

Personal and social responsibility in the context of the defence of human life: the question of cooperation in evil.

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1. Introduction

Questions about whether one should cooperate with the wrongdoing of a principal agent are certainly questions for conscience, if by conscience one means the exercise of judgment about the choices one should make in the light of moral truth.² Such exercises of judgment are for a Catholic necessarily informed by the Church's teaching of moral truth, since a Catholic is committed to acceptance of the Church's authority to teach what is required in the conduct of one's life if one is to be faithful to the way of the Lord Jesus. Since in regard to the defence of human life in the field of healthcare the Church has definitive teachings that the intentional killing of innocent human beings, including direct abortion and euthanasia, "is always gravely immoral"³, a conscientious Catholic will be guided by this teaching in the choices about cooperation he or she makes.

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² See the clarification of the concept of conscience in the paper by Bishop Anthony Fisher OP, 'The moral conscience in ethics and the contemporary crisis of authority'.

³ See the solemn confirmation of this teaching by Pope John Paul II in *Evangelium Vitae* at §57.4, and its specification in respect of abortion at §62.3, and in respect of euthanasia at §65.4.

The distinction between formal and material cooperation, central to the teaching about cooperation in evil, derives its significance from the fact that it is certain *types* of act, identified in terms of *intention* rather than physical causation, that are absolutely impermissible. Since our topic in this conference is the defence of human life, particularly as that defence is required in the field of healthcare, it will be the Church's definitive teaching on the wrongness in all circumstances of *intentionally* taking innocent human life that will be a central determinant of our analysis.

2. Formal and material cooperation

Nearly all of us are involved in collaborative relationships without which we could not secure a range of goods which are ingredient elements of human flourishing. Teamwork is characteristic of the life of healthcare professionals, whose proper concern is the good of health, and legislators, whose proper concern is the just ordering of social relationships, depend on political alliances to secure passage of legislation.

Notoriously, however, human lives are rendered vulnerable by unjust legislation accommodating the practices of abortion, embryo experimentation and euthanasia, and all these practices are characteristically carried out by healthcare professionals often relying on the collaboration of colleagues.

Because cooperative or collaborative relationships are necessary to human well being one cannot insulate oneself from the dangers of wrongful collaboration by the choice completely to opt out of such relationships.

Hence it becomes important to specify both when cooperation can never be one's choice because it is an intrinsically evil choice and when, though one's contribution to another's wrongdoing does not involve one making an intrinsically wrongful choice, one's cooperation should nonetheless not be provided because it is contra-indicated by other considerations.

2.1 Formal cooperation

Cooperation is never to be provided when the course of conduct one would be choosing in cooperating is specified by the very same object as the principal agent's chosen course of conduct and choice of that object is intrinsically evil (*intrinsice malum*). To have the same chosen object in acting is to share the same intention⁴: for a cooperator to share the same intention as a principal agent is to formally cooperate with that principal agent. It is important to emphasise that having the same object as the principal agent does not necessarily mean desiring that object. All that is required is that one's practical reasoning leads one to a choice that is aimed at achieving that object. (As we shall see, the notion of a choice that is aimed at achieving an object X admits of conflicting interpretations. See 2.3 below.) A nurse who finds herself ordered to assist at an abortion may find the abortion morally repugnant but if what she does is directed precisely to helping bring about the abortion then she is formally cooperating in abortion. What she chooses to do may be for her simply a means to avoid losing her job or to avoid displeasing a powerful colleague. In those respects her practical reasoning will differ from that of a nurse who directs her

⁴ I use the term 'intention' to refer to both proximate and further ends of action. This usage (common in Anglophone philosophy) differs from that of *Veritatis Splendor* which reserves the term 'intention' to refer to a person's further or ultimate end in acting.

assistance to bringing about an abortion as something worthy of choice because it satisfies what she thinks to be “a woman’s right to choose”. But while ulterior objects of choice differ in these cases, the ‘proximate object’ of bringing about the abortion is the same.

The choice of formal cooperation in the procurement of abortion is in all circumstances excluded for the same reasons that procurement of abortion *qua* intentional killing of the innocent is excluded. They are that such a choice is a choice of what is intrinsically evil, a grave injustice to the one killed, and as such the kind of choice which, if unrepented, serves to dispose one to grave injustice, i.e. it makes one vicious. This is so because our choices do not merely bring about states of affairs external to us but simultaneously shape what we are disposed to choose. Vice contrary to the good of human life in its most vulnerable phases tends, however, in many contemporary societies to wear a mask of eminent respectability, which is one reason why refusing to be party to it can be difficult.

In talking about formal cooperation I have spoken about *courses of conduct* specified by reference to their chosen objects. The reason for using the locution ‘courses of conduct’ is to avoid the impression that formal cooperation always consists in *doing* something. One may formally cooperate with a wrongdoer by *refraining* from doing what one *could and should* do to prevent the wrongdoing *precisely in order to facilitate the wrongdoing*. Thus a bishop who has a right in the constitution of a Catholic hospital to determine what practices it is ethically acceptable for the hospital to accommodate, may collude with the Board of the hospital, which is intent on accommodating a lucrative but ethically objectionable practice, by

refraining from giving a judgment on the objectionable character of the practice. His choice is precisely that of *not* preventing a practice with the ulterior motive of assisting the hospital to achieve its financial targets. But the choice not to prevent is here a choice to facilitate what is morally objectionable.

