

**When Is the Patient Dead?
When May California Clinicians
Stop Treating Dead Patients?
Growing Challenges to the
Legal Status of Brain Death**

Cedars-Sinai Medical Center, Ethics Noon
Conference • December 21, 2016

Thaddeus Mason Pope, JD, PhD
Mitchell Hamline Health Law Institute

40

**No relevant
financial
interests**

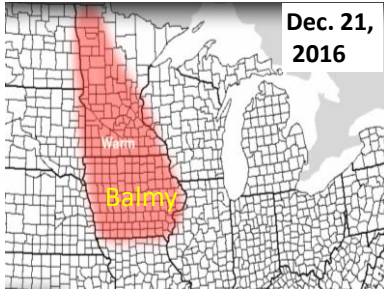
**CSMC
2001**

2



**Thank you
for inviting
me back**





Brain death

CEDARS-SINAI Distinguish

Find a Doctor Conditions & Treatments Programs & Services Patients & Visitors Guide For Me

Home Programs & Services Healthcare Ethics Educational Opportunities Ethics Noon Conference

Overview Ethics Noon Conference

Educational Opportunities

Ethics Noon Conference

Since 1997, the Center for Healthcare Ethics has proudly presented the Ethics Noon Conference, a monthly event open to all who work with, are affiliated with or receive care at Cedars-Sinai Medical Center. The primary aim of these conferences is to raise the level of awareness and degree of understanding of fundamental as well as emerging issues and concerns in healthcare ethics. Covering a broad range of ethical considerations associated with healthcare practices, healthcare delivery, and the healthcare system, these Conferences

October 19, 2016
"The Ethics of Stem Cell Treatments"
 Clive Svendsen, Ph.D., is holder of the Kerry and Simone Vickar Family Foundation Distinguished Chair in Regenerative Medicine and Director of the Board of Governors Regenerative Medicine Institute as well as Professor of Medicine and of Biomedical Sciences at Cedars-Sinai Medical Center. With over 20 years experience, his laboratory is a recognized national leader when it comes to the study of neurodegenerative diseases.

November 16, 2016 - Weinberger-Wermut Lecture in Genetics & Ethics
"Can We Predict the Future of Genetic Medicine?"
 Jonathan Kimmelman, Ph.D., is Associate Professor in the Biomedical Ethics Unit and in Experimental Medicine and the Social Studies of Medicine at McGill University in Montreal. His research centers on the ethical, social, and policy challenges in testing novel medical technologies in human beings ("translational clinical research"), especially in terms of how risk, prediction, validity and knowledge value is understood and then acted upon.

New science

↓

New ethics

Brain death is different

Old science

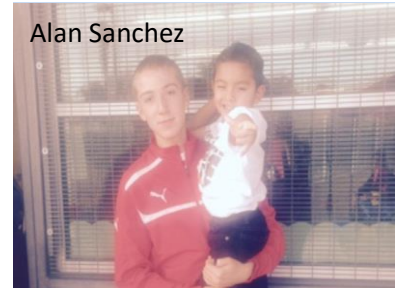
Old ethics



Brain death in California courts



Israel Stinson



Alan Sanchez



Anahita Meshkin



Lisa Avila



Alex Pierce



Jahi
McMath

Roadmap

4 parts

1

What is
brain death

2

Clinician
duties at BD

3

Growing
resistance
to BD

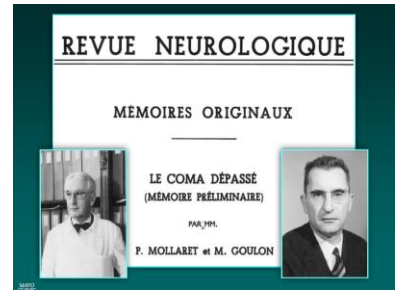
4

5 legal
attacks
on BD

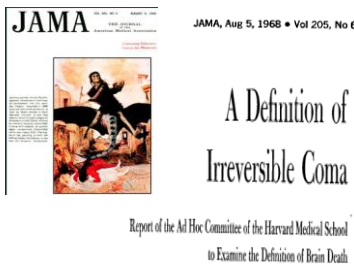
Part
1 of 4

Brain Death

1959

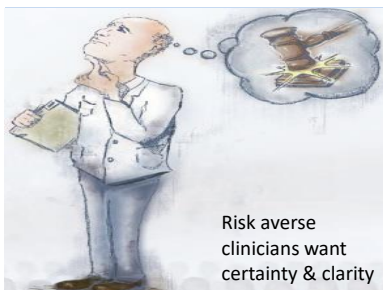


1968



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



Legislation Proposed to Recognize Brain Death

LOS ANGELES (PTS) — Proposed legislation recognizing so-called brain death will be drafted here, according to Dist. Atty. John W. Miner.

