

DHHS's "Right of Conscience" Regulation

On December 18, 2008, the U.S. Department of Health and Human Services (DHHS) issued a "right of conscience" regulation that took effect on January 19, 2009. The rule, intended to reinforce and reaffirm existing federal laws on the books since the 1970s, prohibits recipients of certain federal funds from coercing health care providers into participating in actions they deem morally or religiously objectionable. A portion of the rule reads: "The ability of patients to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule. Instead, this rule implements federal laws protecting health care workers and institutions from being compelled to participate in or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the department." Then Secretary of Health and Human Services, Michael Leavitt said, "This rule protects the right of medical providers to care for their patients in accord with their conscience." Recipients of funds from DHHS are required to certify their compliance with the rule in writing by October 2009. Non-compliance will result in having funding cut off or being required to return funding already received.

The rule has been opposed by numerous groups including the American Hospital Association, the American Medical Association, and the American College of Obstetricians and Gynecologists. Those opposing the regulation claim that it will create a major obstacle to a variety of services including abortion, family planning, end-of-life care and, possibly, some scientific research. Some believe the rule will be particularly burdensome on low-income women whose provider options are limited. Others predict "chaos" among providers across the country, especially among family planning centers and fertility clinics, and that it could affect states' enforcement of legislation requiring all hospitals to provide emergency contraception. The next six to twelve months should provide some indication as to whether these fears materialize. Even some supporters of the rule, however, have concerns about who and what are covered by it. Could it be interpreted too broadly to include too many and too much for reasons that fall short of the intended ones?

Supported by CHA, the new rule is an important affirmation of the right of all individuals to follow their conscience. The right of conscience is an essential component of respect for human dignity.

While this rule rightly affirms the right of conscience, it also brings to the forefront a number of challenging questions. Among them are the following:

- What are the *professional obligations* of health care providers to individuals who come to them seeking legal services that the provider believes to be immoral? How ought such providers respond?
- How do health care providers exercising their right of conscience respect the conscience of those with whom they disagree?
- Do health care providers have an obligation to their patients to present them the full range of viable options, even though the provider might object to one or more of these options on moral grounds? If not, what does that do to informed consent?

It should also be noted that the regulation prohibits discrimination against health care providers who choose to participate in lawful health services. The rule reads: "It also implements the provisions of federal law which protect health care personnel from being discriminated against for their participation in any lawful health service or research activity, including abortion and sterilization, by entities that receive certain funding from the Department." This does not apply within a particular institution that prohibits the performance of certain procedures or research, but it does seem to apply to health care professionals engaged in such activities outside the institution, for example, a physician with privileges at a Catholic hospital also working at an abortion

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clinic. The protection of conscience cuts both ways—it protects against coercion in activities that violate one's conscience and also protects against discrimination when one does participate in activities in accord with one's conscience that some judge to be immoral.

This could pose a challenge for Catholic health care organizations. An additional consideration for Catholic health care facilities and health care professionals working in them—full disclosure. Patients need to know from the outset what the facility/health pro-

fessional will not do. It would seem prudent for Catholic health care organizations to discuss these and other ethical issues coming to the fore as a result of the rule, if they haven't already. ■

Update on Brain Death

In the last issue of *HCEUSA*, an entry in this section noted challenges from various sectors to the adequacy of "brain death" as a legitimate definition of death. Shortly after the publication of the Fall 2008 issue, a conference on organ transplantation was held at the Vatican (November 6-8, 2008) sponsored by the Pontifical Academy for Life, the International Federation of Catholic Medical Associations, and the Italian National Transplant Center. In September, the head of American Life League, who is a member of the Academy, as well as other members of the Academy, requested that the conference be postponed until members of the Academy could discuss it privately. There was concern among these individuals that the conference was not addressing brain death or other death determining criteria. The conference went ahead as planned, and with no scheduled sessions on brain death.

Judie Brown of the American Life League and others believe that brain death criteria are simply a means for obtaining organs from living patients.

