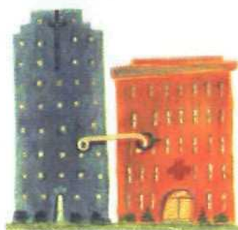

SPECIAL SECTION

INSTITUTIONAL COOPERATION: THE *ERDs*

This Principle of Cooperation Can Guide Collaboration with Other-than-Catholic Partners

BY PETER J. CATALDO, PhD, & JOHN M. HAAS, PhD, STL

In the summer of 2001 the bishops of the United States approved revisions to the *Ethical and Religious Directives for Catholic Health Care Services* (ERDs).[1] Although they were not extensive, these revisions could have a significant impact on the manner in which certain collaborative arrangements between Catholic and other-than-Catholic institutions are configured in the future. Notably the 1994 Appendix explaining the principle of cooperation was not, for example, included in the revised edition.

The revisions were done at the behest of the Holy See to eliminate and avoid certain arrangements judged to involve Catholic institutions in culpable cooperation in the immoral actions of other-than-Catholic institutions. Certainly the Holy See was more concerned with the elimination or avoidance of the immoral arrangements than with the particular formulation of the rationale employing the principle to explain why the cooperation was illicit. Nonetheless, a formulation of the principle of cooperation must obviously be provided or else one could not hope to apply it properly in the future and avoid immoral cooperation. We, the authors of this article, were pleased to see that the 2001 revisions included no new formulation of the principle of cooperation. Because of the cursory manner in which such an important principle would have had to be expressed as a mere appendix to a document such as the ERDs, it would have been subject to the same risk of misunderstanding as occurred in the past. We believe it is good that *Health Progress* is taking this opportunity to present an explanation of the principle and its applications in light of the most recent revisions by the bishops.

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CLARIFYING SOME FUNDAMENTAL CONCEPTS

It is critically important to delineate the specific meaning of the term "cooperation" as it is used in the principle of cooperation, both for an adequate understanding of the various parts of the principle and for the principle's proper application. "Cooperation," in this sense, means the free and knowing assistance of an individual or an institution in an immoral act principally performed by another individual or institution (the principal agent).[2] Whatever else might be said about a particular act of cooperation (that, for example, it is a morally good act if considered by itself), as an act of cooperation, it assists an evil act. Assisting an evil act is the moral marker ("object") that identifies an act as an act of cooperation for the purposes of the principle. Hence, whatever is attributed to the principle or however the principle is interpreted, it must be consistent with the fact that assisting in an evil act is the ultimate referent of the principle of cooperation.

This point about the meaning of cooperation deals with one of the problems in the application of the ERDs to collaborative arrangements. In many cases, the cause of the difficulty is an interpretation of the principle of cooperation as a creative, enabling principle in and through which moral actions are formulated and advanced, rather than as a principle for identifying licit or illicit acts of cooperation either contemplated or

already chosen.[3] Viewing the principle of cooperation as a creative source of morally obligated action reconfigures the principle into a moral mandate to cooperate. This approach can lead to the erroneous justification of illicit cooperation (for example, immediate material cooperation by an institution in direct sterilizations for the sake of a collaborative arrangement).

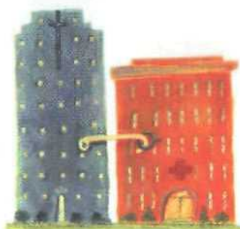
According to this expansive interpretation, the function of the principle is to provide the moral impetus to seek out new ways of collaborating with individuals or institutions. The principle of cooperation becomes one more positive moral principle among the traditional positive moral norms that oblige an individual or institution to do certain kinds of acts. The principle is regarded as a moral mandate to cooperate rather than a moral assay of actions that the cooperator may have been initially obligated to do according to genuine positive moral principles.

However, the positive moral obligations—for example, to love one's neighbor, to care for one's health and the health of those for whom one is responsible, or to contribute to the common good—have specific moral objects by which their respective obligations are formed. If the principle of cooperation is a positive moral norm, then its formal object would have to be assistance in the morally evil act of another. But this is a contradiction because there cannot be a positive moral obligation specifically to assist in evil acts—that is, there is no morally obligated good defined as the assistance to evil action. True, a specific act of providing health care, which is defined by its own good, might incidentally assist an immoral act. But, in such a case, the act's goodness comes from what it is itself, not from the fact that it has in some way assisted or advanced an evil act. Moreover, any good preserved or evil avoided as a result of cooperation may justify certain types of cooperation, but this *justification* ought not to be confused with an *obligation* to cooperate in evil acts. Justification and obligation represent two different moral categories. The justification of an act of cooperation is the reason why it may be done (which relates to the good effect that will result from it), but this is completely different from assistance in evil acts as a moral requirement.