This last example illustrates the fact that the ‘modes’ of cooperation in wrongdoing are quite various. St Thomas Aquinas identifies a number⁵, which I shall describe schematically:

1. By being an accomplice of A in carrying out X.
2. By agreeing to X being carried out by A, where prior agreement is required.
3. By advising A to do X.
4. By failing to advise A against doing X when one *could* and *should* (i.e. when one has an *obligation* to give such advice).
5. By failing to require/order A not to do X when one *could* and *should*.
6. By providing support/aid/concealment of a kind without which A could not do X.
7. By failing to provide help/support of a kind which would have prevented A from doing X when one *could* and *should*.

⁵ St Thomas Aquinas, *Summa theologiae* 2a 2ae, q.62, art.7

2.2 Material cooperation⁶

One may assist another's wrongdoing without it being the case that the character of one's choice – what one intends in acting – is intrinsically evil. But the character of a proposed course of action is not the only kind of reason one can have for refraining from it. We are answerable not only for what we directly intend but also for the foreseeable, unintended consequences of our choices.

If it is clear that what one has in mind to do is not formal cooperation, and furthermore that one's ultimate object in cooperating would be the realization of some instantiation of one of the basic goods constitutive of human flourishing (rather than a merely instrumental good⁷), then the question that confronts one who foresees undesirable side effects of his material cooperation in wrongdoing is: Does my reason for doing what I have in mind to do warrant making a causal contribution to the foreseeable undesirable effects? This question for conscience properly arises whatever the type of material cooperation that best describes one's prospective choice of conduct.⁸ The answer to this question depends on comparing the reasons

⁶ This section 2.2 is particularly indebted to the treatment of the topic in Germain Grisez, *The Way of the Lord Jesus. Vol.3: Difficult Moral Questions*, Appendix 2: Formal and material cooperation in another's wrongdoing, pp.871-897, esp. 876-889. See also Bishop Anthony Fisher OP, 'Cooperation in evil: understanding the issues', in Helen Watt (ed) *Cooperation, Complicity and Conscience: Problems in healthcare, science, law and public policy* (London: The Linacre Centre, 2005), pp. 27-64.

⁷ I assume here that the relation 'instrumental for' is a transitive relation: if X is instrumental for the realization of Y and Y is instrumental for the realization of Z then X is instrumental for the realization of Z.

⁸ It is traditional to distinguish *immediate* from *mediate* material cooperation: cooperation is immediate if one's contribution is to the actual performance of the principal agent's wrongdoing; it is mediate if it is preparatory to or in some other way facilitating of the performance. Mediate cooperation may be *proximate* or *remote*: it is proximate if one is closely involved in facilitating the actual wrongdoing, remote if one simply contributes to maintaining or securing the conditions that make possible the carrying out of the kind of wrongful act that is at issue.

that count for acting with the reasons that count in favour of refraining from acting.

It is important to recognise that the reasons which may count in favour of refraining from acting may be quite various in character:

1. The seriousness of the character of the wrong one materially facilitates, possibly involving grave injustice to the person(s) wronged.
2. The danger that repeated cooperation can have the effect of making one progressively indifferent to the wrong being done to others, can result in one becoming insensitive to their claims upon one, and may eventuate in one being disposed to formally cooperate.
3. One's material cooperation can be perceived by the wrongdoer as an endorsement of his behaviour and may therefore reinforce his inclination to engage in such behaviour.
4. One's material cooperation can be a source of scandal to others, leading them to wrongly cooperate either materially or formally in the wrongdoing, whereas a refusal on one's part to cooperate materially might have helped them to resist any such involvement.
5. Victims of the principal agent's wrongdoing may reasonably construe one's cooperation as itself wronging them and in consequence the good relationship one should perhaps maintain with them is damaged.
6. Material cooperation with wrongdoing can make impossible the witness one may have an obligation to bear against the wrongdoing by undermining one's credibility as a witness.

7. Material cooperation tends to help entrench bad practices which should be eliminated.

The weight the above types of consideration may carry as reasons against cooperating will differ from individual to individual, depending on whether or not one's cooperative contribution is to the actual carrying out of the wrongdoing⁹, on what one's responsibilities are, on the availability of alternative courses of action to achieve the goals one had in cooperating, on the likelihood that refraining from cooperation will be a deterrent to the principal agent, and on the degree of confidence one has that foreseen possible consequences of cooperation will eventuate.

