Brain Death Rejected: Expanding Clinicians’ Legal Duties to Accommodate Religious Objections and Continue Physiological Support

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End of life


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This official Policy Statement of the American Thoracic Society (ATS) was approved by the ATS Board of Directors, October 2014
Patient’s CBO

Roadmap

1. Legal **status** of brain death

2. Religious **objections** to brain death
3. Duties to accommodate objections

4. Reasons to extend accommodation laws

Legal status of brain death

Variability of brain death determination guidelines in leading US neurologic institutions
All 56 US jurisdictions
(narrow exception in NJ)

UDDA

An individual . . . . is dead . . .
who has sustained either

(1) irreversible cessation of
circulatory and respiratory
functions, or

(2) irreversible cessation of all
functions of the entire brain
A Definition of
Irreversible Coma

Report of the Ad Hoc Committee of the Harvard Medical School
to Examine the Definition of Brain Death

Defining
Death

Medical, Legal, and
Ethical Issues in the
Determination of Death

Controversies in the
Determination of Death

A White Paper by
the President’s Council on Bioethics

December 2008
total brain failure = death

Legally settled since 1980s

Remains settled (legally)
“durable worldwide consensus”

Bernat 2013

Clinician duties after death

“After a patient . . . brain dead . . . medical support should be discontinued.”

Annals of Internal Medicine

American College of Physicians Ethics Manual

Sixth Edition

Lois Snyder, JD, for the American College of Physicians Ethics, Professionalism, and Human Rights Committee*
Consent **not** required to stop physiological support

Dead → Not a patient

Not a patient → No duty to treat
Religious objections
total brain failure ≠ death

Not dead until heart or breathing stops

Orthodox Jews
Japanese Shinto
Native Americans
Buddhists
Muslim (some)
Duties to accommodate objections

CA    IL    NY
“Each hospital shall establish . . . procedure for the **reasonable accommodation** of the individual's religious . . . objection. . . .”

10 N.Y.C.R.R. § 400.16(e)(3)

Dead → No duty treat

NY CA IL change this
Imposes duties to “treat” after DDNC

Limited

“reasonably brief period”
Dead  No duty treat

NJ changes this

Changes definition itself

“[D]eath . . . shall not be declared upon the basis of neurological criteria . . . when . . . violate the personal religious beliefs . . . .”
Religious objection → No death by BD

Ventilator → No death by CP

Indefinite accommodation (until death by CP criteria)
Narrow exceptions in 4 states

Accommodation denied elsewhere

Motl Brody (DC)
Extend duties to accommodate

1. BD imposes on profound beliefs
2. Accommodation has **worked** for decades in 4 populous states

No complaints

3. Duties are **limited**
Frequency

Brain death
< 1%
hospital deaths

0.3  Japanese Shinto
0.3  Orthodox Jew
0.3  Native American
0.7  Buddhist
2% of 1% = 0.0002

1 in 5000 deaths

400 cases
nationwide annually
Most in CA, NY, IL, NJ

Type
“hospital is required to continue **only** previously ordered cardiopulmonary support. No other medical intervention is required.”

**Duration**

24 h
“in determining what is reasonable, a hospital shall consider ... needs of other patients . . . .”

4. Brain death conceptually flawed

\[ \text{total brain failure} \quad \equiv \quad \text{Death} \]
Heal wounds
Fight infections
Gestate fetus
Stress response

Value laden judgment about when it is worthwhile to continue physiological support
Only NJ changes who is dead

CA – IL – NY accommodation does **not** threaten uniformity
Since July 2007, I have been blogging, almost daily, to **medicalfutility.blogspot.com**. This blog is focused on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflict. The blog has received over 850,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

Brain Death: Legal Duties to Accommodate Religious Objections 147 CHEST ___ (2015).


Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16. 2014) (with Art Caplan).