The problem of misinterpreting the principle of cooperation as incorporating a positive moral obligation is illustrated by the blurring of the distinction between collaboration and cooperation. The expansive view of the principle of cooperation conflates these two terms in its construal of the principle as representing a positive moral obligation. It can be legitimately argued that, under certain circumstances, one health care organization is obliged to collaborate with another to achieve some good or avoid an evil. However, this is where the moral obligation begins and ends. If the result of such collaboration is cooperation in evil, the cooperation might be *justified* by what the collaboration achieves, but cooperation in evil is not thereby *obligated*. As this example indicates, there are two different acts functioning in two different conceptual categories. One is a deliberate joint corporate action (collaboration) rightly considered in the category of justifying reason, and the other is assistance in an evil act (cooperation) wrongly considered in the category of moral obligation.

In Catholic tradition, positive moral obligations are derived from the natural law.

In the Catholic moral tradition, positive moral obligations are derived from the natural law (e.g., the obligations to preserve life or to live in society) and from charity (e.g., obligations involving the love of God, self, and neighbor). These positive moral duties require an equal effort to avoid evil or those acts that are contrary to our positive moral obligations. The principle of cooperation aids this effort. However, this fact does not entail that the principle as it has been traditionally explained and used is incapable of, or not well suited to, helping individuals and institutions make positive moral contributions. Precisely because it is a guide for avoiding wrongdoing, the principle assists, for example, in acting and living charitably. The traditional manuals of Catholic theology have always treated the principle of cooperation in relation to charity.[4] The reasons for this begin with the fact that charity includes acts of "fraternal correction," that is, acts aimed at helping one's neighbor become virtuous. However, insofar as assisting the evil act of a principal agent is contrary to charity (as moral or spiritual correction), it ought to be avoided to the extent possible under the circumstances; this is what the principle of cooperation is designed to do. As one moral theology manual explains it, "Material cooperation, in itself, is sinful; for charity commands that one strive to prevent the sin of another, and much more therefore does it forbid one to help in the sin of another. Material cooperation, in case of great necessity, is not sinful. . . ."[5] The principle aids in the identification and classification of those cases that possess "great necessity" and those that do not. By functioning as an aid for avoiding evil, the principle enhances charity, preserves our positive moral obligations, and does not risk the erroneous view that there is an obligation to assist in evil acts.



Another fundamental confusion about the principle of cooperation concerns the identification of the wrongdoer in a relationship of cooperation. It is critically important, for a proper understanding of the principle, that the principal agent not be considered the sole wrongdoer. The principle presumes that the principal agent is a wrongdoer, but its primary purpose is judging the moral status of the cooperator. The principle helps to determine whether the cooperator is a wrongdoer, depending upon the type of cooperation and its reasons. If the wrongdoer can only be the principal agent, then the various types of causal connections between cooperator and principal agent represented in the principle are morally vitiated. The various types of cooperation delineated in the principle of cooperation represent particular levels of causal influence on the act of the principal agent. If the wrongdoer is always the principal agent, then the act of a cooperator could never have a causal effect on the act of the principal that could be identified as morally wrong. Thus there can be two wrongdoers—the cooperator and the principal agent—depending upon the cooperation. Given the principle's *raison d'être,* the two moral agents represented in the principle ought to be identified simply as the cooperator and the principal agent.

FORMAL COOPERATION

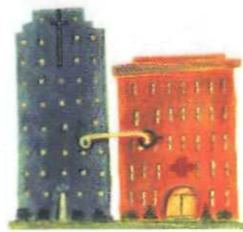
The principle of cooperation divides cooperation into two major types, formal and material. Formal cooperation is assistance provided to the immoral act of a principal agent in which the cooperator *intends* the evil. The assistance need not be essential to the performance of the act in order for the cooperator to intend the evil of the principal agent's act. Formal cooperation is never morally permissible because the cooperator knowingly wills evil. Formal cooperation can be either explicit or implicit. Explicit formal cooperation directly approves of the principal agent's immoral act. This would be the case for a health care provider that established a policy explicitly intending the direct sterilization of men or women. The provider is not the principal agent of the immoral act but does give assistance to it through the policy and does intend the act. Implicit formal cooperation intends the evil of the principal agent, not for its own sake but as a means to some other end that, by itself, might be morally good. Implicit formal cooperation is not identified negatively—through a process of elimination, for example, or from the absence of any explanation distinguishing it from explicit formal cooperation—but by positive indicators. The implicit formal cooperator concurrently seeks a good end and endeavors to secure the conditions by which the immoral act of the principal agent takes place as a means of achieving the good end.[6] The cooperator's actions demonstrate an implicit approval of the principal agent's immoral act. Moreover, whatever similarities might exist between implicit formal cooperation and immediate material cooperation (see below), they are essentially different types of cooperation because the former intends evil and the latter does not.

> The various types of cooperation delineated in the principle of cooperation represent particular levels of causal influence on the act of the principal agent.

