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14 Organ Transplants

A Study on Bioethics and the Ordinary Magisterium

Currently, bioethicists otherwise known for their fidelity to the Magisterium find themselves disagreeing with each other and even occasionally with some magisterial pronouncements about such issues as brain death, condoms and HIV, the withdrawal of artificial nutrition and hydration from those in a debilitating state, and embryo adoption. Disagreement about some of these issues would likely dissipate quickly with more definitive scientific information; for instance, were reliable studies to show that emergency contraception does not prevent implantation, opponents of emergency contraception for post-rape treatment would likely abandon their opposition.

Other issues cannot be decided on the basis of scientific fact. This does not mean that decisions about them are arbitrary or subjective, but they do involve a measure of interpretation not resolvable by advances in medical science. For instance, the very issue I am addressing today, organ transplantation from living donors (hereafter, LOT), depends a great deal on interpretive matters. Do our organs have a purpose or *telos* beyond the good of our own bodies? What principle would justify our "mutilating" our-

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selves for the sake of someone else? In this essay, I am going to review the history of the debate about the morality of LOT, not so much to assess the validity of the arguments advanced, though some of that will be done, but to explore how the Church developed and decided the moral status of LOT.[1] It is of particular interest since the issue involved faithful theologians disagreeing with each other and wrestling with magisterial teachings.

Disagreement with Church Teaching

The proper response of a theologian who finds difficulty with a magisterial teaching has been the focus of much attention for several decades. The Oath of Fidelity, to which all theologians should commit (as a professor at a seminary, I have taken the oath), requires them to pledge: "I adhere with religious submission of will and intellect to the teachings which either the Roman pontiff or the college of bishops enunciate when they exercise the authentic Magisterium even if they proclaim those teachings in an act that is not definitive."[2] The Sacred Congregation for the Doctrine of the Faith comments: "Teachings set forth by the authentic ordinary Magisterium in a nondefinitive way… require degrees of adherence differentiated according to the mind and the will manifested; this is shown especially by the nature of the documents, by the frequent repetition of the same doctrine, or by the tenor of the verbal expression."[3] The list of various factors—the nature of a document, the repetition of a doctrine, and the tenor of the verbal expression—that serve to manifest the mind and will of the Holy See is helpful but does not settle all questions about the proper response to nondefinitive teaching. It would be helpful to have some concrete examples of non-definitive teachings requiring various degrees of adherence and of what behavior constitutes various degrees of adherence.

To add to the confusion there is no established or agreed upon ranking of the "nature" of documents. Is a speech of less authority than an in-

1. Scaria Kanniyakonil provides a thorough review of the literature: *Living Organ Donation and Transplantation: A Medical, Legal, and Moral Theological Appraisal* (Kerala: Oriental Institute of Religious Studies India, 2005).

2. Congregation for the Doctrine of the Faith, "Profession of Faith and the Oath of Fidelity on Assuming an Office To Be Exercised in the Name of the Church" (June 29, 1998) (*AAS* 90 [1998]: 542–51); http://www.ewtn.com/library/curia/cdfoath.htm.

3. Congregation for the Doctrine of the Faith, "Doctrinal Commentary on the Concluding Formula of the *Professio Fidei*" (July 29, 1998) (*AAS* 90 [1998]: 544–51); http://www.ewtn.com/library/curia/cdfadtu.htm

struction? Is an instruction of less authority than an encyclical? How submissive do Catholics need to be to teachings presented in a speech to a congress but expressed in very strong language (for example, Pope John Paul II's instruction on artificial nutrition and hydration)?[4] How submissive do they need to be to a doctrine presented in an instruction issued by the Sacred Congregation for the Doctrine of the Faith that arguably speaks in less than definitive tones (for example, the teaching on embryo adoption in *Dignitas Personae*)?[5] Do "degrees of adherence" include some measure of "non-adherence"? Are theologians permitted to publish contrary to non-definitive teaching? Avery Cardinal Dulles, S.J. suggests that *Donum Veritatis* (Instruction on the Ecclesial Vocation of the Theologian) does not "totally exclude" non-adherence.[6] *Donum Veritatis* 24 states: "The willingness to submit loyally to the Magisterium on matters per se not irreformable must be the rule. It can happen, however, that a theologian may, according to the case, raise questions regarding the timeliness, the form, or *even the contents* of magisterial interventions" (my emphasis). Moreover, *Donum Veritatis* 30 teaches: "If, despite a loyal effort on the theologian's part, the difficulties persist, the theologian has the duty to make known to the magisterial authorities the problems raised by the teaching in itself, in the arguments proposed to justify it, or even in the manner in which it is presented. He should do this in an evangelical spirit and with a profound desire to resolve the difficulties. His objections could then contribute to real progress and provide a stimulus to the Magisterium to propose the teaching of the Church in greater depth and with a clearer presentation of the arguments." Is it permissible to engage in only that questioning that seeks to strengthen a teaching and put it on a more solid footing, or is it permissible to argue that a teaching is wrong? For instance, many theologians currently question the Holy See's approval of brain death criteria as suitable criteria for determining death.[7] Their challenge is not one that

4. Pope John Paul II, "Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas" (March 20, 2004); http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040320_congress-fiamc_en.html.

5. Congregation for the Doctrine of the Faith, *Dignitas Personae* (September 8, 2008); http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html.

6. Congregation for the Doctrine of the Faith, *Donum Veritatis* (May 24, 1990), (AAS 82 [1990]: 1550–70); http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_en.html. Avery Cardinal Dulles, S.J., *Magisterium: Teacher and Guardian of the Faith* (Naples, Fla.: Sapientia Press, 2007), 93.

7. Pope John Paul II, "Address of the Holy Father John Paul II to the 18th International

seeks to strengthen the teaching; they are working to have brain death criteria condemned as suitable criteria for determining death.[8] The fact that the Holy See has been regularly holding conferences at the Vatican on brain death signals that their challenge should not be understood as a failure to give religious submission of mind and will to a non-definitive teaching.[9] Another contested issue is the question of the withdrawal of artificial nutrition and hydration from patients in a persistent vegetative state. In 2004, Pope John Paul II in very strong language taught that provision of artificial nutrition and hydration to patients in such a condition was ordinary care and that to fail to supply it was euthanasia by omission. After many theologians challenged that statement, in 2007 the Congregation for the Doctrine of the Faith issued a response to questions requesting clarity and confirmed the teaching of John Paul II.[10] Theologians continue to publish against this teaching.[11] Are they guilty of failure to give religious submission of mind and intellect?

Reviewing the development of the Church's teaching on LOT should help us see how at least one interpretative matter was worked out.[12] As we

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Congress of the Transplantation Society" (August 29, 2000); http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jul-sep/documents/hf_jp-ii_spe_20000829_transplants_en.html.

8. One of the first challenges was Bishop Fabian W. Bruskewitz, Bishop Robert F. Vasa, et al., "Are Organ Transplants Ever Morally Licit?" *Catholic World Report,* May 1, 2001, 50–56. See also a collection of essays presented at a 2005 Pontifical Council of the Academy Sciences conference on brain death: Roberto de Mattei, ed., *Finis Vitae. Is Brain Death Still Life?* (Soveria Mannelli, Italy: Rubbettino, 2006).

9. See the report of a conference on brain death criteria held by the Pontifical Council of the Sciences, "Why the Concept of Brain Death Is Valid as a Definition of Death," in *The Signs of Death. The Proceedings of the Working Group, 11–12 September 2006,* Scripta Varia 110 (Vatican City: The Pontifical Academy of the Sciences, 2008), 5–13; http://www.vatican.va/roman_curia/pontifical_academies/acdscien/2009/excerpt_signs_of_death_5l.pdf. *L'Osservatore Romano* published a front-page editorial against the concept of brain death by Lucetta Scaraffia on September 3, 2008; http://www.catholicnews.com/data/stories/cns/0804460.htm.

10. Congregation for the Doctrine of the Faith, "Responses to Certain Questions of the United States Conference of Bishops concerning Artificial Nutrition and Hydration" (August 1, 2007); http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20070801_risposte-usa_en.html.

11. See, for instance, Consortium of Jesuit Bioethics Programs, "Undue Burden?: The Vatican and Artificial Nutrition and Hydration," Commonweal, February 13, 2009; http://commonwealmagazine.org/undue-burden-0.

