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An Excessive Claim: Sterilization and Immediate Material Cooperation

by

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Fr. James Keenan, S.J. has recently written on the important issue of institutional cooperation and the 1994 Ethical and Religious Directives of the National Catholic Conference of Bishops. He observes that the subject of institutional cooperation has been the cause of substantial discussion among ethicists, bishops, and administrators of Catholic health care facilities. In an article for this journal, Keenan addresses a number of issues related to institutional cooperation and concludes his article with an examination of duress, and immediate material cooperation with regard to sterilization.¹ In a second and shorter essay in *Ethics and Medics* Keenan, responding to one of his critics, again takes up the issue of duress, immediate material cooperation and sterilization². Keenan's analysis raises several important ecclesiological and magisterial issues especially with regard to the interpretation of magisterial documents. I cannot treat them all them here. I will argue that Keenan's claim³ that Catholic health care institutions, by reason of immediate material cooperation under duress, may at times permit contracting physicians to perform some direct sterilizations is based upon a faulty reading of relevant Church documents.

To hold Keenan's position is not only a misinterpretation of the 1994 Ethical and Religious Directives but also, more seriously, a misinterpretation of the teaching of the *Responsum* of March 15, 1975 from the Holy See to the Bishops of the United States. It is also a misinterpretation of the USCC commentary on the *Responsum* issued on November 22, 1977 and the NCCB clarification on Tubal Ligation issued on July 9, 1980. My argument is based not only on the content of these documents but upon the nature of their doctrinal and magisterial authority. Lastly, I will argue that if Keenan's interpretation were to be adopted it would have the unfortunate consequence of working against the efforts of a local Church – of which any Catholic health care institution is an important part – to live in full communion with the universal Church. I have no doubt that Keenan does not intend or desire this outcome but intended or not, it results from his position.

This article will unfold in three steps. First, I will review Keenan's position about direct sterilization and immediate material cooperation under duress. Second, I review briefly some basic principles of interpretation necessary for the proper interpretation of magisterial documents. I will then carefully examine the *Responsum* from Rome, the 1977 commentary and the 1980 clarification issued by the USCC-NCCB and the 1994 Ethical and Religious Directives. In the third and last step I will argue that questions of institutional cooperation should be situated in the context of the Church understood as a communion and point out how Keenan's position, if adopted, would work against ecclesial communion.

I. Keenan on Sterilization and Immediate Material Cooperation and Duress.

First of all, before summarizing Keenan's position, it is fitting to review the principles of cooperation as laid out in the Appendix of the Ethical and Religious Directives because Keenan draws upon these principles in his articles about institutional cooperation. I will quote in full the relevant section. The appendix distinguishes between formal and material cooperation this way :

If the cooperator intends the object of the wrongdoer's activity, then the cooperation is formal and, therefore, morally wrong. Since intention is not simply an explicit act of the will, formal cooperation can also be implicit. Implicit formal cooperation is attributed when, even though the cooperator denies intending the wrongdoer's object, no other explanation can distinguish the

cooperator's object from the wrongdoer's object. If the cooperator does not intend the object of the wrongdoer's activity, the cooperation is material and can be morally licit.

The second distinction deals with the object of the action and is expressed by immediate and mediate material cooperation. Material cooperation is immediate when the object of the cooperator is the same as the object of the wrongdoer. Immediate material cooperation is wrong, except in some cases of duress. The matter of duress distinguishes immediate material cooperation from implicit formal cooperation. But immediate material cooperation - without duress - is equivalent to implicit formal cooperation and, therefore, is morally wrong. When the object of the cooperator's action remains distinguishable from that of the wrongdoer's, material cooperation is mediate and can be morally licit.⁴

In his two articles Keenan has tried to stress what he calls the "limitedness" of the issue of immediate material cooperation and duress with a case that he believes is representative. I will quote the case he gives in his August 1997 article in this journal.

In an American city of 100,000 inhabitants there are two hospitals, one community and the other Catholic. In the field of obstetrics, the former provides a full selection of services which the latter for ethical reason does not. The latter, instead, tries to protect and promote the values of its tradition. In renegotiating their contract with the Catholic administration, the obstetrics team demands a new proviso: they want permission to do tubal ligations on those women who want ligations *while* having their infant delivered through cesarian section. The team estimates that the number of direct sterilizations would be very limited. Their reasons for the proviso are simply that they believe it is unethical and medically contraindicative to "open" the patient twice. The team is well respected by the administration and is well established in the community. They are prosperous enough that they could move out of the facility, if they were not to receive the proviso. In all other matters they have acceded to the hospital and have regularly observed ERD. If they were to leave the Catholic health care facility, the facility believes it would not be able to deliver any obstetric services and thus would provide no alternative to the community facility.⁵

Keenan argues that this is a case of material but not formal cooperation. Moreover, he judges the activity of the health care facility as immediate material cooperation under duress for grave proportionate

reason. According to Keenan, "Duress means that one's options have been constrained, but to preserve something that is threatened, one may cooperate to protect that value."⁶ He recognizes that some seem to believe that the cooperation would be mediate material cooperation because the health care facility would be only authorizing the cesarian section, while the physicians would be insisting upon the tubal ligation.⁷ Keenan says that while this opinion could be probable he is more inclined to describe the activity as immediate because it is hard to see how in this case the Catholic health care facility could claim not to be authorizing both the cesarian section and the tubal ligation.

