Phoenix Rising from the Ashes

Recent Attempts to Revive New Natural Law Action Theory

Steven J. Jensen

Abstract. New natural law advocates are somewhat notorious for their loose action theory, having a track record of counterintuitive claims. In response to criticisms, advocates have entrenched, further defending their questionable action theory. This paper first rehearses the basic criticism against the new natural law action theory. It then examines four recent attempts to revive this action theory and finds these attempts wanting. Within these attempts, certain patterns arise. Given a certain means A to a goal C, a search is made to determine whether any middle means B is implied by A. The standards of this search vary wildly, however. By some standards, a middle means can be found; by others, every middle means can be easily swept aside. The same author will sometimes use both kinds of standards, depending upon the situation. One great weakness of the action theory, then, is a lack of consistency in applying a universal standard. *National Catholic Bioethics Quarterly* 20.3 (Autumn 2020): 525–544.

New natural law advocates are somewhat notorious for their rather loose action theory. They make what appear to many to be far-fetched claims. John Finnis, for instance, claims that someone can spear an assailant in the heart without intending to kill or even to injure him.[1] Germain Grisez claims that someone can defend

Steven J. Jensen, PhD, is the Bishop Wendelin J. Nold Chair in Graduate Philosophy at the University of St. Thomas in Houston, Texas.

1. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, UK: Oxford University Press, 1998), 287.

herself from an assailant by placing a gun to his head and firing it, all the while not intending even to harm her assailant.[2] More recently, on a matter bearing upon questions of bioethics, new natural law advocates have defended the Phoenix abortion case, in which the baby was aborted in order to save the mother from pulmonary hypertension.[3] The defense claims that the doctors, in performing the abortion, need not intend to harm the baby; they need intend only to terminate the pregnancy. More recently yet, new natural law theorists have conceded that most adulterers probably do not intend to commit adultery and most thieves probably do not intend to steal.[4]

With this track record of counterintuitive claims, one might suppose that new natural law advocates would be inclined to discard their action theory while retaining the rest of their novel ethical account. They have, in fact, resisted this inclination. To the contrary, they have entrenched, further defending their questionable action theory. This paper will examine four recent attempts to revive this action theory.

This loyalty to their action theory is no accident. A loose action theory of some sort or other is needed to preserve other aspects of their account. In particular, new natural law advocates claim that we may never directly intend to harm anyone, whether in capital punishment, war, self-defense, or any other case.[5] This stringent requirement follows, they think, from their idea that we have certain incommensurable basic goods that must guide all of our actions. These goods are themselves needed, they think, to avoid a kind of consequentialist reasoning in which one overarching good supersedes all others.

With the stringent requirements against direct harm, a kind of strict pacifism seems to loom on the horizon. War and self-defense, for instance, appear to be unacceptable (as well as capital punishment, a conclusion that new natural law advocates are typically willing to concede). Our intuitions against pacifism can be defended, however, with the aid of a loose action theory. With this theory in hand, the cases where we need directly intend to harm become almost nonexistent. We can spear a sleeping soldier without intending to harm him; we can fire a gun at someone's head without intending to harm him; and we can abort a baby without intending

2. Germain Grisez, *The Way of the Lord Jesus*, vol. 2, *Living a Christian Life* (Quincy, IL: Franciscan Press, 1993), 473, 484.
3. Christopher Tollefsen, "Response to Robert Koons and Matthew O'Brien's 'Objects of Intention: a Hylomorphic Critique of the New Natural Law Theory,'" *American Catholic Philosophical Quarterly* 87.4 (Fall 2013): 751–778, doi: 10.5840/acpq201387455; and Christopher Tollefsen, "Double Effect and Two Hard Cases in Medical Ethics," *American Catholic Philosophical Quarterly* 89.3 (Summer 2015): 407–420, doi: 10.5840/acpq20156455.
4. Elisabeth Parish, "Two Theories of Action and the Permissibility of Abortion," *National Catholic Bioethics Quarterly* 20.1 (Spring 2020): 59–72, doi: 10.5840/ncbq20202017. Admittedly, Parish states that she is not necessarily an advocate of the new natural law; she is simply giving arguments in its defense.
5. Sherif Girgis, "The Wrongfulness of Any Intent to Kill," *National Catholic Bioethics Quarterly* 19.2 (Summer 2019): 221–248, doi: 10.5480/ncbq201919217; and Finnis, *Aquinas*, 276, 278.

to harm him. What first appears to be a rather strict morality turns out otherwise. That the new natural law action theory should be loose, then, is no accident.

New natural law advocates stand by their questionable action theory not only on account of the need to loosen the stringent prohibition against harm but also because the so-called first-person account of actions has much in its favor.[6] Moral actions are human actions, and human actions are not mere physical causality; they are reasoned and deliberate attempts to change the world. Bruce murders Paula not simply by performing some physical motions that result in her death. He murders her by deliberately aiming to bring about her death. The difference between the terror bomber and the tactical bomber is precisely a difference in deliberation and intent. It is no surprise, then, that a master of action theory such as St. Thomas Aquinas says that the character of human actions is taken from that which is intended. Modern-day attempts to discover some essential action in mere physical activity, such as Jonathan Bennett's search for the "act itself," are fruitless exercises (which was precisely Bennett's point).[7]

Even the identification of intention (within the first-person account) in terms of the goal pursued and the means sought to achieve the goal is wholly praiseworthy.[8] This identification follows in the footsteps of Aquinas, who thought that intention concerns the end, either the remote end or the more proximate end, which can be identified with the means.[9] Furthermore, this approach agrees with the best of the secular literature on the topic, such as Michael Bratman's masterful account of intention.[10] Finally, it agrees with common sense. If Kenny is pounding nails in order to build a shed, it would be rather odd of him to deny either that he intends to build a shed or that he intends to pound nails. Clearly, he intends to do both.

If the new natural law action theory has so much in its favor, then how does it reach (what seem to many) such absurd conclusions? The weak link, it seems, is in the new natural law account of what a means is. What normally might seem to be a means to some goal turns out otherwise on the new natural law account. Harming a sleeping soldier by spearing him in the heart is not a means to winning the war (although spearing his heart is); harming one's assailant is not a means to saving one's life (although shooting him in the head is).