Dr. Paul Byrne of St. Vincent's Medical Center in Bridgeport, Connecticut wrote in a book last year that "life and true death cannot and do not exist at the same time in the same person." He went on to say that persons on ventilators have "normal respiration, a beating heart and normal blood pressure. This is quite different from true death manifested by: no breathing, no heartbeat and no reflexes. Therefore, 'brain death' is simply an error; 'brain death' is false death."

In his address to participants in the international Congress, Pope Benedict XVI referred to organ donation as "a unique testimony of charity." He went on to underscore the critical nature of informed consent in order to preserve organ donation as a "gift." Regarding the determination of death, the Pope said: "[I]t is useful to remember that the various vital organs can only be extracted 'ex cadavere' [from a dead body], which possesses its own dignity and should be respected. Over recent years science has made further progress in ascertaining the death of a patient. It is good, then, that the achieved results

receive the consensus of the entire scientific community in favor of looking for solutions that give everyone certainty. In an environment such as this, the minimum suspicion of arbitrariness is not allowed, and where total certainty has not been reached, the principle of caution should prevail" (*A Unique Testimony of Charity*, http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/november/documents/hf_ben-xvi_spe_20081107_acdlife_en.html). While still a cardinal, the Pope himself registered with an organ donor association.

(**N.B.** James DuBois, Ph.D., director of the Center for Health Care Ethics at Saint Louis University, published an article in the February 2, 2009 issue of *America* on the issue of "Brain Death and Organ Donation," touching on many of the issues noted above).

Vatican Instruction on Bioethics, *Dignitas Personae*

What is this new document on bioethics that has just been released by the Congregation for the Doctrine of the Faith and why was it written?

The Congregation for the Doctrine of the Faith (CDF) has responsibility for addressing issues of faith and morals. Because of the ethical issues associated with emerging reproductive technologies, the CDF issued a document in 1987 called *Donum Vitae* (“The Gift of Life”) to offer guidance with regard to these technological developments. In the 20 plus years since that document was published, medical science has advanced, presenting new and ever-challenging situations.

This new and long-awaited document, called *Dignitas Personae* (“The Dignity of the Person”), is essentially an update of *Donum Vitae* (DV) and considers new developments in science and medicine in light of the church’s commitment to promoting and protecting human life and dignity.

What topics are covered in the document?

After a more theoretical section discussing relevant moral principles (these principles themselves have already been articulated elsewhere, for example DV itself), the document looks to two general areas, “new problems concerning procreation” (Part Two) and “new treatments which involve the manipulation of the embryo or the human genetic patrimony” (Part Three).

Regarding the area of procreation, after a reiteration of the principles articulated in DV the document addresses five areas: (1) intracytoplasmic sperm injection (the injection into the oocyte either of a single sperm or of immature germ cells), (2) freezing embryos, (3) embryo reduction, (4) preimplantation diagnosis, and (5) new forms of what the CDF calls interception (techniques that impede implantation) and contragestation (techniques that abort a recently implanted embryo). A continual emphasis in this section is the dignity and right to life of the embryo. This section ends with a series of paragraphs reiterating the embryo’s right to life and insisting that “all techniques of in vitro fertilization proceed as if the human embryo were simply a mass of cells to be used, selected and discarded” (§14).

The last section of the document deals with genetics and the manipulation of the human embryo. This section concentrates on five areas: (1) somatic and germ line gene therapy, (2) reproductive and therapeutic human cloning, (3) stem cell therapies, (4) attempts at human-animal hybrid cloning, and (5) a long section on the use of biological materials of illicit origin (e.g. vaccines developed from germ lines that themselves were developed by killing embryos).

Is there anything new in the document?

On the one hand, there is very little that is actually new in the document. It repeats the principles already articulated in DV (see §1). The document also indicates that in much of what it says the CDF has relied on previous analysis by the Pontifical Academy for Life, papal encyclicals (especially *Evangelium Vitae*) and other interventions by the Magisterium (see §2). Its value is not in the fact that it is saying something new but rather in the context it provides for addressing issues that have arisen since the publication of DV.

