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The Problem of Complicity

Effective Referral and Physician Participation in Euthanasia, Assisted Suicide, Abortion, Execution and Torture

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Introduction

It appears that most people are willing to grant that a health care worker who has serious moral objections to a procedure should not be compelled to perform it or assist directly with it. However, many people find it more difficult to understand why some health care workers object to even indirect forms of involvement. They fail to see why physicians might refuse to help patients obtain a morally contested service or procedure by sending them to a more willing colleague who will provide it.

Effective referral, contested beliefs

There are increasingly strident demands that this response - what has come to be called “effective referral” - should be forced upon unwilling healthcare workers. Notably, a Canadian parliamentary committee recently recommended that physicians unwilling to kill patients or help them commit suicide should be forced to make an “effective referral”: forced to help find someone willing to do so.¹

These politicians seem to be following a trail blazed by the American College of Obstetrics and Gynecology (ACOG) Committee on Ethics in 2007. Committee members were puzzled by physicians who refuse to refer for or otherwise facilitate what they believe to be wrong, like abortion.

“The logic of conscience, as a form of *self*-reflection on and judgement about whether one’s *own* acts are obligatory or prohibited,” states the Committee, “means that it would be odd or absurd to say, ‘I would have a guilty conscience if *she* did X.’”²

The Canadian politicians and ACOG Committee members seem to think that someone who merely *arranges* for X - be it abortion or euthanasia - is absolved of moral responsibility, perhaps in the belief that only someone who actually *does* or *has* an abortion or *gives* or *receives* a lethal injection can be morally responsible for it. Alternatively, they may believe that responsibility arising from effective referral is morally insignificant.

This reasoning is based on unexamined faith-assumptions shared by Committee members about the nature of the procedures in question and/or moral complicity and culpability. These are contested beliefs, not incontrovertible moral or ethical principles, and the recommendations of the

respective committees would impose those beliefs upon those who think differently through a requirement for “effective referral.”

Complicity in torture

Newsweek columnist Jonathan Alter took this position in the weeks following the terrorist attacks on the United States in September, 2001. Alter argued that it was time to think about torturing terrorist suspects who might know about plans for such horrendous crimes. He acknowledged that physical torture is “contrary to American values,” but argued that it is sometimes appropriate. He proposed a novel ‘compromise:’ that the United States turn terrorist suspects who won’t talk over to “less squeamish allies,”³ a practice known as “extraordinary rendition.” The allies would then do what Americans would not, without compromising American values.

Some months later, Canadian citizen Maher Arar, returning home from Zurich through New York, was detained, interrogated and “rendered” to Syria by U.S. authorities.⁴ In Syria he was imprisoned for almost a year, “interrogated, tortured and held in degrading and inhumane conditions.”⁵

A subsequent “comprehensive and thorough” investigation “did not turn up any evidence that he had committed any criminal offence” and disclosed “no evidence” that he was a threat to Canadian security.⁶ A commission of inquiry was appointed to investigate “the actions of Canadian officials” in the case.⁷

What was of concern to Mr. Arar, the Canadian public and the Canadian government was whether or not Canadian officials had caused or contributed to the imprisonment and torture of Mr. Arar. Even though he was deported by the United States and imprisoned and tortured by Syrian officials, the key issue was whether or not the actions of Canadian officials had made Canada indirectly complicit in torture.

Concern about Canadian complicity surfaces repeatedly in the report of the commission of inquiry: in briefing notes to the Commissioner of the RCMP,⁸ in the testimony of the Canadian Ambassador to Syria,⁹ in references to the possibility of RCMP complicity in his deportation,¹⁰ about the perception of complicity if CSIS agents met Mr. Arar in Syria,¹¹ in the suggestion that evidence of complicity could show “a pattern of misconduct,”¹² and in the conclusions and recommendations of the report itself.¹³

The issue of complicity arose again in 2007 when a report in Toronto’s *Globe and Mail* alleged that prisoners taken in Afghanistan by Canadian troops and turned over to Afghan authorities were being mistreated and tortured.¹⁴ “Canada is hardly in a position to claim it did not know what was going on,” said the *Globe*. “At best, it tried not to know; at worst, it knew and said nothing.”¹⁵ On this view, one can be complicit in wrongdoing not only by acting, but by failing to act, and even by silence. The *Globe* editorial brings to mind the words of Martin Luther King and Mahatma Gandhi.¹⁶