The discussion is obfuscated through the use of morally charged examples. If we wish to determine whether the doctors in the Phoenix Case intended to harm the baby as a means, we might be influenced by the moral conclusion we wish to reach, whether for or against the action. The same can be said for cases of self-defense. Although these morally charged cases cannot be avoided, since they are

6. See Christopher Tollefsen, "Terminating in the Body," *National Catholic Bioethics Quarterly* 19.2 (Summer 2019): 203–220, doi: 10.5840/ncbq201919216.
7. Jonathan Bennett, *The Act Itself* (Oxford, UK: Clarendon Press, 1995).
8. Tollefsen, "Terminating in the Body," 205; and Tollefsen, "Response to Koons and O'Brien," 752, 757.
9. See Steven J. Jensen, "A Long Discussion Regarding Steven A. Long's Interpretation of the Moral Species," *The Thomist* 67.4 (October 2003): 623–643, doi: 10.1353/tho.2003.0004.
10. Michael E. Bratman, *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987).

at the center of the debate, it is better, when investigating the means to an end (or when investigating which means fall within intention), to use examples with no moral implications. Kenny's intending to pound nails in order to build a shed, for instance, is a good neutral example.

As new natural law advocates are quick to point out, their sometimes counterintuitive conclusions about what is intended do not necessarily lead to counterintuitive moral conclusions. They may acknowledge that most adulterers do not intend to commit adultery, but they then assert that these adulterers are nevertheless guilty of a grave moral offense (albeit not adultery proper). They may acknowledge that many abortions need not involve an intention to kill a baby, but they then assert that those who perform the abortions are nevertheless guilty of a grave moral offense (albeit not properly murder).

These qualifications, while well taken, lead to a striking irony. A theory initially advanced in order to defend Catholic teaching on moral absolutes ends with the conclusion that these absolutes have few real-life applications. Adultery is always wrong, but most adulterers are guilty of something else rather than adultery proper. Murder is always wrong, but many abortionists are not guilty of murder but of unfairness, or of some such thing. A theory initially advanced to counter consequentialist reasoning ends with a reasoning that concerns *fairness*, an unclear category that can easily slip into the kind of comparative weighing characteristic of consequentialism.

In what follows, we will consider recent attempts to revive new natural law action theory. We must first rehearse, to a limited extent, the initial criticism that spurred these attempts. We will then examine whether the recent attempts succeed in their effort to defend new natural law action theory.

The Fundamental Criticisms

The fundamental criticism against new natural law action theory questions its account of intention.[11] New natural law excludes from intention (so the criticism goes) that which should be included; the doctors in the Phoenix Case, for instance, need not intend—on the new natural law account—to harm the baby. This criticism might take one of two forms. On the one hand, it might claim that intention

11. Kevin L. Flannery, "Thomas Aquinas and the New Natural Law Theory on the Object of the Human Act," *National Catholic Bioethics Quarterly* 13.1 (Spring 2013): 79–104, doi: 10.5840/ncbq201313172; Kevin L. Flannery, "What Is Included in a Means to an End?," *Gregorianum* 74 (1993): 499–513; Luke Gormally, "Intention and Side Effects: John Finnis and Elizabeth Anscombe," *in Reason, Morality, and Law: the Philosophy of John Finnis*, ed. John Keown et al. (New York: Oxford University Press, 2013); Steven J. Jensen, "Causal Constraints on Intention," *National Catholic Bioethics Quarterly* 14.2 (Summer 2014): 273–293, doi: 10.5840/ncbq201414230; Steven A. Long, *The Teleological Grammar of the Moral Act* (Naples, FL: Sapientia Press, 2007); Matthew B. O'Brien and Robert Koons, "Objects of Intention: a Hylomorphic Critique of the New Natural Law Theory," *American Catholic Philosophical Quarterly* 86.4 (Fall 2012): 655–703, doi: 10.5840/acpq201286450; Matthew B. O'Brien, "Elizabeth Anscombe and the New Natural Lawyers on Intentional Action," *National Catholic Bioethics Quarterly* 13.1 (Spring 2013): 47–56, doi: 10.5840/ncbq201212169.

includes more than the goal and the means to achieve that goal. On the other hand, it might grant this account of intention but question the new natural law analysis of what counts as a means. I think the merits of the former criticism can often be expressed in terms of the latter. To this latter criticism, then, we will now turn.

Fundamentally, the criticism claims that new natural law advocates ignore some crucial means to an end. In self-defense with a gun, for instance, these advocates acknowledge the intended goal of saving one's life. They also acknowledge the means of stopping the attack and the means of firing the gun. Inexplicably, they miss the means of harming the assailant.[12] Firing the gun serves as a means to stop the attack, evidently, even apart from any harm to the assailant. Of course, a gun might scare off an assailant, but this observation misses the mark. We are concerned with someone's defending herself by aiming to hit her assailant, not merely by aiming to make a frightening noise. Hitting assailants with bullets is an effective way to defend oneself, but only because those bullets harm the assailant. Firing a gun serves as a means to the goal only insofar as it actually harms the assailant.

This point is most clearly seen by following deliberation in its proper order. We begin with the goal or end, and we move backward looking for various means to achieve the goal. We do not begin with the means of firing a gun and move forward toward the goal. Suppose, for instance, that Robin seeks to save her life from an assailant. She first recognizes that she can flee the assailant or she can stop him from attacking. Between the two options, she decides that stopping the attack has the better probability of success. Stopping the attack, then, is the first means she settles upon in order to defend her life. But how will she stop the attack? In some manner, she will have to incapacitate her assailant. She might kill him or otherwise injure him. On the other hand, she could trip him or some such thing. She determines that tripping him will only delay the attack (and besides, she probably will not succeed in tripping him). She concludes, then, that it is best to injure him. But how to injure him? She could shoot him; she could hit him over the head with a baseball bat; and so on. In the circumstances, she determines that it would be best to shoot him.

In some cases, Robin might move very quickly from the idea of defending her life to the means of shooting the assailant; she might spend very little time thinking about whether to incapacitate him by way of injuring him. Nevertheless, these points on which she spends little time still concern means. She spends little time because she considers these means (in the circumstances) rather obvious. As Aquinas says, we do not take counsel over means that are considered obvious.[13]

Clearly, what counts as a means in her deliberations need not have anything to do with necessity. Injuring her assailant is not necessary in order to save her life. She might have tripped her assailant, or she might have fled. Robin rejects these means because she does not think that they are as likely to be effective. Still, they might have worked. Injuring her assailant is not necessary; she has simply deemed it best.

12. Grisez, *Living a Christian Life*, 473, 483; and Tollefsen, "Response to Koons and O'Brien," 758.

13 Thomas Aquinas, *Summa theologiae* I-II.14.4.

One might be fooled, however, concerning the role of necessity.[14] If one begins by considering the means of Robin's firing the gun at her assailant (as these discussions often do), then one might note that this action functions as a means only insofar as it injures the assailant. In other words, by the time Robin settles upon the means of firing the gun, she (necessarily) must first have settled upon the means of injuring. The injury is itself not necessary for defense, but it is necessary in order to make the act of firing the gun into a means.

