

Brain Death: Clinician Duties to Accommodate Objections and "Treat" the Dead?

University of Minnesota Center for Bioethics
February 13, 2015 • Minneapolis

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Prefatory Remarks



No relevant conflicts to declare

4 CME objectives

1. Understand the **legal status** of brain death in the United States
2. Describe recent **conflicts** over how to "treat" brain dead individuals

3. Identify **4** U.S. jurisdictions that legally mandate hospitals to **accommodate** objections to brain death

4. Appreciate ethical & legal arguments for **expanding** accommodation duties

Roadmap

1. Legal **duties** after DDNC
2. Recent **conflicts** over DDNC

2. **History** of laws requiring accommodation
3. **Reasons** to extend such laws

Determination of Death by Neurological Criteria

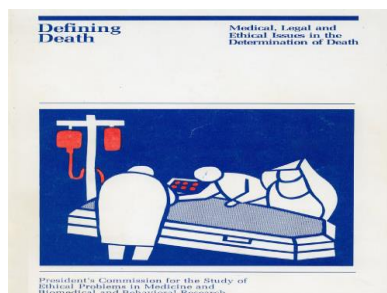
JAMA, Aug 5, 1968 • Vol 205, No 6

A Definition of Irreversible Coma

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

If this position is adopted by the medical community, it can form the basis for change in the current legal concept of death. **No statutory change in the law should be necessary** since the law treats this question essentially as one of fact to be determined by physicians.

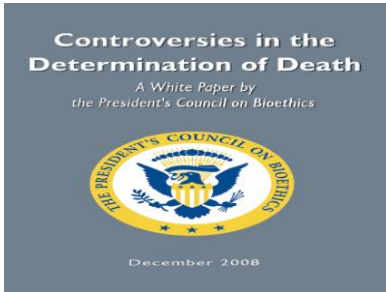
Wrong



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



total
brain = death
failure

Legally
settled
since 1980s

Remains
settled
(legally)

All 56 US
jurisdictions
(narrow exception in NJ)

“durable
worldwide
consensus”
Bernat 2013

Consent **not**
required to
stop LSMT

Dead → Not a
patient

Not a
patient → No
duty
to
treat



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*

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

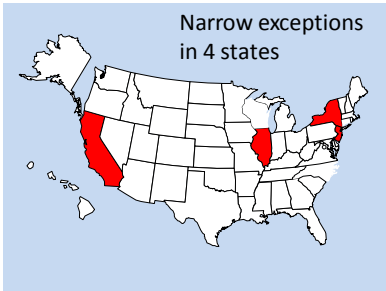
Guidelines for Physicians: Forgoing Life-Sustaining Treatment for Adult Patients

Joint Committee on Biomedical Ethics
of the
Los Angeles County Medical Association
and
Los Angeles County Bar Association

Approved by the Los Angeles County Medical Association February 15, 2006
Approved by the Los Angeles County Bar Association March 22, 2006

“Once death has been pronounced, all medical interventions should be **withdrawn.**”

The rule almost **everywhere**



DDNC in Minnesota

1977



1979

No law, but medical practice

Cranford, "Minnesota Medical Ass'n Criteria: Brain Death-Concept and Criteria," 61 *Minnesota Medicine* 561-63 (1978).

1989

Duane Dean Olson, Jr.



January 31, 1989

"The legislature is now in session and we trust it shares our sense of urgency."



Gov. Perpich signs May 9, 1989

UDDA

Minn. Stat. 145.135

Resurrected Interest

Legally **settled** since 1980s



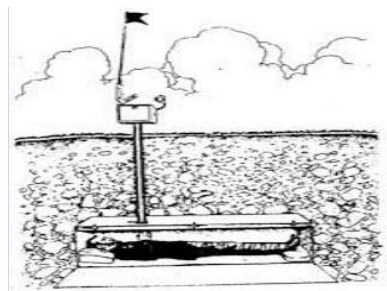
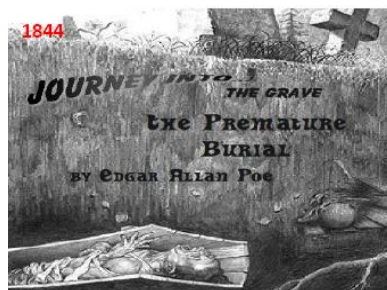
DDNC Conflicts

8 big causes of conflicts

Clinicians want to stop.
Family does not.