12. To read about other issues about which there was a papal statement that was later modified after theologians challenged it, see Eric Marcelo O. Genilo, S.J., *John Cuthbert Ford, S.J.: Moral Theologian at the End of the Manualist Era* (Washington, D.C.: Georgetown University Press, 2007), 217. Genilo tells us that Ford challenged Pius XII on conscientious objection (36), the permissibility of a husband's having sex with his contracepting wife (39)

shall see, the development of the Church's teaching on LOT involved theologians' challenging strong statements opposing LOT by Pope Pius XII, teachings that nonetheless were considered "not irreformable." In recent decades the Holy See has praised LOT effusively in spite of the fact that Pius XII repeatedly spoke against it and although there is as of yet no consensus as to *why* LOT is licit or *in what cases*.[13] This essay will look closely at the writings of Gerald Kelly, S.J. (utilizing the work of Bert Cunningham, C.M.), who did not understand Pope Pius XII's repeated articulations of a principle incompatible with LOT to be definitive. In fact, in the course of his deliberations about the morality of LOT, Kelly developed various principles of interpretation in regard to non-infallible teaching to guide those who would challenge non-infallible teaching.[14] A challenge of this sort is not the dissent of those who object to principles that the Church employs in its reasoning about moral matters. Kelly believed his disagreement needed to respect those principles. Neither was his the dissent of those who were introducing a whole new method of moral theology, such as proportionalism; rather, Kelly was committed to working within the traditional moral theology of the Church. Nor was his the dissent of those who rejected the authority of the Magisterium; Kelly repeatedly acknowledged his willingness to submit to that authority. Thus, it would be wrong to label Kelly and others who challenged Pope Pius XII on LOT as "dissenters" of the ilk we have known for the last fifty years. They were faithful theologians who exercised their responsibility to challenge Pius XII's teachings against LOT, with which they disagreed. They eventually prevailed and effected a reversal of non-definitive teaching.[15]

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and double vasectomies and impotency (42). See also the fluctuation in magisterial teaching on the morality of punitive sterilizations laid out later in this essay.

13. This is the view of John Gallagher, C.S.B., "The Principles of Totality: Man's Stewardship of His Body," in *Moral Theology Today: Certitudes and Doubts* (St. Louis: The Pope John Center, 1984), 217–42, at 233.

14. Gerald Kelly, S.J., "The Morality of Mutilation: Towards a Revision of the Treatise," *Theological Studies* 17 (1956): 322–44. Teachings that are not infallible have been labeled variously in recent Church documents. *Professio Fidei* (1998) speaks of "not definitive" teaching; *Donum Veritatis* (1990) speaks of "non-irreformable" teachings in sections 24 and 28 and also of "non-infallible" teaching in section 33. Dulles, *Magisterium,* includes in appendix 1 notes on a meeting held with Joseph Cardinal Ratzinger, members of the Congregation for the Doctrine of the Faith, and committees on doctrine, wherein the claim is made that there is no essential difference in the words "definitive" and "irreformable" (175).

15. I do not accept the view of Eberhard Schockenhoff, who maintains that the Magisterium under Pius XII argued that LOT was intrinsically evil and reversed that teaching; *Natural Law and Human Dignity* (Washington, D.C.: The Catholic University of America Press, 2003), 38.

In 1991 Pope John Paul II seemed to suggest that the Church has always approved of LOT; he stated: "Since the time of my venerable predecessor, Pius XII, during whose pontificate the surgical practice of organ transplant began, the Church's Magisterium has continually made contributions in this field."[16] This statement does not explicitly state or necessarily imply that Pope Pius XII approved of LOT but it would not be unreasonable to draw such an inference. Though reasonable, that inference would be wrong. As mentioned and as we shall see, Pius XII repeatedly spoke against LOT and never approved of it; John XXIII and Paul VI were silent on the issue.[17] In 1984 John Paul II expressed what seems to be the first magisterial approval of LOT and that position has prevailed.[18] The *Catechism of the Catholic Church* (2296) speaks of LOT as in conformity with the moral law.[19] Pope Benedict XVI has called LOT "a peculiar form of witness to charity."[20]

In 1982, in their second edition of *Health Care Ethics: A Theological*

16. "Address of His Holiness John Paul II to Participants of the First International Congress of the Society for Organ Sharing" (June 20, 1991); http://www.vatican.va/holy_father/john_paul_ii/speeches/1991/june/documents/hf_jp-ii_spe_19910620_trapianti_en.html. For other attributions to Pope Pius XII of approval of LOT, see Father William Saunders, "Organ Transplants and Cloning," reprinted from Arlington Herald, September 14, 2000, http://www.catholicherald.com/school/detail.html?sub_id=6234 accessed, May 6, 2009; and "Play it Again: Organ Donation," no author cited, http://www.cuf.org/FileDownloads/organdon.pdf, accessed, May 6, 2009.

17. Thomas Williams, L.C., claims "neither Pius XII, John XXIII, or Paul VI issued any substantive or definitive statement in this area [of organ transplantation]." "Heterologous Embryo Transfer and the Meaning of 'Becoming a Mother,'" in *Human Embryo Adoption: Biotechnology, Marriage, and the Right to Life*, ed. Father Thomas V. Berg and Edward James Furton (New York: The Westchester Institute for Ethics and the Human Person, 2006), 229–49, at 237. While I agree with Williams about John XXIII and Paul VI, I believe Pius XII issued substantive although not definitive statements about LOT.

18. John Paul II, "Blood and Organ Donors" (August 2, 1984), in *Medical Ethics: Sources of Catholic Teaching*, ed. by Kevin D. O'Rourke, O.P., and Philip Boyle, O.P. (St. Louis; Catholic Health Association, 1989), 213. See also: "Address to Participants of the First International Congress of the Society for Organ Sharing" (June 20, 1991); http://www.vatican.va/holy_father/john_paul_ii/speeches/1991/june/documents/hf_jp-ii_spe_19910620_trapianti_en.html; *Evangelium Vitae*, § 86 (AAS 87 [1995]); "To the 18th International Congress of the Transplantation Society" (August 29, 2000); http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jul-sep/documents/hf_jp-ii_spe_20000829_transplants_en.html.

19. The entry on organ transplants in the 1994 [English] version of the *Catechism* was revised in accord with the Editio Typica of the *Catechism*. Both approve of organ transplants but arguably the 1994 version was more approving.

20. "Address of His Holiness Benedict XVI to Participants at an International Congress Organized by the Pontifical Academy for Life" (November 7, 2008); http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/november/documents/hf_ben-xvi_spe_20081107_acdlife_en.html.

Analysis, Benedict Ashley, O.P. and Kevin O'Rourke, O.P., identified three lessons to be learned from the debate on LOT: 1) "it shows clearly that the opinion of theologians can evolve" (I would add here that it shows that non-definitive Church teaching can evolve as well); 2) "it shows that by refining accepted principles, and not denying them, a way can be found to new positions"; and 3) "it demonstrates that many ethical problems are solved by starting with intuitive judgments and then examining the principles in light of the solution proposed in the intuitive judgment."[21]

The Role of Intuition and Principles

The role of intuition in the debate about LOT is very interesting. Currently, in Catholic bioethical literature, the goodness of organ transplantation is quite taken for granted and seems intuitively obviously good, even by those who know the history of the debate.[22] William E. May in his *Catholic Bioethics and the Gift of Life* states, "We intuitively and instinctively judge that the giving of a part of one's own body to help a gravely or even mortally ill fellow human person is not only morally justifiable but an act of heroic charity."[23] While I agree that intuition was a major force behind the push for approval of LOT, at one time many if not most theologians were opposed to LOT; they did not seem to share those intuitions. Those who did have an intuition that LOT is moral did not defend their approval of LOT on the basis of their "intuitions" alone, since intuitions are not always reliable nor do all individuals of good will have the same intuitions. (For instance, I suspect many people have an "intuitive" repugnance to using animal organs as transplants, although several Church documents have given approval to it.[24] In respect to the current debate about embryo adop-

21. Benedict Ashley, O.P., Jean DeBlois, C.S.J., and Kevin O'Rourke, O.P., *Health Care Ethics. A Catholic Theological Analysis,* 5th ed. (Washington, D.C.: Georgetown University Press, 2006), 105.

22. The Protestant bioethicist Paul Ramsey provided a very sober analysis of LOT wherein he pays a great deal of attention to the debate among Catholics: "The Self-Giving of Vital Organs: A Case Study in Comparative Ethics," in *The Patient as Person: Explorations in Medical Ethics* (New Haven, Conn.: Yale University Press, 1970), 165–97.

23. William E. May, *Catholic Bioethics and the Gift of Life,* 2nd ed. (Huntington, Ind.: Huntington Press, 2008), 353.

24. For a recent review of the question, see Pontifical Academy for Life, "Prospects for Xenotransplantation: Scientific Aspects and Ethical Considerations" (September 26, 2002); http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20010926_xenotrapianti_en.html.

tion, many ethicists have a strong sense that it violates the goods of marriage as a kind of surrogacy and infidelity, whereas other ethicists have a strong sense that it is a good and generous way to save innocent human life.) They believed that finding principles to establish the truth of their intuitions was necessary.

The advocacy of LOT depended a great deal upon two tools of casuistry.[25] The first was the use of analogy and precedent; in moral theology, arguments often proceed by noting that procedure Y should be permissible because in its morally relevant features it is similar to X, which has been accepted as morally permissible. The intuitions of similarity of cases often precede the articulation of how a principle justifies a procedure.[26] In the end, the similarity between LOT and approved practices such as blood transfusion, skin grafts, medical experimentation, and Caesarian sections may have been the most forceful reason for the acceptance of organ transplants. The second tool of casuistry was "probabilism," or reference to the "solidly probable opinion" of respected theologians as a source of guidance for the practical decisions that must be made about issues, both by individuals and institutions. The conviction of a growing number of theologians that LOT was morally permissible was a powerful driving force.

