

**Brain Death: Expanding  
Duties to Accommodate  
Objections**

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**4 parts**

**1**

Clinician  
duties at BD

**2**

Growing  
resistance  
to BD

**3**

Responding  
to objections

**4**

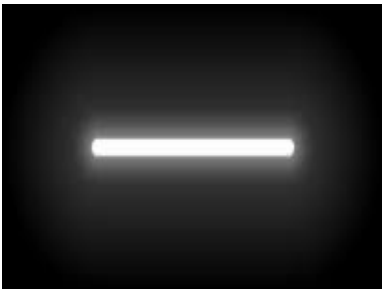
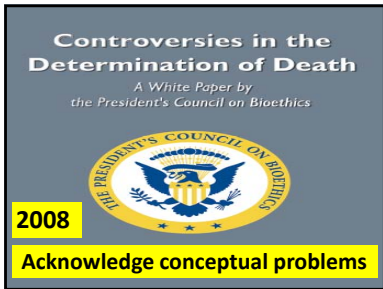
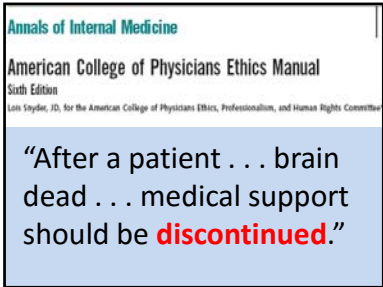
2 legal attacks on BD

Clinician duties after BD

total brain = death failure



Consent is **not** required to stop physiological support



Surrogate resistance is growing

**More** families dispute DDNC



**13 ethics consults** "because family members asked clinical caregivers to deviate from standard procedures following brain death"  
Al Flamm et al. "Family members' requests to extend physiologic support after declaration of brain death: a case series analysis and proposed guidelines for clinical management," J Clin Ethics (2014) 25(3):222-37.



"in recent months . . . the **families of two patients** determined to be dead by neurologic criteria have **rejected** this diagnosis"  
JM Luce, "The Uncommon Case of Jahi McMath," Chest (2015) 147(4):1144-51.



Responses

Diagnostic confusion

1

Do **not** use the term "brain death"

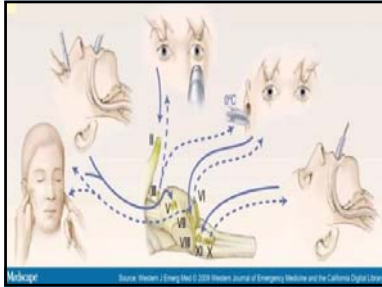
2



Brain Death article snippet with anatomical diagrams and clinical criteria.

Mistrust

1



2

Independent second opinion



Religion



Dead → No duty treat

Dead → **Temp** duty treat

**Expand** duty of accommodation to other states

1

BD **imposes** on profound beliefs

2

Accommodation has **worked** for decades in 3 populous states



3

Rare

Brain death  
< 1%  
hospital deaths

Objections

< 2%

US population

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

Minimal net  
marginal  
burden

**4**

Limited  
in type

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

5

Limited duration

24 h

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

6

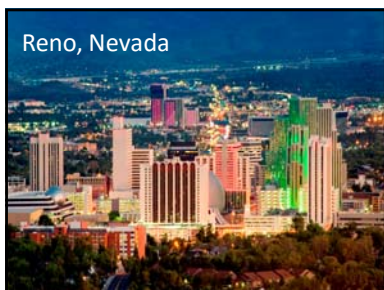
Conceptual flaws

**Value** laden judgment about when it is **worthwhile** to continue physiological support

2 legal challenges

Aden Hailu





**April 1, 2015**  
Catastrophic anoxic  
brain injury during  
exploratory  
laparotomy

**May 28, 2015**  
Met AAN criteria  
for brain death

**Jan. 4, 2016**  
**Still** on organ  
support in hospital

Dead  
**7 months**  
in ICU

Court  
**injunctions**  
pending  
litigation



**Aden's father**  
Argued she is  
**not** dead

**Trial court**  
 AAN criteria met  
 Aden **is** dead

**Aden's father**  
 Appeals to Nevada  
 Supreme Court

**Irrelevant** if Aden  
 meets AAN criteria  
 They are **not** the  
 "right" criteria

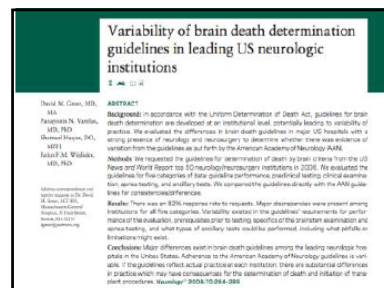


DDNC requires  
 "irreversible cessation .  
 . . **all** functions of the .  
 . . **entire** brain"  
 Nev. Rev. Stat. 451.007(1)