Thus far, government officials. But the problem of complicity does not relate only to government officials. *The Lancet*, among others, has asked, “How complicit are doctors in the abuse of detainees?”¹⁷ and other journal articles have explored the answer with some anxiety.¹⁸

Vicarious moral responsibility

The Arar Inquiry, the concerns raised by the *Globe and Mail* story about Afghan detainees and the alarm raised about physician complicity in torture make sense only upon the premise that one *can* be morally responsible - guilty, in fact- for acts actually committed by another person. If one can be morally responsible for acts actually committed by another, there may be differences of opinion about what kind of action or omission incurs such responsibility.

These differences need not be thoroughly canvassed here. It is sufficient to ask if physicians who believe a procedure to be immoral can reasonably conclude that helping patients to obtain that procedure is morally significant participation that they should refuse.

Physician complicity in executions and torture

The issue of culpable participation in a morally controversial procedure has been considered by the American Medical Association (AMA) in its policy on capital punishment.¹⁹ It forbids physician participation in executions, and defines participation as an action which

- (1) would directly cause the death of the condemned;
- (2) would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned;
- (3) could automatically cause an execution to be carried out on a condemned prisoner.

Among the actions identified by the AMA as “participation” in executions are prescribing or administering tranquilizers or other drugs as part of the procedure, directly or indirectly monitoring vital signs, rendering technical advice or consulting with the executioners, and even (except at the request of the condemned, or in a non-professional capacity) attending or observing an execution. The attention paid to what others might consider insignificant detail is exemplified in the provision that permits physicians to certify death, providing that death has been pronounced by someone else, and by restrictions on the donation of organs by the deceased.

The AMA also prohibits physician participation in torture. Participation is defined to include, but is not limited to, “providing or withholding any services, substances, or knowledge to facilitate the practice of torture.”²⁰ The Canadian Medical Association (CMA), while not faced with the problem of capital punishment, has voiced its opposition to physician involvement in the punishment or torture of prisoners. The CMA states that physicians “should refuse to allow their professional or research skills to be used *in any way*” for such purposes.²¹ (Emphasis added)

Complicity and effective referral

While referral is not mentioned in the AMA policy on capital punishment, nor in the Canadian or American policies on torture, the *kind* of action involved in effective referral is the same *kind* of action that is understood in those policies as illicit participation. This demonstrates that, in principle, at least, it is not unreasonable for physicians to refuse to provide effective referrals for patients for procedures to which they object for reasons of conscience, on the grounds that doing so would make them complicit in a wrongful act.

The point here, of course, is not that executions or torture are morally equivalent to euthanasia, abortion or assisted suicide. The point is that, when governments or professional associations are convinced that an act is seriously wrong - even if it is legal - they are willing to refuse all forms of direct and indirect participation in order to avoid moral complicity in the act. This is precisely the position taken by many conscientious objectors in health care with respect to morally contested procedures.

Complicity and dirty hands

Having considered the problem of complicity, it is now worth asking why the subject of complicity in wrongful acts is not only of grave concern to ethical physicians, medical journals, and professional associations, but why it can so thoroughly arouse the public, the media, and politicians: why commissions of inquiry will so meticulously investigate the possibility of complicity, producing hundreds upon hundreds of pages of detailed analysis of the evidence taken, at no little cost to the public purse.

A jaded few will respond that reports of scandal will always sell newspapers, that scandal always energizes the self-righteous (both the religious and the politically-correct varieties) and that scandal is one of the traditional weapons used against opponents by politicians of all stripes. There is some truth to this, but, going deeper into it, why is complicity in wrongdoing scandalous?

The answer must be that there is something about complicity in wrongdoing that triggers an almost instinctive reaction in people, something about it that touches some peculiar, deep and almost universal sense of abhorrence. One says “almost” instinctive and “almost” universal because, of course, there have always been exceptions: Eichmanns, Pol Pots, Rwandan machete men, for example. And the degree of sensitivity varies from person to person, from subject to subject, and from one culture to another. Nonetheless, complicity in wrongdoing can be a source of scandal, a political weapon and the subject for public inquiries only because it has some real and profound significance.

