

# COOPERATION WITH EVIL, THE THEORY OF ACTION AND THE CONTRACEPTION MANDATE

COOPERACIÓN CON EL MAL, LA TEORÍA DE LA ACCIÓN Y EL MANDATO DE ANTICONCEPCIÓN

COOPERAÇÃO COM O MAL, A TEORIA DE AÇÃO E O MANDATO DE CONTRACEPÇÃO

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## ABSTRACT

The debate concerning the so-called U.S. *Health and Human Services (HHS) Contraception Mandate* has been adequately framed, in the academic field, within the traditional ethical doctrine on *cooperation with evil*. This principle will allow us to conclude whether employers may ethically comply with the onerous existing law or not. The discussion has been quite heated, because the practical conclusions authors have reached vary widely, depending on which interpretation of the theory they rely on. In this paper, some of these explanations are addressed and analyzed from the standpoint of the Thomistic theory of action, which is now the most common point of view. This work concludes that, although the *Contraception Mandate* will most likely be repealed by the current U.S. administration, as things once stood, compliance with it may have been ethically licit in some cases.

**KEY WORDS:** HHS Contraception Mandate; Affordable Care Act; cooperation with evil; theory of action; *per se* consequences of action; *per accidens* consequences of action; Thomas Aquinas (Source: DeCS).

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**RESUMEN**

El debate académico sobre el llamado *U.S. Health and Human Services (HHS) Contraception Mandate* se ha enmarcado, adecuadamente, en el contexto de la doctrina clásica acerca de la *cooperación al mal*. Este principio ayuda a discernir si las empresas y los empleadores estadounidenses deberían o no, éticamente, obedecer a tal ley injustamente impuesta. La discusión ha sido muy acalorada, porque las conclusiones a las que han llegado los distintos autores son muy variadas, en función de cuál ha sido la interpretación de esta doctrina en cada caso. En el presente artículo hemos tratado de examinar y analizar alguno de estos intentos de explicación, desde la perspectiva de la teoría tomista de la acción –que hoy en día es el punto de vista más común–. El trabajo concluye que, aunque el *Mandate* probablemente vaya a ser derogado por el actual gobierno de los Estados Unidos, tal como estaban las cosas, la obediencia de esta ley podría haber sido éticamente lícita en algunos casos.

**PALABRAS CLAVE:** *HHS Contraception Mandate*; *Affordable Care Act*; cooperación al mal; teoría de la acción; consecuencias *per se* de la acción; consecuencias *per accidens* de la acción; Tomás de Aquino (Fuente: DeCS).

**RESUMO**

O debate acadêmico sobre o chamado Mandato de Contraceção, do U.S. Health and Human Services (HHS), foi enquadrado, adequadamente, no contexto da doutrina clássica sobre a cooperação com o mal. Esse princípio ajuda a discernir se as empresas e os empregadores norte-americanos deveriam ou não, eticamente, obedecer a tal lei imposta injustamente. A discussão tem sido muito acalorada porque as conclusões a que diferentes autores chegaram são muito variadas, em função da interpretação dessa doutrina em cada caso. No presente artigo, buscamos examinar e analisar algumas dessas tentativas de explicação, a partir da perspectiva da Teoria Tomista da Ação — que, atualmente, é o ponto de vista mais comum. O trabalho conclui que, ainda que o mandato seja provavelmente revogado pelo atual governo dos Estados Unidos, assim como estavam as coisas, a obediência a essa lei poderia ter sido eticamente lícita em alguns casos.

**PALAVRAS CHAVE:** *Affordable Care Act*; consequências da ação *per accidens*; consequências da ação *per se*; cooperação com o mal; *HHS Contraception Mandate*; teoria da ação; Tomás de Aquino (Fonte: DeCS).

## INTRODUCTION: WHAT IS THE CONTRACEPTION MANDATE?

In 2009, after years of discussion within the Democratic Party, President Obama decided to start a new reform of the health care system based on an *individual mandate* model, which from 2014 onwards was intended to oblige the citizens who still did not have health care coverage to obtain it – assisted, in some cases by fiscal aid. Anyone who refused to do so would be fined/taxed.<sup>1</sup> The reform was finally launched by the federal government through the *Patient Protection and Affordable Care Act* and the *Health Care and Education Reconciliation Act*, which together constitute the *Affordable Care Act*, definitively approved by the American Senate in March 2010 (2).