Trial court did **not**  
**consider** whether  
 AAN measures  
 "irreversible cessation . . .  
**all** functions of the . . .  
**entire** brain"

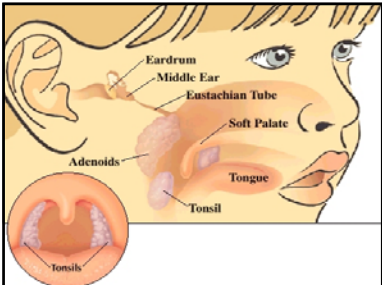
DDNC "must be  
 made in accordance  
 with **accepted**  
**medical standards.**"  
 Nev. Rev. Stat. 451.007(2)

Trial court did **not**  
**consider** whether  
 AAN are  
 "accepted medical  
 standards"





**Jahi  
McMath**

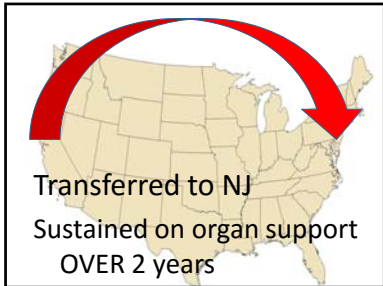


**Dec. 12, 2013**  
Declared dead



**Lost** lawsuits  
against  
hospital





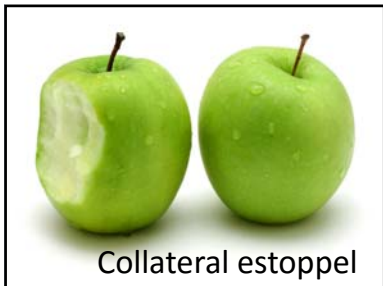

Mar. 2015  
Med Mal lawsuit

Seeking  
**future** medical  
expenses

Dead people do  
not have medical  
expenses

Re-litigate  
status as  
alive

Defendants  
Demurrer

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

**If** true, allegations  
are sufficient





Federal lawsuit against state – to revoke death certificate

Court to rule on motions to dismiss

**Upshot**



AAN criteria may be insufficient

**Legal** standard may demand more than **medical** criteria

Must **reexamine** medical criteria for DDNC



Does not attack the AAN criteria themselves



If alive, must  
**reexamine**  
medical criteria  
for DDNC

**Accuracy  
is essential**



But we've got to verify it legally,  
to see if she  
is morally, ethically  
spiritually, physically  
positively, absolutely  
undeniably and reliably Dead



And she's not only  
**merely** dead,  
  
she's really most  
**sincerely** dead.

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**References**

## Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to [medicalfutility.blogspot.com](http://medicalfutility.blogspot.com). This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflicts. The blog has received over **1 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

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Brain Death Rejected: Expanding Clinicians' Legal Duties to Accommodate Religious Objections and Continue Physiological Support, in *Law, Religion, and American Healthcare* (Cambridge University Press forthcoming 2017).

Brain Death: Legal Duties to Accommodate Religious Objections 147 *CHEST* e69 (2015).

Brain Death: Legal Obligations and the Courts, 35 *SEMINARS IN CLINICAL NEUROLOGY: THE CLINICAL PRACTICE OF BRAIN DEATH DETERMINATION* 174-179 (2015) (with Christopher Burkle).

Review of Death before Dying: History, Medicine, and Brain Death (OUP 2014), 36 *JOURNAL OF LEGAL MEDICINE* (forthcoming 2015).

Legal Briefing: Brain Death and Total Brain Failure, 25(3) *JOURNAL OF CLINICAL ETHICS* 245-257 (2014).

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

Legal Briefing: Organ Donation, 21(3) *JOURNAL OF CLINICAL ETHICS* 243-263 (2010).