Whereas the attempt to justify LOT may have been driven largely by intuition, objections to it were based not on intuitions about the impropriety of organ transplants but on principles long established as authoritative in moral theology: the principle that we could not mutilate ourselves and the principle that bodily parts are ordained only to the good of the body of the person to whom they belong—which came to be known as the principle of finality.[27] It was also driven by the principle—strengthened by abhorrence of Nazi policies—that treating some people as subordinate to others, to the point that their lives may be sacrificed by the state for others considered

25. Servais Pinckaers, O.P., *The Sources of Christian Ethics* (Washington, D.C.: The Catholic University of America Press, 1995), and Romanus Cessario, O.P., *Introduction to Moral Theology* (Washington, D.C.: The Catholic University of America Press, 2001), have leveled devastating critiques at the casuistry based upon the philosophy of Ockham. Here I am referring only to various techniques of the system, not to the system itself. So far as I can discern the theologians who were debating the morality of LOT were in the Thomistic tradition.

26. See Genilo, *John Cuthbert Ford, S.J.,* for a discussion of the use of casuistry by John Ford.

27. Bert J. Cunningham. C.M. provides a useful review of various theologians' understanding of mutilation (ch. 1) and a good review of the principle of finality (ch. 2) in *The Morality of Organic Transplantation* (Washington, D.C.: The Catholic University of America, 1944).

more valuable, is intrinsically evil. This antipathy was expressed by the insistence that LOT was not justified by the principle of totality, the principle that a part could be sacrificed for the good of a whole.

Mutilation

One question behind the hesitancy to accept LOT was whether those donating their organs were mutilating their bodies. The Church condemns mutilation as a violation of the Fifth Commandment. It is wrong to kill innocent others or ourselves; by extension, it is wrong to do serious physical harm to innocent others or ourselves; such harm is called mutilation. (Early treatments of the morality of mutilation seem to have arisen in the context of canon law considerations of disqualifying "irregularities" for the priesthood, in terms of both a candidate's own physical integrity and his fitness for the priesthood: was he "mutilated" in any way or had he participated in actions that mutilated others?)[28] During different periods of history the following acts have been approved by some moralists, and rejected by others: ear piercing, disfigurement of the face for the purposes of making a life of chastity easier, cutting off one's hand under threat of death by a tyrant, castration as a means to preserving a beautiful voice, castration as a punishment, castration as a means to escape from unjust incarceration, and the giving of blood and skin for skin grafting.[29] Here I am not going to try to settle the vexed question of the precise definition of mutilation. But we should note that what constitutes the *sin* of mutilation is not identical with all *physical* mutilation. Perhaps the clearest instance of universally approved physical mutilation is the mutilation caused by surgery. Surgery is permissible because of the "principle of totality": parts that exist for the sake of the whole can be sacrificed for the sake of the whole. Moralists consider the amputation of a diseased limb as a mutilation but a justifiable mutilation, as is circumcision.

The chief question that troubled those deliberating about LOT, among them Pius XII, was whether the principle of totality permitted sacrificing one's own bodily parts for the sake of *another*. Pius XII repeatedly taught

28. Ibid., 4.

29. For ear-piercing, see Cunningham, 8; for purposes of making of chastity easier, see Cunningham, 11, 26, citing Thomas Iorio, S.J., *Theologia Moralis*, vol. 2 (Naples, 1939), n. 198; for cutting off one's hand, see Cunningham, 39ff.; for castration, see Cunningham, 41 ff.; and for giving of blood and skin grating, see Cunningham, 4 and 7.

that LOT violated what came to be called the principle of finality, the principle that the parts of one's body have as their natural *telos* the good of one's body only and have no other *telos:* to give one's organs to another suggests that one's bodily parts are ordered not just to one's own good but to the good of another. In his view, the principle of finality ruled out the possibility of the use of the principle of totality to justify LOT. Early on in the discussion on LOT, skin grafts and blood transfusions were either deemed not to be mutilation because those body parts are replenishable or were considered to be morally permissible mutilations since they are done for purposes of beneficence, not maleficence.[30] We shall see that eventually moralists judged that Pius XII's disapproval of organ transplants as a form of unjustifiable mutilation conflicted with approval of blood donations, skin grafts, Caesarian sections, and experimentation on some for the sake of others. The principles justifying those procedures came to justify LOT but only after much theological discussion. Here we are going to trace the major lines of that discussion.

The Principle of Finality

In *Casti Connubii*, Pope Pius XI laid the foundation for the principle of finality and the principle of totality:

> Christian doctrine establishes, and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their members, or in any other way render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body.[31]

Later, his successor Pope Pius XII clarified that the "natural ends" of the members of the body are only the good of their owner (the principle of finality) and spoke of the sacrifice of a part of the body to provide for the whole as justified by the principle of totality.

In his "Allocution to the Italian Medical-Biological Union of St. Luke" in

30. Cunningham, *The Morality of Organic Transplantation,* cites H. Noldin, S.J., who in 1938 spoke favorably of skin grafts and blood transfusions, 9–10, n. 22, citing *Summa Theologiae Moralis*. See also Iorio, *Theologia Moralis,* n. 199, 4, d., cited in Cunningham, 47, n. 81.

31. Translation from the Vatican website: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

1944, Pius XII invoked the principle of finality several times.[32] He sets the larger context:

In forming man, God regulated each of his functions, assigning them to the various organs. In this way, He distinguished those which are essential to life from those which contribute only to the integrity of the body, however precious be the activity, well-being, and beauty of the last. At the same time, God fixed, prescribed, and limited the use of each organ. He cannot therefore allow man now to arrange his life and the functions of his organs according to his own taste, in a manner contrary to the intrinsic and immanent function assigned them. Man, in truth, is not the owner of his body nor its absolute lord, but only its user. A whole series of principles and norms derives from this fact, governing the use of the body with its members and organs, and the right to dispose of them: principles and norms to which are equally subject the individual concerned and the doctor called in for consultation.[33]

He remarks that not only is it difficult for an individual to determine what principles govern the use of his own body, "much more difficult are the problems raised in society, when it tries to assert its rights over the body, the corporal integrity, and the very life of man."[34] He then goes on to articulate why an individual may sacrifice a good of the part of his body for the sake of the whole of his own body and also asserts that society is not the same kind of whole as the body and thus neither its members nor their part can be sacrificed for the whole:

Here, too, reason and faith trace the boundary line between the rights of society and that of the individual. Certainly man is by nature destined to live in society, but, as is clear from reason alone, as a general principle society is made for the man and not man for society. It is not the community but the Creator Himself Who gives to man dominion over his body and his life. It follows that society cannot directly deprive man of that right, excepting only if man by a proportionately grave crime makes himself punishable with death.

Regarding the body, the life, and the corporal integrity of the individual, the juridical position of society differs essentially from that of the individual himself. Man's power over his members and organs is a direct—though not unlimited—power; because these are parts which go to make up his physical be-

32. An early statement of this principle can be found in Ludo Molina, S.J., *De Justitia et Jure* (Venetiis, 1611), vol. IV, disp. I, n. I, cited by Cunningham, 20.

33. "Christian Principles and the Medical Profession" (allocution to the Italian Medical-biological Union of St. Luke, November 12, 1944), in *The Human Body: Papal Teachings*, ed. the Monks of Solesmes (Boston: St Paul Editions, 1979), 54.

34. Ibid.

ing. Their association in the one being has for goal [*sic*] only the well-being of the whole physical organism in danger, a danger which cannot in any other way be averted. Quite different is the case with society which is not a physical being but a simple community of purpose and action. In virtue of this it can demand of those who make it up and who are called its members, all those services essential for the true common good.

Such are the foundations on which must rest every judgment on the moral value of acts and operations concerning the human body, human life, and the corporal integrity of the person, which public authority allows or imposes.[35]

Pope Pius XII here does not speak explicitly of LOT but makes it clear that man can only sacrifice the good of a part of his body for the sake of the whole of his own body. (Gerald Kelly sees here Pius XII's first use of the distinction between a physical and a moral whole.[36] We will see a clearer statement of these principles in the pope's 1952 speech to histopathologists, in which he explicitly speaks against organ transplants.)

The Thesis of Bert Cunningham, C.M.

In 1944 Bert Cunningham wrote a highly influential dissertation in defense of LOT,[37] *before* Pius XII made his several speeches against it and before any successful organ transplants from living donors had taken place (except for ovarian transplants).[38] Many successful cornea transplants

35. Ibid., 55–56.

36. Gerald Kelly, S.J., "Pope Pius XII and the Principle of Totality," *Theological Studies* 16 (1955): 373.

37. Cunningham, *The Morality of Organic Transplantation*. I find it surprising that John J. Ford, S.J., made notice of this dissertation in *Theological Studies* even before it was distributed, "Notes on Moral Theology," *Theological Studies* 5 (1944): 517.