Keenan reasons that because the physicians in this case ask only to do tubal ligations on women who are already having a cesarian section that there is not any kind of direct sterilization being authorized by the health care facility. He identifies the issue of duress as "the threatened loss of all obstetrics from Catholic health care facility to the large urban area." Two further considerations are said to follow. First, it is necessary to consider the impact of the loss of the service of obstetrics for women. Where else would women find the kind of values that embody a Catholic health care facility if the physicians make good on their threat to leave? Second, how real is the threat of the physicians to take their services elsewhere? Is there any chance that obstetrics services could be obtained from other physicians who would be faithful to the ERD? Keenan submits that if the threat of the physicians to withdraw their services is real and there is little possibility of offering a genuine alternative then "many seem to believe that prudence guides both the facility's administrators and the bishop to approve the contract."⁸ He goes on to explain that the way to avoid scandal in this case would be to explain the kind of duress that confronts the health care facility and by pointing out the fact that only a limited number of exceptions are provided because the physicians insist that it is "medically contraindicative to not do a requested sterilization on a woman undergoing a cesarian section."⁹ Keenan concludes this way and I think it is important to quote him in his own words:

By cooperation, the health care facility is still able to offer its services while promoting its Catholic values. It is not opening up the possibility of losing an otherwise reputable obstetric team. In fact, it is keeping the team faithful to ERD and the Catholic tradition notwithstanding the exceptional case of tubal ligations on women undergoing cesarian sections. Certainly the facility is not approving the exceptions; rather under the duress of losing their services and therefore being unable to offer any comparable services to their patients, the Catholic facility acknowledges that it has no other alternative.¹⁰

In the same article printed in this journal, Keenan bases his position not only on his interpretation of the Ethical and Religious Directives on cooperation but also on his interpretation of two other documents: the 1975 *Responsum* from the Congregation for the Doctrine of the Faith on Sterilizations in Catholic Hospitals, and the USCC-NCCB commentary on it. In part VI of his article Keenan dialogues with Russell Smith about immediate material cooperation and duress. He applauds Smith for turning to these two documents in order to understand the meaning of duress in the Ethical and Religious Directives. Keenan claims that "Duress appears repeatedly in these documents and Smith uses these as a key for interpreting ERD."¹¹

The claim that both the *Responsum* and the commentary treat the issue of duress in connection with cooperation with sterilization is made in several other articles of Keenan's. In an essay in *Theological Studies* he says "For instance, the Congregation for the Doctrine of the Faith and the United States Catholic Conference have offered strict guidelines governing when a Catholic health care facility, under duress, could materially cooperate in sterilization."¹² In an essay for *Health Progress* it is claimed that:

But, more recently, the Congregation for the Doctrine of the Faith (CDF) and the United States Catholic Conference (USCC) invoked the principle of cooperation in considering when a Catholic health care facility, under duress, could cooperate in sterilization.¹³

The serious problem with these claims is that while the *Responsum* refers to material cooperation it never speaks about duress. It is incorrect to claim that the *Responsum* invoked the principle of cooperation under duress. It is equally mistaken to say that the *Responsum* is one of two documents where "duress appears repeatedly." It is only half correct to represent the *Responsum* and the commentary as offering "strict guidelines" because the *Responsum* does not simply offer guidelines – it is a judgment about the meaning of the doctrine of the Church on sterilization. The commentary offers guidelines and the *Responsum* primarily expresses a doctrinal judgment by the pope. These are two different things and they ought to be distinguished from one another if only because they do not have the same level of magisterial authority behind them. It is important to determine the nature and the authority of these documents if we are to make judgments about why and what kind of cooperation is justified or not justified by Catholic health care facilities.

II. Interpreting and Evaluating Magisterial Documents

When theologians interpret and apply the teaching documents of the magisterium, it is crucial for them to take great care in assessing and evaluating these documents. The theologian should be sure to identify the magisterial source of the document. It is important to know whether a document emanates from the pope, an ecumenical council, a national conference of bishops, an administrative board of an episcopal conference, a regional council of bishops, or an individual bishop. Each and every one of these sources has its own specific authoritative weight and importance. The decrees of an ecumenical council, for instance, possess a greater level of authority than the statements of an Episcopal Conference. The judgment of the pope on what the Church teaches about some aspect of faith or morals enjoys a greater authority than a commentary on the papal judgment issued by a committee of a national conference of bishops.¹⁴ The theologian should also discern the level or degree to which the authoritative teachers in the Church intend to engage their authority. Thus the *Instruction on the Ecclesial Vocation of the Theologian*, issued by the Congregation for the Doctrine of the Faith, reminds theologians that they "must take into account the proper character of every exercise of the Magisterium, considering the extent to which its authority is engaged."¹⁵ Furthermore, theologians are said to be charged with the job "to assess accurately the authoritativeness of the interventions which becomes clear from the nature of the documents, the insistence with which a teaching is repeated, and the very way in which it is expressed."¹⁶ In addition to these points, Fr. Francis Sullivan has observed, rightly, that the theologian must also ascertain the historical context of a magisterial document and within that context determine the meaning of what is taught in the document.¹⁷ With these principles in mind let us turn to the *Responsum* of March 13, 1975 from the Holy See and the commentary of November 22, 1977 issued by the administrative board of the United States Catholic Conference-National Conference of the Catholic Bishops and the clarification published on July 8, 1980.¹⁸

In 1974 Archbishop John R. Quinn, in the name of the American bishops, asked Pope Paul VI for an authoritative clarification with regard to the Church's teaching on sterilization. At the time many questions were raised in the United States as to whether it was morally permissible, in some cases, for Catholic health care facilities to permit direct sterilizations. What was being questioned at the time was Directive 20 of the 1971 Ethical and Religious Directives for Catholic Health Facilities. Some theologians argued that direct sterilizations in some cases might be permitted on the grounds of the principle of totality. Archbishop Quinn asked in his query to the Pope:

Can we accept the general prohibition of direct sterilization in Catholic hospitals and still make a number of exceptions in particular cases to solve pastoral problems?¹⁹