Taphophobia

1 of 8





Maria
de
Jesus
Arroyo

Diagnostic Confusion

2 of 8

“Since there is a **heartbeat** (and he is **warm**), he is alive.”

“He’s in a **coma**.”

“With rehab/time he’ll get better.”

Linguistic Confusion

3 of 8

“Brain dead” implies not **really** “dead”

Brain-Dead Canadian Woman Dies After Giving Birth to Boy

The New York Times
Friday, February 23, 2007

Health

WORLD U.S. N.Y./REGION BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS C
FITNESS & NUTRITION HEALTH CARE POLICY MEN

Brain-Dead Florida Girl Will Be Sent Home on Life Support

Published: February 19, 1964

“she is **'brain dead'** and . . . being **kept alive** by life support to enable the family to say their goodbyes.”

Daily Mail, 03-18-09



Variability Heterogeneity 4 of 8

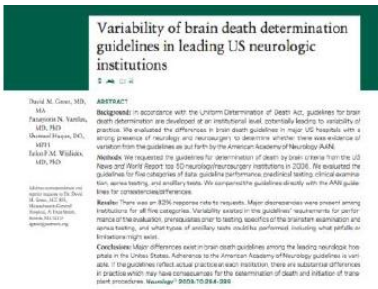
Brain death
concept
accepted across
USA & world

Irreversible
cessation of all
brain function
including the brain
stem

How is irreversible
cessation
measured?

Legal variation
physicians
Qualifications
How tests performed

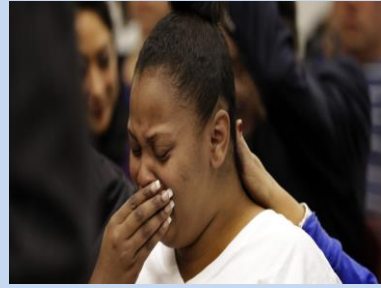
“acceptable medical standards”
“ordinary standards”
“usual & customary standards”



Prognostic Mistrust

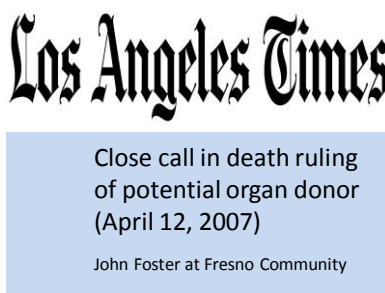
5 of 8





Paul Fisher
Stanford
Child
Neurology

Clinicians were correct in McMath
But many other times, **wrong**



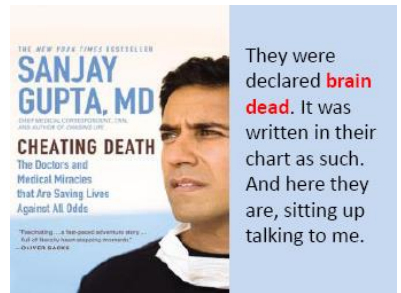
Los Angeles Times

Close call in death ruling of potential organ donor (April 12, 2007)

John Foster at Fresno Community



Bart (Tampa Bay)



SANJAY GUPTA, MD

CHEATING DEATH

The Doctors and Medical Miracles That Are Saving Lives Against All Odds

"Fascinating... a fast-paced adventure story... All of humanity's most precious resources" —DIVER BAKER

They were declared **brain dead**. It was written in their chart as such. And here they are, sitting up talking to me.

Negligent errors

More culpable errors



Hootan Roozrokh

post-gazette.COM
Pittsburgh Post-Gazette

\$1.2 million settlement in 'organ harvest' case

November 19, 2012 12:00 AM

Miracles

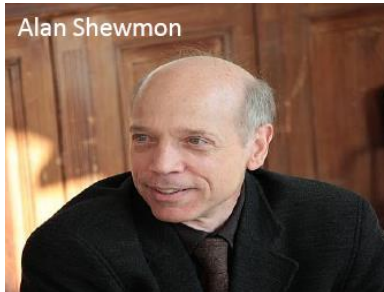
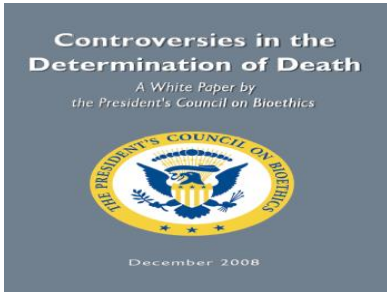
6 of 8



Jesse Koochin
Utah 2004

Conceptual Confusion

7 of 8



Heal wounds
 Fight infections
 Gestate fetus
 Stress response

FROM THE MAY 2012 ISSUE

The Beating Heart Donors

They urinate. They have heart attacks and bedsores. They have babies. They may even feel pain. Meet the organ donors who are "pretty dead."