Institutions are susceptible to implicit formal cooperation because they operate through governance, management, and finance, which set forth and implement the institution's intentions. If, in an effort to secure its viability, a Catholic health care organization negotiates and approves a collaboration agreement that establishes, among other things, the conditions by which an other-than-Catholic collaborator is able to provide direct sterilizations, then the Catholic provider is engaging in implicit formal cooperation in any sterilizations performed as a result of its actions. This implicit formal cooperation would include establishing the conditions by which the provision of sterilizations is either brought into existence for the first time or is continued under a new configuration. Generally if a collaborative arrangement such as a joint operating agreement, affiliation, or joint venture is completely segregated from the governance, management, and financing of direct sterilizations provided by the other-than-Catholic partner (and other procedures and activities considered immoral by Catholic teaching as well), then formal cooperation can be avoided. Although it may be morally licit to acknowledge the existence of such procedures and activities in an agreement as a legal matter, this instrument cannot itself establish the segregation of the procedures and activities without the Catholic party engaging in implicit formal cooperation.

MATERIAL COOPERATION

Material cooperation is assistance provided to the immoral act of a principal agent in which the cooperator does not intend the evil. Delimiting the elements that actually define material cooperation is very important for a proper application of the principle (see below) as well as for an accurate definition. In particular, how any case of material cooperation is morally justified does not enter into the definition of what material cooperation is. The only elements needed to define material



cooperation are, first, the free and knowing assistance to the evil act of another, and, second, the absence of intending the principal agent's evil acts. No other factors define *what* material cooperation is. If these two factors obtain in any given case, then the moral agent is engaging in material cooperation. However, not all cooperation defined by these factors is morally permissible. Some types of material cooperation are immoral.

Material cooperation can be either immediate or mediate. Immediate material cooperation assists in the immoral act of the principal agent by contributing to the essential circumstances of the act. The ERDs find no moral justification for immediate material cooperation by Catholic health care organizations in intrinsically evil acts of a principal agent. "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization" (Directive 70). For example, if a Catholic health care organization agrees to supply surgical instruments to an other-than-Catholic women's hospital as part of a larger collaborative agreement, and these instruments are to be used in direct sterilizations performed at the hospital, then the Catholic party is engaging in immediate material cooperation. There is no intent to provide the sterilizations because the governance, management, and financing of them is completely segregated from the collaborative arrangement, but the supply of surgical instruments is a circumstance essential to the performance of the sterilizations. Moreover, some would regard allowing independent physicians to perform direct sterilizations in a Catholic hospital as immediate material cooperation. However, we consider this to be explicit formal cooperation because such activity does not occur contrary to policy and without planning by the hospital.

Duress and fear may be factors influencing the material cooperator's decision to cooperate, but they are not the essence of material cooperation.

Institutional Duress and Immediate Material Cooperation

The proscription contained in Directive 70 should settle any doubt engendered by the Appendix of the 1994 ERDs about whether duress or fear can justify immediate material cooperation by a Catholic health care organization in intrinsically evil acts. Four key points can be made regarding the function of duress and fear in relation to material cooperation.

First, as explained above, anything pertaining to the justification of particular cases of material cooperation (what was known as the "lawfulness" of material cooperation) stands outside the definition of material cooperation itself. Both duress that narrows the options among which one may choose rather than cooperate in evil, on the one hand, and fear of losing a great good, on the other, may justify acts of material cooperation and lessen subjective culpability. But, as such, these factors are not part of the definition of material cooperation. The *fact* that the material cooperator does not intend the evil of the principal agent and the *reason why* the cooperator lacks this intention ought not to be confused as one and the same. In other words, a distinction must be made between the reason why the material cooperator does not intend the evil of the principal agent and the reason why the cooperator does indeed cooperate. The reason why the material cooperator does not intend the evil is because the cooperator knows the principal agent's act to be immoral and chooses to intend something good rather than the evil. This establishes the fact that the cooperator does not intend the principal agent's act. The reason why the cooperator assists the principal agent is because the cooperator cannot reasonably avoid the evil of the principal agent's act and at the same time preserve some great good or avoid some great evil. This is the justification for the material cooperation.

Duress and fear may be factors influencing the material cooperator's decision to cooperate, but they are not the essence of material cooperation. If, moreover, duress or fear were always justifying factors in the definition of material cooperation, then any act of material cooperation would potentially be morally licit, which is not the case. This is the import of the Congregation for the Doctrine of the Faith's statement on the question of duress and immediate material cooperation: "[C]ulpability for the immoral act in which one participates, and from which one's own action cannot be distinguished materially, may be diminished because of 'duress' and could under some circumstances be eliminated altogether. This is not exactly the same as saying that the action done under duress is morally licit, simply that culpability may be diminished or eliminated."[7]

Second, as the bishops note in the 2001 edition of the ERDs, "while there are many acts of varying moral gravity that can be identified as intrinsically evil, in the context of contemporary health care the most pressing concerns are currently abortion, euthanasia, assisted suicide, and direct sterilization."[8] This fact poses no dilemma. The fact that moral acts that have in common an intrinsically evil nature may be unequal in moral

gravity does not justify any essential contribution an institution might make to an intrinsically evil act of lesser moral gravity, such as direct sterilization. Differences in moral gravity among intrinsically evil acts are not relevant because an institution should never contribute something essential to an act that, by definition, ought never to be performed under any circumstances, whether through formal or immediate material cooperation. However, this difference in moral gravity may be relevant to the question of contributing a nonessential circumstance to an intrinsically evil act whose moral gravity is less grave—for example, providing certain support services to a hospital at which direct sterilizations are performed.

