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

Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School ● Annual Conference: Law, Religion, and Health in America ● May 8, 2015

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End of life

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AMERICAN THORACIC SOCIETY DOCUMENTS

An Official American Thoracic Society Policy Statement: Managing Conscientious Objections in Intensive Care Medicine

Mithya Lewis-Newby, Mark Wicclair, Thaddeus Pope, Cynda Rushton, Farr Curlin, Douglas Diekema, Debbie Durrer, William Ehlenbach, Wanda Gibson-Scipio, Bradford Glavan, Rabbi Levi Langer, Constantine Manthous, Cecile Rose, Anthony Scardella, Hasan Shanawani, Mark D. Siegel, Scott D. Halpern, Robert D. Truog, and Douglas B. White; on behalf of the ATS Ethics and Conflict of Interest Committee

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

Patient's CBO

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Roadmap

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1. Legal **status** of brain death
2. Religious **objections** to brain death

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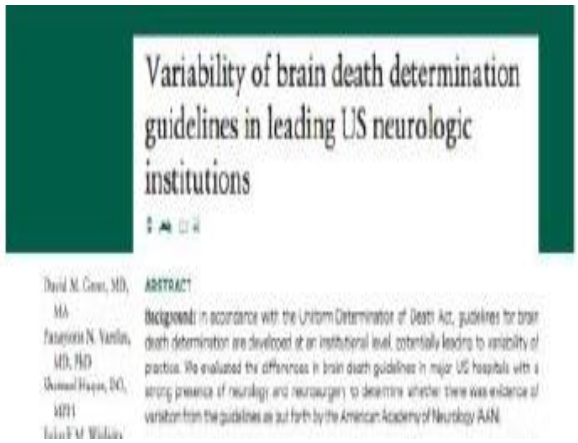
3. Duties to **accommodate** objections
4. Reasons to **extend** accommodation laws

Legal status of brain death


Variability of brain death determination guidelines in leading US neurologic institutions

ABSTRACT

All 56 US jurisdictions

(narrow exception in NJ)

UDDA

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

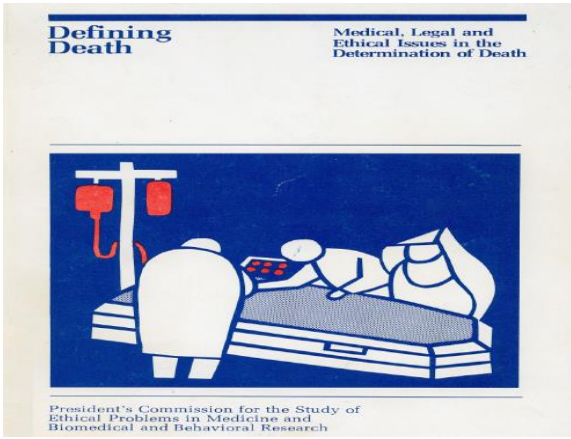
(1) irreversible cessation of circulatory and respiratory functions, ***or***

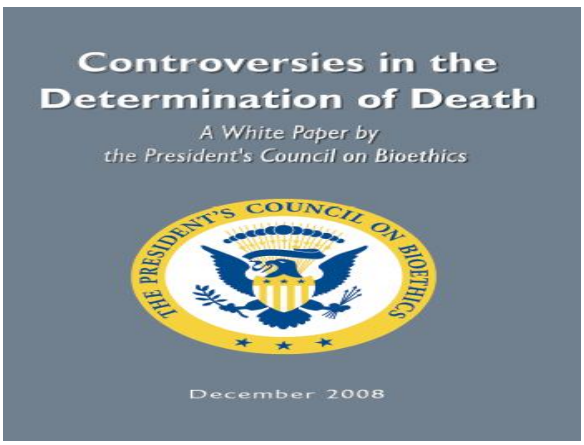
(2) irreversible cessation of all functions of the entire brain

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





total brain failure = death

Legally **settled** since 1980s

Remains settled (legally)

"durable worldwide consensus"

Bernat 2013

Clinician duties after death

Annals of Internal Medicine

American College of Physicians Ethics Manual

Sixth Edition

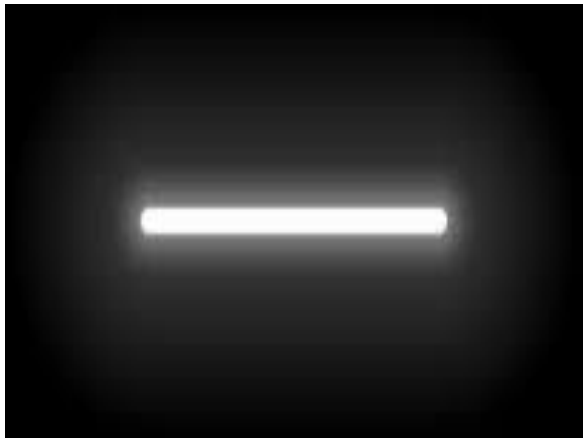
Lois Snyder, JD, for the American College of Physicians Ethics, Professionalism, and Human Rights Committee*