By Dick Teresi | Wednesday, May 02, 2012

RELATED TAGS: ORGAN TRANSPLANTS, SERIES



UMN, *J Neurosurgery* 35(2): 211-18
Brain dead subjects sexually responsive



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 6 San Francisco, CA 94102
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 8 Facsimile: (415) 421-2830
 9
 10 Attorneys for Plaintiff
 11 LATASHA WINKFIELD
 12
 13
 14
 15
 16
 17
 18

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA
 UNLIMITED CIVIL JURISDICTION

LATASHA WINKFIELD,
 Plaintiff,
 v.
 CHILDREN'S HOSPITAL, et al.
 Defendants.

Case No.: PR13-707598
 WRIT OF ERROR CORUM NOBIS AND
 MEMORANDUM REGARDING COURT'S
 JURISDICTION TO HEAR PETITION FOR
 DETERMINATION THAT JAHJ MCMATH
 IS NOT BRAIN DEAD

**Religious
 objection**

8 of 8



Orthodox Jews
Japanese Shinto
Native Americans
Buddhists



History of DDNC Accommodation Laws: NY, NJ, IL

NY, NJ, IL have **laws**

But **custom & practice**
of accommodation in
other states

1986

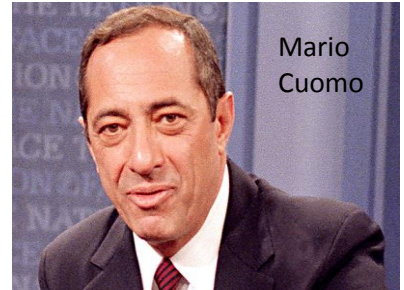


Sheldon
Silver bill

Religious
exemption
from DDNC

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



Mario
Cuomo



“Each hospital shall establish and implement a written policy . . . a procedure for the **reasonable accommodation** of the individual's religious or moral objection to the determination”

10 N.Y.C.R.R. § 400.16(e)(3)

Dead → No duty treat

Dead → No duty treat

↙

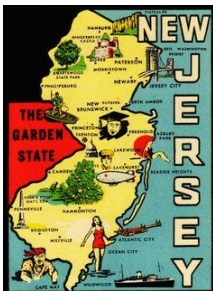
NY changes this

NY

Changes duties to treat **after** DDNC

- Limits
1. Hospital **discretion** to write policy
 2. Only for objections that are **religious or moral**
 3. Only **“reasonable”** accommodation

1991



Did what NY originally planned:
Religious exemption

New York	Accommodation	Dead but ongoing rights
New Jersey	Exemption	Not dead

“The death of an individual **shall not be declared** upon the basis of neurological criteria . . . when the licensed physician . . . has reason to believe . . . that such a declaration would violate the **personal religious beliefs** of the individual.”

Dead → No duty treat
 ↑
 NJ changes this

NJ
 Changes definition **itself**

Assures payment
 Also directly required

Shewmon

80% < 4 weeks
 20% > 4 weeks
 10% > 8 weeks
 5% > 6 months

Limits

1. Only **religious** objections
2. Only objections of the **individual**



Barnert Hospital v. Moreno (NJ. Sup. 1998)

2007



“Every hospital must adopt policies and procedures to . . . **take into account the patient's religious beliefs** concerning the patient's time of death.”

History of DDNC Accommodation Laws in CA



1983

Dority v. Superior Court,
145 Cal. App. 3d 273



DDNC “does **not mean** the hospital or the doctors are given the green light to disconnect a life-support device from a brain-dead individual without consultation”

“We are in accord with . . . deferring to parental wishes until the initial shock of the diagnosis dissipates; and would **encourage** other health care providers to adopt a similar policy.”