Third, the life of an institution is life by analogy, just as the institution is regarded as a "person" by analogy. Its life is not real life. Consequently, a threat to the life of a health care institution is not morally commensurate with the real and imminent threat to the life of a human person forced to choose between cooperating or being killed. This essential difference was made clear by the Congregation for the Doctrine of the Faith when it wrote, "It seems to us that the duress which may justify material cooperation with evil on the individual level, such as threats to one's life, cannot legitimately be transferred to institutions since even the closure of an institution cannot equal the gravity of losing one's life." [9] Hence duress as a factor that may diminish individual culpability for immediate material cooperation cannot legitimately apply in institutional cases, which was the judgment reached with respect to collaborative arrangements judged to be illicit by the Congregation for the Doctrine of the Faith over the last several years. Indeed, it is obvious that the argument for institutional duress fails on the merits, and its failure was a significant reason why the arrangements were overturned.

Fourth, there is no need to use the National Conference of Catholic Bishops'* *Commentary* on the March 13, 1975, *Reply of the Sacred Congregation for the Doctrine of the Faith on Sterilization in Catholic Hospitals (Quaecumque Sterilizatio)* or the 1994 Appendix to the ERDs for answers to questions concerning institutional duress and immediate cooperation. [10] Both documents have been superseded by *Quaecumque Sterilizatio* itself and by Directive 70 of the current ERDs. In our opinion, the *Commentary* was at best ambiguous about whether *Quaecumque Sterilizatio* allowed immediate material cooperation in intrinsically evil acts performed in Catholic hospitals; the 1994 Appendix contained internal flaws that prevented a proper application of the principle to the issue of institutional immediate material cooperation. [11] *Quaecumque Sterilizatio* is quite clear on the issue of direct sterilizations in Catholic hospitals—a fact whose recognition by the U.S. bishops is shown by their quoting of an excerpt from that document in the current ERDs: "Any cooperation institutionally approved or tolerated in actions which are in themselves, that is, by their nature and condition, directed to a contraceptive end . . . is absolutely forbidden. For the official approbation of direct sterilization and, *a fortiori*, its management and execution in accord with hospital regulations, is a matter which, in the objective order, is by its very nature (or intrinsically) evil." [12] Moreover, it is equally clear that the point in *Quaecumque Sterilizatio* (see 3.b) that material cooperation by a Catholic hospital is morally permissible under certain circumstances is a reference not to immediate material cooperation but to mediate material cooperation.

> The graver the evil to which the cooperator contributes, the graver the good sought or the evil avoided must be.

Mediate Material Cooperation

Mediate material cooperation assists in the immoral act of a principal agent by contributing to nonessential circumstances of the principal agent's act before, during, or after the act. This type of cooperation might be justified if some great good were to be gained (or prevented from being lost) or if some great evil were to be avoided. Mediate material cooperation is morally licit according to a proper proportionality between the goods to be protected or the evils avoided, on one hand, and the evil of the principal agent's act, on the other. The graver the evil to which the cooperator contributes, the graver the good sought or the evil avoided must be. Indeed, licit mediate material cooperation has traditionally been understood in terms of the four basic conditions of the principle of the double effect as applied to a cooperator. The act of material cooperation has two effects, the bad effect of assisting an evil act, and the good effect of preserving good or avoiding evil. Thus an act of mediate material cooperation is licit because:

- The cooperator's act is itself morally good or indifferent.
- The cooperator does not intend the evil of the principal agent's act.
- The good effect is not achieved by means of

* The National Conference of Catholic Bishops has since been renamed the U.S. Conference of Catholic Bishops.

the bad effect (the principal agent is the primary cause of the evil act).

• The good effect is proportionate to the bad effect.

Consider the case of a collaborative arrangement that contributes to the overall viability of an other-than-Catholic partner that performs immoral procedures. If neither the Catholic partner nor the joint entity itself engages in formal or immediate material cooperation, then the first three conditions of the principle of the double effect are fulfilled. The fourth condition is fulfilled by virtue of the fact that the Catholic partner is seeking to preserve a great good or avoid a great evil. The following are examples of collaborative arrangements that involve morally licit mediate material institutional cooperation:

• A Catholic system and an other-than-Catholic health system propose the formation of a joint operating company (JOC) for the purpose of operating the systems' hospitals and conducting joint activities. The Catholic system would negotiate and approve a joint operating agreement establishing the JOC. The JOC and the hospitals' joint activities would operate in compliance with the ERDs. The collaborative arrangement would have the effect of securing the viability and survival of the other-than-Catholic system and its illicit procedures, including direct sterilization. However, the other-than-Catholic system would establish a corporation separately governed, financed, and managed for the purpose of providing direct sterilizations.

• A Catholic health care system and an other-than-Catholic system propose a collaborative arrangement, the sole purpose of which is to provide joint programs in several specific areas, such as cardiology and radiology. Direct sterilizations would be provided at one of the hospitals of the other-than-Catholic system in a manner completely independent of the proposed arrangement. The affiliation agreement would have the effect of securing the viability and survival of the other-than-Catholic system and its facilities.