But of course, Robin will not reason in this manner: by the time she begins considering whether to shoot her assailant or to club him over the head, she has already settled upon the means of injuring him. The need to point out this necessary link arises only in the third person as we look at Robin's action as executed, not as she deliberates about it in the first person. A first-person account of human actions, then, will not need to point out any necessary link. Nevertheless, it will conclude that Robin does indeed intend to injure her assailant. What matters is the causes upon which Robin settles. It matters not whether those causes are necessary or optional.

The absence of this conclusion in the new natural law account, which is supposedly first-person, probably arises from the blinding influence of moral considerations. The new natural law advocate must reconcile two important moral judgments. First, it is never acceptable to intend to injure someone. Second, Robin surely is justified in firing the gun at her assailant. Conclusion: Robin must not be intending to injure her assailant. If intention includes the means, then she must not be intending to injure her assailant as a means. The first-person account, it seems, is trumped by moral considerations.

It is better to set aside moral considerations and just consider what Robin perceives as a means to achieve her goal. Suppose that Robin wants to stop a squirrel from climbing a tree (because it proceeds onto her roof and into her attic). She gets a pellet gun and shoots the squirrel. Why? Because she has first reasoned that harming the squirrel will stop him from climbing the tree. Short of harming him, it will do no good. If it merely frightens him, it will only hurry him up the tree. Injury, then, is essential to Robin's reasoning. In self-defense, her reasoning is similar.

Shooting in self-defense is fairly straightforward, at least when compared with the craniotomy case or with the Phoenix abortion case. These cases require a further analysis of what counts as a means to the end. We will stick to the craniotomy case, since it is more straightforward. It does not involve the question of the ontological status of the placenta or of that part of the placenta that (on the face of it) belongs to the fetus.[15]

In the craniotomy case, the doctor seeks to save the mother as a goal. Her life is threatened by the labor, which will continue indefinitely, since the baby's head is

14. See Parish, "Two Theories of Action," 64, 69,70. Parish seems to be fooled by this. She continually emphasizes that certain causes are not essential or not necessary and *therefore* not intended as a means.

15 Parish, "Two Theories of Action," 67–68; Elisabeth Parish suggests that, in "Causal Contstraints," I was unaware of the fact that the placenta has parts that come from the mother. To the contrary, I explicitly discussed that part of the placenta that belongs to the mother; see Jensen, "Causal Constraints," 293.

too large to fit through the woman's pelvis and cesarean section is not available. The doctor reasons backward from his goal to the means of ending the labor. But how will he end the labor? He must make the head of the baby smaller so that it can fit through the pelvis. But how will he make the head smaller? He must crush the head.

In this line of reasoning, injury does not arise as obviously as it does in the case of self-defense. Robin defends herself by incapacitating her assailant, and she incapacitates him by injuring him. In contrast, the doctor does not bring injury into his deliberations, at least not directly.

Critics of the new natural law claim, nevertheless, that injury does enter the doctor's intention. In one form or another, these critics use what might be called the *identity thesis*. Crushing someone's skull, they claim, is the same thing as injuring him. The reasons given for this identity vary, and sometimes the identity goes a step further, claiming that the crushing is identical with killing (and not just with injuring). Sometimes the identity is connected to the nature of the physical activity, at other times to social conventions.[16] These versions of the identity thesis have definite weaknesses, and one may be inclined to side with the rebuttals provided by new natural law theorists.[17] Nevertheless, the instinct underlying the identity thesis remains solid: crushing someone's skull is the same as injuring him, and if you intend to crush his skull, you also intend to injure him.[18]

Worry over the identity thesis (perhaps subconscious) may be the reason why new natural law advocates, when listing the means chosen by the doctor, often exclude the crushing of the skull. To be fair, not every advocate makes this glaring oversight (or at least not always).[19] When they acknowledge that the doctor does indeed intend to crush the skull, they deny the identity thesis, at least with regard to the intention of the doctor. The doctor can separate, in his intention, the crushing of the skull and the injury to the baby. The crushing of the skull is itself two things. On the one hand, it is a reducing of the size of the baby's head; on the other hand, it is an injury to the baby. Within intention, however, it is only one of these: the reduction of the size of the baby's head. Why? Because we intend actions under that description by which they are intelligibly attractive as a means to our goal.[20] The doctor does not need the baby to be injured, but he does need the baby to have a smaller head.

Has the new natural law successfully excluded injury from the doctor's intention? This question need not be settled at this point. The discussion so far suffices to raise the concerns that are laid against the new natural law action theory. Matters

16. See O'Brien, "Objects of Intention," 751–778.
17. See, for instance, Tollefsen, "Response to Koons and O'Brien," 751–778; and Girgis, "Wrongfulness if Any Intent," 221–248.
18. For another rationale, see Jensen, "Causal Constraints," 273–293.
19. Joseph M. Boyle, "Who Is Entitled to Double Effect?," *Journal of Medicine and Philosophy* 16.5 (October 1991): 480, doi: 10.1093/jmp/16.5.475; and John Finnis et al., "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory," *The Thomist* 65 (2001): 26n38, doi: 10.1353/tho.2001.0014.
20. Finnis, *Aquinas*, 287.

can be further evaluated by considering the replies provided by the recent attempts to revive new natural law action theory.

Dispositions toward Imaginary Options

Elisabeth Parish attempts to avoid certain means to an end by claiming that what really matters is a person's disposition. A person does not intend the means just so long as he is disposed to abandon the means if he were to discover that it is optional rather than necessary. She provides the following example: "If shooting an attacker did not, in fact, severely or fatally injure the attacker but merely incapacitated the attacker temporarily (with pepper spray, for example), would the victim still choose to shoot to defend his or her life? If so, then we know that harm itself is not an inherent means in the intention of the shooter; it is only a side effect. The disposition is only to stop an attack."[21]

We are asked to imagine that Robin's gun ejects pepper spray instead of bullets, and then we are asked to examine what Robin would do (based upon this new information concerning her gun). If she would change her plan to get a gun that does fire bullets, then she did indeed intend to harm her assailant as a means to incapacitate him. But if she is willing to keep her gun (since, after all, it still incapacitates her assailant), then she never intended to harm her assailant. All that matters is her disposition. Perhaps no pepper spray is available, but she *would* use it *if* she had it. That is enough, for Parish, to transform the harm (in the initial plan) into a side effect. Parish's essential point would remain, it seems, if the counterfactual is made less fanciful. We might ask simply what Robin would do if she had pepper spray available.

A morally neutral example reveals that Parish's analysis must be incorrect. Kenny intends to (A) move a hammer in order to (B) pound nails in order to (C) build a shed. Now he discovers that he could in fact build the shed entirely with screws. Pounding nails is optional (as is moving a hammer). It turns out that he has no screws, but if he did have screws, then he would have built the shed entirely with screws.

