thomas observes that "it often happens that man acts with a good intention, but without spiritual gain, because he lacks a good will. Let us say that someone robs in order to feed the poor: in this case, even though the intention is good, the uprightness of the will is lacking. Consequently, no evil done with a good intention can be excused. 'There are those who say: And why not do evil that good may come? Their condemnation is just' (Rom 3:8)."⁵²

In short, it is not merely as a physical datum, but as the deliberate choice of the agent that the disorder of an action is morally evil, precisely because it is always wrong to choose certain types of action irrespective one's further intention. Thus, Aquinas observes that "it often happens that man acts with a good intention, but without spiritual gain, because he lacks a good will. Let us say that someone robs in order to feed the poor: in this case, even though the intention is good, the upright-

⁵¹ John Paul II, *Veritatis splendor* (August 6, 1993), n.78.

⁵² *Ibid.*

ness of the will is lacking. Consequently, no evil done with a good intention can be excused.”

The whole argument of those who cite *Veritatis splendor* n. 78 as an argument justifying intentionalism resides in the erroneous view that because the object of the moral act is not merely and reductively physical, therefore the integral nature and *per se* effects of the action chosen are not included within the object of the moral act and so may be disregarded as crassly physical and subrational. But to say that the object of moral action is not merely a physical datum is not to say that our deliberate moral choices and actions do not extend to the embrace of particular moral causalities. If I design to choose and enact as a means some action that terminates directly in an innocent so as to harm that person, I cannot free myself of moral culpability for this direct harm I have chosen merely because I am seeking some other good and exclude the evil causality from the description of my action.

Suppose that someone were in a queue for a lifesaving therapy, preceded by several others, but with a prognosis so limited that it seemed he would not live long enough to receive therapy. Were this prospective patient to kill one of those in line ahead of him to remove the impediment to receiving treatment, would this action merely be one of “removing obstacles to lifesaving therapy?” Surely this might adequately depict the agent’s proposal for action in terms of the *ratio* of the appetibility of the act to the agent and the intention of the end. Perhaps the agent acts in this way with grave reluctance and distaste, solely because this is the only manner of obtaining lifesaving therapy. But morally, would not such an action constitute wrongful homicide?

The description of an agent’s intention in his proposal for action is insufficient to constitute the object of the act unless it includes the integral nature and *per se* effects of the chosen action. The integral nature and *per se* effects of the chosen action are included in the object, because in choosing such an action as means the will goes out to *that* action and its *per se* effects. Although we can agree that this occurs under the aspect or formal *ratio* of the intention of an end, the result is the same. Thus, the one who murders those in front of him in the queue for lifesaving therapy, so that he has a chance to receive it in time to save his life, is one who chooses to do murder for the sake of removing impediments to lifesaving therapy. This is to say that the object is not merely a “posit” or “proposal” or “intention,” but is what is done under the *ratio* of the end sought. Accordingly, the end sought and the *ratio* of the appetibility of the act to the agent do not suffice to make the nature of action morally irrelevant, nor is the nature of freely chosen action a merely and crassly physical datum that is of no moral significance. Yet for the NNLT, only what is included in the proposal one formulates, and not the integral nature and *per se* effects of chosen action, is held to be essential to the object of the act.

The very language of *Veritatis splendor* n. 78 is contrary to the NNLT reading inasmuch as it emphasizes that *no matter how laudable one’s intention may be, it cannot justify the choice to perform certain types of action*. Clearly, whether one is performing an act of such a type is not merely a function of whether one can forward a proposal for action whose description avoids mentioning the type of action that is chosen. These “types” are not themselves mere functions of the agent’s *description*: they are functions of the nature of the action itself as an object of choice, which is

irreducible to physical causality but does not exclude it or exist without it. If the agent himself “constitutes” the moral object whole-cloth, then there is precisely no norm whatsoever for human action, and the passages of *Veritatis splendor* n. 78 that indicate such a norm restraining choice would be vain and otiose, tantamount to the direction that one may not act under a certain *description* (“I am not suffocating a child, I am preventing dynastic civil war”). But the whole Catholic moral tradition teaches that one may not choose actions of a certain nature irrespective one’s further intention or preferred description of action.