38. Oddly, one kind of transplant that seemed appealing to many Catholic moralists was ovarian transplants. The question (and case noted) is discussed by Cunningham, *The Morality of Organic Transplantation,* xiii–xv and 49–56. Ovarian transplants were done not to treat infertility but to treat hormonal imbalance; the first one involved the exchange of ovarian tissue between sisters, each suffering a "complementary ovarian pathological condition" (50). Cunningham cites a report that tells of eighty successful cases which cured women of such conditions as epilepsy, dementia praecox, and manic depression (52). See also Kelly, "Pope Pius XII and the Principle of Totality," 391, n. 32. In his *Medico-Moral Problems* (St. Louis: Catholic Hospital Association, 1958), Kelly speaks of ovarian transplants as approved, 248. Charles J. McFadden, O.S.A., *Medical Ethics* (Philadelphia: F. A. Davis: 1967), speaks of ovarian transplants as legitimate, 290 and 293. I believe most moralists would now disapprove of ovarian transplants that could result in a woman's conceiving a child with another's woman's ova. That does not seem to have been a factor that troubled theologians when the procedures were first done. Cunningham notes that

from dead donors had been done and the question of the morality of cornea transplants from living donors was raised. Cunningham did not think it likely that LOT would become common but he saw the marvelous results of the transplants that had been done and was seeking to find a principle that could justify them.[39] Obviously, since Cunningham was writing before Pius XII spoke against LOT, he was not taking issue with anything Pius XII taught. He did, however, perceive his position to be in conflict with the views of some respected theologians and in apparent contradiction to some established principles.[40] As we shall see, a key point for Cunningham was the fairly universal approval of blood transfusion and skin grafts: he believed the principles justifying those practices should justify LOT.

In his dissertation Cunningham presented three arguments that ultimately prevailed in some form. First, he made several arguments against the principle of finality; he claimed that in some way all men are *ordained* to the good of other men without being *subordinate* to them. He found support for his view that mankind was united in some important way in an opinion of Vermeersch, S.J.:

> Because of the unity of the human race, by which we are in some way one with the neighbor, perhaps we may explain also why one may correctly ordinate directly some detriment of his own body to a proportionate corporal good of the neighbor, as when one allows that skin be taken from him for the cure of the wound of another, or that by blood transfused from him the blood of another be renewed so that the other may be able to live. Must there not be admitted some ordination of our members to the body of the neighbor?[41]

Cunningham goes on to use the thought of Aquinas to support his view that in a sense all men are one body. He uses Aquinas's discussion of the transmission of original sin:

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the physician who performed multiple successful ovarian transplants had tested a few of the women who subsequently became pregnant, all of whom were the biological mothers of their children. Cunningham allows the possibility that women may have conceived by another woman's ova but maintains that the woman who gestated the child would be the mother of the child (55). McFadden provides the very interesting information that "a child born after an ovarian graft to the mother is viewed as an illegitimate birth by the United Kingdom Medical Defense Union," *Med. Tribune* 3, no. 38 (October 1962): 293.

39. Cunningham, *The Morality of Organic Transplantation,* 104.

40. Ibid., ch. 4.

41. A. Vermeersch, S.J., *Theologia Moralis,* vol. 2 (Rome, 1928), n. 323, Cunningham, 70, n. 23.

And therefore one must proceed in another way by saying that all men who are born of Adam can be considered as one man, inasmuch as they are similar in nature which they have received from their first parent, as in states, all the men who are of the same community are reputed as one body, and the whole community is considered as one man. And also, as Porphyrius states, "that by participation of species, many men are one man." Thus also many men derived from Adam are, as it were, many members of the one body.[42]

Cunningham asks: "If… an argument, based on unity in nature and consequent order of men to one another, can be validly used to assert the liceity of minor mutilations such as skin-grafts, can it not be used also as a basic justifying principle for greater mutilations which are also expressions of mutual love?"[43] Cunningham goes on to invoke the concept of the Mystical Body of Christ to fortify a unity he posits also exists already in nature: because of the unity of men in species, their unity in the Mystical Body of Christ (actual or potential), there exists an ordination of men to one another, and, as a consequence, an order of their members one to another.[44]

Secondly, Cunningham noted that Iorio, S.J., an opponent of LOT, invoked the principle of charity to justify a person putting his life at risk for another and also to justify a person donating blood or muscle tissue to another.[45] Iorio argues that just as a man may not directly kill himself to save another, he also may not directly mutilate himself to save another.[46] Cunningham agrees that no man should ever directly kill himself for another since man's life is in God's dominion not his, but that we are administrators over our bodies otherwise and that "since we can do for others what we can do for ourselves" we could mutilate ourselves for someone else's well-being. Following an extensive discussion of the order and obligation of charity, he concludes: "We argue then: if theologians will admit that one may suffer a greater evil, death, as an act of charity to one's neighbor, why may he not, for the same reason, effect or permit mutilation of self for the good of the neighbor?"[47]

42. Thomas Aquinas, *Summa theologiae,* I-II, q. 81, a, 1, arg. 4 in corp, cited by Cunningham, *The Morality of Organic Transplantation,* 72, n. 26. He also references Aquinas, *Summa contra Gentiles,* book 3, c. 128 (Cunningham, 76, n. 42).

43. Cunningham, *The Morality of Organic Transplantation,* 77.

44. Ibid., 63, 77–86.

45. Ibid., 63–70.

46. Perhaps it should be noted that a great deal of Iorio's resistance was in reference to testicular transplantations (even from a monkey to a man) that were being done to enhance sexual prowess. Ibid., 65.

47. Ibid., 96.

Thirdly, Cunningham argues throughout that since blood transfusions and skin grafts were permitted, other types of donation from one person to another ought also to be permitted. In response to the claim by some theologians that these practices ought not be considered mutilation because the damage is reparable, Cunningham counters that they are at least temporarily harmful and the condemnation against mutilation is not just against temporary mutilation.

In commenting on Cunningham's dissertation in 1947 (how many dissertations have made their way into the "Notes on Moral Theology" in *Theological Studies*?), Gerald Kelly reported on a critique of Cunningham's dissertation by Father J. McCarthy (how many dissertations are commented on in major theological journals?!).[48] Although he had some criticisms of Cunningham's thesis,[49] Kelly was sympathetic to Cunningham's conclusions even to the point of wanting to call Cunningham's position "solidly probable" were it not for Pius XI's statement of the principle of finality in *Casti Connubii,* which he calls the "real stumbling block" to Cunningham's thesis. (Recall that "probable" does not mean "likely" but "able to be justified"—that is, supported by worthy arguments.) Surprisingly, Kelly does not mention Pius XII's statements of the principle of finality in his speech to the Union of St. Luke in 1944 that arguably challenge Cunningham's thesis.

Kelly was drawn to attempting to find a way to justify LOT and proposed that the possibility of LOT may have disclosed that organs do in fact have a "secondary" purpose beyond that of the individual to whom they belong.[50] He notes that when donating an organ does not put the donor at undue risk, the primary purpose of the organ (the good of one's own body) is not defeated while the secondary purpose (helping the neighbor)

48. J. McCarthy, "The Morality of Organic Transplantations," *Irish Ecclesiastical Record* 67 (March 1946): 192–98.

49. Kelly had some objections to Cunningham's thesis; he found that Cunningham's claim that it is permissible for an individual to sacrifice the good of his body for the sake of a "social body" "borders on the fantastic": "Notes on Moral Theology 1946," *Theological Studies* 8 (1947): 97–126, at 100. He noted that no matter how good the arguments of Cunningham on many points, since he did not deal with the principle of finality, he did not address the concerns of Pius XI. Kelly noted that Pius XI's remarks were made in the context of eugenic sterilization and implied that perhaps that context limits the applicability of the remarks: "Notes on Moral Theology 1946," 101. As I read Cunningham's thesis, I believe he was not guilty as charged by McCarthy and Kelly of not taking into account the challenge of the principle of finality.

50. Ibid.

is achieved. Kelly expected his proposal to provoke a "firing squad."[51] That fear seems to have been unfounded; he does not report in subsequent volumes of *Theological Studies* that any opposition to his position was registered and, in fact, the next reference to Cunningham's thesis in the pages of *Theological Studies* was not until 1954, when John R. Connery, S.J., registers that he agrees with Cunningham.[52] It seems that many theologians were being persuaded by Cunningham's thesis.

Let's return to the period immediately following Cunningham's thesis. I do not know if Pius XII was familiar with it or the articles that evaluated it, though it seems strange that no one would have brought Cunningham's highly regarded thesis to Pius XII's attention.[53] Certainly, there is no evidence that Pius XII was in the least bit inclined to accept the principles advanced there and some strong evidence that he would have been opposed to them. Pius himself made reference to the principle of charity as justifying blood transfusions. In 1948 he lauded members of the Italian Association of Blood Donors, and spoke of the charity of blood donors, of the way in which their actions were a suitable imitation of Christ.[54] Pius mentions that those who donate blood are like parents who were the source for the blood of their children. If Pius believes this literally, perhaps he is thinking that blood being exchangeable and replenishable is, unlike other bodily parts, something that can be donated. Yet, the principle of finality maintains not that only what is not replenishable is ordained solely for our good, but that all of our bodily parts (except our reproductive organs) are ordained solely to our good. Moreover, we certainly did not receive our skin from our parents and skin is not nearly as "replenishable," so what principle would permit skin grafts? Pius XII seems never to have recognized the tension between his approval of blood transfusions and skin grafts, and the principle of finality. Moreover, he seems to have allowed the principle of charity to overcome the principle of finality in respect to the donation of some bodily materials; he never elected to use this principle to justify LOT.

51. Ibid., 101.

52. John R. Connery, S.J., "Notes on Moral Theology 1953," *Theological Studies* 15 (1954): 594–626, at 603.

53. Albert R. Jonsen indicates his conviction that Pius XII was aware of Cunningham's thesis and rejected it: "From Mutilation to Donation: The Evolution of Catholic Moral Theology regarding Organ Transplantation," Catholic Social Concerns Lecture Series, March 29, 2005; https://web.usfca.edu/uploadedFiles/Destinations/Institutes_and_Centers/Lane/Events/documents/Jonsen_OrganDonation.pdf (accessed July 25, 2010).