Controversy arose following that approval. Was it constitutional to enforce citizens to purchase a commercial product, namely a health insurance policy? The Supreme Court answered that question by stating the individual mandate was not an order to acquire a commercial product but a tax, which certainly is within the constitutional limits of congressional power. Apart from that, at the beginning, the reform project was well received

1 What is described so far is the most well-known part of the reform, which would provide coverage to around 30 million Americans: “The majority of Americans – 197.2 million – purchase private health care coverage through their employer and 15.7 percent of Americans – nearly 49 million people – are not insured. Thanks to significant changes in the regulation of private health insurance, federal subsidies for low-income workers to purchase private health insurance, a mandate that requires individuals to secure and maintain health coverage, and the expansion of the Medicaid program, an estimated thirty-two million Americans are expected to be newly insured once the ACA is fully implemented. With these increases in coverage, the rate of insured citizens in the United States is expected to increase from 83 percent to 94 percent” (1: p89).

by most Americans: basic health assistance was considered, by many, as a citizen’s right rather than a privilege. But soon, during the congressional debate, some individuals and organizations – including the Catholic hierarchy – expressed concern about the way certain aspects of the reform project were taking shape. The final version of the *Affordable Care Act* specified that all health insurance policies and programs had to cover some preventative services for women, which would be spelled out later by the Department of HHS. Indeed, in July 2010, that department made public a first list of those preventative services; the definitive list would be issued in the summer of 2011 (3: #41728). There was an immediate reaction, since the list included some forms of abortion, contraception and sterilization. The complaint was grounded in the belief that these are not genuine health care services and, moreover, that compelling people to abide by such a mandate undermines the freedom of conscience of many American citizens who would be obliged to cooperate in evil actions (abortions, contraception, sterilizations) carried out by the recipients of the insurance they provide.

The *Contraception Mandate* is, thus, defined as the American state or federal rule or law that requires insurance companies or employers who grant this service to their employees to include contraception in their health care insurance plans. Although the *Mandate* will most likely be repealed by the current U.S. administration, I still find it very interesting to address this issue from an ethical point of view.

## ETHICS AND THE CONTRACEPTION MANDATE

In the ethical field, the debate concerning the *HHS Contraception Mandate* has been adequately framed

within the traditional doctrine on cooperation with evil. It has been characterized as the action of a third party that, in some foreseeable way, facilitates the primary agent's performance of an immoral action the latter had already decided to carry out. The manualistic tradition has adopted different classifications of cooperation, doing so in an attempt to shed light on the moral accountability of that evil action to the person who somehow is making it possible. The starting point is a basic distinction between formal and material cooperation, depending respectively on whether the cooperator approves or disapproves of the evil action. In the case of material cooperation, the morally illicit action is tolerated or suffered without implying approval of the principal agent's behavior; for example, when cooperation is derived from an action that had to be performed for whatever reason.

This raises the problem as to what extent effective, though involuntary – *indirectly voluntary* – cooperation with the evil action of another is morally licit. As the mere distinction between materiality and formality in cooperation offered no satisfactory answer to this question, further distinctions were coined within material cooperation. The first and most important is that which distinguishes between *immediate* and *mediate* material cooperation. The former takes place when someone helps the primary agent, by participating in some way in his or her action. A very illustrative example, and one that is widely reported in the literature, is that of cooperation in an onanistic act performed by one's spouse, when it is for proportionate reasons. Mediate material cooperation, on the other hand, occurs when someone makes an instrument available for another person to use for evil purposes, such as a pharmacist who gives alcohol to someone he or she knows will use it not to disinfect a wound but to get drunk. Sgreccia talks about

*immediate or direct cooperation* as that in which “the action of the cooperator is in operative unity with the action of the primary agent.” Whereas in mediate or indirect material cooperation, “there is a gap between the action of the primary agent and that of the cooperating agent such that the primary agent's activity can have multiple aims and not a single and inevitable outcome” (4: p362). With the latter, the action of the principal agent may take different directions according to his or her free will, which plainly shows the cooperator's action is not necessarily linked to it.

We can also talk about a further distinction; that is, one between *proximate* and *remote*. It is generically based on the physical or moral concatenation between the action of the cooperator and that of the primary agent. Immediate material cooperation, obviously, is always proximate; mediate material cooperation may be either proximate or remote. The owner of a gun shop who sells a gun to a well-known murderer is cooperating in a proximate way, inasmuch as the predictable outcome of that action is a crime. The CEO of a bank that gives a loan to the owner of the armory knowing that he sells weapons no matter who buys them cooperates in a more remote fashion. In practice, although a little bit vague, this distinction is not unimportant.