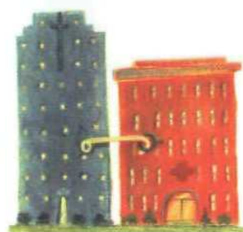
• A Catholic health system proposes to establish a JOC with an other-than-Catholic system. The JOC would manage the Catholic system's facilities and would provide management assistance for some of the other-than-Catholic system's facilities. Direct sterilizations are performed at one of the other-than-Catholic system's hospitals. A services agreement ensures that each service provided by the Catholic system is completely separated from the immoral procedures. The affiliation agreement would have the effect of securing the viability and survival of the other-than- Catholic system and its facilities.

In each of these four situations, the fact that the governance, management, and financing of any immoral procedures or activities conducted by the other-than-Catholic entity have been completely segregated from the collaborative arrangement and the Catholic health care system means that formal cooperation can be avoided. The Catholic health system would also avoid immediate material cooperation in these examples. However, because in each case the viability and survival of the other-than-Catholic system is secured by the collaborative arrangement, the Catholic system would indirectly contribute to the continued performance of direct sterilizations at the other-than-Catholic facility. This contribution might be considered mediate material cooperation. The cooperation would be morally justified if, as the result of such an arrangement, the survival of the Catholic health care ministry were thereby preserved or important health care services were significantly improved.

Mediate material cooperation can be either proximate or remote.

Mediate material cooperation can be either proximate or remote. This is not a difference of physical or geographic location, but rather a causal difference. The distinction between proximate and remote refers respectively to mediate material cooperation that has a direct causal influence on the act of the principal agent (proximate) and that which has an indirect causal influence (remote). Thus it is possible for a cooperator to be physically proximate to the act of a principal agent and yet engage in remote mediate material cooperation. Conversely, a cooperator may be physically remote from the principal agent's act but engage in proximate mediate material cooperation.

Consider, for example, the 2002 reconfiguration of the Lease Agreement between the city of Austin, TX, and the Seton Healthcare Network. Brackenridge Hospital, which is leased and operated by Seton, is physically contiguous to a new city hospital at which direct sterilizations will be performed. The renovations made by Seton to the space that the city hospital will occupy constitute remote mediate material cooperation by Seton in the sterilizations performed there because there are many intervening causes between the renovation of the space and the performance of the immoral acts. The location of the decision makers who decide to assist the city hospital may be physically remote from the sterilizations, but those decisions may include providing utilities to the new city hospital, for example,



which would have a much more direct effect on any sterilization procedures performed there. The decision-making administrators may be far from the site, but because of the causal relation of their decision to what is occurring at the new city hospital, it could be said that they are engaged in *proximate* mediate material cooperation.

The Brackenridge Hospital Case

Because the Seton/Brackenridge Hospital Lease Agreement is so well known, we will, as a means of illustrating our point, look at it a bit more closely. The arrangement has sometimes been called the "hospital within a hospital" structure. Some people have advocated this structure for other collaborative ventures, which we at The National Catholic Bioethics Center would not consider licit.

It is important to note that the "hospital within a hospital" structure of the collaborative arrangement between Seton and the city of Austin was adopted as the only reasonable way for Seton and Ascension Health (of which Seton is a part) to extricate themselves from illicit cooperation resulting from a morally defective collaborative arrangement that had been entered into in good faith. The case presented a problem of disengagement from illicit cooperation under unique circumstances. Because the circumstances were unique, the revised Brackenridge arrangement probably cannot be seen as a legitimate model for new collaborative arrangements.

In 1995 Seton Healthcare Network entered into a 30-year Lease Agreement with the city under which Seton assumed responsibility to govern and operate the city's Brackenridge Hospital. According to Seton's administrators, this was done to respond to a request made by the city and to expand the health care ministry to the poor of the Daughters of Charity. Seton did not need to assume this responsibility to secure its own viability or to respond to market pressures. However, many in the community had speculated that the city might be forced to close Brackenridge because of *its* precarious financial condition. The proposed Lease Agreement was approved by the then-bishop of Austin, who did so on the advice of three different moral theologians.

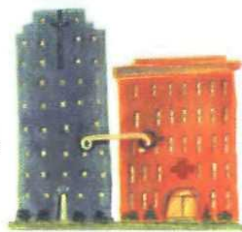
A year later, the bishop was told that the Holy See had reviewed the arrangement and judged it to be morally illicit. Seton could not simply abrogate the contract lest it suffer a significant financial penalty for nonperformance. In light of some of the other initiatives undertaken by Seton, a termination of the contract would have resulted in a severe, perhaps crippling material impact on its ministry. The Holy See insisted that a solution be found to extricate Seton from the illicit cooperation in which it found itself and to which it was contractually committed. In our estimation, the solution that was found was nothing that might serve as a paradigm for entering into new collaboration arrangements, but it did at least address the specific problems of Seton and its Lease Agreement with Brackenridge.

Each venture has unique, specific circumstances that have a bearing on the moral solution that must be found.