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

Consent **not** required to stop physiological support

Dead → Not a patient

Not a patient → No duty to treat



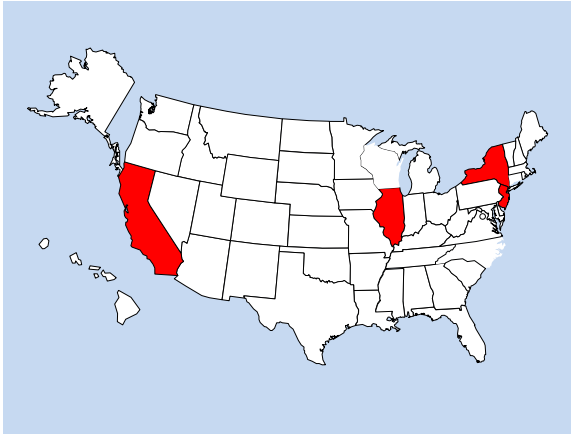
Religious objections

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

Dead → No duty treat

NY CA IL change this

Imposes duties to "treat" **after** DDNC

Limited

"reasonably brief period"

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

NJ

Opposite

Dead → No duty treat

NJ changes this

Changes definition **itself**

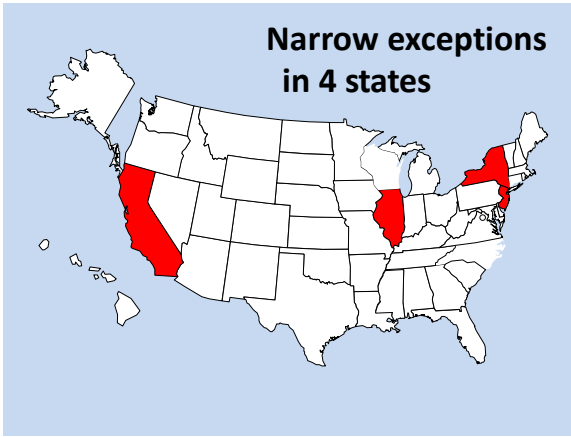
"[D]eath . . . **shall not be declared** upon the basis of neurological criteria . . . when . . . violate the **personal religious beliefs** . . . ."

Religious objection → No death by BD

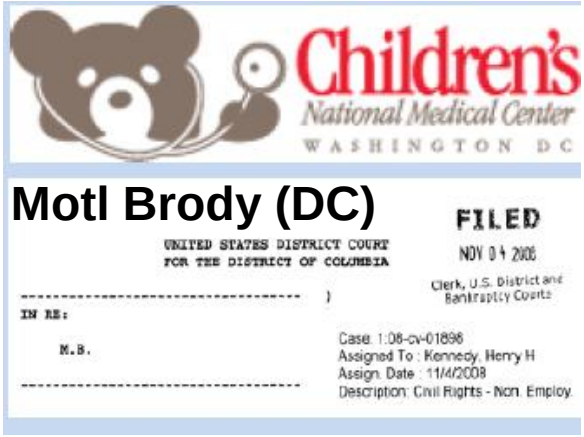
Ventilator → No death by CP

Indefinite accommodation

(until death by CP criteria)



Accommodation denied elsewhere



Beth Israel Deaconess Medical Center

Extend
duties to accommodate

1. BD **imposes** on profound beliefs

2. Accommodation has **worked** for decades in 4 populous states

3. Duties are **limited**

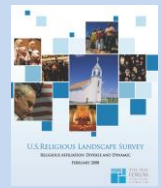
Frequency

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

69

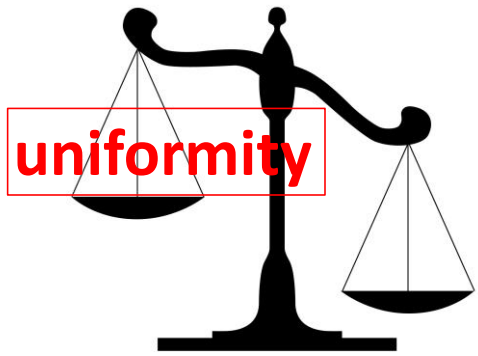
"in determining what is reasonable, a hospital shall consider . . . **needs of other patients** . . . ."

4. Brain death conceptually flawed

total brain failure = 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

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References

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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 850,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

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