On Parish's account, Kenny does not intend to pound nails. But surely he does. We settle upon plans and make intentions not based upon mere dispositions and fanciful options. We make plans based upon the reality with which we are faced. Kenny is faced with the reality that he has no screws. Perhaps he would like to build a shed with only screws, but he cannot get screws. So he decides to build his shed with nails. His disposition together with abstract possibilities does not shape his plan.

Parish herself provides a telling counterexample to her own view. A thief (A) fires a gun in order to (B) injure his victim in order to (C) steal his money. As it turns out, however, the thief is so disposed that if he had had pepper spray available, then he would have (A) used the pepper spray in order to (B) incapacitate his victim in order to (C) steal his money. On Parish's account, so it would appear, the thief never intends to injure his victim; the injury is only a side effect. Parish brushes aside this counterexample by noting, "If we have reason to know that the thief's intention was also to kill, this defense is ridiculous." Indeed! She then implies that we

21. Parish, "Two Theories of Action," 69.

do not have reason to know the thief's intention, by adding "It is, however, entirely plausible that shooting the victim was not part of the thief's original intention."[22]

This reply is fraught with confusion. First, it replaces harm with killing. Second, it replaces harm with "shooting the victim." Third, it replaces intention with "the thief's original intention." We can imagine, perhaps, that the thief originally plans to threaten with the gun, hoping thereby to get the money. When his victim begins to run away, he fires the gun in order to injure his victim in order to incapacitate him in order to steal. Firing the gun (and injuring, for that matter) was not part of his initial intention. Initially, he merely planned to frighten. This initial plan, however, is irrelevant to the question, for circumstances forced the thief to change his plan. His new plan included firing the gun and injuring his victim. All of these actual circumstances and actual plans are irrelevant to Parish. All that matters is what the thief *would* have done under other circumstances. The only facts relevant for her first-person perspective are facts concerning dispositions and facts concerning absolute theoretical necessity.

Reasonable Counterfactuals

Parish claims to derive her account from Sherif Girgis. What he says, however, is far from pellucid: "Say you decide and plan to do A as a means to B, which will bring about C, your ultimate goal. But then, before taking any action, you find out that A will not cause B after all. Since you had been planning to use B to achieve C, you will now have to either abandon goal C or find a new means to it. Conversely, if you do not need to rethink anything on finding out that your action will not have a certain effect, then that effect was outside your intention."[23] The final sentence is a puzzler. If you had indeed decided to do A in order to achieve B in order to achieve C, then upon discovering that A does not in fact bring about B, you must certainly rethink your plan.

An indication that Girgis does not mean what he says follows immediately: the example he provides does not fit the pattern he proposes. Adapted to the craniotomy case, it would run as follows: the doctor intends (A) to crush the skull in order to (Q) reduce the size of the head in order to (C) end the labor.[24] B (injuring the baby) was not in the picture from the beginning, which is why Girgis can claim that the agent indeed has no need to rethink anything. When the doctor discovers that crushing the skull does not in fact cause injury to the baby, he does not need to rethink his plans. After all, injuring the baby was never in the picture. Put this way, the argument looks rather like a *petitio principii*. Girgis is trying to show that the doctor does not intend to injure the baby. Girgis does so by supposing, from the beginning, that the doctor never intends to injure but only to reduce the size of the head.

The same may be said of his contrary example, which involves a woman who wants an abortion to avoid the burdens of motherhood. She then discovers that the

22. Parish, "Two Theories of Action," 69.
23. Girgis, "The Wrongfulness of Any Intent," 239.
24. Girgis is actually discussing something like the Phoenix Case, but it is not difficult to draw the parallels with the craniotomy case, which I use for simplicity, as mentioned above.

baby will not be killed by the abortion. This discovery, says Girgis, "Will force her to rethink things because all along she was seeking (A) the procedure as a means to (B) achieve the child's death, which would enable her to (C) avoid the costs of motherhood."[25] One could not ask for a more explicit *petitio*. Girgis wants to conclude that the woman intends to kill the baby. As evidence, he says that she must rethink things. Why must she rethink things? Because she intended to kill the baby.

To make the two contrary cases parallel, we must ensure that B is either in the picture or out of the picture for both cases. On the one hand, if B is in the picture, then both agents will unquestionably have to rethink their plans. The difference, if we are to read Girgis favorably, is that the woman will have to reintroduce B by some other means besides A (which is an abortion). In contrast, the doctor may be pleasantly surprised to discover that he never needed B from the beginning. On the other hand, if B is out of the picture, then what will happen when the agent discovers that A does not cause B? The doctor will not have to rethink anything. The woman, thinks Girgis, will have to find another way to achieve her goal (of avoiding the cost of motherhood). Although she did not initially see it, B was essential to her original plan.

In either event, Girgis cannot be concerned (as he claims) with what the agent actually intends. With the first option, both agents intend to B; with the second option, neither agent intends to B. Rather, Girgis is concerned with what an agent must realistically intend in order to achieve his goals, supposing he is well informed about the causes involved. Girgis's analysis works, *mutatis mutandis*, on the case of self-defense precisely as we have described above. Robin (A) fires a gun in order to (B) injure her assailant in order to (C) incapacitate him. If she discovers that firing the gun does not injure her assailant (A does not cause B), then she must rework her plan, for the assailant will be unhindered in his attack, which indicates that injuring her assailant is indeed essential to her intention.

By introducing pepper spray, Parish attempts to make self-defense parallel to Girgis's analysis of the superfluity of injury (in cases such as the craniotomy). Even though the gun does not injure the assailant (A does not cause B), the assailant is stopped because the gun causes the pain of pepper spray. Of course, if Robin has a typical gun, and if Robin is well-informed, then she will know that the gun will not shoot pepper spray. In short, she will still recognize the need for injuring the assailant.

Introducing hypothetical causes that do not exist in reality, such as the pepper spray (which does not exist for Robin in her situation), serves to eliminate any necessity in intention. Girgis's example, for instance, might be modified. The abortion does not cause the death of the baby but spirits the baby away to an adoptive family. Given this imaginary causality, the death of the baby is no longer necessary for the goal. But Girgis is not concerned with fanciful causes. He is concerned only with causes that are actually available. Girgis's point very much relies upon (or even insists upon) the third-person perspective, which describes causes actually available to the agent. He cannot follow Parish and make imaginary causes relevant to intention. Otherwise, his case of ending the cost of motherhood collapses. If

25. Girgis, "The Wrongfulness of Any Intent," 239.

fanciful causes are eliminated in the case of the woman seeking an abortion, then they must also be eliminated in the case of self-defense with a gun. Parish thinks that mere conceptual possibilities shape intention; Girgis thinks that real causes shape intention.