## COOPERATION WITH EVIL AND THE THEORY OF ACTION

Some authors have rightly felt this criteriology may find a more suitable and synthetic expression in the *theory of action*, focusing on the *moral object of the act of cooperation itself*. Indeed, in the pursuit of increased objectivity in the evaluation of cases of conscience, authors had been moving like a pendulum from consideration of the purely

interior dimension – formal and material cooperation – to the merely exterior connection between cooperation and the evil actions themselves, looking rather to the effective causal influence: they increasingly had changed focus from the intentional level to the external level of execution. As a result, one may end up saying that it is not enough for an action to create an interior *conditio sine qua non* in order for it to be morally wrong (i.e., the will of the agent), but rather it needs to be *efficaciter iniusta*: only when an effective causal influence on the evil act is present, can one speak of participation in the illicit action. Hence, we realize the moral evaluation of cooperation oscillates between the suspicion of subjectivism, with a formal criterion that follows only *voluntariness*, and the material criterion that stands for the *physical* causal influence on the external act.

In the so-called *teleologisms*, for example, the center of the action is situated in the external physical act, evaluated in relation to the rule, while the voluntariness of the subject is an element that is added later to establish accountability. From the perspective of the *acting person*, however, when needing to establish a criterion for cooperation, we should set the spotlight instead on the objective content of the acting subject's behavior. This approach seems consistent with the point of view of *Veritatis Splendor*, which states “*the morality of the human act depends primarily and fundamentally on the ‘object’ rationally chosen by the deliberate will*” (5: #78).<sup>2</sup>

In applying this perspective to our subject, we can use St. Alphonsus' definition of *formal cooperation* as the act that “concurr[s] in the evil will of the other and cannot be done without sin. Material cooperation, however, is that

which concurr[s] only in the evil action of the other, *outside of the intention* of the cooperator [*praeter intentionem cooperantis*]” (6: 1. II, tr. III, Ch. I, dub. V, no. 63).<sup>3</sup> But what does St. Alphonsus mean when talking here about *intention*? *Intention*, in this case, is that toward which the will tends, in a general or broad sense, in a particular action. E. C. Brugger, in an essay in which he explains the difference between *direct willing* (or *intending*) and what is caused by the agent but does not pertain to his will (7), puts it clearly by saying: “one *intends* precisely and only what one resolves (or sets oneself) to bring about by some piece of behavior. This includes two things: (a) some *end* for the sake of which one acts – that which one seeks for its own sake; and (b) some *means* (call it a *close-in end*) that one resolves to bring about as a way of realizing the end one seeks. One *intends*, as Aquinas clearly states, both one's end and one's means (as a close-in end). Together they form one's intelligible proposal for action”.<sup>4</sup>

For instance, when I go running for the sake of staying healthy, both the *intended end* (“staying healthy”) and the *intended means* (“going running”) are the things *directly intended* or *willed*. The rest of what happens as an effect or consequence of that action, even if foreseen, caused immediately and unavoidable – although I may very much wish to avoid it – is beyond my will (*praeter intentionem*, or traditionally called *indirectly willed*). An example is the leg pain I certainly will have after the hard workout I did in order to keep healthy. Brugger gives the helpful example of the loaded passenger airplane that gets shot down by an F/A-18 because it was being used by terrorists as a guided missile against

2 Emphasis in the original.

3 The translation is mine.

4 Some of the italics are mine.

civilian targets. Both the pilot and the Joint Chiefs had, as an *intended end*, “to protect Americans on the ground from the attack” and, as *intended means*, “to remove the plane from the sky by blowing it up,” because that was the only means at hand. Those two elements completely and satisfyingly describe the moral action they brought about. They did not at all *intend* the death of those 235 innocent passengers, neither as an end nor as a means, although they certainly caused it. For *physically causing is not always morally intending*.<sup>5</sup>

Let us move on. Some authors speak about *formal cooperation* from the standpoint of the two modes of intending described above. This is understandable, because *intention* (in either sense) affords *formality* – its ultimate moral sense – to an action. Indeed, Aertnys and Damen state that in formal cooperation what a cooperator *intends* is the sin of the principal agent and the manner of *intending* may be two-fold: either *ex fine operantis* (by the deliberate willing of the cooperator) or *ex fine operis* (by the “inner purposefulness” of the action performed) (8: #398). Prümmer, along the same line, says the contribution of the formal cooperator to evil can be either, because the act of cooperation is sinful itself – *ex fine operis* –, or *ex fine operantis*, by giving consent to the bad will of the evil doer, as when someone willingly helps a friend so he can sin more easily with his lover (9: t. 1, p. I, Tr. IX, Ch.. III, art. III, par. 2, n. 617).<sup>6</sup>