The *Responsum, Quaecumque sterilizatio*, was the way the Pope answered this query of the American bishops. Although the document was issued through the Congregation of the Doctrine of the Faith it has the authority of the Pope's teaching office behind it. It should be recalled that Vatican II taught, in *Christus dominus*, n.9, that the various offices of the Roman Curia act in the name of the Pope and by his authority. Strictly speaking then, the Pope, the head of the apostolic college, is the source from which the *Responsum* was issued. What level of papal authority engaged in this document? The *Responsum* is an exercise of the authority of the ordinary papal magisterium and as such expresses authentic doctrine of the Church. In the *Responsum*, the Pope as head of the college of bishops, gives his judgment (ordinary papal magisterium) as to what the entire college of bishops teaches and has taught (ordinary universal magisterium) about sterilization. When the Pope exercises his ordinary magisterium as he does in the *Responsum*, he seeks to serve his brother bishops with their task of seeing that their particular Churches live in full and complete communion with the universal Church.²⁰ The pope issued the *Responsum* not only to answer the query put to him by the American bishops, but to assist them in their efforts to make sure that each of their particular Churches is fully Church so that the universal Church might be completely present in every diocese in the United States.

What does the *Responsum* teach? First of all it defines direct sterilization as:

Any sterilization which of itself, that is of its own nature and condition, has the sole immediate effect of rendering the generative faculty incapable of procreation is to be considered direct sterilization Therefore, notwithstanding any subjectively right intention of those whose actions are prompted by the care or prevention of physical or mental illness which is foreseen or feared as a result of pregnancy, such sterilization remains absolutely forbidden according to the doctrine of the church.²¹

The *Responsum* rejects the idea that the principle of totality might be applied to justify some sterilizations on the grounds that it is sometimes necessary to surgically interfere with the reproductive organs for the greater good of the person. The *Responsum* teaches that direct sterilization

harms the dignity and ethical good of the human person because it removes an essential element of "foreseen and freely chosen sexual activity." Direct sterilization is said to be intrinsically evil (*intrinsece mala*).

Careful attention must be paid to article 3a which deals with cooperation and "management of the Catholic hospitals." This section begins: *Quaevīs eorū cooperatio institutionaliter adprobata vel admissa ad actiones ex seipsis . . .* Attention must be paid to the verbs used here *adprobata vel admissa*. This is not a parallelism. Two distinct things are being affirmed in the use of these verbs. A translation:

Any cooperation of the hospitals which involves approval [*adprobata*] or allows [*admissa*] actions which are in themselves, that is, by their nature and condition, directed to a contraceptive end, namely, so that the natural effects of sexual actions deliberately performed by the sterilized subject be impeded, 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 [*intrinsece mala*]. The Catholic hospital cannot cooperate with this for any reason. Any cooperation so supplied stains the mission entrusted to this type of institution and would be contrary to the necessary proclamation and defense of the moral order.²²

The Latin text, with the verbs that it uses, clearly says that a Catholic hospital in its management and policies can neither actively approve nor passively permit direct sterilizations because they are intrinsically evil actions which always harm the person who is sterilized. The verb *admissa* can be translated as "allow," "permit" or "allow access to" or "permit access to." The Latin is stronger than the English translation that appeared in *Origins* which translated *admissa* as "consent."²³ The cooperation that is forbidden is not simply a matter of a Catholic health care facility simply stating its "non-approval" of direct sterilization. Forbidden are hospital regulations that not only approve but allow or permit direct sterilization. Were the regulations of a Catholic health care facility to approve or allow such actions they would amount to the "official approbation" (*officialis approbatio*) of intrinsically evil actions. Formal cooperation then whether by regulations that approve or allow direct sterilizations is absolutely ruled out for a Catholic health care facility.

Moreover it is taught that cooperation in direct sterilization "stains" or "besmirches" (*dedeceret*) the mission entrusted to the institution. There is the clear affirmation that approving or permitting sterilizations harms the mission of a Catholic hospital. The *Origins* translation renders the verb

dedeceret as 'unbecoming.' While this is a possible translation, a strong case can be made for translating the verb as "stain" or "besmirch." Such a translation fits well with the context of the whole paragraph which speaks of the official approbation of direct sterilization as matter which, in the objective order is an intrinsic evil. The next section (3b) states that

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.²⁴

There are a couple of important points about this paragraph that call for very careful interpretation. First, what is meant by "traditional doctrine" and where do we find it?

The phrase "traditional doctrine" (*traditionalis doctrina*) refers to something very specific. In this context "traditional doctrine" refers not so much to the teaching of the magisterium but to the theological opinions of approved authors concerning some aspect related to faith and morals. By use of the term "traditional doctrine" the *Responsum* refers to the nomenclature, reasoning and explanation with regard to some subject – in this case material cooperation – about which there is some consensus in the writings of "approved authors."²⁵ In other words, we can expect to find the "traditional doctrine" in the consensus of those theologians whose writings have been published under ecclesiastical approbation. This is not to deny that there may be certain points of difference in the "approved authors." On the other hand, the traditional doctrine about material cooperation has to do with those matters about which there is some consensus. The *consensus* of "approved authors" is important here. "Traditional doctrine" is not something simply collected from a consultation of theological writers of one's choosing.

More important, it is evident that what the papal document, in this paragraph allows for is mediate material cooperation not immediate material cooperation. The *Responsum* alerts us to this fact as soon as it speaks of the distinction between proximate and remote as "remaining valid." These distinctions have to do with mediate material cooperation not immediate material cooperation. Proximate or remote (mediate cooperation) refers to how closely the cooperation is associated with the sinful act. No one, to my knowledge, argues that these distinctions apply to immediate material cooperation because the object of the cooperator and the wrongdoer coincide in immediate material cooperation. The *Responsum* also mentions the distinctions between necessary and free (contingent) cooperation.²⁶ But this gives us no reason to think that it is somehow

referring us to immediate material cooperation.

