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# SELECT STATE AND LEGISLATIVE DEVELOPMENTS

HOWARD J. FETTERHOFF†

The presentation we submitted to the USCC for this program is testimony that we presented to the Pennsylvania General Assembly in this last session in support of the Uniform Determination of Death Act which is now the law in Pennsylvania. But rather than give a verbatim presentation of the material, I thought I would just do the following. First, to give some background on the political dynamics which led to the introduction and the passage of the Uniform Determination of Death Act in Pennsylvania and, then, give highlights of some of the major concerns that the bishops of Pennsylvania had to resolve before supporting this legislation.

I want to acknowledge that although brain death legislation has now passed in about 30 states, and in several of those states with the support of Catholic Conferences, it is still quite a controversial issue both within the Church and within the pro-life movement. The latest evidence of this is the April 21, 1983 news release from USCC headlined "Pro-Life Committee Affirms Opposition to Definition of Death Legislation." Now, that happened after we had planned to give this presentation, so, I am not here as an adversary of the Bishop's pro-life committee. In fact, however, we have a different position in Pennsylvania than that recently taken by this committee.

Regarding the political dynamics which led to the introduction and passage of this legislation early in the previous session of the Pennsylvania General Assembly which began in 1981, the Pennsylvania Department of Health, the Pennsylvania Medical Society, and the Hospital Association of Pennsylvania, including Catholic Hospitals, expressed interest in passing a determination of death statute in our state. But the legislative leaders, fearing that it would be another divisive issue like abortion, said they wouldn't touch it unless they were sure that the Pennsylvania Catholic Conference would not oppose it. So, we were invited by the Depart-

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† Executive Director, Pennsylvania Catholic Conference.

ment of Health to sit down with the Committee made up of members of the hospital association, the medical society, the transplant teams and others to see whether we could come to some agreement over legislation of this kind.

The bishops gave permission for this participation on our part without committing themselves in advance to supporting whatever legislation might come out of this committee. One of the main reasons that they accepted the invitation was that they felt somebody should be there looking at how this legislation would affect the patients whose diagnoses would occasionally come under this kind of law. Since the hospitals and the medical society and others might have a kind of professional outlook on this in terms of the impact of the law on themselves, the bishops wanted to be sure of its impact regarding the protection of the lives of patients. So we did participate in that committee.

Now, after most of 1981 when the committee was doing its work and the bishops were doing their research and their consultation, it happened that in November of 1981 the bishops of Pennsylvania announced their support for the Uniform Determination of Death Act in Pennsylvania. The committee had selected that act which had just been agreed upon by the President's Commission on Bio-Ethics.

These are the dynamics which led to the introduction and passage of this legislation. I want to make it clear that the bishops were not under pressure from anyone to accept this legislation and had they not accepted it, had they not for their own reasons seen some good in it, we could have opposed it and stopped it. It was not a question of feeling that, well, this is the best we could do and we've got to give in. We could have stopped it but our bishops did not feel it was right to stop it because they saw more good in it than harm.

Pennsylvania's bishops dealt with the key issues in broad consultation with pro-life physicians and medical moralists around the country. The most adamant and formidable opponents of the Uniform Determination of Death Act base their opposition on medical and moral grounds more than on legislative grounds. For example, they are convinced that the diagnostic criteria for determining death on the basis of irreversible cessation of all brain functions, including the brain stem, are unreliable, that you cannot be sure that a person is dead when you are using these diagnostic criteria. In addition, they contend that even if the diagnostic criteria were reliable, that is, even if doctors knew for sure that all brain functions had ceased irreversibly, you still could not be sure that the patient had died. Now, a corollary of this second problem that opponents of this legislation see is that they contend that destruction of the brain and indeed destruction of the respiratory and circulatory systems as well must be ascertained before death can be determined. These were the crucial issues, as far as the bishops were concerned, which they had to resolve in

their own minds before they could support the legislation.

I will not recite all the details of the research and consultation undertaken, but they concluded that there is confidence among pro-life doctors, among hospital staffs, including Catholic hospital staffs, and among medical moralists that these diagnostic criteria when applied conscientiously do lead to reliable conclusions that death has occurred. Second, once the medical profession was able to assure them of this, there seemed to be no moral question left about whether or not the person was dead. Irreversible cessation of *all* functions of the brain is acceptable to the Pennsylvania bishops as death.