54. Pope Pius XII, "Allocution to the Italian Association of Blood Donors" (October 9, 1948), in *The Human Body*, 54, 104–7.

In a 1952 speech to a congress on histopathology, Pius XII spoke of the principle of finality four times, when addressing patients, doctors, and public authorities in ways that again indicate his disapproval of LOT. He also made remarks that seem to reject charity as a justifying principle for mutilations that would serve others. In one section he addressed those who would do experiments on patients or expose patients to extremely experimental procedures. He stated:

> As far as the patient is concerned, he is not absolute master of himself, of his body, or of his soul. He cannot, therefore, freely dispose of himself as he pleases. Even the motive for which he acts is not by itself either sufficient or determining. *The patient is bound by the immanent purposes fixed by nature.* He possesses the right to use, limited by natural finality, the faculties and powers of his human nature. Because he is the beneficiary, and not the proprietor, he does not possess unlimited power to allow acts of destruction or of mutilation of anatomic or functional character. But, in virtue of the *principle of totality,* of his right to employ the services of the organism as a whole, he can give individual parts to destruction or mutilation when and to the extent that it is necessary for the good of his being as a whole, to assure its existence or to avoid, and naturally to repair, grave and lasting damage which could otherwise be neither avoided nor repaired.
>
> The patient has not the right to involve his physical and psychic integrity in medical experiments or researches, when these interventions entail, either immediately or subsequently, acts of destruction, or of mutilation and wounds, or grave dangers.[55] (My emphasis.)

The reference to the immorality of a patient's allowing procedures that would mutilate himself in an effort to help others indicates that Pius did not accept the principle of charity as justifying LOT.

When Pius subsequently addresses physicians, he reiterates the principle of finality and makes it clear that his previous remarks refer to organs:

> We have explained at what point the personal rights of the patient to dispose of himself, of his mind, of his body, of his faculties, organs and functions, come face to face with a moral limit. At the same time, we have found an answer to the question: where does the moral frontier exist for the doctor in research and the use of new methods and processes in the "interest of the patient"? The frontier is the same as for the patient: it is the one fixed by the judgment of

55. Pope Pius XII, "Allocution to the First International Congress of Histopathology" (September 13, 1952), in *The Human Body,* 198–99, 198. Kelly, "Pope Pius XII," notes that this is the first time Pius XII used the expression "principle of totality," 373.

right reason, and it is traced by the demands of the moral law which is derived *from the natural finality or purpose stamped on beings,* and from the scale of values expressed by the very nature of things.[56] (My emphasis.)

When he addresses public authorities, he recites some of the horrors perpetrated by governments (he is clearly pointing to the Nazis) against patients and clearly rejects the claim that individuals can be sacrificed for the sake of the community.[57] He then goes on to explain further why the state, which is also a whole, cannot sacrifice its members for the sake of the whole: it is because it is a *moral* whole and not a *physical* whole:

A quite different state of affairs obtains in the moral community and in each organism of a purely moral character. The whole has not here a unity which subsists in itself, but a simple unity of purpose and of action. In the community the individuals are only collaborators and instruments for the realization of the ends of the community. . . .

When the whole does not possess a unity except of finality and of action, its head, that is to say, in the present case the public authority, retains without doubt a direct authority and the right to impose its demands on the activity of the parts, but in no case can it dispose directly of its physical being. Moreover, every direct injury attempted against its essential being by public authority is a departure from that sphere of activity which rightly belongs to it.[58]

We need to note that while, in this 1952 speech, Pius XII objects to using the principle of totality to permit a state to mandate LOT, the fact that LOT violates the principle of totality is not the whole or even the primary basis of his objection. Yes, it is true that the individual does not exist for the sake of the whole and thus cannot be sacrificed for the whole, but it is also true that Pius XII has made it very clear that neither the patient nor his doctor can sacrifice any of the organs or bodily parts of an individual for *any* purposes beyond the good of the individual himself—not even the good of helping others. If neither the patient nor the doctor can do so, it would be wrong for the state to do so. Thus, although many who have discussed the debate on LOT have taken the principle of totality as the key principle and have suggested that Pius XII's focus on that principle was due to his fears of the practices of Nazi Germany, the above speech indicates that it was the principle of finality that was most definitive in his reasoning.[59]

56. Pius XII, "Allocution to the First International Congress of Histopathology," 201.
57. Ibid., 203.
58. Ibid., 204–5.
59. See, for instance, Jonsen, "From Mutilation to Donation."

How strong are we to understand Pius XII's objections to LOT to be? He does not explicitly use the words "LOT is intrinsically evil," nor does he use the words "sacrificing an individual for the sake of the whole is intrinsically evil," but I believe his intentions are clear in both cases.[60] In respect to LOT, the mind of the Holy Father was clearly this:

(1) The principle of finality permits us to use our organs only for our own benefit.
(2) Organ transplants involve the use of organs for the benefit of others.
(3) Organ transplants are not moral.[61]

He also rejects any principles that would seem to allow us to override the above reasoning; he explicitly rejects the principle of totality and implicitly rejects the principle of charity as permitting us to use our organs for the benefit of others. Certainly theologians during Pius XII's pontificate understood Pius XII to be teaching that the principle of totality does not permit LOT because LOT violates the principle of finality. Is there truly any wiggle room in what Pius XII said about the finality of our organs and the permissibility of LOT?

Pius XII reiterated the principle of finality in a 1953 address to military surgeons in the context of the question of assisted suicide during warfare: "The patient, on his part, the individual himself, has no right to dispose of his own existence, of the integrity of his organism, of his particular organs and of their functional capacity, except in the measure demanded by the good of the whole organism."[62] Does not this claim rule out LOT?

Pius XII's final statement on LOT was in 1956. Let me note here that the first successful kidney transplant was done on December 23, 1954, by a Catholic doctor, Joseph E. Murray, who eventually won a Nobel prize for his

60. Schockenhoff, "Natural Law and Human Dignity," maintains that the Magisterium under Pius XII taught that LOT was intrinsically evil (38).

61. For a similar interpretation of magisterial teaching, see Edward Furton's interpretation of the teaching of *Dignitas Personae* on the personhood of the embryo; he maintains: "*Dignitas Personae* has not stated point-blank that 'the embryo is a person.' We will not find that exact expression anywhere in the text. Nonetheless, it is apparent that this is the only possible conclusion that one can draw, for if it is true that the embryo undergoes no change in nature throughout its development, and if it is true that the embryo, by its very nature, has the dignity of a person, then it must also be true that the embryo is a person from the moment of conception": "Is the Time of Personhood Settled? *Dignitas Personae* Advances the Debate," *Ethics and Medics* 34 (April 2009): 4.

62. Pope Pius XII, "Allocution to Military Surgeons" (October 19, 1953), in *The Human Body*, 281.

work. Is it not likely that Pius XII would have known of this successful transplant? If he approved he could surely have said so. The fact is that the next occasion he took to speak of LOT was in 1956 and then he spoke against it and explicitly listed the kidney among the organs under consideration.

Gerald Kelly and Mutilation

We shall speak of Pius XII's 1956 talk more fully in a moment, but we need first to take a close look at Gerald Kelly's 1955 article "Pope Pius XII and the Principle of Totality," and his 1956 article "The Morality of Mutilation: Towards a Revision of the Treatise."[63] In these articles Kelly is clearly arguing for LOT and trying to determine a justification to do so, in light of Pius XII's repeated articulation of principles that are incompatible with LOT.

In his 1955 article, Kelly acknowledges that between 1952 and 1954, Pius XII on several occasions reiterated the principle of finality and his rejection of the application of sacrificing the good of the individual for the sake of whole on the basis of the principle of totality.[64] But he also looks at some statements of Pius XII concerning offering one's body for the purposes of medical experimentation for the benefit of others. In his address to the Eighth Congress of the World Medical Association, in 1954, Pius stated:

> What goes for the doctor in regard to his patient, goes also for the doctor in regard to himself. He is subject to the same great moral and juridical principles. He cannot, therefore, submit himself to scientific experiments or practices that entail serious harm or threaten his health. Still less is he authorized to attempt an experiment which, according to authoritative information, may involve mutilation or suicide. The same must be said, furthermore, of male and female nurses and of anyone who may be disposed to give himself to therapeutic research. They cannot submit themselves to such experiments.[65]

Kelly understands this text to permit experimentation that falls short of seriously harming or threatening the health of the subject of the experimentation. He concludes that the principle for permitting limited experimentation is the principle of charity.[66]

63. Kelly, "The Morality of Mutilation."

64. "Allocution to Delegates at the 26th Congress of Urology" (October 8, 1953), in *The Human Body,* 277–81 (original in *AAS* 45 [1953]: 673–79), and his "Allocution to Military Surgeons," 281–83.