According to these authors, in material cooperation there is, at most, a continuity or connection within the *physical dimension* of the action. In it, the cooperator’s action should always have either a moral object – as an intended close-in (proximate) end – and an end that are different from those of the primary agent’s own action. Therefore, it is possible to set the conditions and limits of moral acceptability according to the doctrine of *double effect* from which it ultimately flows. Formal cooperation, however, will always be illicit, because the act of cooperation is tainted by an evil *finis – operis* or *operantis*. In other words, the continuity or connection ascends to the level of the *intention*, to the *form* of the action – that which is recognized by reason and sought by the will as an end or as a means.

The general statement that can be made with regard to formal cooperation is that in it there is *consent or approval* – as a generic act of will – *of the evil action* of the primary agent. Prümmer himself, in the example on adultery reported above, can help us to understand that the role of intention in an act of cooperation has not always been properly explained. Formal cooperation lies in *consent* (in a broad sense) to the evil action of the principal agent and not necessarily, as some try to claim, in *identification* between the *finis operantis* of the primary agent and the cooperator. By bringing Nancy,

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operator (*finis operantis*) is the sin of the principal agent,” and also implicitly formal when “the cooperator does not directly intend to associate himself with the sin of the principal agent, but the end of the external act (*finis operis*), which for the sake of some advantage or interest the cooperator does intend, includes from its nature or from circumstances the guilt of the sin of the principal agent.” Similar explanations have been put forth by Anselm Günthör (11: #330) and the Italian theologians Livio Melina (12: p473) and Lino Ciccone (13: p149), among others.

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5 Whether or not there is a proportionate reason to bring about the death of 235 innocent people (or cause my leg pain) is something that needs to be evaluated under the double effect reasoning, but we will speak about this later. What said is enough for the sake of what I want to explain now.

6 McHugh and Callan perceive it in a similar way (10: p618). When talking about implicit formal cooperation, they say it may be *explicitly formal*, when “the end intended by the co-

who is married, into contact with his friend George, so they can commit adultery, John will cooperate formally if he approves of his friend's evil action, but he may well not know or even may not consent to the end (*finis operantis*) that moves George in his adulterous act (for example, winning a bet). John's very end itself may be multifarious: hurting the feelings of Nancy's husband or buying a car with the money he receives in exchange for his collaboration. In any event, the element that *formalizes* his cooperation is a generic *consent* to George's adulterous action. Note, therefore, that in *formally cooperative action* we will be able to equate, at most, the ends (*finis operantis*) of the involved subjects although, as we have seen, not even this is necessary. The *object of action* or *intention of the means* (or the *object of choice*) of the cooperator and the principal agent (*finis operis*) can never be the same. This is of great importance, but it has not always been understood well.

The USCCB, for example, stated in 1994 that "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" (14: p382). This passage was removed in successive editions because it provided no easy interpretation. Indeed, implicit formal cooperation, as the authors above explain it, may refer to an evil object of action (*finis operis*), but one that is always different from the principal agent's object. The action of the cooperator and that of the principal agent need to be different. Otherwise, we no longer would be able to talk about cooperation: we would then say they were carrying out *the exact same evil action*. Melina makes the same mistake, but with a slight difference:

he considers immediate material cooperation as that in which there is an identification of the objects of action on the part of the cooperator and the principal agent. Furthermore, he defines implicit formal cooperation in the same way, hence, stating that it is always illicit (12: p478). In addition to what has been said above, we must now argue that if this were so, we would never be able to talk about the possibility of the existence of elements that may justify, for proportionate reasons, performing an act of immediate material cooperation. As we all know, the traditional doctrine has always recognized them (15,<sup>7</sup> 6: V, tr. VI, Ch. II, no. 947).

Admittedly, the distinction between the types of formal cooperation, according to the ways of intending, is not at all free from danger. In any case, these attempts may be useful for realizing that the act of cooperation is not, as some suggest, the mere sum of an external *feri*, plus a subjective end. Rather, every human action, including the act of cooperation with an evil action, has a voluntariness that gives it a moral sense. These authors try to flee from the recourse to principles – such as immediacy, proximity or remoteness – which, by their tendency to cling to a merely external causality, push us away from the constitutive identity of the action in the intellect and in the will of the acting subject. Nevertheless, according to the different ways all of this is understood, we may reach *very different practical consequences of great importance*, as evidenced by the disparate responses that have been proposed on the issue of the *Contraception*

7 In #59, Pius XI says: "Holy Church knows well that not infrequently one of the parties is sinned against rather than sinning, when for a grave cause he or she reluctantly allows the perversion of the right order. In such a case, there is no sin, provided that, mindful of the law of charity, he or she does not neglect to seek to dissuade and to deter the partner from sin."