Moreover, since the *Responsum* reaffirms that sterilization is an intrinsic evil it should be abundantly clear why it does not and cannot allow immediate material cooperation where in the words of the 1994 ERD "the object of the cooperator is the same as the object of the wrongdoer." For this would be the very kind of cooperation that is said to be "absolutely forbidden." The *Responsum*, contrary to what Keenan claims, never mentions duress or immediate material cooperation and it certainly does not mention duress in connection with immediate material cooperation. The *Responsum* does not teach, even implicitly, that duress somehow turns implicit formal cooperation into a permissible form of immediate material cooperation. Nor does the *Responsum* refer, even implicitly, to immediate material cooperation under duress in the case of direct sterilization.

It remains true that the *Responsum* recognizes that there might be times when the principle of material (mediate) cooperation in direct sterilization might apply. On the other hand, the *Responsum* only mentions this after it has rejected "Any cooperation of the hospitals which involves approval or allow actions which are in themselves that is, by their nature and condition, directed to a contraceptive end." The use of these very restrictive terms shows that the *Responsum* understands the possibility of mediate material cooperation to be rather rare and an uncommon occurrence. Still, even though the *Responsum* never explicitly mentions duress, it is probably correct to interpret the *Responsum* as acknowledging, at least implicitly, that duress may come into play with regard to possible instances of mediate material cooperation.²⁷

Whenever material cooperation is applicable, the *Responsum* cautions in article 3c that "great care must be taken against scandal and the danger of any misunderstanding by an appropriate explanation of what is really being done." Scandal should be understood in the theological sense, e.g., behavior or attitudes that involve deeds or omissions that lead others to do evil or lead others to be tempted to do evil.²⁸ The *Responsum* certainly leaves open the possibility that in some cases the chance of scandal might be so great that material cooperation should be avoided even though it otherwise might be supplied.

This brings me to the statements of the USCC (1976) and of the NCCB (1980). Again, in evaluating these documents we must ask: 1) what is the source of the document, 2) what is the weight of authority that is being exercised and 3) what is the meaning of what is taught or affirmed in the document?

The 1977 document is a commentary on the *Responsum* issued by the Administrative Board of the United States Catholic Conference-National Catholic Conference of Bishops. The commentary, it should be noted is

not a statement of the entire conference of bishops and was not represented as such. Strictly speaking, the Administrative Board is not and did not purport to be a doctrinal authority. What is the weight of the authority of the commentary? It is simply an interpretative guide designed to help bishops interpret and apply the doctrine that is reaffirmed by the papal magisterium in the *Responsum*. What is normative for the commentary is the doctrine as taught by the *Responsum*. This is important to remember when determining the meaning of what the commentary says. As an interpretative guide the commentary in no way replaces the responsibility of the local bishops who remain the sole authorities responsible for seeing that the doctrine of the church is correctly interpreted and applied in their dioceses. It should be borne in mind there can be no question here of a "doctrinal contradiction" whereby the commentary is at odds with papal teaching or where the commentary would legitimate a partial or incomplete interpretation and application of the *Responsum*. Whatever the ambiguities of the commentary, and I believe there are some, the administrative board certainly intended it to be faithful to the meaning of what is taught by the pope in the *Responsum*.

What does this commentary affirm? First of all the commentary repeats the teaching contained in the *Responsum* that " 'any sterilization which of itself, that is, of its own nature and condition, has the sole immediate effect of rendering the generative faculty incapable of procreation' is completely forbidden."²⁹ On the one hand the commentary repeats the *Responsum*'s insistence that direct sterilization "May not be used as a means of contraception nor may it be used as a means for the care or prevention of physical or mental illness which is feared and foreseen as a result of pregnancy." On the other hand, the commentary does not reproduce the *Responsum*'s assertion that this holds true even in the face of subjectively right intentions on the part of those whose actions are prompted by such health concerns. This is an unfortunate omission. The commentary does go on to acknowledge that the *Responsum* teaches that "no mandate of public authority can justify direct sterilization nor can the principle of totality be invoked."

Next, the commentary notes that not all procedures that bring about sterility are always prohibited. The *Responsum* did judge article 20 of the 1971 Ethical and Religious Directives to be a faithful expression of Church teaching. Article 20 states that procedures which cause sterility may be permitted when they are directed to the cure or prevention of a serious pathological condition and are not directly contraceptive and when a simpler treatment is not possible or "reasonably available."³⁰ The commentary goes on to reproduce the three principles given in article 3a-c of the *Responsum*.

The commentary then suggests six guidelines for hospital policy. Guidelines 2, 4 and 6 are of particular interest here. No. 2 speaks specifically about duress: "Material cooperation will be justified only in situations where the hospital because of some kind of duress or pressure cannot reasonably exercise the autonomy it has, (i.e., when it will do more harm than good)." No. 4 cautions that:

In judging the morality of cooperation a clear distinction should be made between the reason for sterilization and the reasons for cooperation. If the hospital cooperates because of the reason for the sterilization, e.g., because it is done for medical reasons, the cooperation can hardly be considered material. In other words the hospital can hardly maintain under these circumstances that it does not approve sterilizations done for medical reasons, and this would make cooperation formal.

The commentary says that in order for cooperation to be material "the reason for cooperation must be something over and above the reason for sterilization itself." In other words, the reason for cooperation must not be for medical reasons but for some other external reason. This becomes clear in guideline #6 which says "Direct Sterilization is a grave evil. The allowance of material cooperation in extraordinary cases is based on the danger of an even more serious evil, e.g., the closing of the hospital could be under circumstances a more serious evil."