Obiter dictum
“by the way”
“said in passing”

1986



Richard Katz

AMENDED IN ASSEMBLY APRIL 10, 1986
 CALIFORNIA LEGISLATURE—1985-86 REGULAR SESSION
ASSEMBLY BILL No. 3311

Introduced by Assembly Member ~~HHH~~ Katz

February 18, 1986

An act to amend Section 14123 of the Welfare and Institutions Code, relating to Medi-Cal; An act to amend Section 7180 of the Health and Safety Code, relating to The Uniform Determination of Death Act.

LEGISLATIVE COUNSEL'S DIGEST
 AB 3311, as amended, ~~HHH~~ Katz. ~~Medi-Cal covered benefits~~
The Uniform Determination of Death Act.

Would have made CA = NJ

1987

AMENDED IN ASSEMBLY APRIL 6, 1987
 CALIFORNIA LEGISLATURE—1987-88 REGULAR SESSION
ASSEMBLY BILL No. 1390

Introduced by Assembly Member Katz

March 4, 1987

An act to add Section 1256.5 to the Health and Safety Code, relating to health facilities.

LEGISLATIVE COUNSEL'S DIGEST
 AB 1390, as amended, Katz. Health facilities: general acute care hospitals.

2008



Mike Eng

AMENDED IN ASSEMBLY APRIL 3, 2008
 CALIFORNIA LEGISLATURE—2007-08 REGULAR SESSION
ASSEMBLY BILL No. 2565

Introduced by Assembly Member Eng

February 22, 2008

An act to add Section 1254.4 to the Health and Safety Code, relating to health facilities.

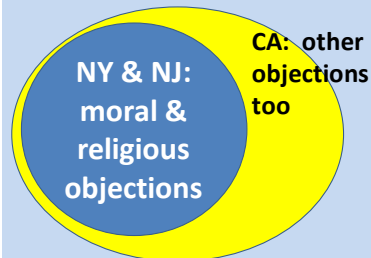


California Health &
Safety Code § 1254.4

1254.4

Made CA
like NY

CA **broader** duty
accommodation



Examine
accommodation
duties **separately**

1. Non-moral
2. Moral, cultural

**Non-
moral**

What does
1254.4 require
of hospitals?

1. Text (plain language)
2. Legislative history
3. Custom & practice
4. Judicial construction

Plain language

1254.4 on
non-moral
objections

Accommodation

What (type)

How long (duration)

What

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

How long

“reasonably
brief period”

“amount of time afforded to gather family or next of kin at the patient's bedside”

“in determining what is reasonable, a hospital shall consider the **needs of other patients** and prospective patients in urgent need of care.”

“hospital **shall adopt a policy** for providing family or next of kin with a reasonably brief period”

Delegation
Deference
Discretion

Legislative history

1254.4 on
non-moral
objections



2007
“there out
to be a law”
contest

Constituent's mother
experienced a severe stroke

Patient eventually diagnosed
as neurologically dead.

Physician took 15 hours to
notify the family

Family was given **3 hours** to
pay their final respects

1 family member out of town

Family's spiritual leader could
not be reached.

Early versions of
the bill suggested
2 days

Annual cost per
hospital = \$78,000

Based on 1 patient per
month at \$6500 **for 24
hours**

Custom, Practice

1254.4 on
non-moral
objections

*Irvine v. California
Employment
Commission*
(Cal. 1946)

Delegation
Deference
Discretion

“hospital **shall adopt a policy** for providing family or next of kin with a reasonably brief period”

<24	X X X X
24	X X X X X X
36	
48	X
72	X X X



CHO
Usual: 2-3 days
Actual: 8 days



Hiram Lawrence
CHO
> 1 week

1254.4

Examine accommodation duties separately

1. Non-moral
2. **Moral, cultural**

4 types of sources

- Plain language
- Legislative history
- Custom & practice
- Court rulings

Plain language

1254.4 on
moral & cultural
objections

“**reasonable efforts**
to accommodate . .
. special religious or
cultural practices
and concerns”

practice and
concerns “of the
patient **or the
patient's family**”

Not drafted as
exemption
(indefinite) but as
accommodation
(definite)

Perverse if mandated to
continue DDNC but not
for PVS

Dead have more rights
than the living?

“A health care provider . . .
may decline to comply . . .
medically ineffective health
care or . . . contrary to
generally accepted health
care standards . . .”

Cal. Prob. Code 4735

Delegation
Deference
Discretion

Requires **more**
than “reasonably
brief period” to
gather family

“give meaning to **every
word** in a statute and to
avoid constructions that
render words, phrases,
or clauses superfluous.”

Klein v US (Cal. 2010)

Separate sections

(a) “reasonably brief period of accommodation”

(c) “reasonable efforts to accommodate”

(d) “in determining what is reasonable, a hospital shall consider the **needs of other patients** and prospective patients in urgent need of care.”

Legislative history

1254.4 on moral & cultural objections

1986 bill failed

“special religious or cultural practices and concerns”

“ritual”



Not about continuing physiological support

Rituals **within** the “reasonably brief period”

Custom & Practice


1254.4 on moral & cultural objections

Look to NY custom since similar rule



nyc.gov/hhc

- Bellevue
- Coney Island
- Elmhurst
- Harlem
- Jacobi
- Kings County
- Lincoln
- Metropolitan
- North Central
- Bronx
- Queens
- Woodhull



nyc.gov/hhc

Reasonable accommodation after the determination of death includes the continued provision of ventilator support and routine nursing care for a reasonable period (generally not to exceed 72 hours from the time of pronouncement). Treatment for an indefinite period of time after the determination of death is not required.

Mariah Scoon

- Admit Feb. 19, 1996
- DDNC Feb 21, 1996
- Hospital gives 5 day (Wed - Mon)
- TRO to Feb. 28
- Hospital wins
- Stay to Mar. 7
- Transferred on Mar. 1

Alvarado

- Sept. 15, 1989 DDNC
- Sept. 21 social worker
- Sept. 22 parents file
- Oct 13 independent expert
- Oct 18 order
- Appeal dismissed (not dead)



Los Angeles Times

A Debate Over Life After Death
February 10, 1997

10-year old girl



Court rulings

1254.4 on moral objections

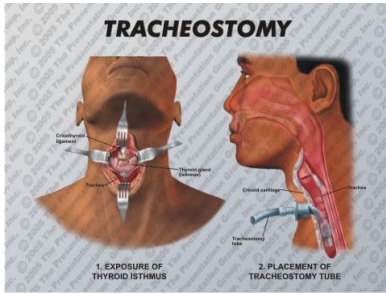
8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA OAKLAND

10
 11 LATASHA WINKFIELD, an individual) 913-59937 SBA
 12 parent and guardian of Jahn McMath, a)
 13 minor)
 14 Plaintiff,)
 15 v.)
 16 CHILDRENS HOSPITAL OAKLAND, Dr.)
 17 David Durand M.D. and DOES 1 through)
 10, inclusive)

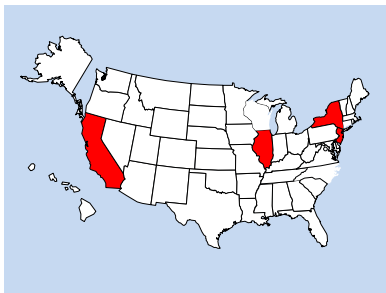
COMPLAINT FOR DECLARATORY RELIEF AND REQUEST FOR TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

1. Violation of the Free Exercise Clause of First Amendment of the United States Constitution
 2. Violation of the Right to Privacy Guaranteed Under the Fourth Amendment of the United States

18. Plaintiffs are Christians with firm religious beliefs that as long as the heart is beating, Jahn is alive. Plaintiff Winkfield has personal knowledge of other who had been diagnosed as brain dead, where the decision makers were encouraged to "pull the plug" yet they didn't and their loved one emerged from legal brain death to where they had cognitive ability and some even fully recovering. These religious beliefs involve providing all treatment, care, and nutrition to a body



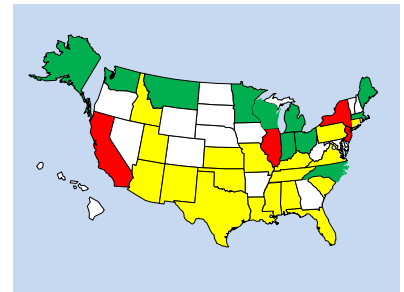
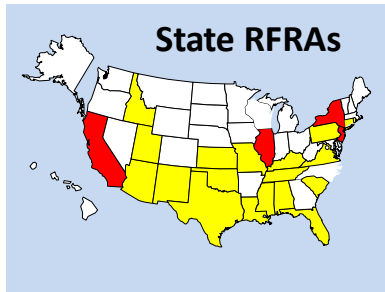
RFRA



Religious objectors may demand **exemptions** from generally applicable laws that substantially burden the objectors' religious practice

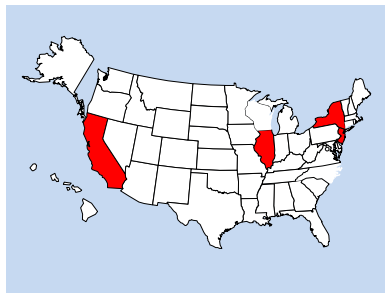


But RFRA applies only to **federal** law
DDNC is **state** law



Yang v. Sturmer, 728 F. Supp. 845 (D.R.I. 1990).

State must demonstrate compelling governmental interest to overcome religious objection to autopsy.



Denied accommodation requests



JEFFERSON CIRCUIT COURT
DIVISION NINE
JUDGE JUDITH E. McDONALD-BURKMAN

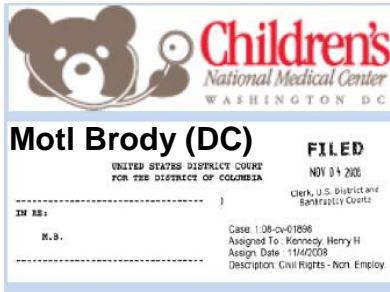
NO. 14-CI-3541

IN THE INTEREST OF ISSAC LOPEZ, A MINOR

ORDER

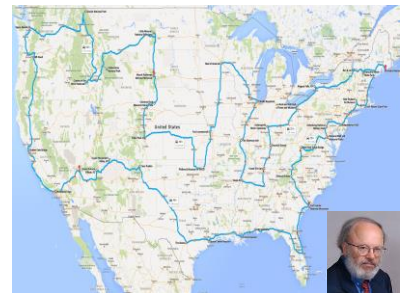
*** **

Issac Lopez is legally dead. Norton Healthcare, Inc. d/b/a Kosair Children's Hospital and members of its medical staff henceforth shall have no legal obligation to artificially maintain



Should they have been accommodated

Societal need for **uniformity**



1

Imposes on profound beliefs

2

1% hospital deaths

Small hospital
1-5/year
Large hospital
25/year

3



Just cardiopulmonary
standard

Not individually
determined

4

TYPE

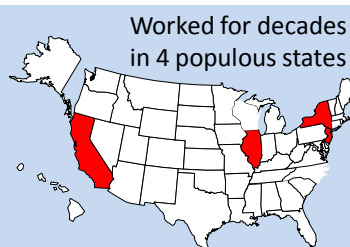
Ventilator only
Permit rituals

LENGTH

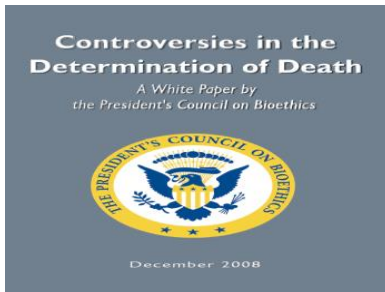
24 hours
Unless HTO

240

5



6



total
brain
failure = satisfy
certain
clinical
criteria

total
brain
failure = Death

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



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W www.thaddeuspope.com
B medicalfutility.blogspot.com

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References

Medical Futility Blog

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 775,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

251

Brain Death Rejected: Expanding Clinicians' Legal Duties to Accommodate Religious Objections and Continue Physiological Support, invited manuscript for 2015 Annual Conference Law, Religion, and American Healthcare, PETRIE-FLOM CENTER FOR HEALTH POLICY, BIOTECHNOLOGY, AND BIOETHICS, HARVARD LAW SCHOOL (May 2015).

Legal Aspects of Brain Death Determination, in 35 SEMINARS IN CLINICAL NEUROLOGY: THE CLINICAL PRACTICE OF BRAIN DEATH DETERMINATION (forthcoming 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).