65. Here I am citing the text as given by Kelly, "Pope Pius XII," 388.

66. Ibid., 390.

Kelly does not include the continuation of the above passage, where Pius XII makes it clear that the principle of finality guides his deliberation about experimentation and that he is wary of appeals to altruism:

> The basic prohibition has *no bearing upon the personal motive of an individual who willfully undergoes self-sacrifice and self-denial in order to help an invalid, nor does it have any bearing upon man's desire to collaborate in the interests of serious scientific study seeking to aid and serve humanity.*... We are not concerned here... with questions of such motivation and devotion. *The question this time is basically that of disposing of a non-personal good without having the right to do so.* Man is only the custodian, not the independent possessor and owner of his body, his life, and of all that the Creator has given to him to make in accordance with the ends of nature.[67] (My emphasis.)

Pius XII does not allow that the desire to benefit others justifies doing direct damage to one's self. Kelly proposes that serious risks to self should be permitted by the principle of charity, since "charity itself does not limit risk; rather, there are cases in which charity permits, if it does not demand, the greatest risk, even to loss of life."[68] Kelly bypasses Pius XII's reference to the principle of finality and conjectures that Pius XII took the position he did because of the historical circumstances in which his remarks were made—and this was not, it seems, the context of the abuses of the Nazis, but rather a more positive context. Kelly asserts that "he was not saying that in no conceivable circumstances could serious risks be taken in experimentation, he was saying that in medical experimentation and research as it is carried on today by the medical profession there is no proportionate reason for serious risks."[69] While that may be true, it is also true that Pius XII again reiterated the principle of finality, which rules out any really risky medical experimentation and it would seem LOT as well.

Believing himself to have established that Pius XII permitted individuals on the principle of charity to offer themselves for medical experimentation—if sufficient steps were taken to protect people from undue harm—Kelly goes on to examine the question of LOT. He indicates that theologians were much divided on the issue[70] but pronounces that it is "solidly probable" that "organ transplantation is licit provided it confers a

67. Ibid., 316.
68. Ibid., 390.
69. Ibid.
70. See Kelly, "Pope Pius XII," 392, particularly n. 34 and n. 36. Another list appears in his subsequent article, "The Morality of Mutilation," 333, n. 32. The debate did not die quickly. Another list of articles can be found in Connery, "Notes on Moral Theology," 557–59.

proportionate benefit on the recipient, without exposing the donor to great risk of life or depriving him completely of an important function."[71] He notes that the principal justification put forward in behalf of LOT was the law of charity, "based on the natural and supernatural unity of mankind" and on the view that one's neighbor is "another self."

Kelly acknowledges that the principle more difficult to refute was that of finality and notes that it is the crux of the question: "Any proponent of transplantation who ignores [the principle of finality] is playing the ostrich."[72] He notes, however, that the Holy Father had permitted other actions that involve one individual making a donation of his body to others such as by submitting to medical experimentation and or donating blood. He pointedly asked: "The very admission of the licitness of transfusions carries with it recognition of a further purpose of blood which was not known, as a matter of fact, except through the progress of medical science. Is it not admissible that progress in the same science can discover further vital purposes that can be served by other parts of the body?"[73] He also believed Pius XII must have been aware of the debates and if he had wanted to end them "he had ample opportunity to do so."[74] Of course, it might also be said that if he had wanted to give an indication of openness to the liceity of LOT, he had ample opportunity to do so. At the end of his 1955 article, Kelly claimed that Pius XII "neither explicitly nor implicitly closed the controversy" on LOT.[75]

Kelly again addresses the question of LOT in a 1956 article, "The Morality of Mutilation: Towards a Revision of the Treatise." Whereas in his 1955 article Kelly attempted to find wiggle room in speeches of Pius XII that would permit organ transplantation, in the 1956 article he is calling for "revision." He finds justification for calling for revision in Pius XII's apparent revision of Pius XI's condemnation of punitive sterilization. Pius XI and the Holy Office under Pius XII had made remarks that condemned punitive sterilization, but Pius XII later clarified that the condemnation was only of sterilization of the innocent.[76] Kelly maintained that the formulations of the pontiffs were "perfectly apt for the errors at which they were

71. Kelly, "Pope Pius XII," 392.
72. Ibid., 394.
73. Ibid., 395.
74. Ibid.
75. Ibid., 396.
76. Kelly, "The Morality of Mutilation," 325. See also John Michal Cox, "A Critical Analysis of the Roman Catholic Medico-Moral Principle of Totality and Its Applicability to Sterilizing Mutilations" (Dissertation, Claremont Graduate School, 1972).

aimed, [but]… were broader than their own intention."[77] From this instance, Kelly concludes: "The very fact that popes themselves have gone out of their way to clarify or restrict their moral pronouncements indicates that a theologian is not necessarily irreverent or disloyal in supposing that other such statements may need clarification or restriction or rephrasing."[78]

Kelly argues that popes must make evident when they intend to close a controversy.[79] He clearly believes that Pius XII did not do so in respect to LOT. Kelly argues, however, that certain principles should guide theologians who would challenge authentic, non-infallible teaching of the Magisterium and clearly tries to follow them himself.

Kelly's foremost principle is that the interpreter of papal teachings must be attentive to the meaning of the words, to context, and to the papal intention. He allows that the principle of totality does not serve to justify LOT. That is a negative principle that he believes has been established as speculatively and practically certain. Nonetheless, in respect to the legitimacy of LOT, he again speaks of the "theological note" as "being solidly probable, at least extrinsically," a position he has held for about a decade.[80] He notes that a large number of theologians continue to condemn LOT but notes that it has "as many defenders as opponents."[81] Thus, although Kelly agrees with Pius XII that the principle of totality does not justify LOT, this does not mean that some other principle might not justify LOT. Following Cunningham, Kelly finds very appealing Vermeesch's use of the "unity of the human race" to justify blood transfusions and skin grafts and believes this principle can be used to justify LOT.

When Kelly moves to considering the arguments made against LOT, he addresses four arguments "leveled at the defenders of transplantation," four arguments that he must refute to justify LOT. Let's take them one by one and also consider his responses:

(1) Those opposed to LOT maintain that defenders of LOT unjustifiably argue from indirect sacrifice of life for the neighbor to direct mutilation for the sake of the neighbor. In response Kelly reviews why it is permissible for us to allow indirect sacrifice of our lives for others when the order of

77. Kelly, "The Morality of Mutilation," 325.
78. Kelly, "Pope Pius XII," 325.
79. Kelly cites canon 1323 §3; the parallel canon in the 1983 Code of Canon Law is 749.3.
80. Ibid., 333.
81. Ibid., 333–34, n. 32.

charity requires that we should love ourselves first. He notes that Aquinas solved this problem "by showing that in giving one's life for the neighbor one really prefers his own good of a higher order, that is, the *bonum virtutis*."[82] Kelly maintains that if indirect sacrificing of one's life is permitted to save another's life, then direct mutilation of one's self for another should be justified—and it would be done to advance in virtue.[83]

(2) Kelly dismisses the second objection, that defenders of LOT attempt to justify an act which is intrinsically evil by the extrinsic motive of charity as begging the question; it has not been established that LOT is intrinsically evil.

(3) Opponents of LOT claim that it is the established opinion of moralists that LOT is immoral. Kelly responds,

> As regards mutilation, it seems unquestionable that the moralists have been enunciating immutable principles, deduced from the nature of man, when they say that man is only the administrator of his body, and that as administrator he may destroy certain members and functions when this is necessary for the good of the whole. But whether they are still in the realm of immutable principles when they say that personal welfare is the only reason justifying serious self-mutilation is open to serious doubt.[84]

The one reason he gives for the principle of finality being open to serious doubt is the common view that permits "maternal mutilation for the welfare of her child."[85] Earlier in the article he had noted that moralists such as Connery pointed to Caesarian sections that put mothers at serious risk for the benefit of their child as approved operations that violate the principle of finality.[86] He notes that no one has answered this challenge of Connery to the principle of finality. (A counterargument could certainly be that a mother in conceiving a child has rightly put her body at the disposal of the child and that the relationship of mother to child is unlike any other relationship, but that counterargument is not mentioned or addressed by Kelly.)

82. Ibid., 341, n. 43 cites *In 3 sent*, d. 29, q. 1, a.5.

83. Paul Ramsey discusses at some length the interpretation of the principle of totality as permitting LOT because one is seeking one's own good—virtue—by means of LOT. Thus one is not sacrificing one's self to benefit another; one is benefiting one's self by LOT (*The Patient as Person*, 169ff).