Such legislation would be the first in the nation recognizing brain death — death when the brain ceases to function, even though the heart and respiration are continued by artificial means.

The proposal would be an amendment to the California State Uniform Anatomical Gift Act of 1968.

The three-man drafting committee intends to state that the death of a person by reason of brain death must be pronounced, except in an extreme emergency, by a physician who is certified by the American Board of Neurology or the Board of Neurology and Psychiatry, according to Miner. He said it will not define brain death.

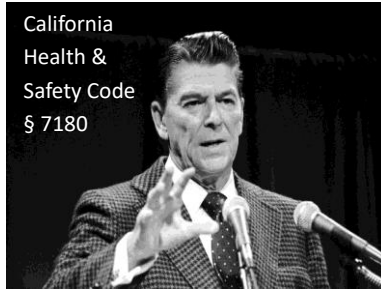
The Los Angeles County district attorney's vital organ transplant committee decided that a clear definition of death is needed now that heart transplants have raised the question as to whether the donor is technically dead or alive at the time his heart is taken.

The current problem, Miner said, is that heart transplant surgery requires taking a living heart from a body. But by traditional and historical standards, if the heart is living, the body is not dead.

Many heart surgeons, he explained, are refusing to perform transplants because of the contradiction in terms as to when the body is legally dead.

1974

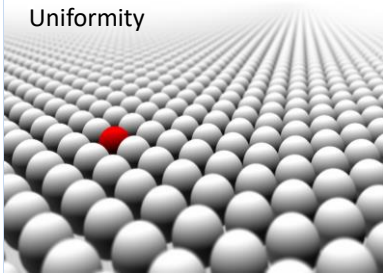
California
Health &
Safety Code
§ 7180



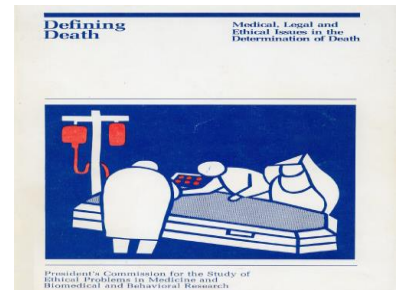
Variability



Uniformity



1981

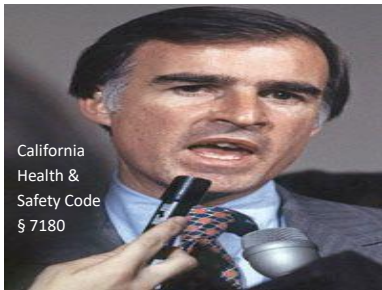


UDDA

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

1982



UDDA
beyond
California

All 56 US
jurisdictions

(narrow exception NJ)

Legally
settled
since 1980s

Remains
settled
(legally)

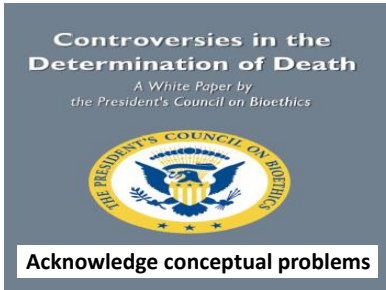
“durable
worldwide
consensus”

Bernat 2013

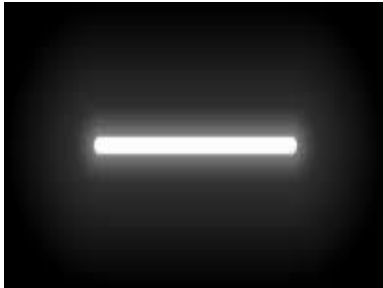
BUT

61

“well settled
yet still
unresolved”



Total
brain = death
failure



Part
2 of 4

Clinician
duties
after BD

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.**”

California Medical Association Views & Reviews

Really, most **SINCERELY** dead
Policy and procedure in the diagnosis of death by
neurologic criteria
D.M. Shaner, MD; R.D. Orr, MD; T. Drought, PhD; R.B. Miller, MD; and M. Siegel, MD

“once death . . . diagnosed .
. . . **discontinue** support . . .”