It should be clear that for one plausibly to interpret a papal encyclical as vitiating the prior understanding of the Church’s moral tradition requires far more than a dubious and intensively controvertible analysis of one line of an encyclical. But the line of the encyclical is not even obscure: in viewing action from the viewpoint of the agent, one must not consider what is done alone but the *ratio* under which it is done. This does not at all *reduce* the object merely to the *ratio* under which the agent performs his action, because the object of the agent’s action is not merely the *ratio* of the act’s appetitibility to the agent, but also the morally significant causality of the action to which his will deliberately extends in choice and action.

Of course, other examples are commonly brought forward in favor of the NNLT analysis. It is not unusual to hear the argument that analgesics used in caring for terminal patients function directly both when intended for the sake of killing the patient in an act of euthanasia and when intended merely for the sake of pain relief (when they may accidentally speed the death of the recipient). What then is the difference? In the permissible use of analgesics, death is denominated as accidental not merely because it is not intended as an end, but also because the chosen dosage is selected precisely as not knowably sufficient to kill; therefore, the death is rightly judged to be accidental.

The critical point is established by asking the following: Granted that for sufficient reason it is licit to “attrite” the good of life—that is, to weaken the patient in a way that risks shortening life—is it licit to administer a dosage of analgesics clearly sufficient immediately to kill the recipient? While one may justify the administration of an amount of morphine sufficient to diminish pain, weakening the patient and involving a higher risk of death as a result, this is quite different from administering a dosage that by its very nature will kill the patient. To do the latter is deliberately to choose to cause the death of the patient, even if one’s intention is not to kill but to do something else (e.g., remove suffering, or, alternatively, test the pain reliever for the sake of future patients, both clearly good ends, but not sufficient to justify the intrinsic evil of wrongful homicide). If this distinction is justifiable, it would seem that the use of the example of pain relief for terminal patients by the defenders of intentionalism is sophistical in the extreme, depending on the confounding of something wholly accidental to an act with something essential to it. To weaken the patient in seeking the good of pain relief, and so to run a higher risk of accidental death, is not of itself to choose to introduce a new cause of death, and so, for sufficient reason, is justifiable.

Notice how, in the case of the treatment of a terminal patient, it is not the act as merely physical, as intentionalists allege (not, in the language of *Veritatis splendor* n. 78, “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”), but rather the act precisely as presenting itself as an object of choice which is decisive. If one administers an analgesic⁵³ in a dosage that is to the best of one’s knowledge not sufficient of itself to kill, but which one knows will weaken the patient and thus risks attenuating or shortening the good of life and increasing the risk of death, and if then death accidentally ensues, this is not a wrongful homicide. However, if one principally seeks only pain relief but knowingly administers a dosage clearly sufficient immediately to kill, this is objectively an act of attempted wrongful homicide even if only pain relief is sought. Further, it remains an evil choice even should the patient not die as a result because, in choosing a dosage of itself judged to be lethal prior to action, one’s will embraces an action that is wrongful even should a divine miracle forestall its evil.

Choosing to kill an innocent as part of pain relief is objectively different from attenuating the good of life of an innocent and taking a calculatedly higher risk of death to avert the horror of unremitting pain. We frequently subject the good of life to higher risks of harm or death for the sake of good ends. Such choice to risk life is wholly other than acting directly to cause death. A realist rather than logicist account of the object of moral action includes not only the agent’s ideational proposal for action, but the deliberately chosen action in its integral nature and *per se* effects.

Thus, for example, in the use of salpingectomy in tubal pregnancy, removing a damaged tube is medically indicated to help the mother; the harm that ensues to the child is neither the principal reason for acting *nor* does the *action* directly (which refers to morally significant *causality*) terminate in the body of the child in a destructive manner. Instead, it terminates in the tube, and in such a way as to correct a medical defect. Indeed, it is not moving a part of the tube, as such, which renders the harm that ensues to the child predictable, but rather the fact that the child seemingly is where it cannot be sustained in life and cannot be moved to any place where it can be sustained. How different are these cases from craniotomy, where the child’s head is directly and deliberately crushed; how different from abortion, in which the child is essentially crushed or lacerated to death or dismembered together with its placental organ of oxygenation and nutrition!