Unlike the *Responsum* the commentary explicitly mentions duress and material cooperation. How is this to be understood?

The commentary certainly does not intend to go beyond or conflict with the doctrine of the Church as stated in the *Responsum*. To interpret the commentary as arguing that duress justifies immediate material cooperation would be to put the commentary in direct conflict with the *Responsum*. Therefore when the commentary speaks of duress and material cooperation, it must be understood as referring to mediate material cooperation. This holds too for distinctions made in No. 4 between the reason for sterilization and the reason for cooperation. Again, the form of cooperation here has to do with infrequent mediate material cooperation.

There are some ambiguities in the commentary that make it capable of misinterpretation especially when a reader reads it out of context, forgetting that the *Responsum* norms the commentary. Two ambiguities might lead such a reader to misinterpret both the commentary and the *Responsum*. First of all, only when the commentary directly quotes the *Responsum* does it reproduce the *Responsum's* clear assertion that direct sterilization is a matter which in the objective order is intrinsically evil.

The commentary certainly does not deny this assertion and does say that: "Direct Sterilization is a grave evil." The reader can be left to wonder whether this is the same thing as an intrinsic evil. This can lead to a further misunderstanding when coupled with the omission of the *Responsum's* point that direct sterilization is "absolutely forbidden" even when there are subjectively good intentions prompted by illness "which is foreseen or feared as a result of pregnancy." A clear affirmation that direct sterilization is an intrinsic evil, as stated in the *Responsum*, is absolutely critical for understanding that direct sterilization always harms the ethical good of the human person and that it is for this reason that immediate material cooperation (implicit formal cooperation) cannot be licit even under duress.

Secondly although the commentary quotes the *Responsum's* reference to material cooperation and the distinctions between proximate and remote and necessary and free it does not mention these distinctions in the guidelines that it offers. Again, when the *Responsum* mentions these distinctions it emphasizes and alerts the careful reader to the fact that the material cooperation that it recognizes as valid is mediate material cooperation. The fact that the commentary fails to reproduce these important distinctions may lead some readers to think that what is permitted in some cases is immediate material cooperation under duress for grave proportionate reason.

None of this is to gainsay the fact that the administrative board of the USCC had every intention for the commentary to be a faithful interpretation of the *Responsum*. The only purpose for pointing out these ambiguities is to show how the commentary could be misunderstood. It is important to remember, however, that any ambiguities in the commentary must be resolved in favor of the doctrine as taught in the *Responsum*.

Therefore, I submit: To invoke the USCC commentary as a justification of immediate material cooperation under duress is to misunderstand both the commentary and the *Responsum* or, worse, it involves thinking, however implicitly, that the commentary contradicts the *Responsum*. To repeat: material cooperation with direct sterilization as mentioned in the commentary can only refer to mediate material cooperation.

The fact that the 1976 commentary on the *Responsum* contained ambiguities that led to certain misinterpretations is shown by the fact the National Catholic Conference of Bishops thought it necessary to issue in July 1980 a clarification due to "a certain confusion with regard to the morality of tubal ligation as means of contraceptive sterilization."³¹ The statement was drafted by the NCCB Committee on doctrine and was approved by the bishops by mail. To my knowledge the margin of approval

was not publicly disclosed. The clarification, unlike the commentary, is issued as a statement not simply of the Administrative Board but in the name of the entire NCCB. What is the weight of the authority of the clarification? It is an interpretative guide issued in the name of the bishop's conference and approved by the bishops. The clarification, in several of its statements and directives does repeat and express the doctrine of the Church as taught by the ordinary universal magisterium. The purpose of the clarification is to help bishops dispel the confusion surrounding the teaching of the Church. The clarification in no way usurps the responsibility and authority of the local ordinary for assuring that the moral teachings of the Church are correctly interpreted, taught and followed in his diocese. The clarification itself in fact mentions this responsibility of the local bishop. It is also important to remember here that the doctrine as taught by the *Responsum* is normative for the clarification.

Apart from giving a stricter interpretation of material cooperation, the clarification repeats the traditional teaching on sterilization. It states that: 1) direct sterilization is objectively immoral even if performed for medical reasons; 2) the principle of totality cannot be invoked to justify sterilization, and; 3) formal cooperation in contraceptive sterilization whether by approval or toleration for medical reasons, is forbidden and totally alien to the mission entrusted to Catholic health care facilities. In its fourth point the clarification explains that the reason given for justifying material cooperation in the commentary on the *Responsum*:

refers not to the medical reasons given for the sterilization but to grave reasons extrinsic to the case. Catholic health care facilities in the United States complying with "Ethical and Religious Directives" are protected by the First Amendment from pressures intended to require material cooperation in contraceptive sterilization. In the unlikely and extraordinary situation in which the principle of material cooperation seems to be justified, consultation with the bishop or his delegate is required.³²

This seems to be a stricter interpretation of material cooperation than the one given in the commentary because it says that such cooperation involves only grave reasons extrinsic to the case which are said to be "unlikely" and an "extraordinary situation." It is not possible to argue that the clarification somehow permits immediate material cooperation under duress for a proportionately grave reason in the case of direct sterilization. Again, we must recall that when the clarification speaks of material cooperation it means mediate material cooperation. Any other interpretation would put the clarification in direct conflict with the doctrine of the Church as taught by

the *Responsum*.

What about the 1994 Ethical and Religious Directives of the NCCB and what they say about immediate material cooperation under duress? First, it should be recalled that the ERD were issued with unanimous approval by the bishops of the United States in the name of the NCCB.