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

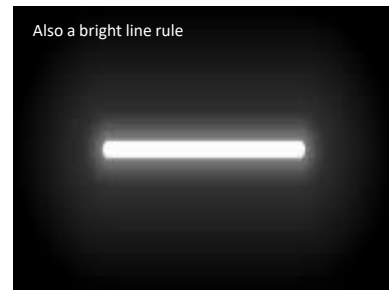
Approved by the Los Angeles County Medical Association February 15, 2006
Approved by the Los Angeles County Bar Association March 22, 2006

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

Consent
not
required

Dead → Not a
patient

Not a patient → **No** duty to treat



BUT



Dead → No duty treat

Dead → **Temp** duty "treat"

1983

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



“does **not mean** . . .
doctors . . . green light
to disconnect a life-
support . . . without
consultation”

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

Obiter dictum

“by the way”
“said in passing”

2008



Mike
Eng

2007

“ought to be a
law” contest

Constituent's mother
experienced severe stroke

Eventually diagnosed as
neurologically dead.

Physician took **15 hours** to
notify the family

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

1 family member out of town

Family's spiritual leader could not be reached.

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

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

What

“continue **only** previously ordered **cardiopulmonary support.**”

“**No** other medical intervention is required.”

How long

“reasonably
brief period”

“amount of time . .
. **to gather** family .
. . . at . . . bedside”


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

Early versions of the bill –
1 or 2 days

SCBCC SOUTHERN CALIFORNIA BIOETHICS COMMITTEE CONSORTIUM LMU/LA Bioethics Institute

January 18, 2016

"BRAIN DEATH": FACILITATING FAMILY/HOSPITAL DIALOGUE ABOUT DEATH BY NEUROLOGIC CRITERIA



Sunday, January 18, 2016
8:00 a.m. – 12:45 p.m.

Ahmanson Auditorium
University Hall 1000
Loyola Marymount University
1 LMU Drive | Los Angeles, CA 90045

This full-day conference for healthcare professionals, bioethics scholars, stakeholders, and the public is presented by the Southern California Bioethics Committee Consortium in collaboration with LMU Bioethics Institute.

Cost is \$20 per person, parking is free. For more information and to register, visit timeandbioethicsconference.com

<24 **x x x x**
24 **x x x x x x**
36
48 x
72 x x x




NEW YORK CITY
HEALTH AND
HOSPITALS
CORPORATION
nyc.gov/hhc

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

BUT

Accommodation **not enough** for some

**Part
3 of 4**

**Surrogate
resistance
is growing**

More families
dispute DDNC

CONTEMPORARY
ISSUES

Organ support after death by neurologic
criteria
Results of a survey of US neurologists (200)

Annex Lewis, MD
Nelle Adams, BA
Panosiris Vardas, MD,
PhD
David Green, MD, MA
Arthur Caplan, PhD

NEUROLOGY
Aug. 2016

50% report
families request
organ support
after DNC



“in recent months . . .
families of . . . patients
determined . . . dead by
neurologic criteria have
rejected this diagnosis”

JM Luce, “The Uncommon Case of Jahi
McMath,” Chest (2015) 147(4):1144-51.



13 ethics consults “family
members asked . . . 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.

**Trillium
Health Partners**

56 DDNC (2014-16)
Conflict in **10%**

Many cases going to court

Part 4 of 4

5 attacks on brain death

Attack 1 of 5

Confusion Mistrust



FREE SECOND OPINION EXAMINATION

JAMA Patient Page: Brain Death. Includes text, diagrams of brain sections, and a list of resources.



Tawil I et al, "Family presence during brain death evaluation: a randomized controlled trial" - Crit Care Med. 2014 Apr;42(4):934-42

Attack 2 of 5

Want
religious
exemption



Religious objection → No death by BD

Contrast 1254.4

Dead → No duty treat

Dead → No duty treat

NY CA IL change this

Dead → **Temp** duty "treat"

NJ

Opposite

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** . . ."



Indefinite
accommodation

Until
death by
CP criteria

California
rejected
(twice)

1986



Richard Katz

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

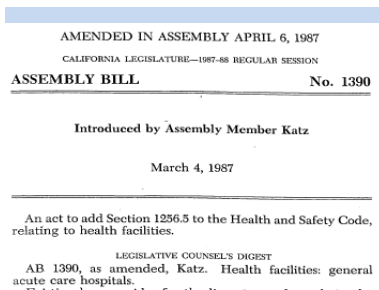
Introduced by Assembly Member Hill Katz

February 18, 1986

An act to amend Section 14132 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, Hill Katz. Medi-Cal covered benefits The Uniform Determination of Death Act.