Is Girgis correct, then, in his analysis of cases such as the craniotomy? Can the doctor avoid intending to injure the baby? In this case, Girgis needs no imaginary causes. The craniotomy does in fact cause the head to be smaller, thereby ending the labor. If the injury were left out of the picture but the head was still made smaller, the goal would still be achieved. Can Girgis justly conclude, then, that the injury need not be intended?

While Parish is guilty of introducing imaginary causes, Girgis may be guilty of conceptually eliminating causes that cannot be eliminated in reality. Applied to the craniotomy case, he must imagine a craniotomy that is not also an injury. This feat can be achieved, it seems, only by ignoring reality. If someone breaks off the leg of a chair, he damages the chair; furthermore, the damage is nothing other than the broken leg as it is considered in relation to a functioning chair. Can we imagine someone's breaking off the leg of a chair without also damaging the chair? Only by ignoring what it means for the chair to be damaged. Similarly, we can imagine a craniotomy without an injury to the baby only by ignoring the fact that a crushed skull is an injury. The injury is nothing other than the crushed skull in relation to a functioning baby.

To be fair, Girgis is arguing against a version of the identity thesis that seems questionable. In this version, the craniotomy would be identical with killing the baby. The identity is between two distinct effects: the crushed skull and the death of the baby. Against this view, the importance of Girgis's counterfactual denial is evident. However confusedly expressed, his argument, when spelled out, wins the day. The point, then, is not that Girgis has failed to make his case against his opponents. The point, rather, is that Girgis's case does not count against the identity thesis itself; it counts against only one particular version of it.

This version against which Girgis argues is not the strongest available: the identity between a crushed skull and death is fairly weak, since the two are distinct effects, however closely they are linked in causality. A stronger thesis identifies the crushed skull and injury. These two cannot be separated, even in the most creative imagination. Consequently, injury cannot be excluded from the doctor's intention. What would happen to the doctor's intention if A did not cause B, that is, if the craniotomy did not cause injury? At this point, a confusion might arise, for the one injury (of a crushed skull) causes another injury (of death). We can legitimately ask, then, what would happen to the doctor's intention if the craniotomy did not cause the injury of death. No such possibility is available for the injury of a crushed skull. We cannot ask what would happen to the doctor's intention if the craniotomy did not cause the injury of a crushed skull. In fact, it does not cause the injury. It is the injury. After all, *craniotomy* is nothing but an abstract term referring to the crushing of a skull. Fanciful conceptions cannot eliminate this injury.

Conceptual Necessity or Something Like It

At this point, Parish may suggest that her approach, with its emphasis upon possible causes, is more faithful to the spirit of the new natural law action theory. Girgis's

concern with the actual causes confronted by the agent ignores the emphasis, within new natural law, upon conceptual necessity as opposed to actual physical necessity. The standard of conceptual necessity was introduced early on by Joseph Boyle.[26] When confronted with the spelunkers who are trapped in a cave because their companion is stuck in the only exit, Boyle argues that they can blow him up intending only to disperse his parts and open the passageway. Death does not enter their intention, because death is not conceptually linked with blowing someone to bits. As we have seen, he must push the matter further. He must claim that blowing someone up is not conceptually linked to *injuring* him, since the new natural law will not allow any injury, whether death or something less. If blowing to bits is conceptually linked to injury, although not to death, then Boyle's argument will not serve its purpose (ultimately, to justify craniotomy).

In his recent article, Patrick Lee relies heavily upon the standard of conceptual necessity to solve many of the problems faced by new natural law action theory. Unfortunately, the boundaries of conceptual necessity are unclear. This difficulty is most evident when Lee tries to address an example provided by Alexander Pruss: "An eccentric, literalistic but always truthful magnate tells Sam he will donate to famine relief, saving hundreds of lives, if and only if Sam follow his directions to the iota. Sam is to purchase a gun, sneak at night into a zoo owned by the magnate, and kill the first mammal he sees. Unfortunately, the first mammal Sam sees is the zookeeper, and he shoots her. When Sam is charged with murder, he argues that he did not intend to kill the human there, but only to kill the mammal."[27]

Lee responds by pointing out that Sam seeks a concrete action of killing a mammal, and this concrete action is also an act of killing a human being. In short, Lee gives some version of the identity thesis so that he can include a means that his theory, on the face of it, should exclude. He says, "This human being's death is not a distinct state of affairs closely connected to the state of affairs that is needed to bring about his end; rather, this is the state of affairs needed to achieve his end."[28]

Lee senses, however, that he may have gone too far. He may have committed himself to more than he bargained for. He cannot include all of the concrete details within intention. Otherwise, his new account would look much more like his opponents' than like the new natural law.

Lee avoids this difficulty with some version of conceptual necessity. What matters, he says, is that a human being is a particular kind of mammal; the two are essentially related. Consequently, Sam's intention does include the humanity

26. Joseph M. Boyle, "*Praeter Intentionem* in Aquinas," *The Thomist* 42.4 (October 1978): 649–665, doi: 10.1353/tho.1978.0004.

27. Alexander R. Pruss, "The Accomplishment of Plans: a New Version of the Principle of Double Effect," *Philosophical Studies* 165.1 (August 2012): 49–69, 53–54, doi: 10.1007/s11098-012-9925-4. Interestingly, Pruss introduces the concrete details of an action not by incorporating them into intention, but as an additional criterion for analyzing actions. In short, he accepts the new natural law account of intention but says that actions must be evaluated not simply by intention.

28. Patrick Lee, "Distinguishing Between What Is Intended and Foreseen Side Effects," *American Journal of Jurisprudence* 62.2 (December 2017): 249, doi: 10.1093/ajj/aux021.

of the zookeeper; on the other hand, it does not include other features such as the color of her eyes. Sam, then, intends to kill a human being, but he does not intend to kill someone with green eyes (although the zookeeper does have green eyes, and Sam is aware that she does).[29] Having green eyes is simply not essential to being a mammal or to being a human being.

This rubric, however, opens Lee to a plethora of difficulties. What if the magnate had told Sam to kill the first thing with brown eyes? It happens to be the zookeeper. As Lee himself has told us, having green or brown eyes is not essential to a human being, so Sam can intend to kill something with brown eyes without intending to kill a human being. Or what if the magnate had told Sam to kill the first thing over three feet tall, which again happens to be the zookeeper? A particular height is not essential to being a mammal or to being a human being, so Sam need not worry that his intention (to kill something over three feet tall) will spill over into an intention to kill a human being.