Having said this, it is still important to look at the CDF’s treatment of several of the issues. In Part Two, for example, although the document acknowledges its dependence upon DV’s moral analysis based upon the principles of respect for life, respect for the integrity of marriage and family, and respect for the integrity of the marriage act (see for example §6), most of its actual ethical analysis concentrates on the first of these principles, the respect for life. This does not reflect a lessening of the Catholic Church’s commitment to the other of these principles but rather the nature of the topics treated. The dignity of the human person from conception to natural death governs the CDF’s treatment of every issue addressed in Part Two. This principle is also behind the CDF’s proscription against (1) preimplantation diagnosis, since the immediate effect of such

diagnosis is the destruction of an embryo suspected of having some quality that is not wanted (§22) and (2) the freezing of oocytes, because the only purpose for such freezing would be their use in the process of in vitro fertilization (§20). The principle of respect for life also informs the CDF's analysis of those methods of birth control that impede fertilization.

In this section, possibly the only item that might be called "new" is in §19, where the document discusses frozen embryos already in existence. Having stated that using embryos for research and for implantation into infertile couples are both morally unacceptable, it takes up the topic of embryo adoption and concludes that, although the intention may be morally praiseworthy it "presents however various problems not dissimilar to those mentioned above." This paragraph concludes with the acknowledgement that "abandoned embryos represent a situation of injustice which in fact cannot be resolved."

Comments in §23 may raise some questions about Directive 36. The paragraph states that "anyone who seeks to prevent the implantation of an embryo which may possibly have been conceived and who therefore either requests or prescribes such a pharmaceutical, generally intends abortion." The Catholic Health Association supports this judgment. It also believes that implementation of Directive 36 of the *Ethical and Religious Directives* remains unchanged.* Plan B, the medication of choice for emergency

contraception, does not appear to have a post-fertilization effect, given the results of repeated scientific studies.

Respect for human life and dignity is also the controlling principle in Part Three. Several topics here might be considered new in that they are discussed more explicitly here than in other documents. The CDF prohibits germ cell therapy "in the present state of research" (§26), warns against the dangers of genetic enhancement (§27), cautions against new techniques for producing embryonic stem cells such as parthenogenesis, altered nuclear transfer, and oocyte assisted reprogramming (§30), prohibits hybrid cloning using animal oocytes for reprogramming the nuclei of human somatic cells (§33), and concludes that it is morally illicit for researchers to employ cell lines or tissues derived by immoral means (e.g., destruction of embryos or aborted fetuses) even if others were responsible for the illicit derivation. It rejects the "criterion of independence," that is, the distance between the researcher and those who unethically obtained the cells or tissues. It does not, however, condemn the use of vaccines made from such tissues if there is a grave reason (§34-35).

Who will be affected by this document?

As the CDF states in the Introduction, the document is aimed at "the Catholic faithful and to all who seek the truth."

Because of the content of the document, those most likely to be affected are Catholic couples and clinicians especially fertility specialists and geneticists, as well as researchers.

The document is unlikely to have much of an impact on Catholic hospitals because these hospitals do not employ the procedures addressed in the document.

Why does the Church involve itself in scientific matters?

The document does not pretend to be science. It rather defends an ethical perspective. On the one hand, the document does consider "science an invaluable service to the integral good of the life and dignity of every human being" (§3). On the other hand, however, the CDF places these technical issues into a larger human context. The document describes its task as drawing upon "the light both of reason and of faith and seek[ing] to set forth an integral vision" of the human person (§3) by means of which one can make moral decisions regarding these issues.

*Bishop Lori, chair of the USCCB's Committee on Doctrine, and Richard Doerflinger, associate director of the USCCB's Committee on Pro-Life Activities, have commented publicly that they do not believe that par. 23 refers to Plan B.