1987



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

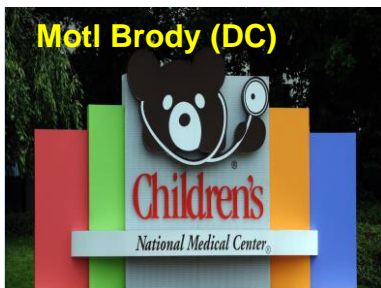
Introduced by Assembly Member Katz

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.

Rejected
everywhere
outside NJ



Shahida Virk (Mich.)



Cho Fook Cheng (Mass)

BUT



Case 2:16-cv-00889-KJM-EFB Document 64 Filed 07/01/16 Page 1 of 17

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18 Attorneys for Plaintiff(s)

19
 20
 21
 22
 23
 24
 25
 26

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No.: 2:16-cv-00889-KJM-EFB

Josee Fonseca, an individual parent
 and guardian of Israel Stinson, a
 minor,
 Plaintiff,
 v.
 Karen Smith, M.D. in her official
 capacity as Director of the California
 Department of Public Health, and Dow,
 Defendant.

Second Amended Complaint for
 Equitable Relief

REQUEST FOR JURY TRIAL

Attack
3 of 5

Consent
for apnea
test

Final confirmatory
test before
declaring death


Remove ventilator
No drive to
breathe → dead

No right to
treatment
after death
Other than brief accommodation

SO

Prevent from
being declared
dead

Refuse
consent to
apnea test

No apnea test

No determination
of death

No DDNC

Treatment duties
do not end

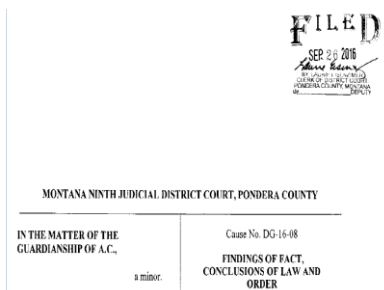
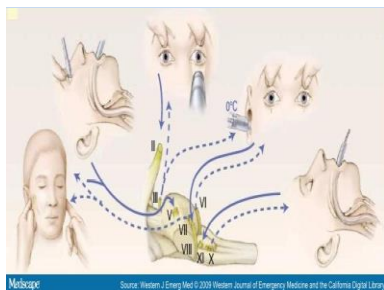
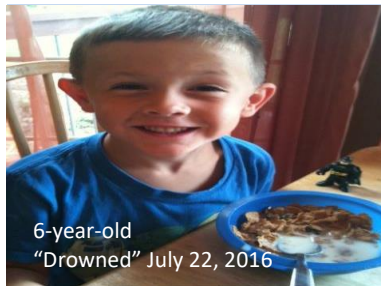
Effectively
same as **NJ**

Prevent
determination
instead of
declaration

Do clinicians
need **consent**
for apnea test?

Yes

**Allen
Callaway**



I. SVH's request for a judicial declaration permitting SVH to conduct testing on A.C. to determine his brain activity over the guardian's objections is denied.

II. A.C.'s guardian and mother has the sole authority to make medical decisions on A.C.'s behalf, including the decision as to whether any future brain functionality examinations should be administered.



Do clinicians need **consent** for apnea test?

MT said "yes"

KS also said "yes"



18TH JUDICIAL DISTRICT COURT
SEDGWICK COUNTY, KANSAS

Forbid brain viability exam
TRO 02/01/06
D/C home 03/17/06

Do clinicians need **consent** for apnea test?

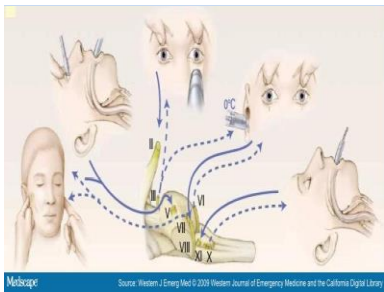
MT & KS said "yes"

CONTEMPORARY ISSUES
Organ support after death by neurologic criteria
Results of a survey of US neurologists

1/4 neurologists say need consent

VA said "no"

Mirranda Lawson



I Alison Lawson and Patrick Lawson refuse any sort of "Brain Dead" testing including the "Apnea" test on our daughter Mirranda Grace Lawson. We do not want the ventilator removed or cut-off for any amount of time. We are Christians and it is against our religious beliefs to remove the ventilator. Her heart is still beating. Removing life support will cause death. That is murder and is against the Christian faith.