Lee also uses conceptual necessity to get around the injury to the baby in the craniotomy.[30] The doctor need not intend to injure the baby, although he does intend the concrete action of crushing his skull, which is indeed an injury to the baby. According to Lee, however, the injury is like having green eyes: it is not conceptually linked to crushing the skull. Why not? Because something counts as injury only if it is permanent. After all, in open-heart surgery the surgeon does many things (such as taking the heart out of the chest cavity) that would be injury if they were permanent, but in this case they do not count as an injury.

The injury to the baby in the craniotomy, however, is not permanent, at least not conceptually so. Why not? Following Christopher Tollefsen, Lee notes that in some cases it suffices for the doctor to squeeze the head, only momentarily distorting its shape.[31] Never mind that this is not in fact one of those cases. Never mind that the doctor has already tried this mild remedy and found it insufficient. Never mind that before the doctor crushes the skull, he must first evacuate the cranial cavity (that is, scoop out the brain). All that matters is that some cases (although not this case) can be treated with a temporary distortion of shape.

Once again, we are being asked to imagine that as Kenny pounds away, he does not intend to pound nails. After all, other people in other situations build sheds with only screws. Never mind that Kenny is not one of those other people and he is not in this other situation.

The parallel with Parish is evident. Never mind that Robin does not have pepper spray (or a gun that shoots pepper spray). All that matters are possibilities. In some cases, pepper spray will suffice for self-defense. By this standard, Robin does not even intend to fire the gun, since sometimes people can avoid being killed simply by fleeing. Indeed, this option was open to Robin (unlike the pepper spray), but she decided that it was not likely to be as effective. Although Lee acknowledges

29. Lee, "Distinguishing Between," 249.
30. Lee, "Distinguishing Between," 245n26.
31. See Christopher Tollefsen, "Is a Purely First-Person Account of Human Action Defensible?," *Ethical Theory and Moral Practice* 9.4 (August 2006): 450, doi: 10.1007/s10677-006-9024-8.

that the doctor is choosing a concrete instance of a craniotomy, all that matters are other possibilities that do not apply to this concrete instance. Likewise, all that matters to Robin are possibilities (some real and some not). Never mind that she has in fact chosen this concrete manner of defending her life.

In the end, Lee and Tollefsen are effectively denying not only that the doctor intends to injure the baby but also that the doctor intends to crush the skull of the baby. These doctors, it seems, intend merely to compress momentarily the baby's head. More accurately, Lee and Tollefsen deny any intention beyond reducing the size of the baby's head. Because there are multiple ways of achieving this goal, none of the particular ways fall within intention. In the situation, only one particular way happens to work, but that concrete detail need not be consulted.

Surprisingly, this emphasis upon conceptual necessity arises in the context of Lee's response to the objection that the new natural law action theory allows excessive leeway in redescribing actions. What falls within intention, he insists, is not arbitrary. The agent "must include those states of affairs she understands to be needed to attain [her] end." What is needed, however, is only what is conceptually necessary. Facts about this concrete case need not be consulted. Lee's treatment of the craniotomy case seems more to confirm the objection than to rebut it. Perhaps for this reason he has relegated this treatment to a footnote.

His treatment of other cases (such as tubal ligation and salpingotomy) appears to place reasonable boundaries upon what can be intended. In these cases, however, Lee adopts the approach of Girgis, consulting only the actual causes available to the agent. Conceptual necessity is placed out of view. For the case of salpingotomy, for instance, Lee insists that the doctor must intend to remove the baby from the fallopian tube.[32]

This conclusion seems undeniable, but if the standard of conceptual necessity is invoked, then it is unclear whether the conclusion is available to Lee. Many ectopic pregnancies end naturally with a miscarriage. For the goal of saving the life of the mother, then, it is conceptually possible (and sometimes advisable) to wait and hope for a natural miscarriage. Although the doctor performing the salpingotomy is in fact removing the baby, it is not clear (given the standard of conceptual necessity) that he need intend to remove the baby. After all, the doctor who crushes the skull can pretend that he is just doing what other doctors do in different situations (momentarily compressing the skull). In the case of the salpingotomy, why cannot the doctor pretend that he is just waiting for a natural miscarriage? Conveniently, however, conceptual necessity is absent from Lee's analysis of this case.

Perhaps Lee will insist that waiting for a miscarriage has no similarity with a salpingotomy. At least the two different sets of doctors (those that momentarily compress the skull and those that crush the skull) are both using forceps upon a baby's head. This need for some similarity in the means chosen may be the reason Parish used an example of a gun that fires pepper spray rather than the alternative of the defender having pepper spray on hand. A gun that fires pepper spray at least has a similarity with firing a regular gun.

32. Lee, "Distinguishing Between," 244.

Given the standard of conceptual necessity, it is unclear whether this defense is available to Lee, but let it be granted. The doctor's action still might be compared to a salpingectomy, in which the doctor removes the fallopian tube. His action is relatively similar, for he does make cuts in the woman and even on the fallopian tube. For a salpingectomy, however, the doctor might well claim that he does not intend to remove the baby. He intends to remove the fallopian tube, and the baby is removed as a consequence. Using conceptual necessity, then, the doctor performing the salpingotomy might claim that he merely intends to remove the fallopian tube (even though he does not actually do so).

Conceptual necessity is a convenient two-edged sword, used sometimes to include within intention elements that the theory would seem likely to exclude (as in the response to Pruss) and at other times to exclude elements that Lee's theory might otherwise seem to include (as with injury in the craniotomy case). The problem, it seems, is that the precise boundaries of this conceptual necessity are known only to the experienced practitioner. The uninitiated, those outside the new natural law, can only guess how it will be applied in the next situation. They are in the dark as to when this convenient tool should be used and when it should be shrouded from view.

It now becomes clear why Girgis, unlike Parish and Lee, does not use fanciful counterexamples but relies only on the causes actually at hand. Evidently, he is dealing with cases in which conceptual necessity is not to be invoked. Its absence is fortuitous, since Girgis is trying to show, against objections to the contrary, that new natural law action theory provides definite content to intention that matches our intuitions.

Doubtful Adulterers

Conceptual necessity (or something like it) also seems to be at play in Lee's response to the problems of theft and adultery. As with Pruss's zookeeper, these problems arise because new natural law action theory says that we intend an action only under those descriptions that make it "intelligibly attractive as a means."[33] For Sam what was attractive about killing the zookeeper was that it was an action of killing a mammal. That it was also an act of killing a human being in no way made it attractive (but probably repulsive).

A similar problem confronts the adulterer and the thief.[34] Probably only on rare occasions is the act of adultery attractive precisely as adultery. Usually, it is attractive because it is sexual relations with someone the adulterer loves or with a beautiful woman or some such thing. Likewise, when Pat steals a new watch from the store, his action is attractive as a means not because the watch belongs to the store owners. Rather, he is attracted by the value of the watch. On the new natural law account, then, it appears that the adulterer does not intend to commit adultery and the thief does not intend to steal. The adulterer intends to have sexual relations

33. John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: Catholic University of America Press, 1991), 68.
34. See Jensen, "Causal Constraints," 284.

with someone he loves (in some romantic sense of the word *love*), and the thief intends to take what is valuable.