Those who engage in forging and evaluating collaborative arrangements have an adage: "When you have seen one collaborative venture, you have seen one collaborative venture." Each venture has unique, specific circumstances that have a bearing on the moral solution that must be found. This important fact is illustrated by the Seton/Brackenridge case.

Seton, before entering into the Brackenridge Lease Agreement, desired to avoid culpable cooperation with the immoral practices that had been taking place at Brackenridge Hospital. As a condition for accepting management of the hospital, Seton insisted that abortions cease there. That practice was, indeed, eliminated. However, the city of Austin would not countenance the elimination of surgical sterilizations of women at Brackenridge because it regarded such procedures as a community service, despite Seton's beliefs to the contrary. For the sake of the contract allowing it to serve the poor and for the sake of eliminating abortion, Seton agreed to permit surgical sterilizations to continue at Brackenridge and tried to remove Seton personnel from any type of culpable cooperation in this evil. One of the problems, however, is that while Seton had isolated its personnel from illicit cooperation, it had not sufficiently isolated management from the immoral procedures. Indeed, the management arrangements established by the agreement ensured that the immoral procedures would continue to take place. This is what the Holy See found objectionable.

A working group formed by Seton proposed a solution that was approved by the new ordinary and to which no objections were raised by the papal legate appointed to oversee the project. The National Catholic Bioethics Center (where the authors are on staff) was involved in the proposed solution. However, the center is of the opinion that the solution, although legitimate given the unique circumstances of the Seton/Brackenridge Lease Agreement, cannot be seen as a template necessarily applicable to all



proposed collaborative ventures.

Indeed, a number of circumstances concerning the Seton/Brackenridge agreement were unique:

- Brackenridge is a city-owned hospital, not a Catholic-owned one, even though it is being leased and managed by a Catholic health care system.
- Seton was locked into a 30-year lease, the violation of which would have had severely adverse material consequences for its health care ministry.
- Brackenridge did need to expand its obstetric services, although Seton was under no obligation to do so. This need arose quite independently of the attempt to find a solution to the cooperation problem. Absent the need to expand, it might have been impossible to have found a moral solution to the dilemma because Seton could not have proposed an arrangement to allow women to be surgically sterilized without intending that it occur.
- Texas law allows what might be called "hospital within a hospital" arrangements, according to which licensure is granted to two separate and unrelated corporate entities that operate in the same building. Such arrangements can be found in cases in which one hospital has special expertise (e.g., long-term acute care) not provided by the other and for which the other cannot obtain licensure. Under such arrangements, one hospital can provide its licensed services within another general acute care hospital.

Conceptually, the revision of the Seton/Brackenridge Lease Agreement was not complicated. Brackenridge essentially refused to continue to perform surgical sterilizations. The city agreed to take back management of a portion of its own hospital, deciding that it would itself provide expanded obstetric services in that portion. The city will hold the license for its hospital, which will have its own separate managers and governing body. The city further agreed to finance the structural reconfiguration of the plant necessary to accomplish these objectives. And it agreed that no abortions would take place in its own hospital within Brackenridge Hospital.

At this point, the negotiators realized that Brackenridge would have to provide certain services to City Hospital for the proposed arrangement to work. Consequently the city and Seton proposed to enter into an Ancillary Services Agreement for this purpose. However, concerns surfaced that some of the services required by City Hospital might prove to be immediate material cooperation in evil, whereas others were only mediate. Seton's provision of electricity and water would not, for example, contribute anything essential to City Hospital's anticipated surgical sterilizations. However, the provision of sterilized surgical kits would contribute something essential, as could the provision of pharmacy or laboratory services. Seton consequently excluded those functions from the Ancillary Services Agreement, as well as anything else which might be seen as contributing essentially to the commission of immorality in the new City Hospital.

> The principle of cooperation is a limiting principle, not an expansive one.

It was the opinion of the National Catholic Bioethics Center that, as a result of the amendment to the Lease Agreement and the Ancillary Services Agreement, Seton would ultimately be engaged in licit proximate mediate material cooperation with the immoral surgical sterilizations that might occur in City Hospital. Critical to this conclusion, however, was the fact that the arrangement arose as the means to remove Seton from an existing morally unacceptable relationship. This fact morally distinguishes Seton as intending to extricate itself from, not secure the provision of, direct sterilizations. The center would never have approved Seton's entering an arrangement such as this for a new transaction with a third party, because that arrangement would probably have involved an intention on the part of the Catholic party that the surgical sterilizations be performed (implicit formal cooperation). Even if the intention were avoided, such an arrangement would put the Catholic institution into immediate material cooperation. There had to be a significant reason to justify Seton's involvement in proximate mediate material cooperation. The center considered the justifying cause to be the significant financial loss that Seton would suffer if it broke the Lease Agreement and the harm that would accordingly be done to the great good of its health care ministry.

As we have maintained, it is necessary to remember that the principle of cooperation *is a limiting principle*, to avoid cooperating in evil, *not an expansive one*, providing opportunities for cooperating in evil. Even though mediate material cooperation can be licit, there must be a proportionately grave reason for even allowing it. The center considered such to be the case with the Seton/Brackenridge Lease Agreement.