Signed Alison Lawson 5/21/2016
Patrick Lawson 5/20/2016
 Witnessed Karyn Ray 5/20/2016
 Witnessed Laura Riche 5/20/2016

June 10, 2016

The respondent is hereby allowed to administer the apnea test on the subject infant child, who is two years of age, under such mitigating and supportive measures as may be medically necessary and required for the purpose of a determination of the existence, extent, and viability of brain stem activity and thereafter to make

IN THE
 SUPREME COURT OF VIRGINIA
 Record No. 161321
 PATRICK B. LAWSON and
 ALISON J. LAWSON, Appellants,
 v.
 VCU MEDICAL CENTER, d/b/a
 CHILDREN'S HOSPITAL OF RICHMOND
 AT VCU, and d/b/a VCU HEALTH SYSTEM Appellee.
 IN RE: MIRRANDA GRACE LAWSON
 Appeal From The
 Richmond Circuit Court - Case No.: CL16-2358
 VCU HEALTH SYSTEM AUTHORITY'S
 BRIEF IN OPPOSITION



New strategy



Israel Stinson (CA)

To the Drs of Israel E. Stinson
 I will be stepping away today but I will leave my contact number please do not hesitate to call me if anything happens with my son. In my absence please Do NOT perform any tests or exams on Israel without my consent or presence. Thank you so much.
 Jones Fonseca (56) 575-5314
 P.S. I decline or any agreed test that may be performed on Israel Stinson
 Aug. 9, 2016 to CHLA



Alex Pierce

ALLISON ARANDA
 P.O. Box 2013
 Newport, CA 94245
 707.227.6744

FILED
 Superior Court of California
 County of San Bernardino
 JUN 2 2016
 by Reza Joo DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF SAN BERNARDINO

ALEX PIERCE, by and through his mother SADRINA PIERCE, Plaintiff,
 vs.
 LOMA LINDA UNIVERSITY MEDICAL CENTER, Defendant

Case No.: CIV-DS-1608931
 PROPOSED ORDER ON EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER

Upshot

Dead → No duty treat

~~Dead~~ → ~~No duty treat~~

US ICUs will have **more** (probably) dead kids

Often full Others **denied** opportunity of ICU benefit

Attack 4 of 5

Most
troublesome
attack

Are medical
criteria for
DDNC **legally**
sufficient?

AAN does **not**
measure what
the **UDDA**
requires

**Aden
Hailu**



Reno, Nevada



April 1, 2015

Catastrophic anoxic
brain injury during
exploratory
laparotomy

May 28, 2015

Met AAN criteria
for brain death



Dad: “she
is not dead”

Trial court

AAN criteria met
Aden **is** dead

217

Aden's father

Appeals to Nevada
Supreme Court

218



Irrelevant if Aden
meets AAN criteria

They are **not** the
“right” criteria

220

2 reasons

221

1

AAN does **not**
measure what
the **UDDA**
requires

UDDA

224

“irreversible
cessation . . .
all functions of
. . . **entire** brain”

BUT

226

Brain dead
people
do stuff

227

Heal wounds
Fight infections
Stress response

228

Alan Shewmon



Sexually responsive

UMN, *J Neurosurgery* 35(2): 211-18

Gestate
a fetus



AAN measures
only cessation
some functions
of **part** of brain

Supposed to
measure:
“**all** functions”
“**entire** brain”

2

UDDA

225

“must be made in accordance with **accepted medical standards**”

BUT

227

Research

Original Investigation

Variability of Brain Death Policies in the United States

David M. Greer, MD, MA, Hilary H. Wang, BA, Jennifer D. Robinson, APRN, Paragjyoti N. Verdes, MD, PhD, Galen V. Henderson, MD, Edoardo M. Wijdsma, MD, PhD

IMPORTANCE Brain death is the irreversible cessation of function of the entire brain, and it is a medically and legally accepted mechanism of death in the United States and worldwide.