*Mandate*. It is worth taking a look at them with the advantage time has given to the debate.

### COOPERATION WITH EVIL AND THE CONTRACEPTION MANDATE

Long (16), in a comment on an opinion Tollefsen (17)<sup>8</sup> offers about the *HHS Contraception Mandate*, notes what, as we have seen, many authors share; namely, formal cooperation may be *implicit* when the cooperators' action is itself constituted in an act that is evil by its very moral object. The formality of the cooperation lays in intending evil; furthermore, *intending*, as the natural act of will, extends both to the *end* and to the *object* of the act (the chosen means for the sake of an end, which include *the integral nature and per se effects of that which is chosen*).

This statement is critical of certain authors who wrongly identify formal cooperation with cooperation through an evil *end* (*finis operantis*) and material cooperation with cooperation through an evil *object* (*finis operis*). Indeed, as Long rightly seems to point out and as we have commented already, in the very object of action there is already a real *formality*. We are ready to arrive at this point through the classical hylomorphic distinction between the end-form of the action (*finis operantis*) and the object-matter of the action (*finis operis*). As the Thomistic theory would indicate, *this matter* already has formality. Actually, it has been called *forma a ratione concepta* (19: q. 18, a. 10, c): the mere physical action, as understood by practical reason and willed, in the act of choosing, is informed and given moral sense, thus,

8 Tollefsen, in his article, recalls a paper by S. Girgis and R. P. George on cooperation with evil (18).

being moved from the pre-moral *genus naturae* (non-moral mere physicality) into the realm of the *genus moris* (full of moral sense) (20: lib. 3, d. 23, q. 3, a. 1, qc. 3, c; 21: lib. 3, Ch. 8, no. 8; 19: q. 20, a. 6, ad 2 and q. 24, a. 4, c; 22: q. 2, a. 2, ad 13). Therefore, formality, as we demonstrate above, is found both in the end and in the object of an action.

There is one more step. As we have seen, for cooperation to be *formal*, there obviously has to be a reason for its formality: an *intention* (in a broad sense) towards evil. However, a proper act of *material* cooperation, as illustrated, really has to do with an *indirectly voluntary* or *praeter intentionem* effect (21: lib. 3., Ch. 4, no. 2; 19: q. 64, a. 7, c<sup>9</sup>) *beyond intention*, willed neither as an end nor as a means, that takes place in connection with an action that is good in itself and is to be accomplished because of some good that needs to be done or some evil that needs to be avoided. The main problem that arises here is discerning whether or not a certain act of cooperation with evil includes the foreseen evil in its very *object*, as part of the formal components of the action, the integral nature and *per se* effects of that which is chosen. If we agree with the way the authors noted above explain all of it, this will guide us to the answer to a key question: is a particular act of cooperation *implicitly formal* or *material*?

The National Catholic Bioethics Center, in being firmly opposed to the *HHS Contraception Mandate* because it is an unjust law, indicated that compliance was among the options available to employers when dealing with the Mandate, under legal and administrative duress, in pursuit of a greater and compelling good to be accomplished or

9 The latter is the most famous one in the context of self-defense.



a greater evil to be avoided (23).<sup>10</sup> In stating as much, I assume they were thinking the connection between the action of offering health insurance and the action of the person using that insurance for sterilization can be that of an action and its *praeter intentionem* effects; in other words, an action of *material cooperation*. Therefore, according to the NCBC statement, the use of contraception, through an insurance policy, may not be considered part of the integral nature and *per se* effects of what is chosen when someone is offering that health care insurance, or else they would have never stated so. Long seems to suggest otherwise. According to him, those consequences are part of the essence of the intended object of the action of “offering insurance”. I tend to place myself on the side of the NCBC ethicists.

We cannot deny this is a classic, yet complex question. St. Thomas raised this issue when recognizing the distinction between the circumstances that are part of the essence of the object of action – *conditiones* – and those that affect the action in an accidental fashion – *circumstantiae* in a strict sense – (19: q. 18, a. 10, c; 20: lib. 6, d. 16, q. 3 a. 2, ql. 3, ad 1). The difficulty theologians experience when attempting to properly define the essential objective matter – or the *conditiones* of the object – of that which is forbidden by the 5<sup>th</sup> or the 7<sup>th</sup> Commandments shows it is a question with no easy solution. For example, those essential circumstances constitute the objective difference between killing and self-defense, between stealing fruit and taking fruit from someone else’s tree to save a person who is starving.