The judgment that an individual has to make in a particular case in taking account of the reasons favouring cooperating compared with the reasons favouring refraining from cooperating is not based on an impossible proportionalist comparison of the incommensurable goods at issue but is rather a prudential assessment of the course of conduct best ordered to "the whole of living-in-a-good-way".¹⁰

2.3 Drawing the line between formal and material cooperation

Since formal cooperation with evil is always wrong, because a choice intentionally to help bring about that evil, it is important to have a defensible view of the scope of intention, if one is to distinguish between intended and

⁹ See the previous footnote 8.

¹⁰ Grisez, *op.cit.* p.885, quoting St Thomas, *Summa theologiae* 2-2, q.47, a.2, ad 1.

foreseen but unintended effects of what one does. Here some philosophical claims are unavoidable.

There are at least three positions one can find in the contemporary literature on cooperation:

1. What an agent intends is to be identified in terms of the description of what his practical reasoning specifies as the ultimate purpose/end of a chosen course of conduct.
2. What an agent intends is to be identified in terms of the description of what his practical reasoning specifies as required for the achievement of his end (i.e. his means) and includes no effect of acting that is not logically entailed by that description. Here the idea of logical entailment has a different interpretation from the interpretation it has in the third position on the scope of intention.
3. What an agent intends is to be identified in terms of the description of what his practical reasoning specifies as required for the achievement of his end, which includes any effect logically entailed by that description.

The first understanding of intention may seem implausible in that it eliminates reference to proximate objects of choice, but despite its implausibility it shows up in contemporary discussions of cooperation.

The difference between 2 and 3 identifies the arena of an important debate in contemporary moral theology, which I can deal with here in only a summary

fashion.¹¹ The difference between positions 2 and 3 hangs on differing understandings of the notion of logical entailment as it applies to act descriptions.

The notion of logical entailment employed in 2 is construed in terms of what necessarily obtains across all possible worlds. An effect of an agent's chosen action is said to fall outside the scope of intention if the description of what is identified in his practical reasoning as strictly required for the achievement of his end does not logically entail that one brings about that effect, meaning that one can conceive of a possible world in which that effect does not obtain as a result of the agent's chosen way of acting.

This position on the scope of intention is well illustrated by an example which is famous in the literature, that of craniotomy. Craniotomy to save the life of a mother in obstructed labour standardly involves removing the contents of the child's cranium before crushing it, and in any case generally involves crushing it in a way that directly causes the death of the child. About this procedure it has been said that

“A surgeon who performs a craniotomy and could soundly analyse the action, resisting the undue influence of physical and causal factors that would dominate the perception of observers, could rightly say ‘No way do I intend to kill the baby’ and ‘It is no part of my purpose to kill the baby’ ... Our contention ... is that when someone chooses to do a craniotomy on a baby to save his or her mother's life in an

¹¹ I have dealt with it more fully in an unpublished lecture on ‘The scope of intention in the doctrine of double effect’ [The 2002 Linacre Lecture at Ave Maria School of Law, Ann Arbor, Michigan].

obstetrical predicament, the morally relevant description of the act would not include killing the baby.”¹²

The causal sequence leading to death is irrelevant to determining intention, the authors of this quotation argue, because it is no part of the significance of the act as that is determined by the practical reasoning of the doctor who carries out the emergency craniotomy. One of these authors had earlier argued that “It seems to be logically possible that the craniotomy be performed and the fetus not be killed.”¹³ It is made clear that ‘logically possible’ means ‘possible in some conceivable world’ – as distinct from the actual set-up of this world – when it is explained that “The fetus’s death is entailed by the craniotomy and the relevant physical laws and the present state of medical technology” – but not by the description under which the procedure is chosen, viz. that of altering the dimensions of the baby’s head to remove it from its obstructed position in the birth canal.

Lying behind the difference between this understanding of the scope of intention and the third interpretation of the notion are opposed understandings of causality, one Humean, the other Aristotelian.

For Hume, causal laws simply describe constant conjunctions of cause and effect, and cause and effect are conceptually unrelated. The connection is simply a contingent, empirical connection, and there can be no *a priori* reason for excluding the conjunction of any kind of cause with any kind of effect and no reason, therefore, to speak of essential causal effects.

¹² John Finnis, Germain Grisez, Joseph Boyle, “Direct” and “Indirect”: A Reply to Critics of our Action Theory’. 63 (2001) *The Thomist*: 1-44, at pp.24, 29.

¹³ Joseph M Boyle Jr, ‘Double-effect and a certain type of embryotomy’, *Irish Theological Quarterly* 44 (1977): 303-18, at p.308.

For Aristotle, by contrast, there is a logical or conceptual relation between a cause and its effect, it being part of the definition of a cause that it has a tendency to produce such-and-such kind of effect. It is because a cause is defined as a tendency to produce such-and-such an effect that we can distinguish between essential and accidental effects.