Thus, it must be said that the NNLT reasoning offers little to no improvement whatsoever over the proportionist or consequentialist account, save that it is less overt and so perhaps piously obscures the enormity of the derogation of the moral law that it represents. The intentionalist account of action theory is deceptive inasmuch as it allows use of the language of “intrinsic evils” while nonetheless construing this language in such a manner that in fact anything—subject only to an agent’s own self-description of a proposal for action—may be done. That is to say, in the NNLT account, only the cognitive proposal of the agent and not the deliberately chosen causality of the action provides moral definition. *This is the result of adopting a logicist rather than realist starting point in one’s object theory.* Indeed, it is a speculative error with practical implications, the very thing that the NNLT maintains to be impossible but which is the wellspring of its many errors.

⁵³ Of course, this is in the case of a dying patient, where such a choice is intelligible.

It is true that, as Aquinas teaches,⁵⁴ where the object is *per se* ordained to the end, the species derived from the end is most formal and containing. Thus, in just defensive action one may harm an unjust assailant under the *ratio* of warding off unjust assault, insofar as such harm is the only proportionate means of defense.⁵⁵ But this is a far cry from directly killing an innocent merely because one also seeks some further good end (the assailant is at least performatively culpable of destructive agency: whereas the fetus is not so much as capable of agency). One may not directly kill an innocent even to save one's own life.⁵⁶ Further, the fetus is not an assailant, but rather a "co-victim" in cases of tubal pregnancy.

A Small Error

The earlier comment of this essay regarding "a small error in the beginning" thus has an ironic dimension. For it should now be clear that from the beginning the errors of the>NNLT are great, but its implications are even greater, indeed, seismic in their gravity. A doctrine available as an "intra-Catholic source" for the defense of abortion as a licit means of addressing a pregnant woman's pulmonary hypertension, for the crushing of fetal skulls, for euthanasia through deliberate analgesic overdose, and for other such enormities *ad infinitum*—all for so long as one merely proposes thereby to achieve some further good—is not a doctrine that can be expected to nurture the teleological moral dynamism of the Catholic intellectual tradition.

There are consequences of judgment, and the rejection of the>NNLT manifests the need for a profoundly different approach. What is required instead is an appropriately speculative engagement with the teaching of Aquinas. This is not a new answer, although it adverts to a doctrine so startlingly profound as to be new to each ensuing generation. It is time for the too widespread *de facto* derogation of the teaching of Aquinas after Vatican Council II to end. There is much work to do.

⁵⁴ *ST* I-II, q. 18, art. 7. The normative order of ends suffers no defect, but human intention may, and the order of what is chosen in relation to intention is important even in cases of defective intention for understanding the species of an action: a species whose good or evil is indeed judged in relation to unified normative teleology.

⁵⁵ As Vitoria argues, in cases where the only means of defense is lethal of its nature, it is defense that is intended as end, and the lethality of the chosen action, because *per se* ordained to defense, takes on the species of the end, so that the whole act may be willed but not intended as an end: "Totum illud licet velle, sed non intendere." Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomas*, tom. 3, *De justitia*, ed. Vincente Beltrán de Heredia, *Biblioteca de Teólogos Españoles*, vol. 4 (Salamanca, 1934).

⁵⁶ By which I mean someone both morally and performatively innocent—the latter being ruled out by the case, for example, of the man with a brain tumor who becomes subject to aggressive outbursts and whose action renders him a lethal threat. The action is not morally imputed to him, but dangerous and wrongful action is imputed to him not as moral agent but *qua* agent simply speaking. Thus, *Evangelium vitae* n. 55 acknowledges that such an individual might be in some case justly slain: "Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason."