

Determination of Death by Neurological Criteria: What is Reasonable Accommodation? Are We Doing It?

Southern California Bioethics Committee Consortium
January 18, 2015 • Los Angeles

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Prefatory Remarks



International Business Ethics Case Competition (IBEC)
Center for Ethics and Business, Loyola Marymount University, Los Angeles, California
University of St. Thomas, Saint Paul, Minnesota

OPPORTUNITIES FOR SUPPORT

- PLATINUM \$25,000+
- GOLD \$15,000
- SILVER \$10,000
- BRONZE \$5,000

Roadmap

1. Legal duties after DDNC
2. **History** of 2008 CA accommodation statute
3. **Meaning** of 2008 statute

Determination of Death by Neurological Criteria

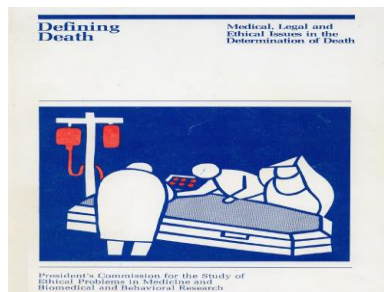
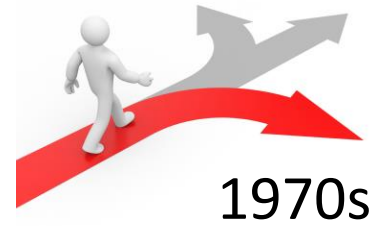
JAMA, Aug 5, 1968 • Vol 205, No 6

A Definition of Irreversible Coma

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

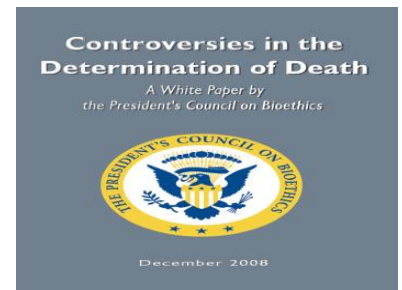
- If this position is adopted by the medical community, it can form the basis for change in the current legal concept of death. **No statutory change in the law should be necessary** since the law treats this question essentially as one of fact to be determined by physicians.

Wrong



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 NJ exception)

“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 Seyler, 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

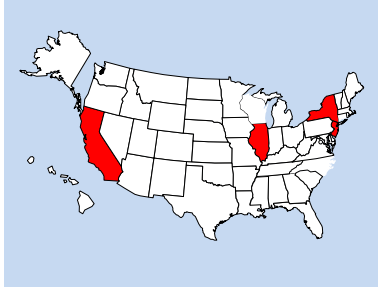
Joint Committee on Biomedical Ethics
of the
Los Angeles County Medical Association
and
Los Angeles County Bar Association

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

California
rule for
34 years



**DDNC in
California**

1974

California Health &
Safety Code § 7180

1982

California Health &
Safety Code § 7180

**History of DDNC
Accommodation
Laws: NY, NJ, IL**

NY, NJ, IL have **laws**

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

1986



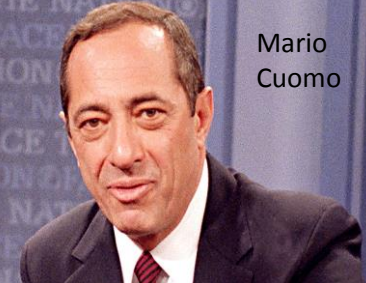

Sheldon Silver bill

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

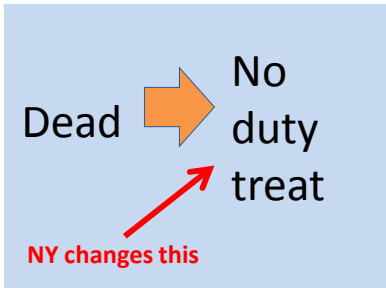
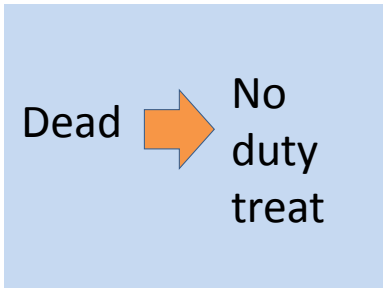


Mario Cuomo



“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)