Scandal

The church has a moral tradition regarding scandal, not as a matter of public shock or surprise,

but as an issue involving the leading of another to wrongdoing or sin. The bishops explain the relation of scandal to cooperation in this way:

> The possibility of scandal must be considered when applying the principles governing cooperation. Cooperation, which in all other respects is morally licit, may need to be refused because of the scandal that might be caused. Scandal can sometimes be avoided by an appropriate explanation of what is in fact being done at the health care facility under Catholic auspices. The diocesan bishop has final responsibility for assessing and addressing issues of scandal, considering not only the circumstances in his local diocese but also the regional and national implications of his decision (Directive 71).

The fact that a partner in a collaborative arrangement performs a most grave evil act, such as abortion, in itself greatly increases the potential for scandal concerning that arrangement, which might otherwise involve morally licit cooperation. However, the risk of scandal is not evaluated simply on the basis of a proportional difference between what the parties consider to be grave wrongdoing. Scandal is also proportionate to the level of institutional integration produced by the collaboration. As with the risk for formal cooperation, the greater the level of institutional integration the greater the risk is for scandal.[13] The more integration there is, the more it can appear that the Catholic party is condoning the evil or is in some way identified with it.

The greater the level of institutional integration, the greater the risk is for scandal.

Ethical Guidelines for Evaluating Collaborative Arrangements

The following five guidelines ought to form the baseline of any moral evaluation of a collaborative arrangement:

- The members of a collaborative arrangement should understand that it represents an extension of the identities of the participants. As a result, the joint entity cannot act in a manner contrary to the missions of the members. Thus a Catholic health care organization may not participate in a collaborative arrangement that does not act consistently with the ERDs. This is not an imposition of Catholic values because the Catholic institution is acting in the only way *any* health care organization can, namely, by delivering health care according to a particular vision of what is good for the human person.
- The first step in an ethical review of a collaborative arrangement is to determine whether it or the Catholic institution will engage in formal cooperation in evil (explicit or implicit) in and through the arrangement. Any governance, management, or financing of immoral procedures and activities must be completely segregated from the collaborative entity by the other-than-Catholic party.
- If it is concluded that formal cooperation can be avoided, then a determination must be made as to whether either the Catholic member or the joint entity would engage in immediate material cooperation. Any actions by these entities that would constitute immediate material cooperation must be excluded from the arrangement. Contributing essential employed staff or equipment to the performance of an immoral procedure is certainly—if not formal cooperation absent a demonstrated intention—immediate material cooperation. An appeal to duress cannot be made to justify immediate material cooperation in intrinsically evil acts.
- If it is determined that neither the Catholic party nor the joint entity would engage in formal or immediate material cooperation, then a judgment must be made as to whether the collaboration involves justified mediate material cooperation. There must be great goods to be gained (or preserved) or great evils to be avoided to justify mediate material cooperation.
- Pursuant to Directives 67 through 72, collaboration with the local bishop and compliance with any diocesan protocols must be carried out in the earliest stages of planning for a possible collaborative arrangement. In particular, all parties should be prepared for the possible judgment by the bishop that, for reasons of scandal alone, the collaborative arrangement cannot be permitted.

A Limiting Principle of Moral Action

To apply the principle of cooperation properly to collaborative arrangements between Catholic and other-than-Catholic health care organizations, one must first correctly understand the principle's purpose. As Directive 69 puts it: "If a Catholic health care organization is considering entering into an arrangement with another organization that may be involved in activities judged morally wrong by the Church, participation in such activities must be limited to what is in accord with the moral principles governing cooperation."

The bishops recognize that the principle of cooperation is a limiting, not an expansive, principle of action. Its purpose is to limit action so that evil may be avoided in the pursuit of good, not to

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cumque Sterilizato, March 13, 1975, p. 10. Paragraph 3b says: "The traditional doctrine regarding material cooperation, with the proper distinctions between necessary and free, proximate and remote, remains valid, to be applied with the utmost prudence, if the case warrants."