In response to Pruss, we have seen, Lee was willing to stretch beyond the normal boundaries of new natural law action theory. Sam's intention, Lee insisted, includes the humanity of the zookeeper not because it makes his action attractive as a means but rather because Sam intends not just the abstract action of killing a mammal; he intends a concrete action, which is in fact an act of killing a human being. Conceptual necessity conveniently restricted Sam's intention to the humanity of his victim, leaving aside many other concrete details of his action.

For the adultery case, Lee also is willing to go beyond the normal bounds of what makes an action "intelligibly attractive as a means." Something like conceptual necessity seems to bring the marital status of his partner into the adulterer's intention.[35] Or if the marital status does not enter into intention, then at least it enters into the adulterer's moral action. In this last bit of ambiguity (between what falls in intention and what falls into the action done), Lee seems to forget what he said at the very beginning of the article, namely, that an agent most properly does what he intends to do: "The main purpose of distinguishing what is intended from what is foreseen and knowingly caused is to be able to identify the act, or the kind of act—what kind of thing is being done—so that, in turn, the act can then be assessed morally (as a kind of act) in relation to moral norms that prohibit certain kinds of act."[36]

Lee's general argument, by which he folds the marital status into intention or at least into the action, runs as follows: supposing the adulterer is himself married, then necessarily every action of sexual relations with someone besides his wife will be an action of adultery. These actions of sexual relations, it seems, are acts of adultery by a kind of conceptual necessity.

One can hardly quibble with this conclusion. It is not clear, however, whether Lee can consistently utilize this analysis. Why not start with sexual relations in general and observe that there is no conceptual necessity that a given act of sexual relations must also be an act of adultery? Why pick out sexual relations in which one of the individuals is married? Of course, that is in fact the concrete situation (the man is married). As we have seen, however, applying conceptual necessity to the concrete situation, as opposed to the general possibilities, is a choice that Lee makes in some situations but not in others. Lee makes a similar move for theft, the details of which we need not examine.[37]

With her analysis of adultery and theft, Parish can once again claim to be more in the spirit of the new natural law. Unlike Lee, she conforms with Grisez's judgment concerning actions such as theft.[38] She concedes that (on the new natural law account) most adulterers do not intend to commit adultery and most thieves do not intend to steal; consequently, the agent does not most properly commit

35. Lee, "Distinguishing Between," 250. He speaks of what is "conceptually impossible."
36. Lee, "Distinguishing," 231–232.
37. Lee, "Distinguishing," 250–251.
38. Germain Grisez, *The Way of the Lord Jesus,* vol. 1, Christian Moral Principles (Chicago: Franciscan Herald Press, 1983), 247n3.

adultery; rather, adultery is an accepted side effect.[39] She then points out that the new natural law can still explain why these actions are wrong. They are not wrong because they are properly acts of adultery or theft (that is, human actions intended as such). They are wrong because they involve unfairness or some such thing.

Concrete Details

Parish is also more consistent with the new natural law account when she rejects, outright, the relevance of the concrete details of an action. The only features of an action that enter intention, it seems, are those that make it attractive as a means. The thief who takes a red car, for instance, does not intend to take a red car; he intends only to take a car. To include other concrete details, thinks Parish, is counterintuitive. Furthermore, she thinks that I have conceded, in my earlier article, the counterintuitive nature of my own account.[40] Perhaps I did not state my position clearly enough. Nevertheless, a careful reading indicates that I concede no such thing. Our intuitions confirm that the thief intends to take a red car, although its being red in no way made it attractive as a means. He took a red car in order that he might take a car (since a red car was the one available).

Similarly, G. E. M. Anscombe's account of the man pumping poisonous water does not match our intuitions.[41] She claims that he merely intends to pump water; its being poisonous falls outside his intention (because he does not care whether it is poisonous). Our intuitions indicate otherwise. He intends to pump poisonous water in order that he might pump water. He knows that he must perform a concrete action of pumping, and the water available is poisonous. It is this water he intends to pump, and this water is poisonous.

Likewise, the doctor who performs a craniotomy intends to injure the baby in order that he might narrow her head. The concrete detail of injury falls within his intention, although it does not make his action attractive as a means. This version of the identity thesis remains untouched by Girgis's analysis. The claim is not that crushing the skull necessarily causes injury and that this necessity brings the injury into intention. Rather, the claim is that injuring (an aspect of the concrete action of crushing) causes the narrowing of the skull. The doctor intends to injure, then, as a means to narrow.

Our intuitions concerning intention, then, include the concrete details.[42] I do not concede otherwise. What does not include the concrete details (or rather, includes only a selection of them) is the moral character of the action.[43] The fact that the car is red in no way affects the moral character of the thief's action. Rather,

39. Parish, "Two Theories of Action," 70.
40. Parish, "Two Theories of Action," 66, 70.
41. G. E. M. Anscombe, *Intention*, 2nd ed. (Ithaca, NY: Cornell University Press, 1963), 42.
42. For an account of what does fall outside intention, see Jensen, "Causal Constraints," 273–293.
43. See Parish, "Two Theories of Action," 68, 72. Parish consistently seems to think that intention must somehow be delimited by the moral species. We intend plenty of things, however, that have nothing to do with the moral character of an action, as when Kenny intends to pound nails. For this reason, authors such as Michael Bratman can give

its moral character is determined by another concrete detail, namely, that the car belongs to someone else. Both concrete details are included within intention (intuitively so); only the latter is included within the moral character of the action.

Terminating in the Body

The lack of attention to concrete details may be what prevents Tollefsen (and Lee as well) from perceiving the force of another objection against the new natural law action theory.[44] Various authors have claimed that this theory overlooks an important feature of actions such as craniotomy and salpingotomy. These actions, they claim, terminate in the body of a human being. Furthermore, they terminate in the body "so as to harm the person."[45]

Tollefsen capitalizes on an ambiguity of this last statement. "So as to harm the person" might mean merely that these actions result in harm to the person. Given this reading, Tollefsen rightly points out that it is sometimes morally permissible to act upon an innocent person, foreseeing that our action might result in harm to him. Tollefsen imagines spraying a powerful water hose at an assailant.[46] Robin, for instance, might spray the hose, foreseeing that her assailant will be violently pushed back and be injured in the process (perhaps banging his head against a wall).