<sup>10</sup> The same conclusions were drawn in the February 2014 issue (24), after giving full consideration to several new elements as the exchanges. Considering how they were offered at that time, these did not provide any relevant improvement from a moral point of view.

There is an image that has been brought up several times and in the very context of the discussion we are dealing with. When we pay taxes we *know* that part of them will be directed to performing abortions, conducting research with embryos, and family planning. Moreover, these wicked actions are *certainly* going to be performed by taking advantage of our taxes. So, we can say they *physically include* funding these evil actions. Still, we currently continue to comply with the tax law because, when doing so, we are not *intending* (morally) some of the actions that will be performed by taking advantage of our taxes: the evil ones – such as abortions. This can be true if we acknowledge that a general tax law does not point, *per se*, towards abortion, but rather towards so many good things that *truly build the common good of society* and are accomplished thanks to our taxes. Then, we can say that those evil actions are only indirectly intended – they are *praeter intentionem* or beyond our will. In other words, they are not an essential part of the intended act of “paying taxes” but rather an accidental part of it. My action in “paying taxes” is completely morally defined as “contributing to the common good of my society (*end*) by giving some of my money to the authorities (*means*)”. The wicked things some people will do with those taxes are not willed by me as an end in themselves or as a means to achieve that end, and they contribute nothing to those ends and means. They are unintended foreseen effects of an action that in *itself* is very good.

#### **PER SE AND PER ACCIDENS EFFECTS OF CHOSEN ACTIONS**

*Only at this point*, since I know there actually *is* an evil that is going to be committed as a consequence of my *good* action, can I – and I should – think about whether

there is an *iusta causa* or a proportionate reason to become one of the causes of that evil. In other words, I must consider whether there is an evil that has to be proportionately avoided by paying the taxes (helpless decadence of society, going to jail, large fines or other penalties) and/or a good to be proportionately pursued (the common good – the so many positive things the authorities can accomplish thanks to our taxes). If I had considered those foreseen evil effects caused by my taxes – abortions, etc. – as an essential part of the objective action of “paying taxes,” my last statement would make no sense: paying taxes would just be evil in itself and my cooperation with abortions, contraception and sterilization would be, at least, *implicitly formal* on account of the very evil object of my act of cooperation, which is *formalized* by an intrinsic intention to bring about those evil effects. As far as I can understand, Long maintains this is what happens when offering a type of insurance like the “mandated” one. Citing Thomas Aquinas (19: q. 20, a. 5, and clearly again q. 64, a. 7, c), he uses the distinction between *per se* and *per accidens* effects. The former, also known as *in pluribus*, are effects that necessarily follow the action because they are willed. They are the first consequence of the action, that which the action produces *immediately*. The latter, *in paucioribus*, are the effects that are beyond the will of the agent, because of the particular circumstances in question. The action would be immoral if it caused the evil effect *per se*, because this would necessarily be the effect sought by the objective intention of the subject, hence, giving the action its moral species (19: q. 39, a. 1, c).<sup>11</sup> Long includes, in the primary act of cooperation (in

its moral object), the described foreseen evil effects of the action of “providing insurance” because, as he would say, they are *per se* following upon the action. Moreover, we can say they are certainly going to happen.

I am not so sure about such a *per se* connection. I am convinced medical insurance of this sort does not point, *per se*, towards contraception. When I pay for a health care policy, the *end* I intend is “improving the health of my employees” or “contributing to an improvement in the health of Americans,” while the *means* I intend, the essence and *per se* effect of my moral action – which define what a *health care insurance* is – involve “providing medical aid to my employees” or “guaranteeing medical assistance to cure my employees’ illnesses”. This is a very good thing. Otherwise, they would have no coverage and would not be able to afford certain important and even critical therapies. Some of my employees may use the insurance for wicked purposes; namely, committing suicide by overdosing on psychotropic substances or taking an entire pack of aspirin, killing someone by poisoning their champagne, doping while playing pro sports, or taking antibiotics when they should not (and all of this is covered by the insurance I provide!). Moreover, many Americans actually do these things every year. So, it is certainly going to happen. But all these *effects* follow upon my action *per accidens*. They are not intended by me, either as my end or as the means I choose to achieve that end, and actually do not even contribute to them at all: they are *praeter intentionem* or *indirectly willed* effects.<sup>12</sup>

11 Here, Thomas explains that *per se* consequences constitute the moral species of an action, not the *per accidens* ones. In a different question of the *Summa Theologiae* (q. 43, a. 3, c) he further states, as we know, that *praeter intentionem* are *per accidens* consequences of our actions.