10. As John Paul II has put it in *The Splendor of Truth* (*Origins,* October 14, 1993): "The morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will" (n. 78). "The primary and decisive element for moral judgment is the object of the human act, which establishes whether it is capable of being ordered to the good and to the ultimate end, which is God" (n. 79). The moral object is the intention inherent in the action the actor is actually performing: the goal of the action, as opposed to the goal of the actor. See also *Catechism of the Catholic Church,* 2nd ed., Libreria Vaticana, Vatican City, Italy, 2000, n. 1,749 ("The Morality of Human Acts").
11. Aquinas, I-II, q. 6, a. 6, ad 1.
12. Smith.
13. Germain Grisez, *Difficult Moral Questions,* Franciscan Press, Quincy University, Quincy, IL, 2000, pp. 871, 895.
14. See B. Haring, *The Law of Christ,* vol. 2, Newman Press, Westminister, MD, 1963, p. 496.
15. John Paul II, *The Splendor,* n. 80.
16. John Paul II.
17. See the *Ethical and Religious Directives,* n. 44, p. 42.
18. John Paul II, *Evangelium Vitae, Origins,* April 6, 1995, n. 18.
19. *Ethical and Religious Directives,* p. 36.
20. See James Keenan and Thomas Kopfensteiner, "The Principle of Cooperation," *Health Progress,* April 1995, pp. 23-27.
21. John Paul II, *The Splendor,* n. 81.
22. See the introduction to Part 6, *Ethical and Religious Directives:* "As a rule, Catholic partners should avoid entering into partnerships that would involve them in cooperation with the wrongdoing of other providers" (p. 36).
23. Ashley and O'Rourke, p. 191ff.
24. *Ethical and Religious Directives,* Directives 67 and 68, p. 36.
25. "Scandal is an attitude or behavior which leads another person to do evil" (*Catechism of the Catholic Church,* n. 2,284).
26. Congregation for the Defense of the Faith.
27. Germain Grisez, "How Far May Catholic Hospitals Cooperate with Non-Catholic Providers?" *Linacre Quarterly,* November 1995, pp. 67-72.
28. Gregory Aymond, "Lease Agreement Comes from Statement of Faith," *Austin American-Statesman,* January 2001.

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impel an individual or institution into action that involves some kind of cooperation in evil. Expanding the purpose of the principle of cooperation to include a role of positive moral action opens the way to regarding any collaboration as being at the same time a moral obligation to cooperate in evil, which in turn removes an important barrier to potential immoral cooperation.

Three critical points follow from the basic premise that the principle of cooperation is a limiting principle of moral action:

- The presence of justifying reasons for cooperation in evil in any given case ought not to be construed as evidence for the existence of a general obligation to cooperate in evil.
- The notion of "wrongdoer" is not reducible to the principal agent alone; in some types of cooperation, it also includes the cooperator
- Duress and fear stand outside the definition of material cooperation *per se* as possible reasons for material cooperation.

These points are important in distinguishing immoral from moral cooperation by a Catholic health care organization.

The principle of cooperation, understood as a limiting principle of action that can help a moral agent avoid evil in the pursuit of good (rather than as an obstacle to the fulfillment of Catholic health care ministry and the common good), can be an effective tool in the achievement of those goals. This more restrictive use of the principle—instead of what appears as a newly proposed expansive use—is what will enable the Catholic health ministry to collaborate with others to provide health care in a way that is consistent with its vision of the human good. □

NOTES

1. National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services,* 4th ed., Washington, DC, 2001.
2. See "Cooperation with Non-Catholic Partners," *Ethics & Medics,* November 1998, pp. 1-5.
3. See, for example, James F. Keenan, "Applying the Seventeenth-Century Casuistry of Accommodation to HIV Prevention," *Theological Studies,* no. 60, 1999, pp. 492-512; "International Cooperation and the Ethical and Religious Directives," *Linacre Quarterly,* August 1997, pp. 53-76; "Prophylactics, Toleration, and Cooperation: Contemporary Problems and Traditional Principles," *International Philosophical Quarterly,* June 1989, pp. 205-220; James F. Keenan and Thomas R. Kopfensteiner, "The Principle of Cooperation," *Health Progress,* April 1995, pp. 23-27; John Tuohey, "Partnering for More than the Survival of a Catholic Presence in Healthcare," *New Theology Review,* vol. 12, no. 1, pp. 52-59.
4. See, for example, John A. McHugh and Charles J. Callan, *Moral Theology: A Complete Course,* revised and enlarged by Edward P. Farrell, Joseph F. Wagner, New York City, 1958, and Dominic M. Prummer, *Handbook of Moral Theology,* Mercier Press, Cork, Ireland, 1956.
5. McHugh and Callan, n. 1,514, p. 620.
6. See John Paul II, *Evangelium Vitae, Origins,* April 6, 1995, n. 74; H. Noldin, *Summa Theologiae Moralis,* vol. 2, F. Rauch, Innsbruck, Austria, 1914, n. 117, pp. 9-10; McHugh and Callan, n. 1,511, pp. 618-619; Bernard Haring, *The Law of Christ,* vol. 2, Newman Press, Westminster, MD, 1964, p. 496; Germain Griez, *The Way of the Lord Jesus,* vol. 2, Franciscan Press, Quincy, IL, 1993, pp. 440-444.
7. Congregation for the Doctrine of the Faith, "The Presentation of the Permissibility of Material Cooperation in Intrinsically Evil Actions Developed by the Catholic Health Association," June 13, 1997.
8. National Conference of Catholic Bishops, n. 44.
9. Congregation for the Doctrine of the Faith.
10. The bishops' *Commentary* appeared in *Origins,* no. 11, 1977, pp. 399-400; *Quaecumque Sterilizatio* appeared in *Origins,* 1976, pp. 33-35.
11. See "Cooperation with Non-Catholic Partners."
12. National Conference of Catholic Bishops.
13. See Peter J. Cataldo, "Models of Health Care Collaboration," *Ethics & Medics,* December 1998, pp. 3-4.