The nature of that significance is suggested by a number of expressions: “poisoned” fruit doctrine, “tainted” evidence, money that has to be “laundered,” and “dirty” hands. A senior Iraqi surgeon, commenting on the complicity of physicians in torture under Saddam Hussein, said that “the state wanted them to have ‘dirty hands’.”²² In contrast, some writers refer approvingly to a “dirty hands principle”:

Philosopher Sidney Axinn tells us the Dirty Hands principle “holds that in order to govern an institution one must sometimes do things that are immoral.” He goes on to say that advocates would claim that “we do not want leaders who are so concerned with their own personal morality that they will not do ‘what is necessary’ to ... win the battle.... We have an inept leader if we have a person who is so morally fastidious that he or she will not break the law when that is the only way to success” (Axinn, 1989: 138).²³

But whichever view one takes of “dirty hands,” all of these expressions convey an uncomfortable sense that something is felt to be soiled by complicity in wrongdoing. What is that something? And what is the nature of that cloying grime?

The answer suggested by the Project is that the “something” is not a “thing” at all, but the human person, and that the sense of uncleanness or taint associated with complicity in wrongdoing is the natural response of the human person to something fundamentally opposed to his nature and dignity.

Notes

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2. American College of Obstetrics and Gynecology, Committee on Ethics Opinion No. 385, *The Limits of Conscientious Refusal in Reproductive Medicine* (emphasis added) (http://www.acog.org/from_home/publications/ethics/co385.pdf) Accessed 2008-09-11
3. Alter, Jonathon, “Time to Think About Torture.” *Newsweek*, 5 November, 2001, p. 45.
4. *Maher’s Story*. (<http://www.maherarar.ca/mahers%20story.php>) Accessed 2008-09-08
5. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*. (hereinafter, “*Arar Inquiry: Analysis and Recommendations*”) p. 9 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08
6. *Arar Inquiry: Analysis and Recommendations*, p. 35-36 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08
7. *Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Affair*. (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Terms_of_Reference.pdf) Accessed 2008-09-08
8. Re: briefing note for RCMP Commissioner Zaccardelli: “Assistant Commissioner Proulx states [in the note] that the RCMP can be considered complicit in Mr. El Maati’s detention in Syria. However, Mr. Proulx testified that it was the media and public who would consider the RCMP’s actions to be complicit. He did not personally believe that the RCMP was complicit, nor was he referring to complicity in the criminal sense.” Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, Vol. 1, (hereinafter “*Arar Inquiry: Vol. I*”) p. 64 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08.
9. “The Ambassador did not consider that seeking the fruits of the Syrian interrogation made Canada complicit in obtaining information that might have been the product of torture. He reasoned that he did not ask the Syrians to continue interrogating Mr. Arar so that Canada could

obtain information. Furthermore, the Ambassador did not have any evidence that Mr. Arar was being tortured or held incommunicado. *Arar Inquiry: Vol. I*, p. 271 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08.

10. “Superintendent Killam was aware that Secretary Powell had given Minister Graham the clear impression that the RCMP was complicit in Mr. Arar’s deportation. However, Superintendent Killam testified that, even without making further inquiries in response to the media reports, he was able to exclude the possibility that the allegation of complicity might be true, because the allegation was inconsistent with the RCMP position.” *Arar Inquiry: Vol. I*, p. 299 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08.

11. “Mr. Solomon prepared a draft memorandum for the Minister . . . which dealt with the upcoming CSIS trip to Syria and stated . . . “there are concerns as to whether a visit to Arar by Canadian intelligence officials may make Canada appear complicit in his detention and possible poor treatment by Syrian authorities.” *Arar Inquiry: Vol. I*, p. 309 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08.

“Mr. Livermore testified that the original statement about the reliability of the confession and the possible complicity by Canada if CSIS was to meet with Mr. Arar was “very much on the speculative side” and “it was anticipating something that we later ironed out with CSIS, namely that they would not seek access to Mr. Arar.”