The most crucial area that affects morality in this kind of diagnosis and this kind of public policy is how it impacts on transplants. Even the opponents of brain death legislation and the brain death diagnostic criteria are not opposed to termination of treatment when a person has been pronounced dead on this basis. What they are opposed to is the removal of vital organs while the respiration and circulation is being continued by artificial means. However, *if there is certitude that death has occurred on the basis of brain function criteria* even though the heart might be beating with the help of artificial means, there is no moral objection to the removal of vital organs.

Having determined from this consultation and research that both the medical and moral dimensions behind uniform determination of death legislation are sound, our bishops concluded that there is much to be gained in terms of protecting human life from a clear legislative standard for determining death. The bishops base this conclusion on several factors. First, the Church and pro-life organizations have much more influence in legislatures than we do in the courts. Our problem with the pro-life issue and aid to schools and all of the crucial issues that we are wrestling with give us much more trouble in courts than they do in legislatures.

Second, preventing legislatures from enacting clear and restrictive statutes which insist on total and irreversible cessation of all brain functions only leaves a public policy vacuum which the judiciary is only too happy to fill. As Congressman Rodino said, one of the reasons the judiciary has to develop public policy is that legislatures fail to act. We did not think we should prevent the Pennsylvania legislature from acting on this issue.

One last little anecdote that dramatized for me the value of supporting this legislation. One of the Senators from Pennsylvania who is a very articulate and emphatic advocate of abortion said in evaluating her position on this legislation, "The pro-life people are always trying to get us to legislate when life begins. Well, I'm not going to do that and I'm not going to legislate when it ends either." When she said that it occurred to me that she had an insight there, whether she knew it or not, that showed a

little bit of inconsistency on our part for resisting drawing a clear line at the end of life. By erasing the line at the beginning of life the Supreme Court opened the door to abortion on demand. It was not the pro-life movement or the Church's philosophy that benefited when the Supreme Court said you cannot tell when life begins as a matter of public policy, and it is not going to be the pro-life movement either that benefits from keeping the line at the end of life vague, once you have sufficient confidence that you can draw the line with medical and moral certitude.

So in our opinion, if the policies in this country acknowledge evidence of vital functions from conception until death, and also acknowledge that as long as vital functions are present in a living human being protection of life should be continued, we cannot but benefit. That is why we say in our testimony that a well-drawn determination of death statute can be just one part of a comprehensive pro-life policy. A Determination of Death Statute in itself will not prevent euthanasia, but it will prevent people who would like to see death declared on much lower standards by the ones who develop public policy.

## Appendix

### OBSERVATIONS ON THE UNIFORM DETERMINATION OF DEATH ACT

The key words of the Uniform Determination of Death Act as passed in Pennsylvania last year are:

ONLY an individual who has sustained either

- 1) irreversible cessation of circulatory and respiratory functions; or
- 2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.

A determination of death must be made in accordance with accepted medical standards.

We had the word ONLY added at the beginning of the language developed by the President's Commission on Bio-ethics to make it crystal clear that no other standards besides the two spelled out in the Act would qualify for determining death in Pennsylvania.

After studying this issue for most of 1981 and 1982, the Pennsylvania Catholic Conference came to three general conclusions:

- 1) Determination of death is no longer a mere clinical issue, but one which calls for a clear public policy;
- 2) The best place to develop public policy on the determination of death is in the *legislative* branch of government;
- 3) The Uniform Determination of Death Act is sound public policy on three important levels: medical, moral, and legal.

In the testimony presented to the House Health and Welfare Committee of the Pennsylvania Legislature on June 29, 1982, we elaborated on these conclusions as follows:

1) *Determination of death is more than a clinical diagnosis of individual deaths.* Today, because of advances in medical technology, but even more so because of deep divisions in American society over the meaning and value of human life, it is a public policy issue of the first magnitude. There is no question about whether our nation will have a public policy on this issue. There is some question, however, about which branch of the government will play the primary role, and on which philosophy of human life it will be based.

2) *The divisions in society over the value of human life stem from two competing philosophies or ethics.* One we call the *Sanctity of Life Ethic*, which holds that all human life, from its beginning to its end, is *sacred* and must be valued and protected by a civilized society, regardless of its condition or quality. The other we can call the *Quality of Life Ethic*, which holds that the value of human life *varies* depending upon its condition or quality. According to this philosophy, the very young or the very old, those dependent upon others, or those hopelessly ill, in short,

those human lives which are a burden to themselves or others, may be deprived of membership among the living because they lack the necessary *quality*. Obviously, the Catholic Church throughout the world urges public policymakers to make policy on life and death according to the first of these competing ethics, the Sanctity of Life Ethic.

3) *The Uniform Determination of Death Act* accords with the Sanctity of Life Ethic because it sets the delineation of life's end at the point where the sacred gift of life ends *naturally*, not at some earlier point when health or consciousness is fading or even permanently lost, and when vital functions persist unaided by technology.

In other words, by explicitly setting the irreversible cessation of circulatory and respiratory functions, or the irreversible cessation of all functions of the entire brain, as the standard for determining death, it rules out lesser standards, such as *irreversible coma*, which can occur in a person who is still alive.

4) *The major elements of the Uniform Determination of Death Act* are contained in all 30 states which have enacted statutes of this kind, and have been recognized in court decisions as well. However, in states where there is no determination of death statutes, the policy will evolve in court cases. Those of us who want to make sure that *total and irreversible* cessation of brain functions remains the standard can rely more on legislatures than on the courts to establish the safest, most restrictive, and most life-protecting policy on the determination of death.

5) *The Uniform Determination of Death Act* protects all concerned, especially the patient, by making sure that no one is pronounced dead unless that individual really is *dead*. Thus, under this Act, no one's vital organs may be removed for transplanting or research *until the person is dead*. Physicians who are negligent in applying the diagnostic criteria for determining that all brain functions have ceased *totally and irreversibly* will be in violation of this law with all that such a violation would entail.

The fact that some physicians and health care providers support this legislation because it gives legal recognition to determining death according to brain-related criteria is not in itself a bad reason, but for us the most important reason is that it protects the patient against less demanding standards for determining death.

6) *The medical component* in determination of death legislation is the most important and has received the most study by our Conference. *Only if* the criteria for diagnosing the irreversible cessation of all brain functions are reliable, *only if* individuals whose brain functioning has ceased totally and irreversibly *are dead*, would it be *moral* to permit this diagnosis in hospitals or to work for the passage of the Uniform Determination of Death Act. Consultation with innumerable physicians, especially those specializing in neurology or neurosurgery, has assured us that the diagnostic criteria upon which the UDDA is based are reliable beyond

any reasonable doubt. For example:

\* A team of two physicians at Holy Spirit Hospital near Harrisburg, Pennsylvania, after six weeks of researching the major medical literature on brain-related criteria for diagnosing death during February and March of 1982, assured us of their strengthened confidence in this diagnosis, and of their support for the UDDA.

\* A conversation with Dr. C. Everett Koop, Surgeon General of the United States, during April, 1982, led to the same conclusion: the diagnosis is sound and so is the proposed legislation.

\* Conversations with *several* neurologists in succeeding weeks reiterated the reliability of the diagnosis.

\* A survey of all of the Catholic hospitals in Philadelphia and Pittsburgh revealed that most of them have established the necessary protocol to determine death on the basis of total and irreversible cessation of all brain functions; that each of them considers the diagnosis perfectly safe for the patient which is the primary concern; and that most of the administrators and the medical staffs involved support this legislation.

Obviously, long before the Catholic Bishops of Pennsylvania decided to endorse the Uniform Determination of Death Act, they had to be sure that determining death according to brain-related diagnostic criteria complied with the Sanctity of Life Ethic and the patient's right to life before they could allow this diagnostic procedure in the Catholic hospitals of this state.

7) *We have no fear whatsoever that the Uniform Determination of Death Act will lead to euthanasia. Not only do we support its passage now, but we will oppose any efforts to weaken it by amendment in the future. As long as the provisions of the UDDA comprise the state's policy on determining death, this law can be part of a comprehensive policy protecting human life to its very end in states where it is enacted. Only if American society and the people of our various states want a weaker, less restrictive standard for determining death in the future can the state's policy be an opening to euthanasia, but the fear of bad legislation in the future is no reason to oppose good legislation today.*

Those of us who advocate the Sanctity of Life Ethic unquestionably have to be on guard against any inroads toward euthanasia. But advocates of euthanasia have much more blatant approaches to their goal than manipulating society's policy on determining when death occurs *naturally*. This is really irrelevant to them because their openly acknowledged goal is to *induce* death *long before* the cessation of vital functions, and to bring about the necessary public policies to permit this.

8) *Finally, we are convinced that the UDDA can do great good because it can be used by advocates of the Sanctity of Life Ethic as much as to affirm life as to determine death. This legislation makes no specious distinction between life worthy of value and biological life. It can even be*

said to equate the two. Although it cannot, in itself, automatically prevent euthanasia, it can help create a more favorable climate for doing so by extending legal recognition to the presence of human life until that moment when the Author of Life Himself, and no one else, withdraws the sacred gift He bestows on each of us at conception.