In response to this counterexample, Tollefsen points out that Steven Long emphasizes the innocence of the person acted upon. In this case, the assailant is not innocent. It is as if, on Long's account, the innocence of the person could change whether the action terminates *directly* in the body. This unusual view of Long provides sufficient distraction for Tollefsen (perhaps reasonably so), such that he overlooks another meaning of the phrase "so as to harm the person."

This phrase might not mean "with the result of harming the person." It might mean, instead, "with the aim of harm done the person." This latter meaning need not imply (as new natural law theorists might be inclined to suppose) that the harm is what makes the action attractive as a means. Rather, it might sometimes imply that the agent aims to bring about a change in the person's body and that this change is indeed harm. The doctor aims to crush the skull, and the crushing is a harm.

On this reading, it matters very much that the action terminates in the body. It terminates in the body precisely because the agent directs it there. When Robin sprays her assailant, she also directs her action to the body of the assailant, for she aims to bring about a change in him. In this case, however, she aims to change his place (repelling him), and this change is not a harm, although it might result in one. In contrast, the doctor aims to introduce a harm.

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lengthy accounts of intention while using few if any moral examples; see for instance Bratman, *Intentions*.

44. Tollefsen, "Terminating in the Body," 212–220; and Lee, "Distinguishing Between," 243–244.
45. Steven A. Long, "Fundamental Errors of the New Natural Law Theory," *National Catholic Bioethics Quarterly* 13.1 (Spring 2013): 105–132, doi: 10.5840/ncbq201313173; and Edward J. Furton, "Tollefsen on the Phoenix Case," *Ethics & Medics* 39.4 (April 2014): 3–4; See also Flannery, "What Is Included," 499–513.
46. Tollefsen, "Terminating in the Body," 215.

Tollefsen is oblivious to this distinction, as is evident in the list of examples he uses. He says, "Perhaps the defender has a long piece of piping with which he can, by striking forcefully, repel the attack. Perhaps he has a powerful water hose, which by aiming at the attacker will repel him." Then he adds, without blinking, "Perhaps he has a gun, and shooting the attacker will repel him."[47]

The first two examples are realistic instances of repelling an attack; they *push back* the attack. The third is not; the attack is ended by injuring the assailant. The difference is revealed by Girgis's own analysis. In the first two cases, if the person turns out not to be injured, then the defender will still have repelled the attack (she may, of course, have to repel the attack again if the uninjured assailant renews the attack). On the other hand, in the third case, if the gun does not injure the assailant, then it in no way *repels* the attack. Indeed, the description "repelling *him*" rings false. To Tollefsen, however, this description is no different than the other two. He overlooks the concrete detail that it is the injury, and not some supposed repelling, that stops the attack.

The craniotomy case is different. The injury to the baby is not of itself the efficient cause of reducing the size of the head. Rather, the injury is the concrete realization of reducing the size of the head. The head is reduced by crushing, and crushing is injuring. The head is reduced, then, by way of injuring.

In fairness to Tollefsen, Long, who is far from clear, may well not endorse the view under consideration, in which we act directly upon a body when we aim to bring about a change in the body. Tollefsen, then, may have aptly repelled Long's attack. I suspect he has.

Tollefsen is not likewise justified in dismissing Edward Furton's (admittedly brief) account. Furton's argument is directed against Tollefsen's use of fanciful counterexamples.[48] Tollefsen claims that a dilation and curettage abortion is not harming the baby, because it is sometimes performed after a natural miscarriage.[49] Furton rightly points out that this example is irrelevant to the case at hand (the Phoenix Case), which involved no natural miscarriage; before the procedure was performed, the baby was still alive. Furton also points out that Tollefsen's example of transplanting the baby to an artificial womb is similarly irrelevant to the case at hand.[50]

In short, Furton is pointing out that we must discuss the causes involved in the concrete action that really takes place. Kenny is in fact acting upon nails, not upon screws, and the doctors in the Phoenix Case were in fact acting upon a living baby, not upon the remains of a dead baby. If Kenny has available only pink nails,

47. Tollefsen, "Terminating in the Body," 214–215.
48. Furton, "Tollefsen on the Phoenix Case," 3–4.
49. Tollefsen, "Response to Koons and O'Brien," 773.
50. See Tollefsen, "Response to Koons and O'Brien," 772, 757. Elsewhere, Tollefsen suggests that conceivability is used in the new natural law in a restrained manner to refer to only the end and what the agent takes as needful for the end. As we have seen, however, what is deemed needful depends upon counterfactuals that do not apply to the situation at hand.

then Kenny intends to pound pink nails. Similarly, the doctors intend to harm, not to transplant, the living baby.

Furton is correct. That upon which we actually direct our actions is important. If we act upon the body of the baby, and if the change we seek to introduce is harm, then we intend to harm the baby. What other people possibly might do in other situations is not relevant. This is what we have chosen to do right here and now.

Because he ignores one plausible meaning of "so as to harm the person," Tollefsen incorrectly supposes that the classic grenade case is an instance of acting directly on the body so as to harm.[51] The soldier who throws himself upon the grenade in order to protect those nearby foresees that the grenade will act upon him and harm him with almost certain lethality. The soldier, however, does not act upon himself by introducing some damage. Rather, he acts upon himself by placing himself over the grenade. His aim, thereby, is to act upon the grenade, providing an obstacle to its action. He foresees the reaction, in which the grenade acts upon himself, but this contrary action is not his own. He does not act upon himself, then, so as to harm himself.

Furton does not suggest (as Tollefsen implies by association) that the innocence of the baby in any way makes the action direct. Innocence is relevant for Furton only because it is sometimes acceptable (outside the new natural law account) directly to harm those who are guilty.[52]

Like Girgis, Parish, and Lee, Tollefsen fails to address the force of the identity thesis. Conceptual possibilities that have little to do with the concrete situation provide the means of dismissing the concrete harm that the agent aims to bring about in the very body of the victim.

Essential Flexibility

The new natural law action theory, we may conclude, is not necessarily prone to fanciful redescriptions of actions. It has no fatal flaw that leads its proponents to come up with original descriptions. Rather, the theory simply leaves open the possibility. It has the flexibility by which someone so inclined can choose to find alternate descriptions of a concrete action. Far from incidental, this flexibility is the very *raison d'être* of the action theory itself.

51. Tollefsen, "Terminating in the Body," 216–217.
52. See, for instance, Christian D. Washburn, "Capital Punishment and the Infallibility of the Ordinary and Universal Magisterium," *The Thomist* 82.3 (July 2018): 353–406, doi: 10.1353/tho.2018.0023; and Christian D. Washburn, "The New Natural Lawyers, Contraception, Capital Punishment, and the Infallibility of the Ordinary Magisterium," *Logos* 22.1 (Winter 2019): 19–50, doi: 10.1353/log.2019.0000.