Just as there are essential effects of natural causes so there are essential effects of intentional acts, effects that a particular kind of intentional act tends to produce. And such effects are part of the significance of what one chooses to do in choosing to do that type of act. It may be that what is of particular significance for an agent in what he chooses to do does not make explicit all that belongs to the essential meaning of his chosen action, but *if the description of the act under which he chooses to perform it identifies an aspect of its efficacy which essentially determines another effect then that other effect belongs to the essential meaning of what he does*. The essential determination to which reference is made here belongs to the essential character of the type of causal efficacy chosen to achieve the precise effect the acting person seeks to achieve. It is 'essential determination' which establishes conceptual or logical entailment, such that if it is intrinsic to the meaning of a doing of X that it is a doing of Y one cannot say that one is not choosing to do Y in choosing to do X. It is important to recognise that the conceptual entailment belongs to the character of one's *intention*. It is true that what explains the essential determination which establishes conceptual entailment are truths about human causal activity and truths about the objects on which that activity is exerted. But these are truths which properly enter the perspective of the

acting person not by way of informing foresight of consequences but by way of characterising intention. For the deliberations of the acting person in settling upon what is causally efficacious for the achievement of his ends make intrinsic to the character of his choice what belongs essentially both to that mode of efficacious action and what belongs essentially to its impact on the object on which the action is exerted.

What does this mean for the craniotomy example? What is chosen as the efficacious means of altering the dimensions of the child's head is evacuation of the contents of his brain and the crushing of the cranium. Evacuating the contents of an unborn child's head and then crushing it *essentially determines* the death of that child; there is hardly a more important vital organ than the brain. Performing a craniotomy conceptually entails killing the baby; the killing of the baby is part of the essential meaning of what one chooses to do, even if one can imagine a possible world in which one could re-assemble the baby in such manner that it would continue to be alive. The significance of human action is in part determined by the natural constitution of things in the world in which we actually live.

If the essential nature of modes of causal efficacy and the natural constitution of things places constraints on the character of human action we may ask whether the *conventionally established* nature of certain procedures places similar constraints on the nature of human action. The question can perhaps be best explored by reference to a particular kind of case, that of the participation of Catholic agencies in Germany in providing 'social counselling' to women seeking abortions, a case that exercised the Holy See throughout the last decade of the twentieth century.

German Federal law required, as a condition of obtaining an abortion, that one should have received counselling from counsellors in centres approved for this purpose. To ensure this requirement was met State laws required that a woman should obtain a certificate duly signed by a counsellor testifying that she had received counselling, and presentation of this certificate to a doctor carrying out abortions was necessary in order to obtain an abortion. Within the framework of the law, therefore, a function of the certificate was that of facilitating access to abortion. This was true despite the fact that the law's requirement that a woman should receive counselling was intended to ensure that women were made aware of alternatives to abortion.

The Church in Germany decided to establish approved counselling centres within the framework of the law with the clear intention of taking the opportunity offered by the law to dissuade women from having abortions. But if women were to be induced to come to these centres they had to know that the counsellors had committed themselves in advance to signing and issuing certificates of attendance to any woman who continued to want an abortion, as the majority attending did. The need the certificates met was that of women who persisted in wanting an abortion. It was precisely the function of the signed certificates as providing testimony that a woman had fulfilled a necessary legal condition of abortion that served the purpose of ensuring that women came for counselling. So the choice to undertake to provide certificates *qua* inducement to receive counselling entailed that it was a choice to undertake to provide certificates *qua* facilitating access to abortion. In other words, the formality under which the pro-life counsellors

were committed to undertaking provision of certificates was *qua* documents facilitating procurement of abortion.

If that analysis is correct, one would have to say that formal cooperation in women's advance plans to obtain an abortion became the chosen means to the very worthy end of dissuading women from having abortions. If one considers that to have been the case, there is no reason to be surprised that numbers of counsellors in Catholic centres were corrupted in their attitude to abortion, taking a permissive view of it in their counselling of women.¹⁴

What is decisive for my argument that counsellors signing certificates of attendance were not merely foreseeing but intending the facilitation of abortion is one of the roles in law of the signed certificate, which meant that a commitment to producing a signed certificate could entail a commitment to facilitating abortion.¹⁵

In general, the conventional as well as the natural significance of forms of causal efficacy can determine descriptions of the formal character of action, bearing in mind that a course of conduct can have a number of formal objects.

In the next three sections I will explore the application of the teaching on formal and material cooperation to a select number of questions of

¹⁴ Professor Spaemann spoke at the time of counsellors in Catholic centres who had "fallen prey to an abortion mentality". I am grateful to Dr Helen Watt for observations which helped to make more precise my analysis of the formal cooperation I believe existed in the situation discussed here.

¹⁵ No claim is being made here that this was the basis on which Pope John Paul II required the German bishops to desist from maintaining counselling centres, for one might deny that formal cooperation was involved, while insisting that the centres were engaged in unacceptable material cooperation.

cooperation which arise in different institutional settings in which the defence of human life may be at issue. Each type of case chosen might warrant paper-length treatment on its own, so it should be emphasised that the treatment offered here is both selective and, given the inherent complexity of the type of matter under consideration, liable to provoke disagreement.

3. Dealing with suicidally motivated refusals of life-prolonging treatment.

A suicidally motivated refusal of treatment by a patient is a refusal which is intended precisely to hasten the patient's own death. Such refusals are themselves motivated by a variety of factors which lead the patient to believe that his life is no longer worth living; he judges that he would be 'better off dead' and seeks to bring about his own death by insisting that life-prolonging treatment be withheld or withdrawn. Such refusals of treatment should be distinguished from refusals based on the belief that treatment is futile, in the sense of being no longer therapeutically beneficial, or on the sense a patient may have that the treatment would, for one or other of a variety of possible reasons, be excessively burdensome. The latter kinds of refusal are not based on a patient's belief that his life is no longer worthwhile but rather on the belief that *treatment* in the patient's circumstances is not worthwhile. In the interests of simplifying the

discussion I shall assume that a patient's motivation is both unambiguous and discernible.¹⁶

Suicidal refusals may be expressed by a competent patient in regard to contemporaneous treatment ('Stop giving me my insulin injections now so that I can lapse into a coma and die') or in regard to future treatment when the patient anticipates that he may be no longer competent. The latter type of refusal typically finds expression in a written advance directive.

I shall discuss the problems of cooperation that carers confront in face of such refusals in the context of the law of England and Wales. Competent patients have an *apparently* unqualified right in law to refuse treatment.¹⁷ Moreover, it should be noted that 'artificial nutrition and hydration' are classified in law as 'medical treatment'. A doctor who overrode such a refusal of treatment might be exposed to civil liability for damages for a tort such as battery or exposed to criminal prosecution.

A valid advance refusal of treatment which is applicable in the circumstances which obtain in the life of a now incompetent patient has the same status in law as a contemporaneous refusal of treatment by a competent

¹⁶ So I ignore situations in which in varying degrees patients exhibit mixed motivation, partly suicidal and partly repugnance at the burdens of treatment. Such complex motivations and their relevance to the decisions a carer has to take are discussed by Helen Watt in 'Cooperation problems in care of suicidal patients', in Helen Watt (ed) *Cooperation, Complicity and Conscience. Problems in healthcare, science, law and public policy* (London: The Linacre Centre, 2005), pp. 139-147.

¹⁷ The position of the law is not *completely* clear. The courts have used sweeping language which makes it appear that the right of competent patients to refuse treatment is absolute, and this is certainly the prevailing view among academic medical lawyers. But Professor Keown has pointed out to me that there is a good argument in principle that this right is not absolute, and that competent patients do not have a right to refuse treatment to commit suicide. The courts have not yet held that the right to refuse treatment extends to suicidal refusals. Even in the case of *Re B* (a ventilator-dependent woman who wanted ventilation discontinued) the point was not argued and adjudicated. See further John Keown, *Euthanasia, Ethics and Public Policy* (Cambridge: Cambridge University Press, 2002), pp.227-30.

patient. Failure to respect such a refusal exposes a healthcare professional to the same actions in law.

Healthcare professionals who have conscientious objections to complying with suicidal refusals of treatment appear to have strictly limited room for manoeuvre. According to the (draft) Code of Practice for the implementation of the *Mental Capacity Act 2005* (which comes into force in April 2007) they should make arrangements for the care of the patient to be transferred to another healthcare professional.

What choices is it reasonable for a healthcare professional to make in face of suicidal refusals of treatment and in the context of the law's specification of the doctor's obligations?

To begin with, could a doctor acceptably reason that he may respect a contemporaneous suicidal refusal of treatment precisely with a view to complying with the law's requirement that he must respect all competent refusals of treatment?

If we begin with the question would compliance involve formal cooperation in suicide the answer, I think, must be different in respect of the two examples I have quoted – omitting insulin and omitting tube-feeding.

Insulin is indubitably medical treatment and it is reasonable that the law prohibits the giving of medical treatment to a competent patient who refuses it and that it does so without seeking to specify what would and what would not be acceptable motives for refusal. There would be intractable difficulties

for healthcare professionals in applying a law which sought to discriminate between acceptable and unacceptable motivations for refusal. That being so, it cannot be judged to be a wrongful intention on the part of a doctor to comply with such a law *qua* law protecting the right of patients to refuse medical treatment. The point of the law is to protect a reasonable sphere of self-determination for competent patients, and there is nothing in the nature of respecting the legal requirement so described that determines that one is formally cooperating in suicide.

But if failing to override a patient's suicidal refusal of insulin injections need not amount to formal cooperation in suicide would it amount to material cooperation, given that the hastening of the patient's death consequent upon his refusal of injections is entirely foreseeable? In answering this question one has to bear in mind that the doctor may reasonably think¹⁸ that he cannot physically override the patient's refusal in the sense of injecting the patient against his will. On the other hand he cannot simply acquiesce in what the patient is determined upon, for to do so would be to provide material cooperation. A number of considerations count against such cooperation: the gravity of what the patient proposes to accomplish; the moral danger to the doctor himself of any policy of acquiescing in such refusals; the encouragement given to the patient by merely acquiescing in his decision; the scandal given to others by a policy of acquiescing; and the loss of the ability to give credible witness against suicidal behaviour consequent on such a policy.

¹⁸ Given the language of the courts; see footnote 17 above.

All these considerations suggest that a doctor confronted with a suicidal refusal should in the first instance make determined efforts to alter the patient's mind. If he is unsuccessful in this he should make it clear to the patient that he cannot continue to care for him. Then in carrying out his legal obligation to transfer the patient to the care of another doctor he should not seek to find a doctor who will readily agree with the patient's suicidal will.

The moral character of the available options changes, I think, if we consider a suicidal refusal of established tube-feeding, that is, a demand by a patient that one stop tube-feeding.¹⁹ On the assumption that tube-feeding is not medical treatment but medically assisted basic care of a patient, it ought not to be covered by any law giving competent patients an unqualified right to refuse medical treatment. It is widely thought, though not indubitably established, that suicidal refusal of tube-feeding is covered by the right to refuse medical treatment. One certainly cannot acceptably intend to comply with a law which is considered to accommodate suicidal refusals of tube-feeding when suicidal refusal of tube-feeding is at issue,²⁰ if one's compliance with it is *qua* law accommodating suicidal refusal of basic sustenance. To comply with it *qua* facilitating suicide would be formally to cooperate in suicide. That is not, however, the only formality under which one might choose to comply with the law. One may comply with it *qua* law threatening penalties for non-compliance. One would then be involved in material cooperation in suicide. Both because of the gravity of the

¹⁹ To be distinguished from initiating tube-feeding of the kind requiring a procedure such as gastrostomy. Refusal of a gastrostomy may, depending on the doctor's intention in complying with it, be classified as refusal of a medical treatment and as not involving formal cooperation in suicide.

²⁰ This should not be taken to imply that there cannot be reasonable refusals of established tube-feeding: refusals can be reasonable if the mode of delivering the tube-feeding has become excessively burdensome or the tube-feeding is declined when a patient is in the terminal phase of dying.

consequences for the patient, and because it is not clearly established that there is a right suicidally to refuse tube-feeding, the doctor would have strong reasons for seeking to challenge in the courts the view that he is obliged to comply with such a refusal. It is possible that the court would agree with him. On the other hand, it may simply order the transfer of the patient to another doctor.

Finally, let me remark on the challenge that suicidal advance refusals of treatment present for Catholic healthcare facilities. Their policy should be that of ascertaining if at all possible in advance of admission whether an incompetent patient has an advance directive with that kind of clause in it. If the directive has, then where possible the patient should be refused admission. If such a directive is found subsequent to admission, then relatives and/or those having lasting powers of attorney in respect of the patient should be told that care of the patient can be continued only on condition that no attempt is made to enforce the suicide clause in the advance directive.

4. The use in research of cell-lines derived from embryos or aborted fetuses.

The very specific type of scenario I have in mind to discuss here is that of biomedical researchers who are asked to use cell-lines derived from embryos or fetuses who have been deliberately aborted. I exclude from consideration those who arranged to obtain the tissue with a view to developing the cell-line: since they are generally intimately involved in planning to receive fresh

tissue they cannot but want the abortion performed, intend that it should be performed, and certainly will not be persons who speak against the planned abortion.²¹

In considering possible complicity with abortion on the part of researchers using cell-lines one should distinguish between those using cell-lines obtained long ago²² and those needing contemporaneously developed cell-lines. The latter in so far as they want those who develop and market cell-lines to provide them, and know that provision depends on derivation from tissue obtained from procured abortions, are in the position of people who want the abortions to occur, and are rewarding, through their demand for such cell-lines, the developers who are likely involved in the actual planning of abortions. The intentions of such researchers are describable in terms requiring *de facto* a set-up in which ongoing procurement of abortions is a condition for obtaining cell-lines.²³ So they may be said to formally cooperate in the maintenance of such a set-up.

Researchers using cell-lines with a decades-long ancestry are certainly not committed to maintaining a set-up requiring ongoing procurement of abortions. Could they be involved in any complicity with abortion?

²¹ Sometimes the involvement of those requiring fetal tissue can be so direct that it is the procedure for collecting the tissue which itself kills the child *in utero*. Madraza, I. *et al.*, 'Fetal Homotransplants (Ventral Mesencephalon and Adrenal Tissue) to the Striatum of Parkinsonian Subjects', *Archives of Neurology* 47 (1990): 1281-2, describe a procedure in which women were first cervically dilated, a tube attached to a plastic cannula was then inserted into the uterus, and ultrasound was used to guide the open end of the tube to the head of the fetus where suction was applied from the syringe to slowly aspirate the baby's brain, tissue from which was transplanted to patients with Parkinson's disease.

²² WI-38 was developed in July 1962 from lung tissue from a 3 month old deliberately aborted fetus; MRC-5 was developed in September 1966 from lung tissue of a 14 week old deliberately aborted fetus. HEK 293 (discussed by Alvin Wong, 'The Ethics of HEK 293', *The National Catholic Bioethics Quarterly* 6 (2006): 473-95) was developed in 1972.

²³ The *de facto* set-up is not a necessary requirement for obtaining cell-lines: it might be possible to develop lines from spontaneous abortions (miscarriages).

The mode of carrying out the abortions from which the early cell-lines were derived suggests that the planning of those abortions was in part aimed at deriving those cell-lines.²⁴ It would seem, then, that part of the purpose in carrying out those specific abortions was the derivation of usable cell-lines. If this is so, it would follow that subsequent users of the cell-lines are materially helping to achieve part of the purpose of the original wrongdoers.

If the original carrying out of the abortions was in part aimed at obtaining the now decades-old cell-lines, the obtaining of those cell-lines for research purposes was part of a gravely wrong plan. The proper response to plans of that kind is not to act with a view to them succeeding but rather to frustrate them. There will not in most cases be reason to think that a researcher uses the cell-lines precisely with a view to fulfilling the plans of the original wrongdoers, but *materially* he will be contributing to the fulfilment of those plans and so frustrating what justice would normally require.²⁵

There are other reasons which can count against the use of cell-lines derived from the tissue of deliberately aborted embryos and fetuses. One reason is that, as with other kinds of case in which people take advantage of someone else's wrongful act to promote some worthwhile end, the value of the original act in facilitating their ends *can* lead them to endorse the original act precisely in so far as it facilitated achievement of their ends. But in reality it

²⁴ See the evidence adduced by Rene Leiva, 'A Brief History of Human Diploid Cell Strains', *The National Catholic Bioethics Quarterly* 6 (2006): 443-51.

²⁵ This paragraph is indebted to Alexander Pruss, 'Cooperation with past evil and use of cell-lines derived from aborted fetuses', in Helen Watt (ed) *Cooperation, Complicity and Conscience. Problems in healthcare, science, law and public policy* (London: The Linacre Centre, 2005), pp.89-104. See also Alexander Pruss, 'Complicity, Fetal Tissue and Vaccines', *The National Catholic Bioethics Quarterly* 6 (2006): 461-70.

did so by being the wrongful act it was. One can, of course, resist the temptation to endorsement, but if one fails to then one's own dispositions are corrupted.²⁶

Two other reasons which can count against use of cell-lines derived from tissue obtained from abortions are, first that one's use can be a source of scandal to colleagues (i.e. an obstacle to their recognising the moral truth about procured abortion), and secondly one's use even of old cell-lines can undermine the credibility of the witness one should give against the continued derivation of cell-lines from aborted embryos and fetuses. Those best placed to object to obtaining cell-lines in that way are researchers who are familiar with the nature of their production. Failure to object leaves undisturbed the present practice of pharmaceutical companies and research institutes.

None of the reasons mentioned here are trivial considerations when a researcher comes to make a prudential judgment about whether he could justify using cell-lines derived from tissue obtained from aborted embryos and fetuses. The potential value of his research would have to be both very considerable and very urgent to provide such justification.

²⁶ The phenomenon briefly referred to here has been studied by M Cathleen Kaveny, 'Appropriation of Evil: Cooperation's Mirror Image', *Theological Studies* 61 (2000): 280-313.

5. Legislators and restrictive legislative proposals bearing on the protection of human life: the debate about the implications of *Evangelium Vitae* §73.3

A legislator who votes in favour of legislation which is aimed precisely at permitting the practice of abortion *formally* cooperates in the procurement of abortions, and the gravity of his wrongdoing is in no way mitigated by any declaration that he is “personally opposed” to abortion.

This moral truth has given rise to a debate about the permissibility of proposing or voting for legislation which has the effect of restricting abortion to a shorter gestational period than the period during which abortion was previously permitted but which allows abortion to take place during the shorter gestational period. The resolution to this debate hinges, I believe, on the way conventions about the correct interpretation of legislation clarify the efficacy – what is actually effected – by the passage of such legislation and what may therefore be intended in voting for such legislation.

It is objected that one should not vote for any restrictive proposal (bill or law) which protects some people from the injustice of an existing law while leaving others exposed to that injustice. This is most clearly impermissible (it is argued) when the proposal in question is so phrased as to restate part of the existing law’s unjust provisions. Such a proposal seems to be contrary to *Evangelium Vitae* §73.2:

“In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it or to ‘take

part in a propaganda campaign in favour of such a law, or vote for it'.”

A vote to permit abortions up to 14 weeks in circumstances in which abortion has hitherto been prohibited is clearly a vote to introduce an intrinsically unjust law, in the sense of a law permitting the violation of a fundamental human right, i.e. a right that should never be violated. But if it is never right to vote for such a law how could it be right to vote for an identically worded proposal even if the context in which voting was taking place was one in which the existing law permitted abortion up to 24 weeks? For the wording of the proposal expressly permits abortion up to 14 weeks, that is, it permits to occur what should never be allowed to occur.

Context, however, and the conventions which characterise that context, do make a difference. In the context in which a proposal to permit abortion up to 14 weeks is a restrictive proposal, the effect of passing such a proposal into law is to enact a prohibition on abortion between 14 and 24 weeks. No new permission of abortion up to 14 weeks is being introduced: that part of the law as it was is left intact. And it is left intact simply because it is not politically possible to remove it.