12 Indeed, one may argue that the examples given here are different from the specific case under study, because none of them are *legal* outcomes of a fair use of health care insurance.

Furthermore, between the insurance offered by an employer and the eventual contraceptive action carried out by the employee there is an important intentional gap that makes, I would say, contraception an *accidental* (rather than *substantial*) effect of the action of “providing insurance”. Employees can do thousands of things with that insurance and, as was mentioned earlier, when the evil effect is the fruit of a free choice made by a third party, it can be considered a *per accidens* effect of the action. Such is the case, despite the fact that the insurance *facilitates* it. This intentional gap is the one Sgreccia referred to in the quote I brought up at the beginning of this essay to define what *mediate material* cooperation is.

Here is another helpful element. An employer does not necessarily know *who* among his employees will use the insurance for wicked purposes, if ever someone does. Nor does he know *the number* of his employees who will do so: it may be a small number, because not all the employees of a company are women, and not all women use contraception. Moreover, among all the *effects* medical insurance causes overall (basic medical supervision, basic treatments, surgical operations, complex treatments that otherwise would not be affordable, accident coverage, and many more things) abortion, contraception and surgical sterilizations are certainly a very small proportion. Is it still not the case that using an insurance to perform surgical sterilization is an *in paucioribus* effect of that insurance and, thus, susceptible to not being *intended* at all? Long, in his article, states that what an employer is providing with his or her insurance is mass access to

those wicked actions. According to what I have just said, this clearly is not the case. He who does provide mass access to abortion, contraception and sterilization, with a heavy moral responsibility, may be the lawmaker or the President of the United States, but not the employer. Of course, the case would be different if the insurance was only or mostly directed towards evil actions. That would make those effects *in pluribus* rather than *in paucioribus* and, thus, the moral analysis would have to change: it would be much closer to an effect that is necessarily intended when choosing the action of “providing insurance”. But then, should we still call it *health care insurance*?

Let us look at it from a different point of view, while continuing to take advantage of the helpful hylomorphic approach to the theory of action. As we were saying, the chosen object in any free action plays a double role. On one hand, it is the *matter* that will be informed by the agent's end. However, on the other hand, the intentional dimension of the chosen object itself gives *form* to a certain matter – *materia ex qua* or the outcome of a mere physical description of an action. It is obvious that the object of action, as the close-in end (proximate, *finis proximus*) of the will, needs its own *matter* that enters into the definition of what it is, thus, becoming the *materia circa quam* (20: lib. 2, d. 36, q. 1, a. 5, arg. 5; 19: q. 18, a. 2, ad 2). This matter is *essential* for the object of action: you cannot contracept or even engage in efficient cooperation with contraception without preventing fertilization or at least trying it, just as you cannot intend to build a skyscraper out of modeling clay. You need bricks or any other *proper matter*. There has to be a *debita proportio* between the *materia ex qua* and the *finis proximus* (object of the action).

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However, I believe they are useful all the same. They shed light on the argument of *moral proximity or connection* between the act of cooperation and that of the principal agent.

Nevertheless, not all acts that cause the prevention of fertilization are due to intended contraception. An action may have other *material components* than the essential ones that *accidentally* fall onto the action. A case in point could be the unintentional, yet certain prevention of fertilization that occurs in a therapeutic hormonal treatment (25: #15). Using the examples I mentioned before, an accidental material component of going running is the leg pain I will have afterwards – even though I am sure it will happen – or the fact that there were innocent people on the airplane who died as a consequence of it being blown up. The essential material component for the plane example is only “destroying the airplane before it reaches its target”. I am convinced the matter of “contraception carried out by someone taking advantage of the medical insurance I am offering” falls within the category of a material accidental component, along with accidental effects such as someone committing suicide or killing his neighbor using the drugs covered by an insurance plan. These material components are not at all *required* by the object of “providing a health care insurance,” just as causing the death of innocent travelers is not required by the object of “blowing up a plane before it reaches its target”. Contraception does not morally define what my insurance payment is. So, we simply cannot affirm that it *essentially* or *substantially* corrupts the act. If I had paid my employees’ insurance *because* it covers contraception, then everything would turn around, and contraception would be an essential or substantial part of the definition of the object of my action of “providing insurance,” since the matter of “money that gets into their budget for contraception” would be informed by the evil election of my will that seeks contraception and, thus, becomes an illicit moral object (*materia circa quam*, intended effect). The same would happen if the shooter *wanted to kill* the innocent people on that plane because he hated them. Then, the

matter would be an essential part of his chosen action and could no longer be intentionally defined as we did, but rather as the “killing of innocents by blowing up the plane they are on”. But returning to the case of providing insurance, let me go further: we may question again, in the case in which the evil itself – contraception – is willed in the act of providing insurance, whether it should then no longer be morally defined as “providing a medical insurance plan,” but rather as “paying for contraception.” To this, I would respond that such a change would, in fact, make sense.