The ERD state:

The purpose of these ethical and religious directives then is twofold: first, to reaffirm the ethical standards of behavior in health care which flow from the church's teaching about the dignity of the human person; second, to provide authoritative guidance on certain moral issues which face Catholic health care today.³³

An explanatory note that accompanied the ERD says that "at the annual meeting of the National Conference of Catholic Bishops the directives were approved as the national code, recommended for implementation by the diocesan bishop."

The ERD are authoritative because they express the Church's universal moral teaching (ordinary universal magisterium) in communion with the entire apostolic college together with its head, the pope and because they offer guidelines that seek to apply this teaching according to the judgment of the NCCB.

The ERD give authoritative guidance on moral issues that confront Catholic health care in the United States at a time when there are dramatic changes in health care ministry. On the other hand, doctrinally the ERD teach nothing new. They do not represent an advance in the development of the moral doctrine of the Church. It should also be pointed out that not all parts of the ERD have the same weight of authority. For instance, the guidelines on cooperation contained in the appendix of the ERD does not have the same weight of authority behind it as the ERD's reaffirmation of the Church's teachings on direct sterilization, direct abortion or its reaffirmation that health care facilities must treat their employees respectfully and justly. The latter expresses the moral teachings of the ordinary universal magisterium (the common teaching of the bishops and the pope), while the appendix's guidelines on cooperation do not. To be sure, the appendix is authoritative since it is part of the ERD approved by the bishops. But it cannot be equated with the authority of the moral doctrine of the Church as expressed elsewhere in the ERD. The appendix does not mark a doctrinal advance in the magisterium's moral teaching. It is certainly subject to revision in the way that the Church's teaching on direct

abortion and justice in the workplace is not.

It should also be observed that the ERD in no way supplants or substitutes for the local bishop's responsibility for insuring that health care ministry is practiced according to the moral teachings of the Church. The ERD are "recommended for implementation by the diocesan bishop." The bishop, of course, remains the authoritative teacher of the Church's moral teaching in his diocese and the authoritative interpreter and implementer of the ERD.³⁴

Having noted the level of the authority of the ERD what should be concluded as to what they say about immediate material cooperation in the case of duress?

Even as an authentic magisterium of the NCCB the ERD cannot and were not intended to be interpreted in such a way as to be in conflict with the teaching of the ordinary papal magisterium. Again, we must keep in mind that what is normative for the ERD in the case of the Church's teaching on sterilization is the *Responsum*. When the appendix speaks of immediate material cooperation in some instances of duress, it cannot mean this with regard to acts that are intrinsically evil such as sterilization. This would put the ERD in conflict with the *Responsum* that teaches as we have seen that sterilization is an intrinsically evil act and that only mediate material cooperation is permissible in some cases. Another reason why it is mistaken to interpret what the appendix of the ERD says about immediate material cooperation and duress as applicable to intrinsically evil acts is that such an interpretation would put the ERD in contradiction with what *Veritatis Splendor* teaches about intrinsic evil. In n.81 of that encyclical we read:

If acts are intrinsically evil, a good intention or particular circumstances can diminish their evil, but they cannot remove it. They remain "irremediably" evil acts; per se and in themselves they are not capable of being ordered to God and to the good of the person Consequently, circumstances or intentions can never transform an act intrinsically evil by virtue of its object into an act "subjectively" good or defensible as a choice.³⁵

Understood in this way, duress is nothing more than a circumstance of the moral object and as such can never transform the intrinsically evil act into something "capable of being ordered to God and the good of the person." It follows therefore that immediate material cooperation in intrinsically evil acts is impermissible even in the presence of duress.³⁶ I conclude then that the appendix of the ERD cannot be invoked to justify immediate material cooperation under duress for grave proportionate reason with regard to

direct sterilization.

Let us return to the representative case proposed by Keenan. In that case the Catholic health care facilities by its approval of the contract with the obstetrics team would give permission for a limited number of direct sterilizations. But this means that the Catholic health care facility would be permitting immoral actions that are intrinsically evil. It means that these health care facilities would be giving what the *Responsum* says cannot be given: an official approbation of direct sterilization in its management and execution in accord with its regulations. No matter how much a Catholic health care facility says that it does not “approve” of direct sterilization, no matter how few direct sterilizations are permitted, the fact remains that the Catholic health care facility contractually permits acts which can never be ordered to God or the good of the person to take place on its campus. The opinion that under the duress of losing its services a Catholic health care facility can contractually permit direct sterilization, cannot be reconciled with the moral doctrine of the Church as a careful reading of the *Responsum* shows.

III. Concluding Remarks

The proper interpretation of the teaching of the Church is important for a local Church whose bishop is charged with the responsibility of seeing that his Church lives fully in union with the life of the universal Church. Obviously the work of a Catholic health care facility takes place within a local Church and makes an indispensable contribution to its life and mission. If Keenan’s claim about immediate material cooperation under the presence of duress with regard to direct sterilization was adopted by a Catholic health care facility – such as the one Keenan describes in his scenario – it would be acting contrary to Church teaching and thus would be harming the efforts of the local Church to live in communion with the universal Church.

Questions of institutional cooperation that confront Catholic health care facilities have an ecclesial context, and that context ought to be seen as the Church understood as a communion. Recent theological works and documents of the magisterium have, rightly, drawn attention to the fact that Vatican II’s understanding of the Church as a communion is a, if not *the*, central idea of the council’s documents.³⁷

In an ecclesiology of communion the universal Church is the communion of particular Churches. In and through the particular Churches the universal Church is present and concrete in the world. On the other hand, each particular Church only exists fully as Church in the universal Church. This or that local Church is not complete or self-sufficient by

itself.³⁸ A local Church is only fully ecclesial to the extent that it lives according to the universal bonds of ecclesial unity, that is, in the common faith, life, and worship of the Church, and including of course the principle of apostolic succession. Only in this way can the universal Church with all its essential elements be present and be recognized in any given local Church. If any one of these elements are partially absent or absent altogether then what results is a state of impaired communion with the universal Church. Communion is not only a gift but an unfinished task that a local Church will constantly be striving and struggling to achieve. As the visible principles of unity in their Churches, bishops are agents of communion who seek to insure that their Churches are living in communion with the universal Church. Understood in this way a bishop – who is in communion with all the other bishops of the world and the pope – is the visible sign that a local church lives in communion with the universal Church.