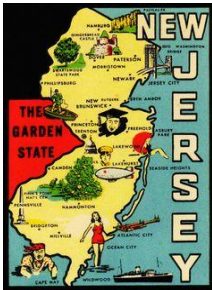
NY

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

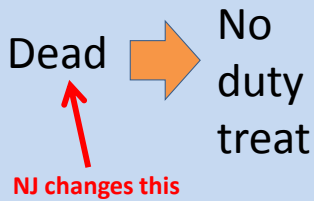
1991



Did what NY originally planned:
Religious exemption

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

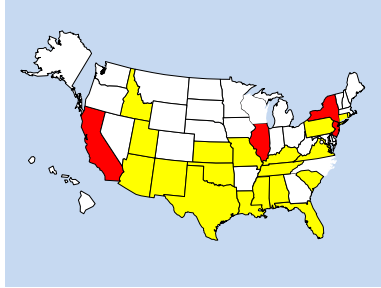
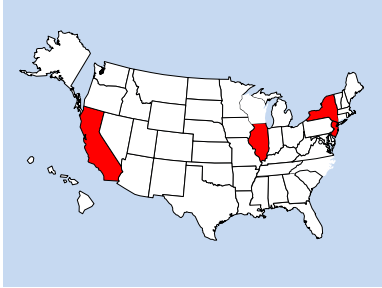
“The death of an individual **shall not be declared** upon the basis of neurological criteria . . . when the licensed physician . . . has reason to believe . . . that such a declaration would violate the **personal religious beliefs** of the individual.”



NJ

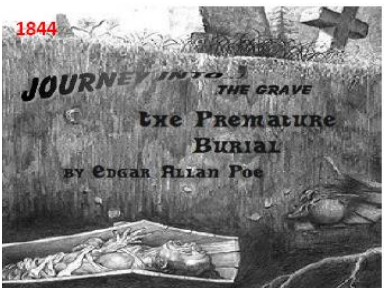
Changes definition **itself**

Assures payment
Also directly required

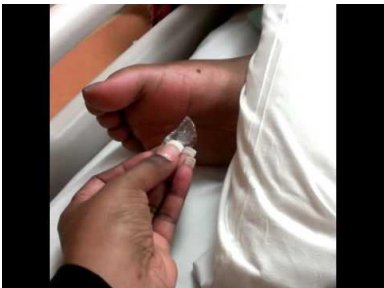


Religious objectors may demand **exemptions** from generally applicable laws that substantially burden the objectors' religious practice

Diagnostic Mistrust



"she is **'brain dead'** and . . . being **kept alive** by life support to enable the family to say their goodbyes."
Daily Mail, 03-18-09



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 12
 13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 14 IN AND FOR THE COUNTY OF ALAMEDA
 15 UNLIMITED CIVIL JURISDICTION
 16
 17 LATASHA WINKFIELD,
 18 Plaintiff,
 19 v.
 20 CHILDREN'S HOSPITAL, et al.
 21 Defendants.

Case No.: PR13-707596
 WRIT OF ERROR CORAM NOBIS AND
 MEMORANDUM REGARDING COURT'S
 JURISDICTION TO HEAR PETITION FOR
 DETERMINATION THAT JAHN MCSMATH
 IS NOT BRAIN DEAD

Los Angeles Times

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

John Foster at Fresno Community



Maria de Jesus Arroyo

ABC NEWS HOME VIDEO | U.S. | WORLD | POLITICS | ENTERTAINMENT | TV
1000
 Arizona College Student Bounces Back From the Dead After Nearly Giving Organs
 May 31, 2011
 By GISEAN DONAHEDSON JAMES for GOOD MORNING AMERICA

1.1K 3:11 96 275 Comments

THE NEW YORK TIMES BESTSELLER
SANJAY GUPTA, MD
 CHEATING DEATH
 The Doctors and Medical Miracles that Are Saving Lives Against All Odds

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



Hootan Roozrok

Not in NY, NJ, IL
Only moral & religious





Orthodox Jews
Japanese Shinto
Native Americans
Buddhists

History of DDNC Accommodation Laws in CA



1983

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



LOMA LINDA UNIVERSITY

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 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.

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.