84. Kelly, "The Morality of Mutilation," 342.

85. Ibid., 343.

86. Ibid., 338.

(4) Kelly then turns to what is perhaps the most serious challenge of all and that is the teachings of Popes Pius XI and XII, who "have both used verbal expressions that apparently rule out serious self-mutilation for the good of the neighbor, for example, that the bodily members exist *only* for the good of the whole; that man is *not* free to dispose of particular organs or their capacity to function *unless* this is necessary for the good of his whole being."[87] Kelly responds that the historical context of this judgment "had nothing to do with organ transplantation; that Pius XI's remarks were made in reference to eugenic sterilization and that Pius XII's remarks were in reference to abusive medical experimentation, to totalitarianism that subordinated an individual to the whole, and to extreme individualism that gives man undue autonomy over his life and body."[88] He maintains that theologians are free to interpret these as historically conditioned statements unless the Holy Father indicates he wants to close the controversy. Kelly interprets Pius XII's silence on the question of LOT in his address to the Eighth Congress of the World Medical Association of September 30, 1954, to indicate that the issue was still open,[89] and his explicit statement that he was not going to address the question in his 1956 address on cornea transplants from cadavers as indications that the question was still open.[90] He remarks that an explicit papal statement on the issue would be premature since moralists were learning "much from this controversy."[91]

Pius XII, Cornea Transplants, and LOT

Let us take a look at Pius XII's remarks in his 1956 address on cornea transplants.[92] Kelly puts a great deal of weight on Pius's clear statement

87. Ibid., 343.

88. Ibid.

89. Ibid.; in n. 44 he cites a Father Hürth, S.J., in support of this interpretation.

90. John Lynch, S.J., "Notes on Moral Theology," *Theological Studies* 18 (1957): 216–48, provides a list of authors who come to opposite conclusions about Pius XII's intentions in regard to LOT *inter vivos* in his 1956 speech. Connery sides with those who believe Pius XII did not intend to settle the issue. Francis J. Connell, C.SS.R, "The Pope's Teaching on Organic Transplantation," *American Ecclesiastical Review* 135 (1956): 159–70, in a commentary on the speech observed, "Beyond doubt, there is a general feeling that it is a noble deed to give a fellow man a portion of our body, and that the Pope does not wish to declare such a practice sinful until it is evident that no good argument in its support can be produced" (169). Connell was the director of Cunningham's dissertation.

91. Kelly, "The Morality of Mutilation," 344.

92. Pope Pius XII, "Tissue Transplantation," in *The Human Body,* 375–76 (an allocution to a group of eye specialists, May 14, 1956).

that he is not going to take up the question of live donors and in 1963 cites it as a sign that Pius did not want to pronounce on the issue.[93] Pius XII, however, did not say he was not going to speak of the question of LOT in general, but only about the transplantation of *corneas* from *living* donors; he does in fact speak about LOT, quite forcefully and clearly against the practice. He may well have thought that if he established that all LOT is wrong, he would also have established a fortiori the transplantation of corneas from living donors is wrong. Without some such explanation, we must allow that neither Pius XII nor his proofreaders noticed that he said he was not going to address a subject and then did.

This is what he said:

> It is argued that, if it is permitted, when necessary, to sacrifice a particular member (hand, foot, eye, ear, kidney, sexual gland) to the organism of "the man," it should likewise be permitted to sacrifice a particular member to the organism "humanity" (in the person of one of its members who is sick and suffering). The purpose visualized by this manner of argumentation, to heal, or at least to soothe the ailments of others, is understandable and praiseworthy, but the method proposed and the argument on which it is based are erroneous. The essential difference between a physical organism and a moral organism is neglected, as is also the essential qualitative difference between the relation of the parts to the whole in these two types of organism.
>
> The physical organism of "the man" is one complete whole in its being. The members are parts united and bound together in their very physical essence. They are so absorbed by the whole that they possess no independence. They exist only for the sake of the organism and have no other end than that of the total organism.[94]

In the above paragraph, I believe Pius XII is clearly indicating his disapproval of LOT, in denying that the desire to soothe the ailments of others (the principle of charity?) justifies LOT. Note that Pius explicitly mentions donation of kidneys as an action that is not morally permissible—the only form of LOT that was possible at the time. His argument is clear. Pius notes that some forms of mutilation are permissible—the sacrifice of a hand or kidney for example to protect the good of the individual man; the principle of totality permits such. But he denies that any part of a human being—and here he is clearly meaning a hand or a kidney, for example—can be sacrificed for the well-being of someone else, to a suffering person who is a

93. Kelly, "Notes on Moral Theology," *Theological Studies* 4, no. 24 (1963): 629.
94. Pope Pius XII, "Tissue Transplantation," 375.

member of the whole of "humanity." Moreover, in this address, Pius even included some seemingly tangential references to his encyclical *The Mystical Body of Christ*, which had been used by Cunningham to justify organ transplants. These remarks by Pius XII may not have been so tangential; they may have been meant to signal that Pius XII did not think his encyclical could be used to justify LOT.

I believe Kelly, along with some of his contemporaries, was engaging in selective reading in dismissing Pius XII's statements in 1956 that seemed to rule out LOT.[95] Certainly, others saw a condemnation of LOT in the 1956 address; indeed, in the same volume of *Theological Studies*, J. R. Connery, S.J., acknowledged that in his 1956 address, Pius XII addressed the issue of LOT in what appears to be a "condemnation of it."[96] Nonetheless, he diminished the authority of the statement by observing that he did not think the Holy Father would settle an important dispute in comments made in an "in passing" fashion. Pius XII, however, may not have thought he was addressing the issue in an "in passing" fashion: he may have thought he was simply reiterating a point. Connery also noted that the reality of organ transplants was still not truly practical and that a decision would be premature. Again, Pius XII may not have thought a decision was premature; he made his argument based on what he thought was a solid immutable principle.

The Practice of Catholic Hospitals

LOT was approved and practiced in U.S. Catholic hospitals even while Pius XII was speaking against it. The first "Ethical and Religious Directives for Catholic Hospitals" were drawn up in 1948, revised in 1955, and again revised in 1971; all of them approved of LOT.[97] It is reasonable to ask by what process the U.S. bishops arrived at this conclusion and for what reason. So far as I can determine, there was no official magisterial approval given to

95. See, for instance, Connell, "The Pope's Teaching on Organic Transplantation": "Beyond doubt, there is a general feeling that it is a noble deed to give a fellow man a portion of our body, and that the Pope does not wish to declare such a practice sinful until it is evident that no good argument in its support can be produced" (169).

96. J. R. Connery, "Notes on Moral Theology," *Theological Studies* 17 (1956): 549–83, at 559–60.

97. "Ethical and Religious Directives for Catholic Health Facilities," in *Pastoral Letters of the United States Catholic Bishops*, vol. 3 (1962–74) (Washington, D.C.: National Conference of Catholic Bishops, United States Catholic Conference, 1983), 279.

LOT during that period. (As mentioned earlier, I believe the first magisterial approval of LOT was given by John Paul II in 1984.)

It is reasonable to think that Kelly was the person responsible for the acceptance of LOT by Catholic hospitals. For good reason, he has been called the "most influential American Catholic medical ethicist" of the 1950s.[98] He reportedly referred to his own career as "The Life of a Moralist during the Reign of Pius XII."[99] His influence was not confined to being the one who assessed the quality of the arguments pro and con in the pages of *Theological Studies*—which might be said to be the power of the person who writes the minutes. As the chairman of the committee established by the Catholic Health Association to draw up a set of directives for Catholic hospitals and the author of a series of pamphlets that were a commentary on the directives and were published with the directives, it seems fair to conclude that Kelly was the driving force behind those directives.[100]

A version of the directives dated 1949 states: "Ordinarily the proportionate good that justifies a directly mutilating procedure must be the welfare of the patient himself. However, such things as blood transfusions and skin grafts are permitted for the good of others. Whether this principle of 'helping the neighbor' can justify organ transplantation is now a matter of discussion. Physicians are asked to present practical cases for solution if such cases exist."[101] In one of his pamphlets commenting on this directive, Kelly addresses the question of the morality of LOT. There the bulk of his discussion revolves around Cunningham's dissertation,[102] of which he speaks approvingly, but he notes it is difficult to square Cunningham's

98. David F. Kelly, *The Emergence of Roman Catholic Medical Ethics in North America* (New York: Edwin Mellen Press, 1979), 170. For more about Kelly's influence, see Orville N. Griese, *Catholic Identity in Health Care: Principles and Practice* (Braintree, Mass.: The Pope John Center, 1987), 8–9.

99. Edwin L. Lisson, S.J., *The Historical Context and Sources of Moral Theology in the Writings of Gerald A. Kelly, S.J.* (Rome: Pontificia Universitate Gregoriana, 1975), 16.

100. The first publication I could find was first copyrighted in 1948–49; Kelly, *Medico-Moral Problems* (1954, seventh printing). It was printed twice in 1949 and yearly until 1954. Various versions of this volume were clearly published at different times.

101. This 1948 code is printed at the end of the *Medico-Moral Problems,* 1954, and this passage appears on page 7 of the code. The 1955 version of the code (identical on this point to the 1948 code) can be found in McFadden, *Medical Ethics,* 444. For the 1971 code, ibid., 279.

102. Oddly he gives an example that he says is based on Cunningham's dissertation. I did not find this example in Cunningham's dissertation; he gives the example of ovarian transplantation to treat infertility. Cunningham's dissertation speaks only of ovarian transplantation to treat various physical and mental problems resulting from hormonal imbalance. Kelly, *Medico-Moral Problems*, part 3, 22.

conclusion with Pius XI's invoking of the principle of finality in *Casti Connubii*.[103] At this point, Kelly still acknowledges that the morality of LOT is an open question but calls Cunningham's thesis "practically probable."[104]

In the 1957 edition of *Medico-Moral Problems,* Kelly speaks of the goodness of LOT being instinctively obvious. He continues to acknowledge that LOT cannot be justified by means of the principle of totality. What is curious is that he does not reference the principle of finality; earlier he had spoken of it as the crux of the argument. In this edition he neither mentions the principle of finality nor shows what arguments have been made against it. Instead, he states: "As long as the controversy is not settled in favor of those who object to organic transplantation, homografts of this kind [kidney transplants] should be permitted, provided that they are not contrary to good medicine."[105] In the next edition of his *Medico-Moral Problems* in 1958, Kelly again speaks of the goodness of LOT as being not only morally justified but as heroic. He notes that "renal transplantation is a perfect example of the kind of organic transplantation about which there is theological controversy. It involves the sacrifice of a complete and important organ and it is solely for the benefit of the recipient. As long as the controversy is not settled in favor of those who object to organic transplantation, homografts of this kind should be permitted, provided that they are not contrary to good medicine."[106] He does not identify any of the objections against LOT.