Arar Inquiry: Vol. I, p. 310
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08

12. “. . . the intervenors suggest that the circumstances under which these individuals ended up in Syrian detention raise troubling questions about whether Canadian officials were complicit in their detention. The evidence of what happened to them could possibly show a pattern of misconduct by Canadian officials.” 770 *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Factual Background*, Vol. II, p. 770 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_II_English.pdf) Accessed 2008-09-08

13. “Canadian officials did not participate or acquiesce in the American decisions to detain Mr. Arar and remove him to Syria. I have thoroughly reviewed all of the evidence relating to events both before and during Mr. Arar’s detention in New York, and there is no evidence that any Canadian authorities — the RCMP, CSIS or others — were complicit in those decisions.” *Arar Inquiry: Analysis and Recommendations*, p. 29 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_III_English.pdf) Accessed 2008-09-08

mission.ca/eng/AR_English.pdf) Accessed 2008-09-08

“Although decisions to interact must be made on a case-by-case basis, they should be made in a way that is politically accountable, and interactions should be strictly controlled to guard against Canadian complicity in human rights abuses or a perception that Canada condones such abuses.” *Arar Inquiry: Analysis and Recommendations*, p. 35
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

“If it is determined that there is a credible risk that the Canadian interactions would render Canada complicit in torture or create the perception that Canada condones the use of torture, then a decision should be made that no interaction is to take place.” *Arar Inquiry: Analysis and Recommendations*, p. 199
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

“Even if one were to accept that Canadian officials were somehow complicit in those arrests, that would not change my conclusion, based on the evidence at the Inquiry, that Canadian officials did not participate or acquiesce in the American decision to send Mr. Arar to Syria from the United States.” *Arar Inquiry: Analysis and Recommendations*, p. 271
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

“Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.” *Arar Inquiry: Analysis and Recommendations*, p. 345
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

“Clearly, the prohibition against torture in the Convention against Torture is absolute. Canada should not inflict torture, nor should it be complicit in the infliction of torture by others.” *Arar Inquiry: Analysis and Recommendations*, p. 346
(http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

14. Smith, Graeme, “From Canadian custody into cruel hands.” *Globe and Mail*, 23 April, 2007 (<http://www.theglobeandmail.com/servlet/story/RTGAM.20070423.wdetainee23/BNStory/Afghanistan/>) Accessed 2008-09-07

15. Editorial, “The truth Canada did not wish to see.” *Globe and Mail*, 2 April, 2007. (<http://www.globeauto.com/servlet/story/RTGAM.20070423.weafghan23/BNStory/specialComment/>) Accessed 2008-09-08

16. “We will have to repent in this generation, not merely for the hateful words and actions of the bad people, but for the appalling silence of the good people.” King, Martin Luther, *Letter from Birmingham Jail*, 16 April, 1963. (<http://www.nobelprizes.com/nobel/peace/MLK-jail.html>) Accessed 2005-08-02
“Non-cooperation with evil is as much a duty as is cooperation with good.” Gandhi, Mahatma, *Statement before Mr. C. N. Broomfield, I. C. S., District and Sessions Judge*. Ahmedabad, 18 March, 1922. (<http://www.mahatma.com/php/showNews.php?newsid=3&linkid=12>) Accessed 2005-08-02
17. Editorial, “How complicit are doctors in the abuse of detainees?” *The Lancet*, Vol 364, August 21, 2004, p. 725-729
18. Miles, Steven H., “Abu Ghraib: its legacy for military medicine.” *The Lancet*, Vol 364, August 21, 2004, p. 725-729; Lifton, Robert Jay, *Doctors and Torture*. N Engl J Med 351;5
19. American Medical Association Policy E-2.06: Capital Punishment
(http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/E-2.06.HTM&s_t=execution&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=6&) Accessed 2008-09-08
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(http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-2.067.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-1.02.HTM&nxt_pol=policyfiles/HnE/E-2.01.HTM&) Accessed 2008-09-08
21. Canadian Medical Association Policy resolution BD80-03-99 - Treatment of prisoners. Status: Approved, 1979-Dec-08. Last Reviewed, 2004-Feb-28: Still relevant.
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