Supplemental content at jamaneurology.com

Variability of brain death determination guidelines in leading US neurologic institutions

David M. Greer, MD, MA
 Anasweni N. Venkita, MD, PhD

ABSTRACT
Background: In accordance with the Uniform Determination of Death Act, guidelines for brain death determination are developed at an institutional level, potentially leading to variability of practice. We evaluated the differences in brain death guidelines in major US hospitals with a

Number of physicians
 Qualifications
How tests administered

Hailu = AAN
 AAN \neq UDDA

241

Upshot

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

UDDA

“irreversible
cessation . . .
all functions of
. . . **entire** brain”

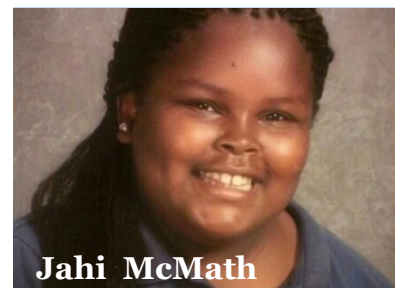
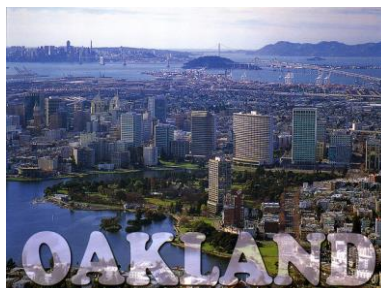
Deferred to medical
profession how to measure

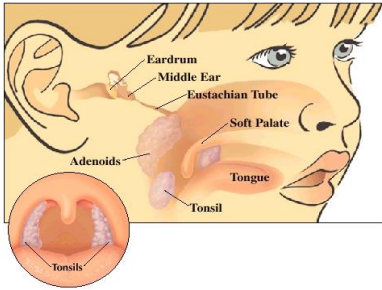


May need to **amend**
Legal criteria
Medical criteria
or Both

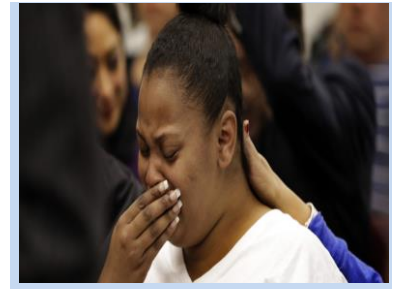
Attack 5 of 5

Jahi McMath

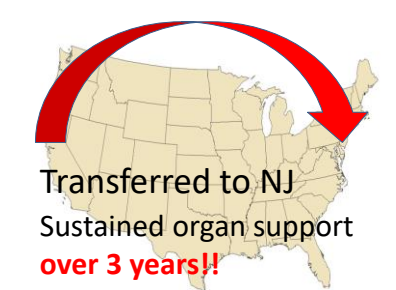
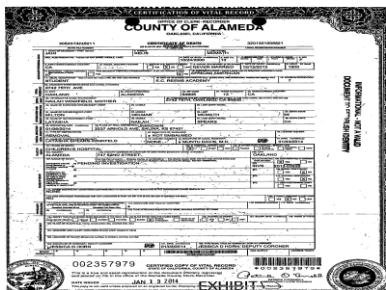




Dec. 12, 2013
Declared dead



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



Collateral estoppel



If true, allegations
are sufficient



**Chance
to prove**

Does not attack
the AAN criteria
themselves



**Contrast
Aden Hailu**

Aden

Hailu = AAN

AAN **≠** UDDA

Jahi

AAN = UDDA

Jahi **≠** AAN

Upshot

Argument
over **facts**,
not law

If alive, must
reexamine
medical criteria
for DDNC

Death
should be
irreversible

Accuracy
is essential

One final case used by CMA



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



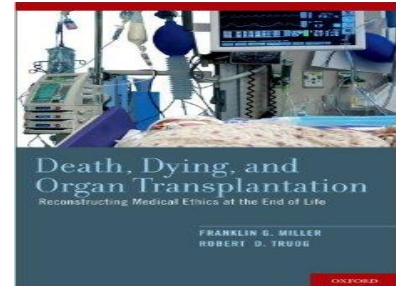
And she's not only **merely** dead, she's really most **sincerely** dead.

Conclusion

Life | Death

Life | Death

Debate has
been
academic



“critics and
skeptics have
not gained
much
traction with
lawmakers”

Not true
anymore

Now it is a
public policy
question

Not just
more scrutiny
more debate

Fundamental
reassessment
of settled laws
& practices



References

Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to 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 **2 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

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