In the 1968 edition of his book *Medical Ethics,* Charles J. McFadden, O.S.A., made a distinction that moralists latched on to, the distinction between anatomical integrity and functional integrity; he explained that donations and procedures that merely compromised anatomical integrity (such as the removal of a healthy appendix or the donation of a kidney) are morally permissible because they do not violate functional integrity.[107] That terminology shows up in the 1971 Ethical and Religious Directives:

103. Kelly, *Medico-Moral Problems,* mentions a solution proposed by Edwin F. Healy, S.J., that never seems to have gotten much traction: Healy argued that the possibility of organ transplantation was not taken into account when the principles of finality were articulated; he claims that since organs are not destroyed in the process of organ transplantation, therefore they are not mutilated; ibid., part II, 22, citing Edwin F. Healy, S.J., *Teacher's Manual for Moral Guidance* (Chicago: Loyola University Press) [no date or page given].

104. Kelly, *Medico-Moral Problems,* part III, 25.

105. Kelly, *Medico-Moral Problems,* (1957) 252.

106. Ibid.

107. McFadden, *Medical Ethics,* 289–90.

30. The transplantation of organs from living donors is morally permissible when the anticipated benefit to the recipient is proportionate to the harm done to the donor, provided that the loss of such organs does not deprive the donor of life itself nor of the functional integrity of this body.[108]

The statement in respect to LOT in the 2001 Ethical and Religious Directives is very similar:

30. The transplantation of organs from living donors is morally permissible when such a donation will not sacrifice or seriously impair any essential bodily function and the anticipated benefit to the recipient is proportionate to the harm done to the donor. Furthermore, the freedom of the prospective donor must be respected, and economic advantages should not accrue to the donor.[109]

Note that nothing is said in these directives about *why* LOT is morally permissible. A failure to provide an explanation is unsettling for those who know the history of the debate. Indeed, scholars are still debating which principle permits LOT; as we saw, Cunningham argued for a principle of charity. Augustine Regan, C.S.S.R. argued for an expanded understanding of the principle of totality.[110] Martin Nolan, O.S.A. argued for employment of the principle of totality in a proportionalist fashion.[111] Father Orville Griese speaks of the principle of the common good.[112] Germain Grisez gives fairly minimal treatment to the issue and speaks of "Christian mercy," which may perhaps create an *obligation* to donate in certain circumstances.[113] One recent article has appeared that raises serious misgivings about LOT: Father Stephen Torraco notes that *Veritatis Splendor* 80 cites

108. "Ethical and Religious Directives for Catholic Health Facilities," 279.

109. United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 4th ed., 2001; http://www.usccb.org/bishops/directives.shtml#parttwo.

110. Augustine Regan, C.SS.R., "Basic Morality of Organic Transplants between Living Human Beings," *Studia Moralia* 3 (1965): 320–61; and "Man's Administration of His Bodily Life and Members, the Principle of Totality, and Organic Transplants between Living Humans," *Studia Moralia* 5 (1967): 179–200. Ramsey, *Patient as Person*, raises some important concerns about the principle of totality being used to justify LOT; he is concerned about pressure put on individuals to donate their organs (169–75).

111. Martin Nolan, "The Positive Doctrine of Pope Pius XII on the Principle of Totality," *The Augustinianum* (March 1963): 28–44. Ramsey critiques Nolan in *Patient as Person*, 178–79.

112. Griese, *Catholic Identity in Health Care*, 318. Surprisingly Griese does not mention the problems presented by the principle of finality.

113. Germain Grisez, *Living a Christian Life*. Vol. 2 of *The Way of the Lord Jesus* (Quincy, Ill.: Franciscan Press, 1993), 543.

Gaudium et Spes, which includes "mutilation" among the list of intrinsically evil actions. Torraco argues against the distinction between anatomical and functional integrity and believes that distinction does not serve to overcome objections based on the principle of totality.[114] But Torraco's is a lone voice.

Unanticipated Problems

In spite of the current enthusiasm for LOT, I believe some moral dimensions of LOT have not been sufficiently explored by Catholic theologians. There is no evidence that those who argued for the morality of LOT during the pontificate of Pius XII anticipated the magnitude of problems that have arisen from the types of organ transplants that have become possible, problems such as trafficking in organs, pressure put on individuals to donate, the push for a brain death criteria to ensure a greater supply of organs, the drive to declare some individuals less than persons so that we could take their organs, and cloning as a source of organs.[115] Leon Kass's 1992 article against permitting the sale of organs provides a thoughtful reflection on the phenomenon of organ transplants that should provide a useful basis for a full ethical consideration.[116] Many questions have been left unasked and unanswered: for instance, who should give what organ to whom for what reasons? Are some donors putting themselves at undue risk and thus endangering the fulfillment of their duties to their own loved ones, current or potential? I believe a Church document laying out the principles behind the approval of LOT and addressing many of the collateral issues is long overdue and would be very beneficial. And perhaps even then the issue would not be closed; we may simply not have enough experience with all facets of the practice that we can with full confidence assert that we have discovered the morality of all the dimensions of LOT.

114. Stephen Torraco, "*Veritatis Splendor* and the Ethics of Organ Transplants," *Linacre Quarterly* 64 (1997): 52–57.

115. The literature on the experience of LOT is extensive and not all of it enthusiastic. Some representative treatments are Lesley A. Sharp, *Strange Harvest: Organ Transplants, Denatured Bodies and the Transformed Self* (Berkeley: University of California Press, 2006); Ronald A. Munson, *Raising the Dead: Organ Transplants, Ethics, and Society* (Oxford: Oxford University Press, 2002); Renee C. Fox and Judith Swazey, *Spare Parts* (Oxford: Oxford University Press, 1992); and Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge: Cambridge University Press, 2006).

116. Leon R. Kass, "Organs for Sale? Propriety, Property, and the Price of Progress," *The Public Interest* 197 (Spring 1992): 65–86.

In a time of rapidly proliferating new bioethics issues, this exercise in tracing the path of the approval of LOT should be instructive for bioethicists and perhaps the Holy See as well. It demonstrates the wisdom of flexibility on the part of the Holy See and persistence on the part of theologians. (Other stories may demonstrate the need for docility on the part of theologians and persistence on the part of the Holy See!) The difficulties of pronouncing on the morality of new medical practices are profound. It certainly is not as simple as finding some heretofore articulated moral principle and then simply applying it to the new procedure. Principles articulated to deal with one issue may not be formulated with sufficient precision and nuance to deal with new practices. Indeed, perhaps it is too much to expect that in every instance popes will manage to reason to the correct decision in their initial judgments of the morality of various procedures.

Engaging the Magisterium

I believe we can learn from Kelly on how to engage non-definitive teachings. Kelly's principles for engagement of non-definitive pontifical teachings remain useful: (1) careful attention must be made to the precise words used by the Holy Father; (2) consideration must be given to the context in which the judgments are made and delivered; and (3) care must be taken to discern if the Holy Father intended to terminate discussion of an issue. I also believe attentiveness to judgments made in respect to analogous issues proves helpful, as does attentiveness to the intuitions of laity and health-care professionals. And I believe that, when a significant number of faithful moral theologians (the faithful would perhaps be those who have taken the Oath of Fidelity) argue for or against the morality of a procedure or treatment, their views also deserve respectful consideration by other theologians and the Holy See as well.

Flexibility in moral teaching is undeniably unsettling. I certainly do not mean to suggest that it is not possible to make a definitive statement about complicated matters. Nor am I suggesting that the Holy See should not attempt to provide answers to pressing bioethical issues. When new and problematic issues arise, the faithful need guidance. Many think the Holy See has responded too slowly about some matters. Others think it has responded too quickly in light of the complexity of the issues. Certainly there is much evidence that modern pontiffs try not to make hasty judgments; rather they make abundant use of the assistance of experts. There

exist, for instance, a significant number of pontifical councils and academies designed to provide theologians and the Holy Father with the most scientific evidence and sound philosophical and theological reasoning about complex and controverted issues. Theologians must respectfully offer their evaluations of the principles and reasoning that lead pontiffs to their judgments and trust in the Holy Spirit to guide the process to a resolution in truth.

The contours of the debate about the morality of LOT suggest how theologians may serve the Church in assessing various bioethical issues. Certainly some will take the above narrative to justify the practice of dissent and even outright disobedience to directives from the Holy See. That would be very regrettable. I believe it would also be regrettable if the Holy See out of fear of losing stature as authoritative teacher ceased issuing directives because those directives may need later to be adjusted or even reversed. Perhaps we should not be surprised if more accurate scientific information, clearer thinking, and more experience would shed such new light on issues that a reevaluation of initial pronouncements would be required. I believe theologians could now do the Church a great service were we to try to articulate what kind of adherence is appropriate for non-definitive teachings on new and challenging medical matters.