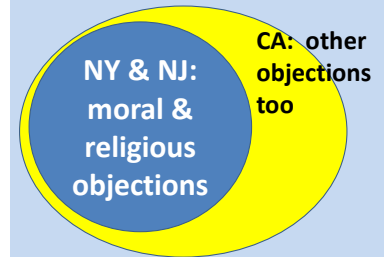


California Health & Safety Code § 1254.4

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



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



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

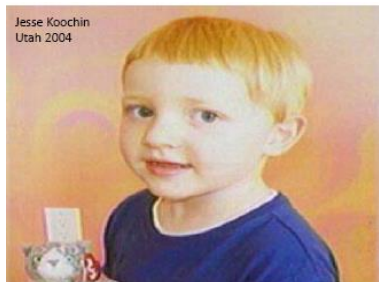
Sept. 15, 1989 DDNC
Sept. 21 social worker
Sept. 22 parents file
Oct 13 independent expert
Oct 18 order
Appeal dismissed (not dead)

Transfers:

McMath (CA)
Hamilton (FL)
Koochin (UT)
Scoon (NY)
Shively (KS)



Jesse Koochin
Utah 2004



Los Angeles Times

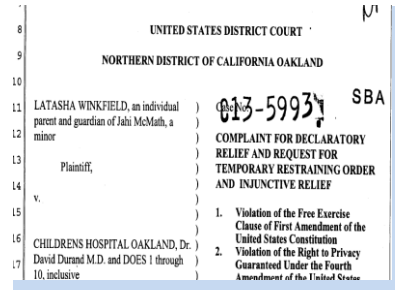
A Debate Over Life After Death
February 10, 1997

10-year old girl

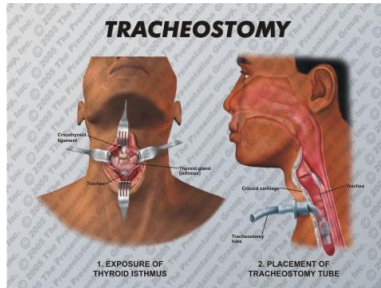


Court rulings

1254.4 on moral objections

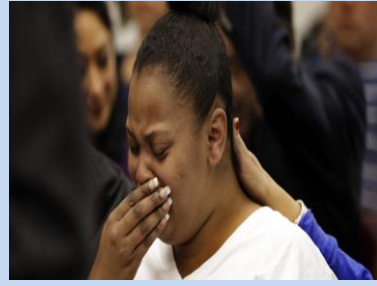


18. Plaintiffs are Christians with **firm religious beliefs** that as long as the heart is beating, Jahi is alive. Plaintiff Winkfield has personal knowledge of other who had been diagnosed as brain dead, where the decision makers were encouraged to "pull the plug" yet they didn't and their loved one 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



TRO





December 12
↓
December 20

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA	
LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner,	Case No. RG13-707598
CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	TEMPORARY RESTRAINING ORDER FOLLOWING PETITION FOR EMERGENCY PROTECTIVE/RESTRAINING ORDER AUTHORIZING MEDICAL TREATMENT AND AUTHORIZING PETITIONER TO GIVE CONSENT TO MEDICAL TREATMENT. Pub. Code §§ 3200 et seq., §§ 4600 et seq.]
	Date: December 20, 2013 Time: 9:00 am Dept: 31

December 20
↓
December 24



December 24
↓
January 5

US Constitution
Federal statutes
State constitution
1254.4

FILED
DEC 30 2013
NORTHERN DISTRICT OF CALIFORNIA
SBA

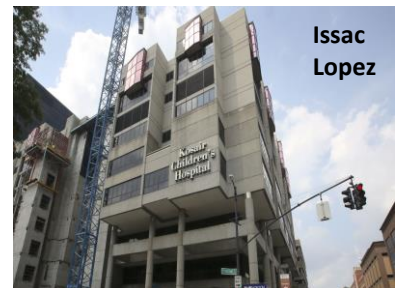
013-5993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA OAKLAND

LATASHA WINKFIELD, an individual parent and guardian of Jahi McMath, a minor
Plaintiff,
v.
CHILDRENS HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 10, inclusive
Defendants

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 Constitution
3. Violation of the Right to Privacy Guaranteed under the Fourteenth Amendment of the United States Constitution
4. Violation of Section 801 of the





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

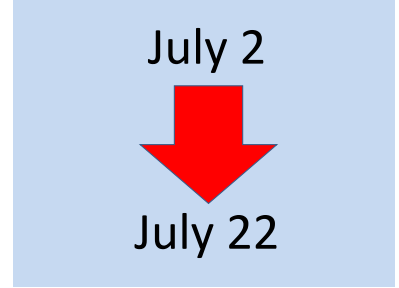
NO. 14-CI-3541

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



Conclusion

TYPE
 Ventilator only
 Permit rituals

LENGTH
 24 hours
 Unless HTO



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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 750,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

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).