If we understand the Church in this way, we can see that when a Catholic health care facility is faced with questions of licit and illicit cooperation it is also faced with the question of whether it will contribute to the efforts of a local or particular Church to live in communion with the whole Church. What a Catholic health care facility decides about cooperation can advance or harm the struggle of a local Church to be fully Church whereby the universal Church is fully present through it. When theologians, ethicists and ethics boards help Catholic health care facilities determine whether and how much cooperation should be supplied they should be careful to present such a question in its ecclesial context. In other words, they will situate questions of cooperation in the broader context of the Catholic health care facility as part of local Church engaged in the task of achieving communion with the universal Church. It is against this background that we can fully appreciate why consultation with the bishop – the visible principle of unity and communion – is so emphasized in recent Church documents. The danger is very real and great that if questions of licit and illicit cooperation – particularly in cases that involve actions that the Church has judged to be intrinsically evil – are not seen in the context of an ecclesiology of communion then certain moral norms are more apt to be seen as mere legal rules extrinsically imposed from the outside instead of norms proclaimed by the universal Church which promote the following of Christ and the dignity of the human person.

References

1. James Keenan, "Institutional Cooperation and the Ethical and Religious

Directives," *Linacre Quarterly*, 64 (August 1997): 53-76.

2. James Keenan, "Cooperation and Hard Cases," *Ethics and Medics*, 23.8 (August 1998): 1-3.

3. Keenan, "Institutional Cooperation and the Ethical and Religious Directives," 71-3. Cf. "Cooperation and Hard Cases," 1.

4. National Conference of Catholic Bishops, "Ethical and Religious Directives for Catholic Health Care Services," (Washington: USCC, 1995). Hereafter cited ERD. See the full text reproduced in *Origins* 24 (December 15, 1994): 450-61.

5. Keenan, "Institutional Cooperation and the Ethical and Religious Directives," 71. Keenan sketches a very similar case in his "Cooperation and Hard Cases," 2.

6. Keenan, "Institutional Cooperation and the Ethical and Religious Directives," 68.

7. Aside from citing a similar case in Gary Atkinson and Albert Moraczewski, *A Moral Evaluation of Contraception and Sterilization*, (St. Louis: Pope John XXIII, 1979) 86-7, Keenan does not specify to whom he refers here.

8. Keenan, "Institutional Cooperation," 72. Keenan does not specify the "many" who seem to believe that the bishop should approve the contract.

9. Keenan, "Institutional Cooperation," 72.

10. *Ibid.*, 73.

11. *Ibid.*, 69

12. James F. Keenan and M. Cathleen Kaveny, "Ethical Issues in Health-Care Restructuring," 56 (March 1995): 146. [footnotes omitted]

13. James Keenan and Thomas Kopfensteiner, "The Principle of Material Cooperation" *Health Progress*, 76.3 (April 1995), 24. [footnotes omitted]

14. The teaching of the ordinary universal magisterium refers to the teaching authority of the college of bishops together with their head, the pope, when the college is not gathered together in an ecumenical council and is not defining something as dogma of the faith.

15. "Instruction on the Ecclesial Vocation of the Theologian," n.17. For the full text see *Origins*, "Instruction on the Ecclesial Vocation of the Theologian," 20 (July 5, 1990): 118-126.

16. "Instruction on the Ecclesial Vocation of the Theologian," n.24.

17. Francis Sullivan, *Creative Fidelity*, (New York: Paulist Press, 1996) 4-5.

18. For an unofficial translation of the *Responsum* see *Origins*, 6 (June 10, 1976): 34-5. For the official Latin text see *Acta Apostolica Sedis*, 68 (November 1976): 738-740. For the text of the Commentary see *Origins*, "Sterilization Policy for Catholic Hospitals," 7 (December 8, 1977): 399-400; for the clarification see *Origins*, "NCCB Statement on Tubal Ligation," 10 (August 28, 1980): 175. Perhaps it should be noted that the text of the *Responsum* was not made public in the United States until a physician, who had somehow obtained a copy of it, read it during a discussion at an international meeting of Catholic physicians. *Origins* then published an unofficial translation. Up until that point Archbishop Joseph Bernardin, then president of the NCCB-USCC, had summarized the *Responsum* in a letter to U.S. bishops. For the text of Archbishop Bernardin's letter see *Linacre Quarterly*, 42 (November 1975): 220.

19. As quoted in William B. Smith, "Catholic Hospitals and Sterilizations," *Linacre Quarterly* 44 (May 1977): 109.

20. See *Lumen Gentium*, 25, 27. Cf. *Lumen Gentium* 23.

21. Here I follow the translation in *Origins*, (June 10, 1976): 34. For the Latin text see *Acta Apostolica Sedis*, 68 (November 1976): 738.

22. I have re-worked this part of the translation that appeared in *Origins*. Again, the translation that appears there is not an official translation. In any case the Latin text remains normative. For another translation see "Dialogue about Catholic Sexual Teaching," in *Readings in Moral Theology*, v.8, (New York: Paulist Press, 1993): 172-4. The latter translation renders *adprobata vel admissa* as "approved or admitted." This translation of these verbs is closer to my translation given above.

23. This is not correct according to the dictionaries I consulted - *Cassell's* and *The Oxford Latin dictionary*. "Consent" usually translates *consentire*, *assentire*.