Conventions of legal interpretation oblige one to distinguish between the *form of enactments* and their *legal meaning* or '*juridical effect*' i.e. the propositions of law which these enactments, properly interpreted, make legally valid. The legal effect of some permissive formulae is in context not permissive but restrictive, i.e. the propositions of law which are made legally valid by a successful vote in favour of them are prohibitive.

A law restricting abortion to a shorter gestational period than the period during which abortion was previously permitted comprises, as Professor Finnis puts it, “two (or more) distinct *propositions of law* ... One is a proposition of law that certain abortions are prohibited. The other ... is the proposition of law that other abortions are permitted.”²⁷

This point is essential to making sense of *Evangelium Vitae* 73.3:

“A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorised abortions, in place of a more permissive law already passed or ready to be voted on. Such cases are not infrequent. It is a fact that while in some parts of the world there continue to be campaigns to introduce laws favouring abortion, often supported by powerful international organizations, in other nations – particularly those which have already experienced the bitter fruits of such permissive legislation – there are growing signs of a rethinking in this matter. In a case like the one just mentioned, when it is not possible to overturn or to completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well-known, could licitly support²⁸ proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an

²⁷ John Finnis, ‘Helping enact unjust laws without complicity in injustice’. *American Journal of Jurisprudence* 49 (2004): 11-42, at p.14. The whole of section 5 of my paper is heavily indebted to this article.

²⁸ “Support” in the English of *Evangelium Vitae* §73.3 translates “suffragari”, which echoes “suffragiis sustinere” of §73.2 which is translated as “vote for”.

unjust law, but rather a legitimate and proper attempt to limit its evil aspects.”

What *Evangelium Vitae* §73.3 regards as “licit” is a vote for a restrictive proposal aimed at making effective a proposition of law that certain abortions are prohibited. Even if the wording of the proposal is in terms of a permission, the effect cannot be to introduce a permission for the abortions in question, since that already exists²⁹, but rather its effect is to introduce a prohibition of some abortions which previously were permitted.

It is because that is the effect of the restrictive proposal that, when in §73.3 *Evangelium Vitae* envisages a legislator voting for such a proposal precisely with the aim of “limiting the number of authorized abortions”, it is consistent with its prior subsection §73.2 which teaches that it is never licit to vote for “an intrinsically unjust law, such as a law permitting abortion or euthanasia”; for to vote for restrictive legislation *qua* restrictive has the effect of prohibiting, to the degree politically feasible, the practice of abortion, and as such has no tendency to bring into effect permission for abortion. The law of the State will remain “intrinsically unjust” to the extent that it continues to permit abortion. But legislators who succeed by their votes in restricting a more extensive permission of abortion have brought into effect a just prohibition of some abortions.

Attention to the precise formality of the legislators’ intention as that takes effect within the conventions of the law makes clear that voting for a restrictive legislative proposal need involve no formal cooperation with the procurement of abortions.

²⁹ Evidently a proposal should not extend a permission which otherwise would have lapsed.

6. Conclusion

The casuistry of cooperation in wrongdoing is not a straightforward topic. In this paper I have offered an interpretation of the notion of formal cooperation which suggests that what some would identify as material cooperation (and even defensible material cooperation) should be classified as formal cooperation, and choices that others would regard as formal cooperation in wrongdoing should not be thought to embody an intention which can be so characterised. It is clearly important to have a true understanding of formal cooperation because of what is at issue in choices that count as formal cooperation in grave wrongs against human life: one's acting on reasons which should *never* characterise one's choices, and which, if they do, will seriously corrupt one's character.³⁰

The complexity that attends discerning what is the right choice when material cooperation is at issue arises from the range of considerations which one needs to take into account in reaching a prudential judgment about one's responsibility. Errors of judgment can arise from failures to take into account all the considerations relevant to choice.

Conscientious judgments about what would be formal or wrongful material cooperation can place healthcare workers in particular in situations in which they are obliged not to meet expectations of them, whether they are the

³⁰ The moral significance of formal cooperation is discussed in Luke Gormally, 'Why not dirty your hands?', in Helen Watt (ed) *Cooperation, Complicity and Conscience. Problems in healthcare, science, law and public policy* (London: The Linacre Centre, 2005), pp.12-26.

expectations of patients, of colleagues, of institutions or of the law. In some of those situations refusal to meet those expectations may not be costly; but there are situations in which conscientious objection to cooperation in wrongdoing may cost a person dear, in ways he cannot avoid. In such situations he may recall that the defence of innocent human life is integral to the proclamation of the Gospel. “In the proclamation of this Gospel”, Pope John Paul II wrote, “we must not fear hostility or unpopularity, and we must refuse any compromise or ambiguity which may conform us to the world’s way of thinking (cf. *Rom* 12: 2). We must be *in the world* but not *of the world* (cf. *Jn* 15:19; 17:16), drawing our strength from Christ, who by his death and resurrection has overcome the world.”³¹

[December 2006]

³¹ Pope John Paul II, *Evangelium Vitae* §82.3