For this to be right, we must not forget the classical doctrine on the moral responsibility for the consequences or effects of our actions. While we are responsible for the harmful consequences of our harmful actions, the evil consequences of our good actions – such as providing medical insurance – are *not necessarily* imputable to the agent. They need to be considered in light of the conditions of double effect or the rationale of *praeter intentionem* actions. Sometimes, they are morally accountable: after all, they are referred to as *indirectly voluntary*.

Long clarifies his position using some examples of what he considers to be analogous moral acts: “the one who murders [as an intentional election, as a means for the sake of some end, an object of action] were not,” “the one who offers to provide mass support for the pursuit of sinful actions, while wishing he were not,” the one who “crushes an infant’s skull to remove it from the birth canal and save the mother, and not because one wishes to hurt the child”. I think these examples are not comparable to the case we are studying. They are certainly much closer to effects intentionally following *per se* upon an action and, as such, they are also much closer to becoming an essential part of the chosen action.

In this case, Long is raising *different* moral discussions that do call into question some of the opponents he has here, but I would say in an undue fashion. Tollefsen, Girgis and George, the NCBC, and I are not talking about *choosing evil in order to obtain a certain good*, because when materially complying with the Contraception Mandate the agent *is not necessarily* choosing evil. As Brugger says, “A caricature of the account I am presenting is not uncommon in the literature. It summarizes my argument as follows: ‘All I need to do is mentally ‘direct my attention’ away from some effect of my action and, voilà, the action *becomes* ‘unintentional.’ And, then I describe my act in terms of my wishful mental directing.’ But the view I am defending is not about mental self-persuasion. Intending is not mental directing, but rather *willing* in response to some intelligible proposal. One only acts on what one is interested in; and one is interested in some end for its own sake and some means one believes is suitable for bringing one’s end about. And one intends only what is part – really and entirely – of this ends-means nexus. What falls outside it is *praeter intentionem*” (7).

Does what I have explained mean an action performed under the conditions described *cannot* be imputed to the cooperating agent in any sense? No. After all, the agent is providing an instrument a third person can use to carry out an immoral action more easily. I am not saying believing something is unintentional allows us to cause it with no further consideration.<sup>13</sup> Indeed, as I

13 In this case, we could consider that application of the Contraception Mandate is now a changing issue. For instance, in the wake of a Supreme Court ruling, family-owned corporations were no longer required to pay for contraception coverage and just complying without taking into consideration if that

have stated above, the *praeter intentionem* effects of our actions enter into the field of [indirect] voluntariness, and this is why the causation of some evil may be judged as illicit, even when that evil is not intended either as an end or as an object of choice. What I am trying to say here is that the moral goodness of providing insurance, like the kind under study, can be evaluated adequately according to the classical Thomistic *praeter intentionem* or double effect theory, which is behind the doctrine on material cooperation with evil, with all its premises. Important considerations here will involve analyzing whether there is an *iusta causa* – a proportionate or serious reason – for accepting the harm and performing such an action, the obligation to firmly oppose the unlawful Mandate and to avoid personal, institutional or religious scandal as one complies,<sup>14</sup> and so on.

Hence, complying with the Contraception Mandate under the extremely unlawful duress that was looming over American employers may have been a licit option for them. Moreover, we could come to the conclusion that it was not only licit but compelling; namely, the only course of action as they fought to improve the unjust law that made cooperation a moral obligation. Clearly, if the shooter and the Joint Chiefs could have gotten the plane out of the sky without causing death, they would have done so. But they judged they could not and they decided they *had to* get the plane out of the sky.

ruling applies to one’s corporation could be an aggravating factor in a moral analysis.

14 Here, the social context may play an important role. For example, compliance with the Contraception Mandate may be considered as an overall claudication to unfair impositions by an unjust legislative power. This could, in itself, be a justification for radical opposition to the Mandate on the part of USCCB and other institutions and citizens.

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