24. I follow the *Origins* translation here.

25. It should be recalled that the Theological Commission at Vatican II had occasion to refer to queries to the approved theological writings. For an example see *Acta Synodalia Concilii Vaticani Secundi*, III/8, 88, n.159. One moral theologian who has recognized this meaning of "traditional doctrine" is William B. Smith, "Catholic Hospitals and Sterilization," 112.

26. Necessary cooperation denotes a kind of cooperation without which a sinful act could not be performed. Example: Giving a cyberthief the computer password needed for electronically accessing and stealing from another person's bank account. Free or contingent cooperation is the kind of cooperation without which the sinful act could still be performed. Example: Turning on the computer for a

cyberthief who already possesses the computer password necessary to electronically access and steal from a bank account.

27. Another issue with regard to the traditional doctrine about material cooperation is whether the principles of cooperation apply not only to individuals but to corporate entities such as a Catholic health care facility as well. Except to make three observations about this issue I shall not explore it here for it deserves a separate treatment of its own. First, it should not be too quickly assumed that the *Responsum* meant to say that the principles of material cooperation apply not only to the employees of a health care facility but to the health care facility itself. For one thing the *Responsum* makes no such claim, at least explicitly. Secondly, one would have to show that there is a consensus in the writings of the approved authors (traditional doctrine) to the effect that the principles of material cooperation are applicable not only to individuals but corporate entities as well. Thirdly, there is some indication that some of the approved authors do not seem to think that material cooperation can be applied to corporate entities. For instance, Henry Davis has this to say:

Where a hospital is served and administered by Catholic Religious women or even by a Catholic Committee, no sinful operation should be allowed under any circumstances, except that in the one case, where unexpectedly and contrary to regulations a surgeon proceeds to do what is sinful, the nurse may then offer assistance by material cooperation, to avoid worse evils.

See *Moral and Pastoral Theology*, v.1., (New York: Sheed and Ward, 1938), 348. Davis cites Alfred Vermeersch, *Theologia Moralis*, v.2, (Rome: Universitas Gregoriana, 1928) n.139.

28. For an example see *The Catechism of the Catholic Church*, n.2284.

29. All quotations from the Commentary are taken from the text that appears in *Origins*, "Sterilizations Policy for Catholic Hospitals," 7 (December 8, 1977): 399-400.

30. National Catholic Conference of Bishops, "Ethical and Religious Directives for Catholic Health Facilities," (Washington, D.C.: USCC, 1971), 6.

31. "NCCB Statement on Tubal Ligation," 10 (August 28, 1980): 175.

32. See *Origins*, "NCCB Statement on Tubal Ligation," 10 (August 28, 1980): 175.

33. See the text in *Origins*, "Ethical and Religious Directives," 24 (December 15, 1994): 45.

34. The recent apostolic letter from Pope John Paul II, *Apostolos Suos*, (which adds new canons to the Code of Canon Law) has affirmed that: "Bishops, whether individually or united in Conference, cannot autonomously limit their own sacred power in favor of the Episcopal Conference, and even less can they do so in favor of one its parts, whether the permanent council or a commission or the president." See *Apostolos Suos*, n.20. The logic of this teaching and law of the Church follows from an understanding of Church as a communion.

For the full text of this apostolic letter, see *Origins*, 28 (July 30, 1998): 152-58.

35. *Veritatis splendor*, n. 81.

36. Fr. Kevin O'Rourke has criticized the views of Keenan precisely on this point. See *Ethics and Medics*, 23.8 (August 1998): 3-4.

37. For example see Jean-Marie R. Tillard *Church of Churches: The Ecclesiology of Communion*. (Collegeville, MN: Liturgical Press, 1992), French original *Eglises d'Eglises: l'ecclesologie de communion*, (Paris: Cerf, 1987); Walter Kasper, "The Church as Communion: Reflections on the Guiding Ecclesiology Idea of the Second Vatican Council" in *Church and Theology*, (New York: Crossroads Press, 1992). Miguel Garijo-Guembe, *Communion of the Saints*, (Collegeville, MN: Liturgical Press, 1994), German original *Gemeinschaft die Heiligen: Grund, Wesen und Structur der Kirche*, Patmos Verlag, 1988. Joseph Ratzinger, *Called to Communion*. San Francisco: Ignatius Press, 1996; Jerome Hamer, *The Church is a communion*, tr. Ronald Matthews, (New York: Sheed and Ward, 1964), French original *L'Eglise est une communion*, (Paris: Les Editions du Cerf, 1962). The Final Report of the 1985 extra-ordinary Synod of Bishops observed that: "The ecclesiology of communion is the central and fundamental idea of the council's documents." See "The Final Report," *Origins*, 15 (December 19, 1986): 448. More recently see the Congregation for the Doctrine of the Faith, in its letter to bishops *Origins* "Some Aspects of the Church Understood as a Communion," 22 (June 25, 1992): 108-112.

38. This is what some theologians call the mutual interiority of the Church. See for example Henri de Lubac, *The Motherhood of the Church*, tr. Sr. Sergia Englund, O.C.D., (San Francisco: Ignatius Press, 1982) 201; de Lubac cites Yves Congar, "La collegialite de l'episcopat et la primaute de l'evêque de Rome dans l'Histoire Angelicum," 47 (1970): 403-427." On the mutual interiority of the Church see the Congregation for the Doctrine of the Faith, "Some Aspects of the Church Understood as a Communion" has pointed out here the formula of the Second Vatican Council: "The Church in and formed out of the Churches is inseparable from another formula: The Churches in and formed out of the Church." See *Origins* "Some Aspects of the Church Understood as a Communion," 22 (June 25, 1992): 109.